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The Role of Institutional Architecture in the Reception of Refugees in South Africa

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The Role of Institutional Architecture in the Reception of Refugees in South Africa

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Abstract

South Africa has a progressive legal refugee framework and retains a national refugee reception system comprising of several key pieces of institutional architecture, which include a nationally run refugee status determination (RSD) procedure, and appeal and judicial review mechanisms. All of these are prescribed in law to ensure implementation of the state's international obligations towards asylum-seekers and refugees. Yet, since being established in the mid-1990s, the national refugee reception system, which is overseen by the Department of Home Affairs (DHA), has been plagued by allegations of corruption, serious legal and procedural flaws in the application of the law, and national policies that continually breach international law. This article asks what impact the overarching management of refugee affairs being under the control of DHA has had on individual institutions. Has the DHA been able to truly assert influence over all aspects of the asylum system or have individual institutions been able to carve out their own institutional identity which helps insulate them from broader ideology and allows them to place their mandate for the protection of refugees as a priority? In this way, the article speaks directly to the role institutional identity plays within national refugee reception systems and the impact these issues have on how government officials and institutions implement relevant legal frameworks.

Ultimately, what emerges is a government department that from day one has been able to exert its influence over all aspects of refugee affairs, either through key pieces of institutional architecture, or by responding to perceived setbacks through new policy. The result is a national system that creates barriers that prevent asylum-seekers and refugees from gaining access to the interior and leaves most forced migrants in the country struggling to access basic rights. Equally, the mounting importance of the judiciary and civil society as the only de jure and de facto custodians of refugee protection in the country becomes explicit. The paper concludes by suggesting international agencies such as the United Nations High Commissioner for Refugees (UNHCR) should utilise recent developments through the Global Compact on Refugees as an opportunity to build stronger relations with the more progressive elements of the DHA and push for the reengagement and better co-operation with key stakeholders, such as civil society and academia.

Keywords: Refugee Reception, South Africa, Asylum Institutions, Global Compacts.

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1. Introduction

South Africa has a modern and progressive national legal framework protecting refugees that incorporates international and regional legal norms. In turn, the drafting process by which the national law on refugees came into force involved extensive collaboration from the international community and civil society, through inputs by UN agencies, academics, as well as human rights and grass-roots organisations. The result is a national refugee reception system comprising several key pieces of institutional architecture, which include a nationally run refugee status determination (RSD) procedure, and appeal and judicial review mechanisms. All of these are prescribed in the law to ensure implementation of the state's international obligations towards asylum-seekers and refugees. Yet, since being established in the mid-1990s, the national refugee reception system, which is overseen by the Department of Home Affairs (DHA), has been plagued by allegations of corruption, serious legal and procedural flaws in the application of the law, and national policies that continually breach international law. This criticism has been accompanied by assertions that the asylum space is being deliberately shrunk through policy and practices emanating from the government department.

This article investigates the history and role of the key pieces of South Africa's institutional asylum architecture in the day-to-day functioning of the national refugee reception system, to better understand how these divergences from the law have occurred. These entities include the sub-division of the DHA which has responsibility for refugee affairs, the refugee reception offices (RROs) and their officers that run the RSD procedure, the Appeal Boards, and finally the Judiciary. We ask what impact the overarching management of refugee affairs being under the control of DHA has had on these entities? The government department's longstanding approach to all forms of immigration has been notoriously restrictive. Equally, with its mandate including being the custodian and protector of the identity and status of citizens of South Africa, the DHA has repeatedly shown that its core focus is on national interests. Thus, a good deal of its day-to-day functions appear at odds, or least suggest inherent tensions, with the state's protection and human rights obligations towards asylum-seekers and refugees. As such, the article queries whether the DHA has been able to assert influence over all aspects of the asylum system or if individual pieces of the institutional asylum architecture have been able to carve out a sense of their own institutional identity which i) helps insulate them from the broader ideology and identity of the government department and its political functions; and ii) allows them to interpret the law and place their mandate for the protection of refugees as a priority.

A great deal of research has been written about the shrinking asylum system in South Africa over the past 20 years (Johnson, 2015; Moyo, Sebba, and Zanker, 2021; Amit, 2012; Carciotto, and Mavura, 2022). In this body of work, researchers have rightly focussed on the impact these restrictive policies have had on refugee rights (Belvedere, 2007; Camminga, 2017; Polzer, 2008) and how migrants have been forced to adopt alternative survival strategies to find localised forms of protection and engage with local communities and labour markets (Landau, 2006; Landau and Segatti, 2009). Equally, authors have shown how barriers set up to restrict access to asylum since the early 2010s have been influenced by the DHA slowly shifting towards a more securitised approach to all forms of migration (Johnson and Carciotto, 2018; Moyo and Zanker, 2022). This paper builds on these works by investigating the origins of these key asylum institutions and the history of their relationships with the DHA. In this way, it speaks directly to gaps in our knowledge about the role institutional identity and ideology play within the national refugee reception system; the power and influence the DHA yields over the individual elements of the asylum process; and ultimately the impact these issues have on how government officials and institutions implement the law. The article addresses these points to develop a more nuanced understanding of the make-up of the asylum system in South Africa. More broadly, the paper also has regional and continental implications for how we understand institutional arrangements and their efficiency towards refugee matters, as well as the role

institutional identity plays in the implementation of law. Indeed, the paper shows that while national and international legal frameworks remain a vital component in how refugees access protection in a host state, government institutions and their politics are an equally important determinate of the form of protection offered.

This line of investigation is important because any attempt at improving an asylum system needs to be cognisant of the underlying institutional processes and relationships that are influencing how each piece of architecture functions. Without a clear picture of how the whole system operates within the current political landscape, new initiatives are likely to fail. For example, in South Africa scepticism remains within national civil society and academia around recent developments at the national and international level that have seen the office of the United Nations High Commissioner for Refugees (UNHCR) partner with the DHA to tackle the infamous backlog of asylum claims in South Africa. Using the Global Compact on Refugees and its Global Refugee Forum as conduits for this approach, it is not clear how this initiative will be able to square with very recent policy and legal developments implemented by the DHA which further restrict access to the asylum system and appear to breach international law.

The article adopts a mixed methods approach to researching this topic. Through the wider PROTECT project,[2] an extensive document and literature review was conducted, which was supplemented by key informant interviews with policymakers, government officials, civil society, and researchers between 2018 and 2022.[3] Due to the COVID-19 pandemic, interviews after 2019 were conducted online via Zoom or similar technology. Based on the focus on top-down approaches to refugee protection, the decision was taken not to interview large numbers of asylum-seekers and refugees for the study.

The first section of the article introduces the national legal framework related to refugee protection in South Africa. Then the next four sections move to engage with the key pieces of institutional architecture involved in the national refugee reception system, namely the DHA, the RROs, the Appeal Boards and the Judiciary. Key lines of investigation in each section include their origins within the system, their relationship with the DHA, and their ability to carry out their human rights functions. What emerges through this investigation is a government department that from day one was able to exert its influence over all aspects of refugee affairs, either through key pieces of institutional architecture, or by responding to perceived setbacks through new policy. By doing this, policy and practices have continually been implemented relating to asylum-seekers and refugees that are in line with the DHA's central national security focus. Indeed, while a securitisation approach to all forms of migration has increased in the last ten years, this paper argues that the DHA has broadly adopted this approach to refugees since it was given the responsibility of managing refugee affairs in 1994. The result is a national system that creates regular barriers that prevent asylum-seekers and refugees from gaining access to the interior and leaves most forced migrants in the country struggling to access basic rights. Given the size of the institution, its secrecy over policy creation and its modern-day reluctance to engage in public discussions or research, it nevertheless remains hard to draw neat causal links between policy and practice and the increasing feeling that the department is deliberately attempting to delink all refugees and asylum-seekers from the national refugee reception system, preferring to deal with them under more restrictive immigration controls. Yet, as set out in this paper, if it is not a deliberate attempt, then it is hard to imagine what a more deliberate approach would look like.[4]

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[3] Some interviews were conducted for Nicholas Maple's PhD research and others for the PROTECT project.

[4] This approach is based on Norman (2021).

2. Legal framework revelant to south africa's institutional asylum architecture

South Africa has a comparatively short history of involvement with the global refugee regime, with its institutionalisation at the national level commencing in the early 1990s after the fall of the Apartheid regime. The creation of a national asylum system and its core pieces of institutional architecture followed soon after, but the initial steps towards creating formal arrangements for the protection of asylum-seekers and refugees post-Apartheid were at the international level, through the acceptance of UNHCR on the territory and the adoption of international law (Klaaren and Sprigman, 2000). First, South Africa permitted UNHCR a presence in the country in 1993, with a tripartite agreement made between South Africa, Mozambique, and UNHCR, which accorded 'group refugee status' to Mozambican nationals in South Africa (Maluwa and Katz, 2020). Then in 1995, the government ratified the 1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention), which includes a broad regional refugee definition, and then in 1996, South Africa ratified the 1951 Convention relating to the Status of Refugees (the 1951 Refugee Convention) and its 1967 Protocol. At this point, the state was required to adopt national legislation to implement key international norms and standards and maintain them (Smith, 2003). In response, the Refugees Act 130 of 1998 (the Refugees Act) came into force. As such, while the state has had a long history of refugee movement, national law and policy surrounding forced displacement remains in its infancy (Smith, 2003; Klinck, 2009).

A great deal has been written about the Refugees Act and so this section only draws out key elements in its drafting history which are relevant to this paper's overall themes.[5] In 1995, UNHCR provided the DHA with a suggested draft Refugee Bill based on the Zimbabwe Refugees Act of 1983, which the agency had a hand in drafting (Klaaren, Handmaker and De la Hunt, 2008). In 1997, a Green Paper on Migration was produced which contained a draft refugee policy. The new refugee policy which had received a great deal of input from international scholars, had a focus on temporary protection and burden sharing across the Southern African region (Crush and Williams, 2002; Klaaren, Handmaker and De la Hunt, 2008). It also recommended separate policy processes for migrants and refugees (Crush and Williams, 2002). When the draft policy was shared publicly, there was a high degree of pushback from civil society, with stakeholders concerned with the inclusion of these clauses relating to temporary and collectivised protection (Klaaren, Handmaker and De la Hunt, 2008). A 'White Paper Task Team' which was made up of DHA officials, civil society, and UNHCR then developed the Green Paper into two White Papers, one of which was focused on refugee law (the other immigration law) (Khan and Rayner, 2020; Crush and Williams, 2002). The White Paper on Refugees dropped the focus on collectivised protection and did not specifically provide for temporary protection (Klaaren, Handmaker and De la Hunt, 2008). Final amends by the Portfolio Committee to the Draft Bill resulted in the Refugees Act being passed on the 5th of November 1998 (Crush and Williams, 2002).

There are several key takeaways from the drafting process, both in terms of positives and negatives for the protection of asylum-seekers and refugees and the creation of a new national refugee reception system in South Africa. Firstly, the level of input from international institutions and civil society was considerable – especially through the White Paper Task Team and the eventual White Paper. For this to be achieved, the DHA had to be open to collaboration, debate and even criticism (Crush and Williams, 2002). Yet, as explored in later sections, this collaborative and transparent approach to creating law all but ended by the time the Refugees Act came into force. For example, while post-apartheid South Africa is a party to the 1951 Refugee Convention and UNHCR was involved in the drafting of the Refugees Act, the state now broadly maintains an arms-length approach to UN agencies (Landau, 2009). This can be

[5] See Smith (2003); Klinck (2009); Klaaren and Sprigman (2000); Klaaren, Handmaker and De la Hunt (2008).

seen acutely in the state's delicate relationship with UNHCR – whose role within the state today has been all but reduced to capacity building and education programming. Of course, the idea that UNHCR takes a step back, with a democratic host state being responsible for its own refugee reception policy is entirely consistent with international norms. However, it is equally apparent that this reduced role in South Africa was not a decision made by UNHCR itself. Rather, it was a decision by the South African government, with the intention of keeping UN agencies very much at arm's length.

Secondly, during these drafting stages of the Act, there were already warning signs about how the DHA intended to conceptualise refugees in South Africa. Reports from civil society at the time observe how DHA members tried to resist more progressive elements and ideas. Case in point, civil society had to push hard for the inclusion of core rights, with DHA representatives arguing that foreigners did not enjoy *any* rights in South Africa (Belvedere, 2007). There were even suggestions from the DHA that asylum-seekers should pay for their asylum applications to help distinguish 'genuine' refugees from 'bogus refugees' (Belvedere, 2007). Furthermore, Smith (2003) argues that the DHA introduced last minute changes to severely weaken the law. Key to this was the final Act's focus on protecting refugees who have received official status, while legal and normative gaps remained for the protection of asylum-seekers (LHR, 2017). Certainly, there remains some disagreement over how progressive the Refugees Act is (Smith, 2007).[6] Some academics have suggested that it is a beacon of progressive African legal frameworks, shifting refugee law (particularly the refugee definition) beyond the European centric 1951 Refugee Convention.[7] In contrast, Klaaren, Handmaker and De la Hunt (2008), building on Smith's (2003) argument, suggest the primary purpose of the 1998 Refugee Act was to gain control over groups of forced migrants who were not covered by the 1951 Convention's refugee definition.

A third takeaway from the draft process was the concerns raised by civil society after the publication of the White Paper around implementation (Klaaren, Handmaker and De la Hunt, 2008). The DHA being the main 'implementers of the asylum system in terms of the Refugees Act' (Khan and Rayner, 2020), meant the department gained a great deal of power and influence over other core institutions within the asylum architecture, including the RROs, the RSD procedures and the appeal processes. Perhaps in part based on their interactions with DHA officials during the drafting stages, there were genuine concerns within civil society about how RSD procedures could be kept independent and free from political interference from the DHA (Klaaren, Handmaker and De la Hunt, 2008). As explored in Sections 3 and 4 below, these concerns proved to be valid, with DHA repeatedly showing indifference to the law, interfering with key asylum institutions, in attempts to deter asylum-seekers from applying or staying in South Africa.

Finally, there are two further national legal instruments and regimes relevant to the asylum architecture in South Africa, namely the 1996 National Constitution of South Africa (the Constitution) and the national immigration system. The Constitution sets the legal requirements for valid legislation but also the underlying values that any legislation should be interpreted by (Klinck, 2009). The Bill of Rights[8] specifically, grants the rights contained within the constitution to all people in the state, affirms the 'the democratic values of human dignity, equality and freedom' and guarantees the principle of administrative justice.[9] As a result, the

[6] Also see Klaaren, Handmaker and De la Hunt (2008).

[7] See Smith (2003). For a contrary view on whether the 1951 Refugee Convention was Euro-centric, see Ben-Hun (2016).

[8] The Bill of Rights is second chapter of the South African Constitution, which sets out the civil, political and socio-economic rights of all persons in South Africa. See Constitution of the Republic of South Africa 1996, No. 108 of 1996, 10 December 1996.

[9] Ibid., s. 7(l). Also see Klinck (2009). Note that the Promotion of Administrative Justice Act (Act 3 of 2000) sets out the requirements needed to give effect to the Constitutional guarantee of administrative justice (Amit, 2012).

Constitution has been an influential tool for advocates of asylum-seekers' rights.[10] Lastly, the post-Apartheid asylum system retains an uneasy relationship with the national immigration regime (Johnson, 2015). As Johnson notes, the introduction of the Immigration Act (No. 11) 2002 ('Immigration Act') and its accompanying regulations created a restrictive immigration regime that assisted highly skilled immigrants but closed immigration to most low skilled workers (Johnson, 2015). This has left many migrants with little option but to use the national asylum system to enter and stay in South Africa. These pieces of legislation and their evolving relationship with core pieces of institutional architecture of the national asylum system will be explored further in subsequent sections.

3. The department of home affairs

The first institution of national asylum system architecture to be investigated, and arguably the most influential in terms of the impact on forced migrants obtaining rights and protection in South Africa, is the Department of Home Affairs (DHA). This section traces the recent history of the government department, and specifically since it was given the mandate for refugee matters in the early 1990s. By taking this approach the section draws out a number of issues, including historical ideational factors that have played a role in its evolving institutional identity and approach to refugee matters.[11] As set out below, while the core identity of the institution has remained fairly constant, the overall approach to refugees has shifted further and further away from commitments the state made in the Refugee Act.

There is a risk, however, with this type of investigation of seeing the institution purely as a 'black-box', with the whole department's identity and actions fixed and working as 'one'. Inevitably the situation on the ground is more complex, with discrepancies and contradictions seen within the department in terms of ideologies and conceptualisation of its role in refugee and immigrations matters, as well as discrepancies in terms of policy and practice on the ground between different offices and officers. Thus, while the section (and the broader paper) focuses mainly on widely reported practices to highlight overall patterns and approaches of the DHA, variations are also examined. Finally, the government department has become more secretive and less willing to engage with researchers or civil society over the past ten to 15 years.[12] Thus, with limited access to the day-to-day dealings of the department, it is not possible to draw neat casual lines between specific underlying factors that are influencing policy towards asylum-seekers and refugees. Nevertheless, as explored next, broad patterns do emerge that help explain the overall approach to refugee matters, and in particular the role the identity of the institution continues to play in how refugees access their rights in South Africa.

3.1. The Department of Home Affairs' Refugee Mandate

The DHA's overall mandate involves being the custodian, protector and verifier of the identity and status of citizens and other persons resident in South Africa as well as controlling, regulating and facilitating immigration and the movement of persons through ports of entry (DHA, 2022). This means it is the government department responsible for the registration and provision of documentation to citizens and foreigners in South Africa (Belvedere, 2007). South Africans are dealt with by the Civil Services Branch, while refugees and asylum-seekers are under the prevue of the Immigration Services Branch (Hoag, 2014). The sub-directorate of Refugee Affairs was created in 1994 (Klaaren and Sprigman, 2000), and while the title of the sub-directorate has changed over time, with the sub-division currently under the title of 'Chief Directorate: Asylum-seekers and Refugees Management', it has remained within the

[10] See Minister of Home Affairs and Others v. Watchenuka and Another, (010/2003) [2003] ZASCA 142 (28 November 2003), South Africa: Supreme Court of Appeal, 28 November 2003.
[11] See Hay (2006) and Hamlin (2022).
[12] The authors are aware only of one ethnographic study of the government department to date; see Hoag (2010; 2014).

Immigration Services Branch. There is a perception among civil society and within academics that the priority within the DHA has been the provision of services to citizens, with immigration services seen as a secondary element (Belvedere, 2007). Certainly, in the early days of post-Apartheid South Africa, there was a priority within the department to shift its racist Apartheid image and so to increase citizenship related requests, the department devoted most of its resources to its Civic Services Branch. As a result, refugee issues have continued to be seen as slightly 'residual' or an afterthought located as a part of the broader Immigration Branch (Belvedere, 2007). These historical issues have inevitably created tension between the two key branches, while also playing a role in conceptualising the overall importance of refugee matters within the department. Both branches nevertheless remain susceptible to similar issues of long application processing time, poor customer service, and corruption (Hoag, 2014). Indeed, the department retains an unwanted reputation as being one of the most corrupt and dysfunctional government institutions in South Africa (Kabwe-Segatti and Landau, 2008).

In terms of a mandate for refugee affairs, according to the DHA's published organisational structure, refugee matters fall within the Immigration Services Branch, with the branch responsible for enforcing compliance with the Immigration Act, Refugee Act and the management of holding facilities. Equally, the branch has the responsibility of providing reception to asylum-seekers based on the requirements of the Refugees Act. These responsibilities fall specifically to the Chef Directorate for Asylum-Seekers and Refugees and their department within the Immigration Services Branch. Therefore, the department is responsible for the administration of the Refugees Act and the oversight of its implementation (Ramjathan-Keogh, 2010). Equally, with the Act setting out the obligations of the state towards refugees, the implication is that the DHA has a core mandate to identify individuals in need of protection under national refugee law (Amit, 2012) and oversee their immediate protection.

Yet, a discrepancy emerged almost immediately after the department was given the responsibility for refugee matters; namely between what is set out in national law and key institutional documentation (including the official organizational structure of the DHA), and policy and practices of the department. As explored in this section, the evidence suggests that the department either sees its responsibilities towards refugees as entirely administrative, or believes that the human rights obligations it has towards this population should be continually weighed against national security interests. Equally, the sub-division of the DHA that runs refugee affairs has never been able to generate or retain a strong separate identity from the wider Immigration Branch of the department with its focus on migration control.

3.2. The Early Days of the Department of Home Affairs' Refugee Mandate

In 1994 when the department took over refugee matters, South Africa did not have a refugee act. As a result, the early days of the national asylum regime was not governed or administered by refugee law (Klaaren and Sprigman, 2008). Instead, DHA officials administered refugee issues within the contexts of the Aliens Control Act 96 of 1991 ('Aliens Control Act'), which remained a relic of the Apartheid era. Under this Act, asylum-seekers were technically treated as 'prohibited persons' yet could be granted permission to reside and work in South Africa under section 41(1) (Klaaren and Sprigman, 2008). The Aliens Control Act also provided DHA officials with broad discretion to 'decide how individual requests for immigration permits ought to be evaluated' (Vigneswaran, 2008a). This discretion led to institutional indifference towards clients and impunity within the department (Vigneswaran, 2008a), with immigration officer's regularly infringing migrant rights, including the ability to detain and deport undocumented immigrants with relative ease (Maluwa and Katz, 2020).

Even when the Refugees Act came into force in 1998, Klaaren and Sprigman (2008) observe how the systems set up between 1994 and 2000[13] persisted, with the informal practices and policies run by the DHA not changing with any degree of speed. Even after training was given by UNHCR in the early 1990s, wide discretion remained, with officials at the border making decisions over refugee status with limited managerial or judicial oversight (Handmaker and Nalule, 2021; Handmaker, 1999). These practices were compounded by the two-year gap between the signing of the Refugees Act and the coming into force of the accompanying Refugee Regulations. As such, the Aliens Control Act remained an important reference point during the early days of national asylum regime (Moyo and Botha, 2022).[14] This uncomfortable conflation of the two national migration regimes at the very beginning of the DHA's mandate on refugee affairs inevitably merged refugee and migration issues within the department. Equally, historical practices such as granting of broad discretion and power to individual officers with limited oversight, were allowed to bleed over from past regimes (Maluwa and Katz, 2020). Taken together these early approaches did not permit a clear dividing line to be drawn between the regimes that would encourage the creation of a wholly separate sub-department that viewed their remit as unique and one focused on the human rights of refugees.

The Refugee Regulations finally came out in April 2000 and set out a nationalised RSD procedure and an overarching approach to implement the Refugees Act.[15] The contents of the published regulations though were a surprise to many commentators (Klaaren, Handmaker and De la Hunt, 2008). While the process for drafting the Refugees Act was broadly understood as a consultative process, with UNHCR, academics and civil society all being consulted, the DHA drafted the regulations with negligible public consultation (Belvedere, 2007). The regulations can be understood as a restrictive interpretation of the Act, with official policy limiting access to protection and reducing rights for asylum-seekers both during the RSD process and after status is given (Handmaker and Nalule, 2021; Crush and Williams, 2002). For example, the regulations prohibited asylum-seekers from working or studying; created uncertainty around refugee status by not setting out a clear process for renewal of permits; and failed to guarantee refugee documentation would last more than two-years (Klaaren, Handmaker and De la Hunt, 2008). As a result, Belvedere (2007) suggests that the Refugee Regulations are an example of the state attempting to re-assert control over refugee matters. The stark difference in approaches between the national law (which was heavily influenced from 'above and below' by the global refugee regime and civil society) and the regulations, does at the very least suggest a national institution attempting to balance its obligations towards refugees and its remit relating to immigration matters and national security issues. This historical episode also confirmed the fears of many involved with the drafting of the Refugees Act who witnessed the pushbacks by DHA representatives who wanted to introduce more of a national security focus to proceedings and attempted to reduce the rights and access of asylum-seekers.

It is worth noting that after the fall of the Apartheid regime, South Africa between 1994 and 1997 was governed by a coalition-led Government of National Unity (GNU) under the leadership of African National Congress (ANC). This meant that the Inkatha Freedom Party (IFP), a right-wing political party, was given control of the DHA, with the ANC in charge of Foreign Affairs (Kotzé and Hill, 1997). Given its political background and philosophies, the IFP pushed to maintain strict security focussed approach to migration management within the department (Carciotto and Mavura, 2022). Case in point, in 1998, the then Minister of Home Affairs incorrectly declared that there were between 2.5 and 5 million illegal 'aliens' in South Africa which were costing the State billions of Rand (Palmary, 2002). It was not until 2004 the

[13] There was a two-year gap between the Refugees Act coming into the force and the publication of its accompanying regulations.
[14] Also see Polzer (2007); Handmaker (2001).
[15] New regulations which came into force on 1 January 2020 have repealed the 2000 regulations. See Footnote 26.

ANC gained control of the DHA, at which point, the then Minister Nosiviwe Mapisa-Nqakula stressed the need for a more holistic review of immigration policy (Carciotto and Mavura, 2022). Yet little changed, with historical approaches to immigration and the ten years of GNU appearing to retain a strong influence. Even a 'Turnaround Strategy' launched by Mapisa-Nqakula, aimed at administrative reform was disappointing, particular within the Immigration Branch (including refugee matters) (Segatti, 2011a).

3.3. A Focus on Documentation and Control

The approach and actions of the DHA since the end of Apartheid towards refugee matters gives the impression of an institution which understands its role is mostly administrative, with a focus on the granting of documentation to a category of non-citizens (Belvedere, 2007). This function very much exists as *part of* a larger immigration role which means the granting of documentation is reviewed in line with national security interests. Naturally, this framing does not fit neatly with the DHA being the 'custodian of all asylum seekers, refugees and foreign nationals on South African soil' (Kock, 2018, p.22). Instead, it suggests that the provision of legal documentation to refugees is understood by many within the department, not as a form of protection, but rather an extension of administrative immigration services or migration management. For example, as noted by Amit (2012, p.19), in its 2010/11 Annual Report, the DHA set out its main immigration and asylum policy goals as enabling 'immigration to be managed so as to minimise risks to national security and social stability while maximising economic, social, and cultural benefits'.

This focus on documentation, national security and stability can be seen in relation to the 2009 Dispensation of Zimbabweans Project (DZP). During the 2000s, triggered by the rapid decline of Zimbabwe into a failed or fragile state, one of the 'largest migration events in the region's history', saw thousands of Zimbabweans move across the border to South Africa (Betts, 2014). The DHA data for 2001-2009 reflects this with the number of asylum-seekers rising from 4,860 in 2001 to 364,638 in 2009 (Landau, Segatti and Misago, 2011).[16] In the following years this figure continued to rise with UNHCR reporting that Zimbabweans accounted for over half of the 778,600 new asylum applications from 2008-2012 (Pugh, 2014). In 2009, as a response South Africa offered around 200,000 Zimbabweans who were living there, the option of applying for an exemption permit (Carciotto, 2021). Given the economic, political and social crisis these migrants were escaping from, one way of understanding this response by the DHA, and by extension the South Africa government, is to frame this as a state going beyond its commitments under the global refugee regime. Meaning, the state effectively 'stretched' the key regime norm of non-refoulement to include forced migrants from Zimbabwe who may not strictly fall under the 1951 Refugee Convention refugee definition (Betts and Kaytaz, 2009). Indeed, Zimbabweans have broadly been understood by the DHA as economic migrants, and thus not offered protections under the 1998 Refugees Act (Maluwa and Katz, 2020).

Rightly, the policy gained a good deal of national and international praise as a method of offering legal protection to a large group of forced migrants. Yet, equally this episode can be seen as a state wanting to respond to large numbers of forced migrants on their territory through the national immigration system, rather than the national asylum system and its core institutional architecture. Indeed, while discussed during initial negotiations, the use of the broader refugee definition contained in the OAU Refugee Convention, which includes people who have left their country due to 'events seriously disturbing public order', was dismissed (Betts, 2013; Polzer, 2008). Reasons given for this at the time ranged from, 'strong ties between

[16] L.B. Landau, A. Segatti & J.P. Misago, "Governing migration and urbanisation in South African municipalities: developing approaches to counter poverty and social fragmentation". *South Africa Local Government Association* (SALGA). 2011, 159.

the two states', 'bureaucratic inertia' (Betts, 2013), and that the provision in the OAU Refugee Convention 'lacked doctrinal clarity' (Crisp and Kiragu 2010).

Instead, human rights obligations under the asylum system were effectively bypassed for more pressing concerns; namely, i) easing the pressure on an asylum system by moving many applicants and undocumented migrants into the broader immigration regime; ii) documenting and identifying many migrants already living in South Africa; and iii) reducing the expensive practice of deporting large numbers of Zimbabwean nationals across the border (Carciotto, 2021). While migration pathways (often framed as a 'fourth durable solution') have value, especially if one part of a wider strategy towards durable solutions, concerns with this approach around protection remain (Long, 2014). Contrary to the point made above, temporary migrant permits lose the protection under international refugee law, including the principle of non-refoulement (Carciotto, 2021). Finally, the Zimbabwean permits remained conditional and temporary in nature, with the original permits replaced by the Zimbabwean Special Dispensation Permit (ZSP) and then the Zimbabwean Exemption Permit (ZEP) (Dekker Hofmeyr, 2021). Thus, while this policy could be framed as a form of temporary protection or *temporary toleration* by the host state, for advocates, it is understood as frozen futures. Each time the announcement of a new form of permit occurs, it is always last minute, with thousands of migrants unsure of their long-term future in South Africa (Daily Maverick, 2020a).[17]

3.4. A Further Shift Towards a Security Approach

Previous sections have highlighted how security concerns inherent within the wider DHA can be seen in the institution's engagement with refugee matters from the initial point the refugee affairs division was opened. In 2010, this approach was made even more explicit, when the DHA moved into the government's Justice and Crime Prevention cluster. This meant the department was reclassified from an administrate department to 'important partner in the national security of the country' (Carciotto, and Johnson 2017). Confirming this point, the DHA Strategic Plan (2015-2020) refers to the department as 'the patriotic guardians of our precious identity, citizenship and security' (Moyo and Zanker, 2022).

Certainly, since 2010, the way the DHA has dealt with refugee affairs has undergone further reframing. In 2012, the ANC released a policy document entitled 'Peace and Stability', which made clear that the DHA 'plays a decisive role as the backbone of the developmental state and is central to enabling security'… with 'a major reason for the failure to manage immigration securely and effectively was *the failure in 1994 to realise that the Home Affairs is a highly strategic security department*' (emphasis added). The document also places some of the blame for existing immigration challenges on the unconditional adoption of regional and international instruments. The suggestion being that during the 1990s, the government did not consider the realities of the situation and that migration remained a strategic security issue during the transition to democracy (Amit and Kriger, 2014).[18]

From this point, the DHA has adopted a reductive discourse in relation to the asylum-seekers and refugees. Building on the narrative of 'people abusing the system', the discourse has gone further by conceptualising most 'individuals in the asylum system as illegitimate claimants without protection needs' (Johnson and Carciotto, 2018:169). This framing is echoed in the recent 2016 Green Paper on International Migration (DHA, 2016a). The policy paper repeatedly frames discussions of asylum-seekers and refugees by the statistic that 90 per cent

[17] See also Moyo (2018); Polzer (2008). Angolans were offered similar permits after the cessation of their refugee status occurred in 2013 (Johnson and Carciotto, 2017). This then turned into a four-year 'Angolan Special Permit' that took effect in 2017 and expired in 2021. In 2021, the DHA announced that the Angolans could apply for an 'Angolan Exemption Permit', which would be issued with permanent residency and would not have an expiry date (Scalabrini, 2021).

[18] South Africa is one of only a few countries within southern Africa that ratified the 1951 Refugee Convention without any reservations (Khan and Rayner, 2020).

of asylum-seekers who apply for asylum do not qualify. The inference being that most asylum-seekers are either economic migrants or criminals infiltrating the system and because of these 'bogus' claims, 'real' refugees are being stopped from gaining access to protection.

Interestingly, the 2016 Green Paper on International Migration and then the subsequent 2017 White Paper on International Migration do nonetheless incorporate elements of regionalism, internationalism and multilateralism (Feltes, Musker and Scholz, 2018). Yet these ideals are then typically followed in the policy documents by a strong commitment to defending the sovereignty and security of the state. The discrepancies and contradictions evident in these contemporary policy documents demonstrate how increasing security and stability-focused views held within the DHA are conflicting with more historical and normative-based sentiments within the department (based on principles of Pan Africanism, regionalism and the language of rights). For example, high-level officials concerned by the perceived insecurity and instability caused by the increase in the movement of people into urban areas are behind recent pushes to re-introduce a longstanding idea within the DHA of 'asylum seeker processing centres' close to the border,[19] where asylum-seekers would be detained throughout their RSD application (Feltes, Musker and Scholz, 2018). These tensions around ideology have existed since the ANC came to power in 1994, with the party split on immigration, with many members adopting xenophobic terminology, pushing for the adoption of strict migration measures (Segatti, 2011a).

Finally, the 2017 White Paper also proposed the creation of a Border Management Authority (BMA) with the aim of creating an integrated border control under a single command structure (Carciotto, 2021). The result, the 2020 Border Management Authority Act establishes one single authority to manage all elements of the borders (Maunganidze, 2021). BMA on paper can be seen as a positive step towards improved governmental efficiency. Yet serious concerns remain, including how it appears to further centralise power around the DHA (Moyo and Zanker, 2020), with the BMA remaining a branch of the DHA until 2023, at which point it will become its own public entity, although still reporting to the Minister of Home Affairs (Maposa, 2021). Recent amendments to the Refugee Act (discussed below) and the No. 13 of 2002: Immigration Act, 2002 (Immigration Act) have also added to this impression of a government department gaining more unchecked power, while also continuing the securitisation of all forms of migration (except for highly skilled) (van Lennep, 2021).

To conclude this section on the DHA as the dominant piece of institutional asylum architecture in South Africa, it is evident that responsibility for refugee affairs has never been placed in an independent department solely focused on refugee and asylum issues and accordingly isolated from wider immigration issues. Rather, it is evident that historical conceptualisations of its mandate, coupled with an overriding institutional identity focused on being the protector of national security and the national population, drives the department's responses to asylum-seekers and refugees. In essence, this led to the conflation of refugee matters with broader immigration concerns from the moment the DHA was given responsibility for the protection of these populations. Furthermore, in comparison to the previous section, where it was shown that there was heavy involvement from 'above and below', in the form of UNHCR and civil society providing input into the drafting of national laws, the implementation on the ground of these laws, through policy and practice, firmly remains within the control of the DHA. As explored next, these two elements have resulted in the DHA implementing practices and policy that restrict rights and see the state moving further away from international human rights obligations (Johnson and Carciotto, 2018).

[19] In 1999 the DHA produced a document setting out the argument for reception centres which would detain asylum-seekers until their application was decided (Handmaker, 2001).

4. Refugee reception offices and refugee status determination officers

The second core institution of national asylum system architecture in South Africa are the RROs. The RROs have traditionally been in large urban centres such as Johannesburg, Cape Town, Durban and Port Elizabeth, and as the primary point of contact between refugees and the state, are a vital element of the national refugee reception system (Johnson and Carciotto, 2018).[20] Indeed, as the site of the nationalised RSD procedures, the centres are the main entry point for accessing and regularising legal status and legitimising presence in the country. The following four sub-sections investigate the history of these centres, exploring their often volatile and changeable policies and procedures, while also detailing how the DHA's shifting understanding of its responsibilities towards refugees has impacted the centres. In doing so, the section examines the extent to which the RROs achieve a level of autonomy that can distinguish their role in terms of a human rights mission and ability to offer protection to asylum-seekers and refugees, from the wider migration control orientation and other political functions of the DHA.

4.1. The role of the refugee reception centres

A key provision of the Refugees Act was the creation of the RROs (Khan and Lee, 2018), with five opened in Cape Town, Durban, Port Elizabeth, Pretoria and Johannesburg in 2002 (Moyo and Botha, 2022). The location of the centres in large urban areas can be understood as part of an urban strategy within the early days of the national refugee reception system (Khan and Lee, 2018). When large numbers of states within southern Africa and the wider continent maintained and continue to maintain refugee encampment policies, this commitment to processing refugees in urban areas was laudable (Moyo and Botha, 2022). The DHA is the national institution in charge of running the RROs and as a result, unlike many neighbouring states in southern Africa, South Africa operates a nationalised RSD procedure, with minimal input from UNHCR. The overall asylum system can be split into seven parts: the pre-interview stage, the initial interview, the pending decision stage, the Standing Committee decision, the Refugee Affairs Appeal Board decision, the procedure for manifestly unfounded applications, and any potential judicial review.[21] The first three elements directly relate to the RROs, with the final four elements discussed in Sections 5 and 6 below.

Once a refugee enters South Africa, they are expected to register their intention to apply for asylum either at the point of entry or on their first encounter with a government official (Vigneswaran, 2008a).[22] At this point, DHA officials are responsible for issuing a temporary permit, which legalises the asylum-seekers right to be in the country for three weeks or until they formally lodge their claim (Vigneswaran, 2008a). The applicant should then be directed by the officer to formally lodge a claim at a RROs.[23] Once an asylum-seeker lodges a claim, a Refugee Reception Officer will issue a temporary asylum-seeker permit (Vigneswaran, 2008a). Asylum-seekers are entitled to apply for and be granted a six-month renewable asylum-seekers permit which again formalises their stay in the country (Jones and Houle, 2008). These 'Section 22' permits can be renewed but are often only renewed for a few months or a few weeks at a time (Moyo, Sebba and Zanker, 2021).[24] In terms of RSD procedure, a refugee status determination officer (RSDO) will conduct an interview to evaluate an applicant's claim. The RSDOs are then required to issue a decision letter, which should set out the claim and the reasoning for the decision (Amit, 2012). If the decision is negative, there is a right to an appeal,

[20] In 2008, the DHA opened an RRO in Musina, near the border with Zimbabwe to mainly issue 'Section 22' permits to Zimbabweans (Polzer, 2009).
[21] Based broadly on Klaaren and Sprigman's work (2000).
[22] See Refugees Act Regulations, s. 2(2).
[23] Although new amendments to the Act (the Refugees Amendment Act 2017 - discussed below) now set the time between getting a transit permit and reporting to an RRO as *five* days.
[24] The requirement to issue these permits is set out in Section 22 of the 1998 Refugees Act.

with the decision letter, serving as the basis on which the decision is reviewed (Amit, 2012). These procedures broadly follow the requirements set out in the Refugees Act and its accompanying regulations.

4.2. Accessing the refugee reception centres

RRO's are 'essential to the functioning of the system and for accessing the protection it affords' (Khan and Lee, 2018:1271), yet since their doors first opened in 2002, the ability of asylum-seekers and refugees to access forms of state-based protection via the RROs has been restricted. As Camminga (2017) observes, 'the home intended by the DHA for asylum seekers is seemingly a constantly perplexing, vexed, and elusive edifice.' Forms of obstruction have occurred in several ways: from barriers set up to prevent asylum-seekers and refugees from entering these physical manifestations of the state's refugee reception policy; various formal and informal policies coming from the DHA (some of which based on the 2000 Refugee Regulations, others more patently breaching international law and norms); to customised approaches of specific RROs and specific DHA officials in the centres. In terms of the final point, as discussed below, studies have repeatedly shown wide variation between the RROs in terms of policies and practices often with detrimental effects on asylum-seekers and refugees. While these localised policies suggest a lack of centralised control and oversight within the DHA, their ongoing practices also suggest at least tacit acceptance from the management level in the department.

Since their early inception, the 'physical thresholds' of the centres have been a barrier to many asylum-seekers (Moyo and Botha, 2022).[25] Procedural requirements and formal and informal policies have made the act of walking through the main doors extremely difficult. Firstly, finding an RRO is often harder than one might expect, with the centres constantly closing and or moving to a new site. Between 2003 and 2004, the RRO in Johannesburg moved three times in six months, with no notices displayed providing information on the new location (Camminga, 2017). Further, between 2011 and 2020 only three RROs were functioning properly, with others either shut or partially closed (Moyo, Sebba and Zanker, 2021). This has meant that many asylum-seekers are forced to either move closer to the remaining RROs, allow their documentation to expire, or repeatedly travelling long distances to an open RRO (Amit, 2012).

Secondly, both the Johannesburg and Pretoria RROs have previously set up 'appointment systems' with asylum-seekers given appointments up to six months to a year away (Ziegler, 2020). This left many as 'illegal foreigners' until their eventual appointments, and as a result liable to be arrested, detained, and deported (Ziegler, 2020). Furthermore, until the courts intervened, asylum-seekers regularly had to endure a 'pre-screening' process in car parks outside of RROs without effective access to legal advice. Even though these pre-screenings were not set out in the Refugees Act or the Refugee Regulations, based on these initial answers, RSDOs could reject cases on the spot (Amit, 2012 and Vigneswaran, 2008a). While the practice varied between the offices, if their case was rejected in the car park, many asylum-seekers were told to apply for a work permit under the national immigration regime or even faced the risk of procedures being initiated for deportation (Vigneswaran, 2008a). In additions, reports in the 2000s highlighted how some offices would turn away applicants without an up-to-date asylum transit permit, which appeared to break international and national law, as it effectively stopped asylum-seekers apply for asylum (Amit, 2012). There have also been wide reports of refugees being charged illicit 'entry fees' to enable them into an RRO to make their claim (Landau, 2006 and Landau et al., 2005).

[25] Also see Amit (2012); Vigneswaran (2008a).

Finally, applicants regularly must queue outside the RROs, often for days with many sleeping overnight. These spaces outside of the RROs can be chaotic, with up to 1,000 people waiting at one time; yet while the queues have increased, the capacity to assist them inside the RROs has not kept pace (Cornelius and Jordan 2014; Camminga, 2017). In addition, the policies of the individual RROs can change dramatically and daily, with Hoag (2010) noting an example of how on a specific day all applicants in the queues can suddenly be informed they need to produce a passport or they cannot enter the centre. Most of these barriers to entry have been widespread (either across multiple centres or a general DHA policy) and have been documented since the early 2000s. This suggests most of the policies and practices were either green-lit or at least accepted by high-level officials within the DHA (Vigneswaran, 2008a). Importantly, as explored further in Section 6 below, without the intervention of civil society and the judiciary acting as checks against this institutional power, it is likely that many of these policies would still be in effect today.

4.3. Inside the refugee reception centres

Turning to when (or even *if*) an asylum-seeker makes it into an RRO, there have been repeated claims since the early 2000s from academia and civil society that the RSD procedure in South Africa is fundamentally flawed. This has included RSDOs being placed under huge pressure by the DHA to speed through each claim, with suggestions that officers have been expected to issue around ten asylum decisions a day (Amit, 2010). With these quotes imposed, the quality of decisions has inevitably suffered. Some RROs have also instituted an automatic review of any positive asylum decision (Khan and Rayner, 2021; Amit 2011), with the argument being that it fights corruption, yet equally it gives added incentive to officers to simply issue rejections (Amit, 2011a). The result is a 96 per cent rejection rate (reported in 2019), even though most asylum applications are coming from well-established refugee producing countries such as Somalia, the Democratic Republic of Congo and Burundi (Khan and Rayner, 2020a; Amnesty International, 2019).

In relation to the asylum decisions themselves, numerous reports since the early 2000s show legal and procedural flaws. A 2012 report noted how the 'status determination process continues to be marked by scant evidence of individualised, well-reasoned decision-making' and errors of law, for example by misapplying the concepts of persecution, social group and well-founded fear, improper use of the credibility standard and wrong burden of proof' (Amit, 2012). The report, which was based on the examination of 240 RSD decisions, also highlighted concerns relating to the failure to provide adequate reasons for a rejection and failure to provide protection in cases of gender-based persecution (Amit, 2012).

An area of national law that has repeatedly been misapplied or ignored by RSDOs is Section 3(b) of Refugees Act, which incorporates the expanded refugee definition of the OAU Refugee Convention, by granting refugee status to individuals who have been compelled to flee their country of origin 'owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality.' During the early days of Post-Apartheid South Africa, there were some positive signs in terms of its application, with officers accepting large numbers of African refugees based on this clause (Schreier, 2008).[26] However, by the mid-2000s this approach appears to have stopped, with studies showing that officers were either ignoring or seemly ignorant of the provision (Amit, 2010). Furthermore, Amit, (2010) highlights how many decision letters take an opposing argument to the provision, namely a general civil war situation is not in itself sufficient grounds for granting asylum in South Africa. In other cases, when RSDOs did acknowledge a claim under Section 3(b), they regularly failed to recognise the

[26] Although during this time there were still concerns raised in relation to RSDOs comprehension of national and international law. See also Wood (2019).

distinct elements of Sections 3(a) (which sets out the narrow refugee definition based on the 1951 Refugee Convention) and 3(b) and just conflated the two parts (Amit, 2011a). So, when claimants fled civil war, RSDOs imposed an additional individual persecution requirement (Amit, 2011a). Finally, as Section 3(b) allows for claims from persons fleeing 'events seriously disturbing or disrupting public order'; there is an argument that persons faced with violations of their human rights based on the collapse of an economy and a failed state, such as the case of Zimbabweans in early 2000s, should be eligible for refugee status (Maluwa and Katz, 2020). Nevertheless, DHA has continued to see most Zimbabweans as solely as economic migrants, with claims 'almost universally rejected' (Maluwa and Katz, 2020). Instead, the DHA has preferred to respond to these forced migrants, through the national immigration regime and the use of special migration permits.[27]

Another example of grave errors in the application of the law is the applications of LGBTIQ+ asylum-seekers in South Africa. A 2021 report which reviewed refugee denial letters involving sexual orientation and gender identity since 2000, found that many officials within the DHA saw LGBTQI+ refugees and asylum-seekers applications as duplicitous and frequently denied them based on the assumption that they were fabricated (Mudarikwa et al., 2021). The report also showed that there were religious and cultural prejudices that exist as barriers to protection. For example, a perception exists amongst some in the DHA, that if the country of origin is predominantly Christian, then it is not possible for a person from there to be homosexual. Overall, the report highlighted patterns of disdain and a deep-seated prejudice towards LGBTQI+ claimants, with a clear disconnect between RSDOs and national refugee law.

Key factors blamed for these documented procedural issues inside the RROs include a lack of capacity and training, variations in implementation between the RROs, as well as a culture of corruption with the DHA. Vigneswaran (2008b) notes that many DHA employees have lacked the professional qualifications to enforce the different forms of immigration law. Understaffed already, the closure of key RROs also has not helped, with DHA staff in the remaining centres under more pressure to process larger and larger numbers of claims (Moyo and Botha, 2022). Similar issues have been observed in relation to increased incidences of corruption, with the higher number of applications being seen in the remaining RROs creating more opportunity for forms of bribery (Global Detention Report, 2021). Corruption is not though a new or emerging issue, but rather, ever present at all stages of the asylum process (Amit, 2015). Corruption is seen as 'rampant' within the DHA, with '85 per cent' of staff members involved in forms of corruption (Maunganidze, 2021). Responses to this institution-wide issue have been mixed, with a range of initiatives and programmes launched to address it, and officials regularly arrested (Segatti, 2011a). Yet these efforts have remained reactive rather than proactive, with any reduction in the levels of corruption within the DHA seen as negligible (Landau. 2006; Amit, 2015). Finally, research has shown how the policies and practices of individual RROs in terms of RSD procedures can vary widely, with national law and regulations not always the best indicator of how officers conduct their duties (Amit, 2011b). For example, Amit (2011b) notes that the Pretoria Office repeatedly failed to issue legal documentation to claimants in accordance with the law.

The combination of large numbers of asylum applications, a lack of resources and training at the RROs, and poor management and corruption within the DHA, has created infamous backlogs in asylum claims (Landau, 2006). As of 2022, the DHA and UNHCR reports that over 153,000 asylum seekers have been waiting many years for a decision on their applications for asylum (UNHCR, 2022). As observed recently by UNHCR, 'problems in the asylum system led to some claims being stuck for over a decade waiting to be heard. Of the

[27] See Section 3.3 above.

266,694 refugees and asylum-seekers in South Africa, two-thirds of them do not have access to the full rights and privileges of refugee status' (Washinyira, 2021). This in turn inevitably creates long delays for asylum-seekers, which results in most applicants waiting on decisions well beyond the designated six months. Indeed, many are left waiting years before a decision is made (which can then be appealed, creating even more delays). The vast backlog inevitably denies forms of protection to many refugees, while also having the effect of delegitimising the asylum system, 'with few institutions, social services and employers recognising refugee or asylum papers' (Landau and Segatti , 2009).[28]

4.4. The impact of recent amends national legal frameworks on rros

This final section on the RROs as a core piece of institutional architecture within the national asylum system in South Africa, investigates the impact of new amendments to the Refugees Act and the 2000 Regulations on the functions of the RROs. On 1st January 2020, the Refugees Amendment Act 2008 (RAA, 2008) came into force, which also triggered the immediate coming into force of the Refugees Amendment Act 12 of 2011 (RAA 2011) and of the Refugees Amendment Act 2017 (RAA 2017). The combination of these acts and accompanying new regulations[29] have the potential to fundamentally alter and reshape the national refugee reception system in South Africa. They appear to severely reduce access to the asylum system, add excessive bureaucratic processes and deny asylum-seekers substantive rights (Moyo, Sebba, and Zanker, 2021). In addition, while as of late 2022, most of these changes are yet to be implemented, many of them as set out in national law, appear to violate both South Africa's international obligations and its national Constitution.

Key changes within the RAA 2008 and the RAA 2017 include: the creation of new (and unrealistic) timeframes which are likely to exclude a significant number of asylum-seekers from their right to seek asylum; possibly remove the rights of asylum-seekers to work and study in South Africa; and an expansion on the reasons for exclusion from asylum or revocation of refugee status (Scalabrini, 2020a). As noted by Ziegler (2020), these changes are 'manifestly retrogressive', and are likely to exclude many refugees within the meaning of the 1951 Refugee Convention and OAU Refugee Convention from gaining refugee status.

As way of an example, refugees can now have their refugee status removed if they take part 'in any political campaign or activity related to his or her country of origin or nationality whilst in the Republic without the permission of the Minister.'[30]. This appears to conflict sharply with the Constitution, confirms the right to participate in political activity is for 'everyone' (Hobden, 2020).[31] This latest development goes beyond the DHA's recent public discourse, seen in the recent Green and White Papers on International Migration, of trying to stop the abuse of the asylum system by 'illegals' or criminals at the detriment of 'genuine' refugees. Rather, as Hobden (2020) notes, this approach seems punitive, by creating a 'a sub-class of residents who are more subject than citizen.' It can, nevertheless, still be understood as an extension of national securitisation discourse, with this shift meaning asylum-seekers and refugees become a sub-class of the population, with far less rights than nationals and who can easily be removed from the country, while also appeasing xenophobic tension and rhetoric within the population.

To conclude this section, it is evident that the RROs are unable to remain fully insulated from political pressure and the influence of the wider government department in which they are located. Multiple barriers have been created over the last two decades to prevent asylum-seekers

[28] Also see Handmaker, De La Hunt and Klaaren (2008); and Araia, Breen and et al., (2008).
[29] The new regulations also came into force on 1 January 2020 and have repealed the 2000 regulations. For copy of the new regulations: https://www.gov.za/sites/default/files/gcis_document/202001/42932rg11024gon1707.pdf, (last visited 1 March 2022).
[30] See Section 4 of the 2020 Regulations, read with Section 5(1) of RAA 2017.
[31] The Constitution does though reserve certain political rights to citizens (such as voting).

and refugees from accessing this vital element of the institutional asylum architecture – both outside and inside these buildings. The recurring issues that emerge from the investigations into asylum decisions from RSDOs over the past two decades suggest institutional problems with procedural fairness and highlight an inability of officers to apply national and international law relating to the protection of refugees (Amit, 2012). Yet, equally, while a lack of expertise and training in refugee law is palpable, the continued high level of rejections and poor application of the law at the first instance raise serious concerns around the instructions given to RSDOs by high-level DHA officials. As Vigneswaran (2008a) suggests officials regular act outside of their legislative mandate to reduce the asylum space and prevent asylum-seekers from gaining access to the national refugee reception system. As explored in the next two sections, this leaves the Appeal Boards and the Judiciary as the final elements of institutional asylum architecture to perform oversight functions (Vigneswaran, 2008c). Finally, the recent changes to the national legal framework are also troubling, with the asylum space shrinking even further and the legal understanding of refugee status likely to be downgraded to a sub-category of resident, where the onus will be more on a refugee' obligations to the state than rights owed to them.

5. The appeal boards

The third core institution of national asylum system architecture in South Africa are the national appeal mechanisms. This covers the next three stages of the seven-part national asylum system, namely the Standing Committee decisions, the Refugee Affairs Appeal Board decisions, and the procedure for manifestly unfounded applications (Klaaren and Sprigman, 2000). Asylum-seekers have the right to appeal if their application for asylum at the RROs is rejected. As a result, the DHA was obligated to create the Standing Committee for Refugee Affairs (Standing Committee) and the Refugees Appeals Authority (RAA) to adjudicate on different categories of asylum refusal (Vigneswaran, 2008a). Both entities were set up as independent bodies, with the DHA not permitted to interfere with their decisions (Vigneswaran, 2008a).

In terms of procedure as set out by the national level framework, when an asylum claim is rejected, it can be denied for being either 'unfounded' or 'manifestly unfounded'. For unfounded claims, the claimant can appeal to the RAA as per section 24B(1) of the Refugees Act. The RAA's legislative mandate is to ensure that appeal cases are dealt with *efficiently* and *effectively* and in an *unbiased* manner (Vigneswaran, 2008a). The claimant has a right to appear before the RAA, and the Authority has the power to 'accept the new evidence placed before it, or to refer the matter to the RSDO for a re-hearing on new facts' (Kock, 2018).[32]

The Refugees Act (section 24A(1)) stipulates that manifestly unfounded (which includes two subset categories of *fraudulent* and *abusive*) claims have to be reviewed by the Standing Committee (Mudarikwa, et al., 2021). The Standing Committee was established by section 9A (1) of the Refugees Act, with all members needing to be legally qualified and appointed by Minister of the DHA (PMG, 2021). The authority's main function is to monitor and supervise 'manifestly unfounded' 'fraudulent' and 'abusive' claims (Mudarikwa et al., 2021; Scalabrini, 2020b). The claimant does not have a right to appear before the Committee but can make written representations (Amit, 2012), with the Committee able to either approve or disapprove a decision or refer it back to the RRO with recommendations (PMG, 2021). The Standing Committee has also traditionally been tasked with reviewing applications in terms of Section 24A of the 1998 Refugees Act, meaning it determines if and how an asylum-seeker may work or study in South Africa while awaiting the outcome of their application (Vigneswaran, 2008a).

Similar to previous national institutional architecture discussed, the mandate and function of the two appeal bodies originate from the law. From these origins in the national

[32] Also see Amit (2012).

refugee legal framework, the next two sub-sections investigate how the bodies have evolved over time, and the impact they have had on asylum-seeker and refugee rights. This includes the impact of the infamous backlogs at this stage of the asylum process, recent developments from the global level, with UNHCR now engaging with the DHA on the backlogs, and the various ways the DHA retains an influence over these bodies.

5.1. Institutional independence of the appeal bodies

Both the Standing Committee and the RAA are required to be independent, with the DHA not permitted to interfere with their decisions. Nevertheless, historically several concerns have been raised around these issues (Klaaren and Sprigman, 2000). Both bodies remain within the DHA structure and both report directly to the Minister and Director-General of the DHA for administrative support (PMG, 2021). For example, the administrative work of the Standing Committee is performed by DHA officials, while the Committee is also entirely dependent on the DHA for its budget (PMG, 2021). Thus, neither body retains the 'slightest degree of independence within the administrative structure' of the government department (Klaaren and Sprigman, 2000). The underlying concern that has existed since their formation is that if say the RAA started making decisions that went strongly against the over-arching policy and approach of the DHA, the body could be 'punished' by modifications in budget and staffing levels (Klaaren and Sprigman, 2000).

Historically there have been fears over how decisions made by the RAA (formally known as the Refugee Appeals Board (RAB)) regularly went in favour of first instance decisions (Klaaren and Sprigman, 2000). This was particularly concerning before the Authority started giving reasons for its decisions. The DHA has also threatened in the past to remove the right of appearance before the RAA, with hearings being entirely dependent on paper submissions (Amit, 2012). In turn, there has been accusations of the Standing Committee 'rubber-stamping' decisions at first instance (Khan and Rayner, 2020). Although it should be noted that current figures do show a fairly mixed spread of decisions from the Standing Committee, with the Committee considering 1,356 applications in 2020, of which 578 were granted status (PMG, 2021).

5.2. Impact of backlogs and delays in the appeal process

The backlog and delays in asylum claims discussed above are also present at the appeal stage in South Africa. As a 2010 report noted, poorly written RSD decision letters simply shift the backlog from the first instance to the RAA (at that time the RAB) (Amit, 2010). As of 2021, the RAA had 124,000 active cases and 29, 967 inactive cases (PMG, 2021). SCRA and RAA spokespersons at a Parliamentary Monitoring Group (PMG) meeting in 2021 both acknowledged the backlogs, while suggesting a number contributing factors, including the lack of capacity and financial support from the DHA (PMG, 2021). The complexity of the appeals process also feeds into the backlogs and delays for the appellants. Given the time pressures RSDOs are under, there has been an historical incentive within RSD procedures to reject claims as manifestly unfounded, abusive, or fraudulent rather than unfounded. As Kock (2018) notes, if the Standing Committee, then feels the initial decision was wrong it can refer the decision back to the RRO for a new review. At which point, the new review could decide the case was unfounded, with the potential for a further appeal permitted to the RAA.

These delays, historical backlogs and often at times convoluted process severely undermines the notion that asylum-seekers in South Africa have a right to appeal. Indeed, appellants regularly have to wait between five and 15 years to have an appeal hearing (Khan and Rayner, 2020). Furthermore, the notion that the appeal process can be understood as a corrective measure against legal and procedural flaws and corruption at the first instance is questionable. Certainly, when the rights of asylum-seekers have been violated during the RSD

process, on paper, the appeals process offers a clear pathway to a remedy (Amit, 2012). Yet, the vast backlogs and delays again hamper this. In addition, as Amit (2012) notes, 'the scope and breadth of the deficiencies at the initial decision-making level… limit the ability of these procedures to correct the systemic flaws without fully taking over the role of the RSDO - a role for which the appeal and review bodies are neither authorised nor have sufficient capacity' (Amit, 2012).

These concerns have been frequently substantiated through Parliamentary Monitoring Group (PMG) meetings and the national courts. For example, in a 2021 PMG meeting, while reflecting on the poor quality of information gathering and decisions making at the level of the RSDOs, a spokesperson for the RAA acknowledged that the RAA had no research capacity to verify objective information on the countries of origin of refugees (PMG, 2021). Equally, during judicial reviews, the courts have frequently noted the incorrect application of national and international law at the level of the RAA, including the application of Section 3(b) of the Refugees Act, which incorporates the wider OAU refugee definition.[33]

In response to these issues, South Africa made a pledge through the Global Compact on Refugees, Global Refugee Forum in 2019, that committed the state to implement measures to reduce the number of outstanding asylums claims held by the DHA. Interestingly in a break from recent history, the state and by extension the DHA is engaging noticeably with UNHCR in an attempt to turn this pledge into policy. In fact, DHA and UNHCR signed an agreement as part of the 'Backlog Project' in March 2021 (PMG, 2021) which commits DHA to spend USD 2.6M and UNHCR USD 7M on the project (UNHCR, 2021). The overall aim of the project is to revamp the refugee management system, with the intention of eliminating delays and the backlog (Khan and Rayner, 2020). In addition, recent legislative changes have allowed the RAB to become the RAASA, with the body appointing more staff (PMG, 2021). UNHCR publicly remains confident this new approach can help resolve underlying issues, with a spokesperson noting, 'the project will eliminate the backlog over the next four years and strengthen the system to ensure another one does not form. During the time frame, the appeals of 153,391 people will be heard' (Washinyira, 2021). These are certainly promising developments, particularly with the commitment of resources promised for implementation by both the state and the international institution. Yet, undermining this recent commitment are the restrictive amendments to the Refugees Act which came into force after these commitments were made. As examined above, these amendments will 'increases the risk of refoulement and creates new problems in relation to documentation' (Khan and Rayner, 2020).

To conclude this section on the national appeals architecture, the convoluted nature of the current appeal asylum, in combination with the vast backlogs and limited capacity to respond to the host of issues reported at the first instance, gives the impression of a never-ending process (Kock, 2018). It also indicates that the current architecture is ill-equipped to perform its legal function. For asylum-seekers, this means remaining in temporary and precarious legal situations for years if not decades. During this time, they have to persist on temporary asylum papers, which need to be regularly renewed at the RROs, which have been increasingly designed to keep them out.

Finally, recent amendments to the Refugee Act and accompanying regulations have set out an intention of creating a single Refugee Appeal Authority by dissolving the Standing Committee (Carciotto and Mavura, 2022). On one hand, the current system is overly bureaucratic, slow and in urgent need of reform. Thus, suggestions to streamline the processes can be seen as a positive step for the asylum system and for asylum-seekers and refugees. On the other hand, the justification of 'greater efficiency and flexibility' for this change by the DHA does raise concerns around independency, and legal and procedural probity (Carciotto

[33] See *Harerimana v Chairperson of the Refugee Appeal Board* [2013] ZAWCHC 209, (2014) (5) SA 550 (WCC)

and Mavura, 2022). Particularly when you consider the historical performance of the two bodies and the prevailing institutional identity of the broader government department (Carciotto and Mavura, 2022). Indeed, nothing in the past 20 years would suggest the consolidation of the two bodies into one will improve the efficiency or performance of the appeals architecture and by extension improve protection for asylum-seekers and refugees in South Africa. Equally, this latest development can also be understood as another way the DHA is attempting to consolidate power and by doing so reattain a greater control over who gains access to the national asylum system.

6. Judiciary

This section investigates the role and function of the fourth and final core institution of national asylum system architecture in South Africa, namely the judiciary. As the only piece of asylum architecture that exists entirely independently of the DHA, its evolving and often turbulent relationship with the government department responsible for refugee matters is examined. The focus is on the last stage of the national asylum system, namely judiciary review. However, an analysis of the wider role of the judiciary, in conjunction with a vibrant national civil society is also explored to highlight the core role these entities have played in securing asylum-seekers and refugees their rights under national and international law.

6.1. The role and function of the judiciary

When a decision given by the RAA or the Standing Committee is a 'final rejection', the claimant has the final option of challenging this, by way of a judicial review at a High Court (Scalabrini, 2020b).[34] In these instances, the High Court is asked to decide whether the RAA or the Standing Committee (depending which one was involved in the case) correctly applied relevant laws and followed due process in terms of the Promotion of Administrative Justice Act (Act 3 of 2000) (PAJA) (Mudarikwa, et.al., 2021). The court can then either agree with the decision and uphold the rejection, require the case be reheard by an RSDO, recommend the awarded of refugee status (although this is rare) or 'grant anything further that the court deems appropriate, as long as it falls within the court's powers' (Mudarikwa, et.al., 2021).

Given the systemic problems set out above in relation to the two previous pieces of institutional architecture (namely the RROs and the Appeal Boards), inevitably a large number of judicial reviews have been brought against the DHA. In response, judges have regularly observed that the national asylum system is 'incompetent' and 'deplorable' and accused DHA officials of 'showing blatant disregard for the law, dereliction of duty and bad faith' (Maunganidze, 2021). A clear example of the courts correcting errors in the application of the law seen at the RROs and the Appeal Boards is the application of OAU refugee definition, via its interpretation within Section 3(b) of the Refugees Act. As noted previously, DHA officials have continued to either misunderstand or ignore this section of the Act when conducting RSD procedures. In the Western Cape High Court judgment in *Harerimana v Chairperson of the Refugee Appeal Board* [2013] ZAWCHC 209, (2014) (5) SA 550 (WCC), the court held that the RAA (then the RAB), erred by not considering asylum claims under the OAU definition (Ziegler, 2020). This case is also seen as the first instance in Africa of a judicial consideration of the OAU definition's terms and application (Wood, 2019).

Thus, the courts face a continual challenge of trying to square the protective regime set out in the Refugees Act with Executive policies increasingly aimed at limiting access to asylum procedures and denying rights (Ziegler, 2020). Through judicial reviews, Judges in South Africa regularly become the key piece of national institutional architecture that is attempting to

[34] The High Court is also the location, if a refugee is handed a cessation decision or needs to challenge a removal/deportation order, whereby they can make a challenge through a high court review (Scalabrini,2020b).

shape and clarify the government's (and society's) understanding of national refugee law (Maluwa and Katz, 2020). As Maluwa and Katz (2020) observes, it 'is in this context that the work of judges in South Africa has been both salutary and necessary for the protection of the rights of refugees and asylum seekers.'

6.2. Judiciary as the guardians of the asylum system?

As explored above, while the Refugees Act incorporated key norms within international law and the global refugee regime, the DHA through the accompanying regulations and policy and practices over the last 20 plus years has consistently tried to move the national refugee reception system away from South Africa's international obligations. In response to these attempts, civil society, grass roots organisations and human rights groups have repeatedly pushed back through the courts (Segatti, 2011b).

Public interest litigation relating to asylum-seekers and refugees has remained a constant in South Africa since the mid-1990s (Handmaker and Nalule, 2021). For example, lawyers have brought multiple cases against the decision to close RROs in Johannesburg, Cape Town and Port Elizabeth. Equally, the DHA has repeatedly implemented policy that permitted the concepts of 'safe third country' and 'first country of asylum' to be used as grounds for the rejection of asylum applications (Gil-Bazo, 2015). A circular was even distributed in 2000 by the DHA demanding that officers verify the good faith of asylum-seekers and refugees that had transited through numerous 'safe neighbouring countries' and instructing them to send them back 'from where they come from' (Gil-Bazo, 2015). This was challenged in the courts and a settlement between all parties was reached that saw the circular withdrawn (Gil-Bazo, 2015). In 2012, the DHA changed their policy around permits, making asylum-seekers renew their permits at the office of their first application. Litigation followed and the High Court in Cape Town held that the Cape Town RRO must renew all asylum permits regardless of where the first application was made (Khan and Rayner, 2020). Finally, at the height of the COVID-19 pandemic, the Scalabrini Centre in Cape Town won a case that made many asylum-seekers and holders of special permits (including the Zimbabwean Exemption Permit), eligible for the recently implemented national Social Relief of Distress (SRD) grant (Scalabrini Centre, 2020a).[35]

These are just a small sample of the cases brought again the DHA. A large number have been brought since the mid 1990s, with the majority of cases decided in favour of refugees (Johnson and S. Carciotto, 2017). As a result, the national courts have played a key role in legitimising numerous rights such as the right to work for refugees and asylum-seekers and extending constitutional protection to all those in South Africa, irrespective of their legal status (Ziegler, 2020).[36] Yet the implementation of court orders remains a concern, with the DHA regularly either ignoring court decisions or finding ways to pushback through new policy and practice (Johnson and Carciotto, 2018). As a result, there are few court cases have become genuine precedent-setting cases for the DHA. In terms of ignoring decisions, in the case of the RRO closures, as recently as May 2021, the High Court in the Western Cape found that the DHA was in breach of a Supreme Court of Appeal ruling to re-open the Cape Town RRO, with the Judge ordering the government department to file monthly reports setting out the progress in re-opening (Global Detention Project, 2021). Similarly, enforcement of the decision to void the 'safe neighbouring countries' policy (which had no basis in national law) proved difficult, with the practice continuing, even after further litigation was brought in 2011 (Handmaker and Nalule, 2021).[37] Finally, the Cape Town RRO ignored the court order to accept renewals of asylum permits application (regardless of where the first application was made). Only in 2019,

[35] See Tesfai, de Gruchy and Maple (Forthcoming).
[36] Also see Willie and Mfubu (2016).
[37] Also see Johnson and Carciotto (2018).

seven years after the original court decision, and after further litigation, did the RRO start renewing all permits (Khan and Rayner, 2021).

The DHA has also repeatedly pushed back and attempted to undercut court judgements that favour asylum-seekers and refugees rights (Crush et al., 2017). For example, while the 1998 Refugee Act is ambiguous on the right to work for asylum-seekers, the Supreme Court of Appeal in the *Watchenuka* case confirmed the right (Jones and Houle, 2018). Since that case however, the DHA has continually attempted to weaken the right through bureaucratic barriers and policy decisions (Jones and Houle, 2018). Recent amends by the government to the national legal frameworks have followed these trends in policy and practice. As noted by Ziegler (2020), under RAA 2017, asylum-seekers wishing to have their right to work 'endorsed', must satisfy an RSDO that they are unable to sustain themselves (and dependents), and then only if they cannot be provided for by UNHCR or another charitable organisation, will they be potentially eligible for a work visa. Further, in terms of the 'safe third country' policy, the RAA 2017 has amended Section 4(1)(d) of the 1998 Refugee Act, to now exclude any person who 'enjoys the protection of any other country in which he or she is a recognised refugee, resident or citizen' (Ziegler, 2020).

As explored in this section, the Judiciary as the fourth piece of institutional architecture, is the only element that is entirely independent of the DHA. Removed from governmental oversight or influence, the work of the court has continuedly pushed back against breaches in national law performed by the DHA (via policy or the practices of DHA officials). The role of civil society in this final element of the asylum system should also not be overlooked, with organisations continually fighting back through the courts when the state attempts to further shrink the asylum space. Nevertheless, a good deal of this work which directly relates to the protection of asylum-seekers and refugees is undercut by the DHAs responses to court decisions. Indeed, this section shows how the DHA still holds a good deal of influence over this stage of the national refugee reception system. By ignoring court decisions and pushing back against the courts attempts at course correcting the department's approach to the law, the DHA's institutional identity as a department primarily focused on perceived national interests and an increasing security focus overshadows this final part of the asylum process.

The government department has also shown little signs of attempting to improve in this area. In 2020, an auditor-general review of DHA observed how the department still does not have a coordination procedure with the Department of Justice (the department which is responsible for the judicial review of asylum-seekers) (PCMAB, 2020). Further, through the practise set out above, the DHA gives the impression of a department not overly concerned by the obligations set out in national law or the promotion of asylum-seeker and refugee rights. As such, while the judiciary remain a vital piece of institutional architecture, there remains limits to what can be achieved through the courts (Amit, 2011b).

7. Conclusions

The article has been concerned with the role of key pieces of institutional asylum architecture in the day-to-day functioning of the national refugee reception system in South Africa. The article examined the role that institutional identity plays within the national refugee reception system to i) better understand the level of control the DHA has been able to assert over individual elements of the system; and ii) investigate whether individual pieces of architecture have been able create their own institutional identity, and in doing so, insulate themselves from the broader ideology of the DHA and prioritise their mandate for refugee protection. Ultimately, the paper depicts a government department that can exert influence over all aspects of refugee affairs. This is achieved either through the individual pieces of institutional architecture, or by responding through new policy.

As a result, policy and practice relating to asylum-seekers and refugees tends to be implemented in line with the DHA's central national security focus. Certainly, the separate refugee affairs sub-division has never been able to create its own sense of autonomy or, in practice, a genuine protection mandate that is distinct from general immigration policy objectives of the overall department. Rather than an institution made up of multiple organizational identities carrying out their unique directives, the DHA's overarching mandate dominates proceedings. This can be seen most starkly in relation to the RROs, where the running of the offices and the performance of officers and management inside them over the last 20 years has generally followed the government's increasingly restrictive approach to asylum-seekers and refugees. Only the fourth and final piece of institutional architecture, the judiciary, remains independent of the DHA. Insulated from governmental oversight, the work of the court (in combination with civil society) continues to push back against these restrictive approaches. Nevertheless, this work is still continually undercut by the DHA. By ignoring court decisions or responding to 'unfavourable' decisions by implementing new policy, the DHA has repeatedly shown how it manages to influence this stage of the national refugee reception system.

For asylum-seekers and refugees, this means new and constantly shifting barriers that prevent or restrict them from gaining access to the interior and accessing basic human rights. In addition, these responses to refugees by the DHA also reflect and feed into the high levels of xenophobia and negative attitudes felt against other African migrants within large sections of the national population. Together, this creates an environment of suspicion and fear with many forced migrants preferring to remain invisible, ignoring national institutions and bodies all together. This survival tactic inevitably leaves many, particularly in urban centres, with expired documents or no documents at all, which in turn opens them up to the risk of further exploitation, detention, and deportation.

These findings generate important questions about: institutional arrangements and efficiency; the role of institutional identity in the implementation of law; and whether this practice, wherein a government department with a dominant national security mandate is able to impose its identity over national refugee policy (often in contravention of national and international law), is unique to South Africa. The research produces four crucial observations in this regard. First, it is hard to imagine this level of control and influence by the DHA was envisaged when the Refugees Act was drafted. Particularly when this outcome has rendered many of the other core institutions of the national asylum system architecture, at best inefficient and ineffective, but at worst, completely incapable of fulfilling their mandates. Yet, as noted above, a securitisation approach towards asylum-seekers and refugees has existed in various forms since DHA was given the responsibility for managing refugee affairs in 1994. Indeed, there were warning signs, and without external influence during the drafting of the Refugees Act, from 'above' and 'below' (for example, UNHCR, academia, and civil society), the national legal framework would likely be very different. What is evident, is the risk attached to not creating clear demarcations in terms of mandates and responsibility between a Department of Home Affairs with its overarching institutional identity focused on national security and sovereignty, and a sub-division which has human rights obligations towards a particular group of forced migrants. Without this separation, we are left with a situation where it is extremely ambiguous (both in terms of practice and policy) whether the DHA in South Africa even accepts that it has a specific human rights mandate towards refugees.

Second, it is evident that while national and international refugee law plays an important role in how refugee policy is implemented on the ground in South Africa, legal frameworks are not the only thing that matters. Institutions and their politics do too. Analysis of the global refugee regime by legal scholars often neglect that for many actors working in refugee protection, the law and international norms can remain fairly remote concepts. As Landau et al. (2018) observe, while a national legal framework is important, its presence is not always an

accurate predictor of protection without the 'sustained political will and administrative capacity to properly interpret, implement and enforce[it].' Indeed, without the political will or appetite within the core institutions to comply with national law, refugee policy on the ground in South Africa regularly more accurately reflects the DHAs overarching mandate than the law. Thus, while legal frameworks remain a vital component in how refugees access protection, government institutions and their politics are an equally important determinate of the form of protection offered.

Third, these findings suggest the need for additional investigation into the role of institutions and their politics in how refugees find protection within the region and the wider continent. Indeed, a pertinent question to ask is whether the case study is an outlier in region, due to South Africa's recent turbulent history, or can familiar patterns and behaviours be observed in bordering states? For example, in terms of close neighbours, it is interesting how countries such as Zambia and Tanzania appear to have distinct refugee departments within their Ministries of Home Affairs and incorporate other Ministries into refugee matters. In the case of Tanzania, there is the Refugee Services Department and a broader distribution of responsibility in relation to RSD procedures, with several different Ministries involved in conducting and deciding asylum cases (UNHCR, 2015). In contrast, other states in southern Africa appear to more closely mimic South Africa's approach, with refugee matters in Botswana managed by the Ministry of Defence, Justice and Security, and RSD procedures conducted by a committee mainly composed of officials (non-lawyers) from this security-oriented ministry (UNHCR, 2017). Equally, in Angola, the responsibility for refugees remains within the Service of Migration and Foreigners Department (UNHCR, 2014). Furthermore, what is evident is an increasing popularity across southern African states for framing most forms of cross-border migration solely via a security lens (Maunganidze and Formica, 2018). Thus, further study is warranted to see if and how national departments or sub-divisions with a refugee mandate can insulate themselves from broader department approaches and identities.

Finally, turning back to the case study, the South Africa's refugee reception system needs profound and urgent restructuring (Segatti, 2011b). Yet, it appears politically unlikely that progressive changes to the regime will occur soon. Indeed, numerous proposals stemming from this paper could be recommended, including: i) shifting refugee affairs outside of the DHA; ii) finding more robust ways of insulating the refugee division from wider political forces; iii) 'decentralising' national refugee policy by giving more responsibility and funding to local government; or iv) increasing the involvement of other government departments, which do not have the institutional history or 'baggage' of the DHA. Nevertheless, with the DHA continuing to consolidate power within both migration regimes, coupled with the department's ever-present focus on national security, all such proposals remain for now, unrealistic.

The current situation in terms of the impact of key asylum institutions on the promotion and protection of refugee rights, therefore, remains challenging. As noted in the introduction, we are currently at a stage that if the department is not attempting to deliberately delink refugees and asylum-seekers from the national refugee reception system and move them under immigration controls, then it is hard to imagine what a more deliberate approach would look like. As a result, the role of the judiciary and civil society as the *de jure* and *de facto* custodians of refugee protection in the country remain paramount. It has been unfortunate that external influence from 'above' in the form of UNHCR and other UN agencies have been kept at arm's length ever since the publication of the Refugees Act. Recent developments through the Global Compact on Refugees, though, do offer some glimmer of optimism, with the DHA showing a renewed willingness to engage with UNHCR. One suggestion would be for the UN agency to see this as an opportunity to build stronger relations with the more progressive elements of the department and push for the reengagement and better co-operation with key stakeholders, such as civil society and academia.

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