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Challenging policies and contextualizing rights: Civil society litigation and refugee and asylum seeker governance in South African cities

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Abstract

There has been increasing attention to legal and political contention concerning refugees and asylum seekers in cities. However, there are further opportunities to analyze the relationship between civil society litigation and state institutions in Global South cities. In this paper, I analyze civil society litigation to re-open Refugee Reception Offices (RROs) in South Africa. Primarily based on legal research, I argue that civil society litigation to re-open RROs in specific cities represents an advocacy strategy to contextualize national rights and policies within urban spaces. The paper contributes to broader discussions on civil society advocacy and rights and governance in cities.

Key words: asylum seekers and refugees, litigation, civil society, cities, South Africa

Introduction

*We had promised on World Refugee Day that “a new Port Elizabeth RRO will be opened in October 2018”, and today we are here to fulfil our promise!*¹

The Minister of the Department of Home Affairs (DHA) held an official press conference proclaiming the re-opening of the Refugee Reception Office (RRO) in the city of Port Elizabeth in October 2018. While the minister gave the impression that the department had fulfilled a promise to re-open the office, there was no mention that the department closed down the office to new asylum applicants in 2011 with the intention of permanently shutting it down. There was a further lack of acknowledgement of litigation brought on by civil society organizations and provincial High Court and Supreme Court of Appeal (SCA) court orders from 2011-2015 to re-open the office to all asylum applicants.² There was no reference of non-compliance with court orders to review the closure of the Johannesburg RRO in 2011, or ongoing non-compliance with SCA court orders to re-open an RRO for all asylum applicants in Cape Town by 31 March 2018.³ Finally, there was no mention of ongoing department plans to relocate asylum operations to land border processing centers to replace RROs primarily located in urban areas.

The empirical contradictions behind a decade of civil society litigation and DHA resistance concerning RRO re-openings represent a case of contested urban governance for refugees and asylum seekers. There has been increasing attention to contentious urban politics concerning the protection of refugee and asylum seeker rights in cities. This discussion has often focused on initiatives by municipal governments and local bureaucrats, civil society organizations, mobilized refugee and asylum seekers, or broader social movements. However, there has been relatively less attention to legal contention contesting the removal of state-run offices and administration from cities, particularly in cities in the Global South where the majority of displaced persons live. As compared to political and legal contention over local

protections in cities or upholding national and international rights more broadly, there is further opportunity to analyze civil society and state litigation concerning access to documentation and status determination services in major cities. This litigation further highlights competing legal and normative narratives concerning the importance of social, economic, institutional, and historical contexts of specific cities in realizing international and national rights more broadly.

Through a review of legal case records, supplemented by interviews and fieldwork from 2017-2018, I analyze the legal rhetoric behind civil society litigation and state non-compliance of court orders over RROs starting from 2011. By civil society litigation, I refer to the participation of civil society organizations, including rights-based and refugee-led organizations, in public interest litigation against the state concerning the rights and protections of refugees and asylum seekers. RROs are offices administered by the DHA that to process asylum applications, refugee status determination, and asylum seeker and refugee legal documentation. While officially established in cities starting in 2000, by July 2012, the DHA, had completely closed down the RRO in Johannesburg and prevented new asylum applications at the Cape Town and Port Elizabeth RROs. Civil society organizations have challenged the department to re-open RROs in these cities, leading to ongoing litigation and non-compliance that, in the case of Cape Town, continues to the present. This litigation between civil society organizations and the DHA has highlighted legal strategies that actively contest the normative and legal relationship between cities and protecting the constitutional and human rights of asylum seekers and refugees. Litigation to re-open RROs in cities where they were previously closed down therefore represents a type of legal contention that seeks to embed legislative and policy frameworks within social and historical contexts of specific cities.

The argument follows that the legal ambiguity and contestation of RRO closures led the DHA to increasingly develop vague and intangible statements around policy preferences to relocate RROs to border locations. To justify RRO closures and ongoing non-compliance with court orders to re-open offices, the DHA has sought to decontextualize policy decisions concerning the number and location of RROs and frame the seeming incompatibility of RROs and asylum seeker and refugee rights in cities. In response, civil society litigation evolved to focus on the historical and social embeddedness of RROs and the constitutional rights of refugees and asylum seekers in these cities. Civil society litigation, and subsequent court orders, emphasized the ongoing demand for RRO services and scale of economic opportunities, social networks and migrant communities, and access to public institutions in these cities.

While the significant degree of non-compliance by the DHA concerning court orders to re-open RROs has limited civil society litigation as a political tactic on its own, ongoing legal action continues to frame a legal and normative connection contextualizing RROs within cities. As compared to local rights within municipal jurisdictions, or national and international rights within the country more broadly, civil society litigation to re-open RROs in certain cities draws attention to the contested autonomy of national policies and constitutional rights within specific urban contexts. This form of legal contention therefore represents an important contribution to discussions on cities, policies, and rights by highlighting both the opportunities and limitations of litigation to contextualize rights and policies within cities.

Contesting policies and institutions in cities

Hirschl (2020) has highlighted the tension between the relative lack of constitutional standing of cities in face of national institutions in countries around the world. The unevenness of this relationship between national government and municipal authorities is particularly apparent in

questions of rights and protections for asylum seekers and refugees and other precarious migrants. In light of increasing restrictive national policies directed against these populations and relative shortcomings in their authority over immigration issues, various municipalities and non-state actors have sought to advocate for and provide local rights and policies for these populations (Darling, 2017). For example, cities have developed local protections against national law enforcement of legal status, instituted local identity cards inclusive of undocumented individuals, and enacted various social rights and services for precarious migrants (McDonald, 2012; Bauder & Gonzalez, 2018). Certain municipalities have passed limited local voting and political rights to non-citizens (Arrighi & Bauböck, 2017). Civil society and migrant organizations have further pressured local governments on behalf of asylum seekers, refugees, and other precarious migrants, in response to hostile national policies and relative absence of public services (Theodore & Martin, 2007; de Grauw, 2015; Van der Leun & Bouter, 2015).

City-level protections are often limited by legislative and constitutional frameworks that favor national authorities – and subnational units such as states and provinces – at the expense of cities and municipalities (Hirschl, 2020). City-level protections for refugees and asylum seekers and other precarious migrants are often structured by national restrictive policies and financial distribution for services in cities (Kemp, 2021), broader political party dynamics (Steen, 2016), and restrictive legislative and law enforcement frameworks that favor national laws (Bhuyan & Smith-Carrier, 2012). Additionally, cities and local mobilization have also responded to national dispersal policies for refugees and asylum seekers (Darling, 2016). While local bureaucrats may provide public services to precarious migrants outside of their legal mandates in certain cities, they remain structured within national policies and regulations (Marrow, 2009). Civil society organizations have also faced issues between cooperating with public officials in providing

humanitarian and social assistance and more confrontational advocacy for refugees and asylum seekers and other precarious migrants in cities (Ambrosini, 2015). Refugee protests have also targeted institutions other than municipal and national authorities in cities, such as UNHCR offices in Cairo (Grabska, 2006; Moulin & Nyers, 2007), Tokyo (Shindo, 2009), Kampala (Lyytinen, 2015), and more recently, in South Africa.⁴

However, there has been less analytical focus on civil society efforts to contextualize rights and protections within certain cities, as compared to supporting local rights initiatives or challenging municipal, national and international policies and institutions. In light of the difficulties and limitations faced by refugees and asylum seekers in sustaining mobilization and broader coalitions (Hopkins, 2006; Belloni, 2016), there is further need to analyze the role of litigation on behalf of refugees and asylum seekers in cities, particularly in the Global South. While litigation may be a potentially limited tactic for achieving social movement goals and broader social change on its own (Brown-Nagin 2005), legal action by civil society organizations may play a constitutive role in connecting legal rhetoric and institutions with broader social norms, movements, and institutions (Edelman, Leachman, & McAdam, 2010). Of particular interest, is how civil society organizations and public interest litigation may influence legal reforms and official interpretations of various legislation and policies (Edelman, Leachman, & McAdam, 2010: 669). For example, civil society litigation in the US has played a role in supporting the rights and protections for undocumented and precarious migrants (Coutin, 1998; Ashar, 2017; Cummings, 2018), and the drafting and implementation of refugee-specific legislation (Hamlin & Wolgin, 2012). Legal institutions though have also been complicit in upholding the various exclusionary legal categories and national policies for refugees and asylum seekers (Dauvergne, 2008), while cities have instituted legal and policy reforms against

undocumented migrants and refugees and asylum seekers (Varsanyi, 2008; Janmyr, 2016).

Legal protections and regulations ostensibly to protect and assist refugees and asylum seekers have often been utilized to further their exclusion and discrimination vis-à-vis citizen populations in Global South cities (Fábos & Kibreab, 2007).

Cities, litigation, and refugees and asylum seekers in South Africa

Greater constitutional autonomy for local governments however has not necessarily translated into more municipal involvement and initiatives for refugees and asylum seekers. South African cities are considered to have relative constitutional autonomy in relation to provincial and national institutions in comparative perspective (Klug, 2010; Hirschl, 2020). However, international migration and refugee and asylum seeker governance broadly remains considered a national government issue. For example, there has been a general lack of incorporation of international migration in local development and demographic planning in South African cities (Segatti & Landau, 2011). Similar to cities worldwide, local governments have further lacked the legislative authority or sufficient resources to address international migration at the local level (McDonald, 2008). In interviews for this project, local ward councilors were generally ambivalent towards foreign nationals, emphasizing the conditions and politics around South African constituents in their districts.⁵

Local authorities and opposition parties have often sought to place responsibility on the national government and DHA for shortcomings in border control and immigration policies, while seeking to mitigate issues of violence and unrest concerning foreign nationals.⁶ South African municipalities have taken certain measures and implemented forums in coordination with civil society organizations, particularly in light of outbreaks of xenophobic violence against racialized and precarious migrants (Peberdy & Jara, 2011).⁷ For example, the City of Cape

Town, governed by the opposition party, Democratic Alliance (DA), established temporary camps for displaced migrants in light of xenophobic violence in 2008, but also took legal action to close down and remove remaining occupants from these camps.⁸ Additionally, xenophobic violence against foreign nationals has been attributed to a lack of engagement by local officials concerning issues of insecurity and precarity in South African cities (Misago, 2011). As confirmed in multiple interviews with civil society and state representatives, municipalities across political parties did not play a role in litigation concerning RRO re-openings.⁹ Consequently, in post-apartheid South Africa, litigation for migrant rights has often centered on national institutions and rights-based organizations, with less sustained popular mobilization or political initiatives by municipalities (Polzer & Segatti, 2011).

Given the prominence of legal institutions in post-apartheid South Africa, rights-based organizations and litigation have played a central role in incorporating and upholding international and national rights protections stated in the 1998 Refugees Act (Handmaker, 2011). The Constitutional Court has also recognized that asylum seekers and refugees, as being resident in South Africa, are further protected by broader constitutional rights found in the 1996 Constitution. Litigation has resulted in legal decisions upholding the right to work and study for asylum seekers.¹⁰ Court orders have also challenged unlawful detention and deportation, limited access to RROs, and violations in refugee status determination procedures (Amit, 2011), though other legal judgments have upheld discriminatory practices against refugees, for example, in permitting private security companies from not hiring refugees.¹¹ Litigation has also been found to support further civil society advocacy against DHA policies and administration despite non-compliance issues (Amit, 2011).

The migrant rights sector in South Africa has also been recognized as relatively small and separated from broader labor and social justice movements in the country (Polzer & Segatti, 2011). Organizations have often focused on service provision and legal advocacy, as compared to broader political mobilization or representation of international migrants (Polzer & Segatti, 2011). Public and private regulations have also served to exclude refugees and asylum seekers from various institutions such as financial services in the country (Achieme, 2014). The department has shown significant autonomy and non-compliance with legal mandates and court orders as a result of internal mismanagement, weak political support for refugees and asylum seekers, and institutional incentives to exclude foreign nationals (Amit, 2011; Cote and Van Garderen, 2011; Landau & Amit, 2014). In general, the securitized policies, human rights abuses, and non-compliance by the DHA have led to further and ongoing adversarial relations and legal challenges between the department and civil society organizations (Segatti, 2011).

Case selection and methodology

The following analysis is based on a review of ongoing class action litigation seeking to re-open RROs in certain South African cities starting in 2011. There is an extensive legal history from the 1990s to the present related to litigation against RROs and refugee and asylum seeker policies in South Africa. While it is beyond the scope of this paper to review the various legal cases related to RRO relocations and closures in the country over the past decades, I focus on the legal rhetoric used by civil society organizations seeking to re-open RROs. While the legal case to re-open the Johannesburg RRO was short-lived and ultimately unsuccessful, I focus on legal challenges concerning the Cape Town and Port Elizabeth RROs. This litigation eventually resulted in the re-opening of an RRO in Port Elizabeth in 2018, and ongoing legal challenges and delays in re-opening an RRO in Cape Town. Importantly, litigation concerning these two offices

developed a strategy over time that contextualized the administration and protection of rights within the specific contexts of these cities. While recognizing the limitations of court orders and legal institutions in face of substantial non-compliance by the DHA, I focus on the constitutive dynamics of civil society litigation attempting to develop legal norms contextualizing RROs within specific cities.

Case records included affidavits from involved parties, heads of arguments, supplementary documents and records, and final court judgments. Case records were collected online, at provincial courts, and from legal organizations, and provided a robust and relatively understudied archive of legal and official documents. Legal records were supplemented by approximately one-hour long interviews (n=28) in 2017-2018 with representatives from international organizations, civil society organizations, legal representatives, local government officials, and former RRO management.¹² I also conducted field visits outside current and previously closed RRO locations, and during legal proceedings concerning the re-opening of the Cape Town RRO. Interviews and field observations were used primarily to corroborate material found in the legal documentation and provide contemporary updates and context around RRO litigation and contention. Data was compiled to develop a critical narrative to analyze persistence and variation in legal rhetoric in justifying and challenging RRO closures in these cities. Data was coded around analytical categories related to the relationship between rights and cities within the litigation. Therefore, the analytical focus was less on legal decisions and policy outcomes related to the litigation, but rather on legal and policy narratives attempting to either separate or contextualize cities and refugee and asylum seeker rights and governance. The resulting analysis highlights tensions in the DHA's legal strategy to detach RRO administration from historical and normative associations with cities, and civil society litigation to contextualize

legal interpretations of RRO access, and rights in general, within specific cities.

RRO closures and proposed border relocations

Five RROs were initially established in Johannesburg, Cape Town, Pretoria, Durban, and Port Elizabeth. In the absence of refugee camps, RROs were located in cities where the majority of asylum seekers and refugees lived in attempts to gain employment and access resources. While the 1998 Refugees Act does not stipulate the number of RROs or their location, these offices were initially located in major cities and not in border areas. However, RROs were understaffed and under-resourced to address increasing numbers of asylum seekers and refugees, the majority coming from other countries in Africa, and faced endemic issues of maladministration and corruption (Amit, 2015). The table below highlights differences in estimated demand and capacity for asylum applications per day at RROs forecasted in 2007 (Table 1):

Table 1: Forecasted difference between Estimated Asylum Seeker Applicants, Accepted Asylum Seeker Applicants, and Adjudication Capacity per Day at each RRO (2007)

	Johannesburg	Pretoria	Cape Town	Port Elizabeth	Durban	Total
Estimated Applicant Demand per Day	312	182	138	36	80	727
Accepted Applicants per Day	107	41	33	32	44	257
Adjudication Capacity per Day	3	4	11	10	3	31

Source: Data compiled from FeverTree Consulting (2007). *Transforming the Department of Home Affairs: Refugee Affairs: Reception Offices Network Integrated Plan Workstream Deliverables #7, September 2007.*¹³

Asylum applications peaked in 2009-2010 with over 200,000 asylum applicants each year, above all, from Zimbabwe during a period of acute political and economic crisis. Additional RROs were established in Pretoria from 2009-2016 and Musina at the Zimbabwean border from 2008 to the present. The high demand and lack of access to RROs and asylum documentation led to

various protests and litigation against RRO administrative practices and procedures. Resulting court orders and internal reviews called for the department to improve access, operations, and facilities at RROs, leading to the relocation and consolidation of RROs in these cities. However, relocations of RROs were further challenged in court by neighboring businesses in Johannesburg, Cape Town, and Port Elizabeth, leading to court orders to either address zoning and administrative issues at these offices or further relocate RROs in these cities.

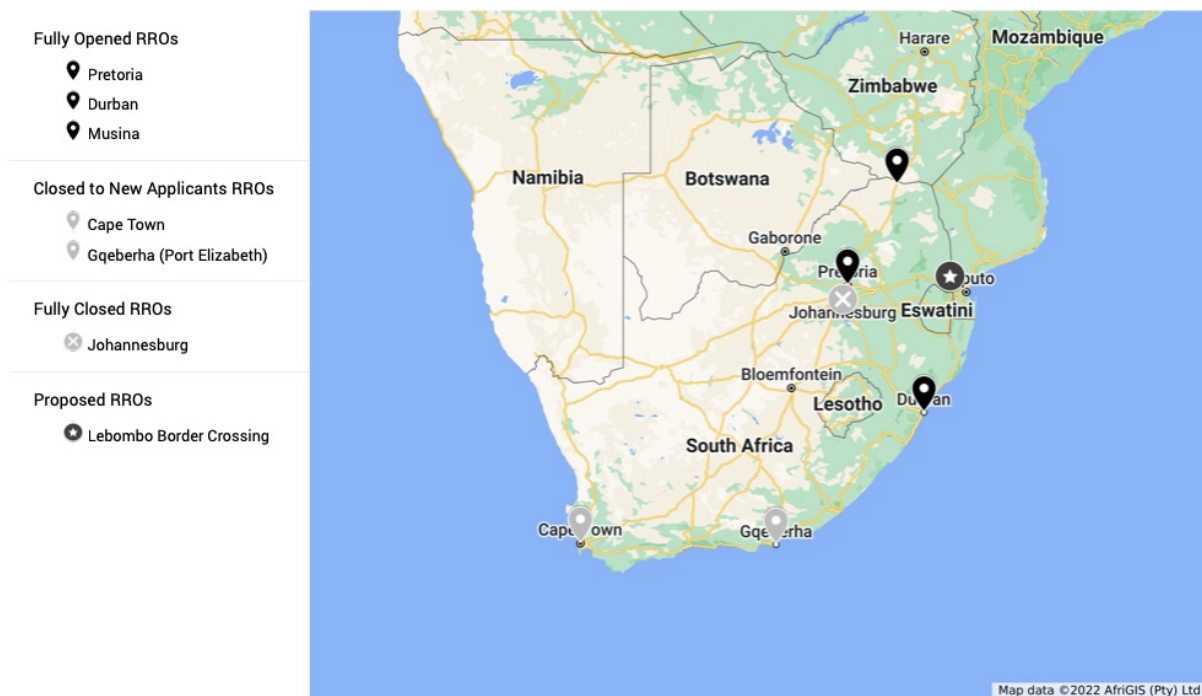
While the DHA did embark on certain logistical and administrative reforms, the department and governing African National Congress (ANC) increasingly supported policies to close down RROs in cities in preference for border processing centers.¹⁴ Initial plans to move RRO operations closer to land borders were considered too expensive and inefficient. However, the DHA increasingly favored the opening of an additional RRO facility at the Lebombo border crossing with Mozambique. While the Lebombo RRO has yet to be constructed, the 2017 White Paper on International Migration clearly outlined the department's proposal to move away from RROs, particularly in cities, and to open processing centers for asylum seekers at land border crossings. These proposed processing centers have been contested by civil society organizations concerned that the centers would effectively detain the majority of asylum seekers during the adjudication process and facilitate their deportation. More recent amendments to the 1998 Refugees Act have further sought to limit access to RROs, restrict refugee and asylum seeker political mobilization, remove the right to work and study for asylum seekers, and make it more difficult for refugees to gain permanent residence and citizenship (Ziegler, 2020).¹⁵

By July 2012, the DHA had officially closed down all RRO operations in Johannesburg, while RROs in Cape Town and Port Elizabeth were no longer accepting new asylum seeker applications, with the stated intention to close down these offices after all pending applications

would be processed. Consequently, organizations including Lawyers for Human Rights (LHR), the Scalabrini Centre of Cape Town (SCCT), Legal Resources Centre in Cape Town, and the Nelson Mandela Municipality University - Refugee Rights Unit (NMMU-RRU) in Port Elizabeth, took legal action against the DHA to have these offices re-opened. Refugee and migrant organizations such as Consortium of Refugees and Migrants in South Africa (CoRMSA) and the Committee Body for Refugee Communities (CBRC) in Johannesburg, and the Somali Association of South Africa (SASA) in Cape Town and Port Elizabeth were also principal applicants in litigation. Civil society organizations had the same advocate working across the three cities, while there was also overlap with the legal representatives in the State Attorney's office representing the DHA. The organization Sonke Gender Justice had also organized more recent protests and media campaigns to pressure the DHA to re-open the Cape Town RRO and Port Elizabeth RROs.

Full and partial RRO closures in these cities resulted in significant issues for accessing RROs and legal documentation in the country. Historically, the Johannesburg RRO had been the busiest office in the country, while the Cape Town office was the third busiest RRO after the Pretoria office. Field observations in 2017-2018 confirmed long lines to renew asylum seeker permits issued before July 2012, and crowds of persons seeking to renew refugee permits or other legal documentation have persisted at the partially opened Cape Town RRO. Additionally, RROs were only located in Pretoria, Durban, and Musina, all of which have faced administrative and operational issues according to civil society organizations (Figure 1).¹⁶

Figure 1: Map of Refugee Reception Offices (Jul. 2012- Sept. 2018)



Note: Top right dark-shaded pin is Musina at the border with Zimbabwe and the star represents the proposed RRO at Lebombo at the border with Mozambique. An RRO in Port Elizabeth (Qqeberha) was fully re-opened in Oct. 2018, though civil society organizations have reported capacity and access issues.

Source: Author, Google Maps.

The limited number of RROs in the country created significant issues of access for asylum seekers legally required to apply for asylum and renew their legal papers in person at RROs.¹⁷

Civil society organizations reported significant issues concerning the costs of travel and risks of exploitation, detention, and possible *refoulement* for asylum seekers and refugees trying to access the remaining offices.¹⁸ In light of the RRO closures and various other policy and administrative measures to limit access to asylum, the number of asylum applicants significantly declined.¹⁹

RROs, contested cities, and contextualized rights

The remaining discussion analyzes the contested legal narratives concerning policies and rights, specific cities, and RRO re-openings. First, the contested legal importance of cities for the

constitutional and national rights for asylum seekers and refugees has led to policy ambiguities and tensions between the DHA and civil society organizations. Second, the DHA framed cities as incompatible with RRO administration and the rights of asylum seekers and refugees in terms of national and personal security. And third, civil society organizations have sought to contextualize national rights and policies within specific cities in support of re-opening RROs, above all, in Cape Town and Port Elizabeth. Therefore, civil society litigation developed a normative and legal claim of upholding constitutional rights within specific cities.

Administrative Blurring between Cities and Borders

In the absence of clear administrative procedures and official policy reforms, RRO closures and non-compliance became a nebulous strategy of weakening urban-based asylum procedures and the ability for asylum seekers and refugees to claim asylum in cities (Polzer Ngwato, 2013).

Initially, the DHA framed the closure of RROs in Cape Town and Port Elizabeth as inherently necessary for the construction of the proposed border office in Lebombo. However, as the implementation of the Lebombo office became delayed, official rhetoric oscillated from affirmative statements on policies for border offices and outright denial of these plans. The following conversation between a DHA executive official and a representative from Lawyers for Human Rights (LHR) during a December 2013 stakeholders meeting in Cape Town summarizes these contradictions and frustrations around the DHA's ambiguous position concerning a relocation policy at the time:

DHA: Which policy?

LHR: To move asylum services to the border. I think I disagree with what you said – with respect. It was not clearly stated like that by the DG [Director-General].

Chair: Have you seen the policy? The question is asked: is there a policy? I said there is no policy.

LHR: But the DG [Director-General] has said that there is – he said so in his answering affidavit.

Chair: I will have to ask him to issue that policy but we are telling you now at this meeting that there is no policy on this. There are considerations about many policy changes and issues. A policy is one that is stated on paper and in practice. There is no such policy.²⁰

By 2014, the department was denying the construction of the Lebombo RRO, while by 2016 was again stating that the office would be constructed but implementation was delayed.²¹ By 2017, the White Paper on International Migration had been released, clearly outlining the department's proposal to open processing centers at border crossings in place of RROs, without addressing non-compliance with court orders to re-open the RROs in Cape Town and Port Elizabeth.²² Therefore, urban RROs have remained uncertain and tenuous locations of partial administration, providing narrow opportunities for civil society litigation to pursue legal norms contextualizing access to legal documentation and asylum procedures at RROs within cities.

Cities as incompatible to rights and policies

In light of the legal ambiguities of RRO closures, the DHA increasingly emphasized the incompatibility of cities for RRO administration and national rights and policies of asylum. The department highlighted preceding litigation by neighboring businesses against RROs. By outlining detailed descriptions of the various regulations and conditions required in securing a property, it also appealed to logistical difficulties in finding suitable locations for an RRO. The department further argued that cities inherently encouraged the abuse of the asylum system by economic migrants. In December 2014, the Director-General of the DHA stated the following in reaffirming the ongoing closure to new asylum applicants and planned full closure of the Cape Town RRO:

17. Economic migrants are exploiting South Africa's legislative framework and refugee services. Historically, they have been able to move to Cape Town and obtain work in Cape Town while the asylum adjudication process has taken its course.

18. Government is entitled to take steps to control the asylum adjudication process, including taking steps to restrict access to RROs in urban areas where access to RROs has historically been abused by economic migrants.

19. While taking such steps may result in hardship in some genuine asylum-seekers, this hardship must be considered in light of Government's legitimate need to regulate the asylum application process and access to RROs.²³

Therefore, the connection between economic opportunities and cities was framed as incompatible with seeking asylum and the implementation of national rights and protections.

Additionally, cities were also framed as inherently dangerous for asylum seekers and refugees. By removing RROs from major cities, and therefore creating less incentives for asylum seekers to live and work in these areas, the argument followed that local South African residents would have less reasons to discriminate against and attack asylum seekers living and working in their neighborhoods. While SCA judges in support of RRO re-openings openly challenged the cynicism of these arguments, the department's argument signified a strategy to not only separate rights from cities, but to emphasize the incompatibility of cities and asylum procedures and protections.

Legal recognition of specific cities

In response to legal arguments by the DHA and non-compliance in delaying the re-opening of RROs, civil society organizations and legal judgments have increasingly favored the legal connection of national rights for asylum seekers and refugees within cities that previously hosted RROs. Therefore, of particular importance was the initial administrative decision to open RROs in these cities in the first place, and the ongoing demand for RROs in these areas. In absence of legislation calling for their specific location in cities or elsewhere, legal proceedings generally recognized the right of the DHA to determine the location or number of RROs in the country. However, court orders in favor of RRO re-openings in cities that previously hosted these offices held the DHA to a higher legal threshold for justifying the closure of RROs. Legal judgements pointed to initial policy decisions and significant demand for RRO services in these cities as support their ongoing operations, particularly in the absence of accessible alternative options.

Civil society litigation therefore focused on connecting access to RROs in Cape Town and Port Elizabeth as fundamental to the constitutional and national rights of refugees and asylum seekers. Initial civil society litigation and early court orders focused on technical and administrative violations in the DHA's closures of RROs, such as failure to consult relevant stakeholders prior to the closures. However, in light of DHA non-compliance with these orders, civil society litigation increasingly focused on an additional strategy of contextualizing RRO closures within specific historical and social contexts. Civil society and legal organizations argued that deliberately removing offices in cities that had relatively greater work opportunities, migrant communities and networks, and access to institutions and resources, was in clear violation of constitutional and administrative protections for refugees and asylum seekers in the country. Additionally, litigation challenged the significant distances and limited options for asylum seekers in the country to access RROs in light of these closures. In this sense, civil society litigation recognized that while the location and number of RROs in the country was a matter of national policy, the administrative decision to remove RROs in these cities represented a violation in their national rights and protections.

Tensions concerning the contested relevance of cities, and in particular cities where RROs closures have taken place, is highlighted in contrasting court decisions. Court orders in favor of the DHA did so on the basis of decontextualizing national rights and policies and location of offices, stating the location and number of RROs was a matter of executive and bureaucratic decision-making.²⁴ In contrast, legal arguments and court orders that eventually called for the re-opening of RROs in Cape Town and Port Elizabeth emphasized the institutional and social basis of these cities in supporting asylum seekers and refugees. Legal arguments in support of RRO re-openings emphasized the ongoing and protracted process involved in

processing asylum claims and numbers of foreign nationals living in these cities. Legal judgments argued that RRO locations in these cities were fundamental to access work opportunities, accommodation spaces, and public facilities at “sufficient scale” in comparison to border areas and ports of entry that lacked sufficient resources and cities to accommodate large numbers of asylum seekers.²⁵ Additionally, the final legal judgment by the SCA in 2015 confirming legal orders to re-open an RRO in Port Elizabeth affirmed the importance of having RROs in locations with established migrant communities:

If those communities are established in a particular geographic area of the country, such as the Eastern Cape, it goes without saying that that is where such persons will head. The suggestion by the relevant authorities therefore that asylum seekers freely choose to live and work in Port Elizabeth or the Eastern Cape and can likewise freely choose to live and work near one of the remaining RROs is untenable.²⁶

While acknowledging that the 1998 Refugees Act did not stipulate where RROs should be located, these judgments declared that RRO closures in these cities were unlawful considering the significant demand and costs involved in visiting these offices, scale of economic opportunities and social facilities, and established migrant networks and communities in relation to more rural and isolated border areas. Therefore, SCA court judgements found that DHA resistance to re-open RROs in Port Elizabeth and Cape Town was legally irrational and in contradiction to the intention of the Refugees Act and constitutional protections providing access to public institutions, as opposed to limiting their accessibility.

Discussion and conclusion

As elsewhere in the world, the South African government has increasingly securitized and criminalized asylum seeker and refugee management in efforts to limit and deter asylum seekers from the country. In light of various internal and external constraints on the complete relocation of RROs from cities to border crossing areas, the DHA has seized opportunities to close down RROs in cities where there has been high demand for RRO services. The closure of RROs have

been resisted by a group of committed civil society and rights-based organizations that have challenged these decisions within legal institutions focused on upholding constitutional law. While civil society litigation has achieved significant victories in court orders calling for the re-opening of RROs in certain cities, civil society litigation has confronted limitations with the non-compliance of court orders by the DHA. Contradictions in legal reforms, political interests, and policy implementation have led to a lack of transparency and heightened ambiguity between the DHA and civil society and legal organizations, an administrative infrastructure of delayed border centers and contested and partially operating RROs in cities. Legal contention over RROs is further limited by the relative absence of activist municipal governments and broader political and electoral coalitions in support of asylum seekers, refugees, and precarious migrants in South Africa. Therefore, the case of civil society litigation concerning RRO re-openings in certain cities highlights the opportunities and limitations of litigation as a strategy to confront state policies.

However, civil society litigation and legal contention over re-opening of RROs in Port Elizabeth and Cape Town highlights an important constitutive strategy contextualizing international and national rights to specific historical and social contexts in cities. Cities worldwide are characterized by competing policies and movements concerning municipal and national migration governance (Hirschl, 2020). However, by seeking legal mandates to maintain asylum processing offices within specific cities, litigation over RRO re-openings differs from contention over dispersal policies or sanctuary movements in North American and European cities, and other protests in Global South cities. Legal contention over RRO re-openings not only highlights administrative issues or discrepancies at offices in particular cities (Marrow, 2009), but broader contention over the national distribution of these offices. Therefore, in

addition to national or international rights more broadly, civil society litigation against RRO closures has highlighted connections between refugee and asylum seeker rights and the cities that previously hosted these offices.

Civil society litigation has sought to hold the DHA accountable for RRO closures in specific cities by appealing to constitutional and refugee law in the country. However, violations in constitutional and refugee law have been interpreted within a place-specific framework. Litigation has referred to the historical precedent of initial locations of RROs in these cities, and potential access to social, economic, and institutional resources in urban spaces as compared to more rural areas or border locations. While the specific number or location of RROs is not stated in South African law, civil society litigation has challenged the legal rationality of removing RROs from cities where they were previously established and may provide greater opportunities for asylum seekers and refugees to access rights and protections. In light of non-compliance with court orders and pending legislative and policy reforms in favor of border processing centers, civil society litigation has increasingly sought to constitute legal and social norms that contextualize asylum seeker and refugee rights within major cities. Therefore, civil society litigation has challenged DHA rhetoric of decontextualizing RRO policies from the historical and social conditions of specific places, and framing cities as inherently problematic for the administration and integrity of RROs and the safety of asylum seekers and refugees.

The relevance of specific urban conditions for the realization of legal rights has additional implications for the drafting and interpretation of legal documents and reforms at municipal, national, and international scales. While not specified in international conventions or national law in South Africa, the specific location of RROs and access to asylum procedures and documentation have become a primary issue in the administration of asylum in the country. In

addition to providing legal support for ongoing civil society advocacy for refugees and asylum seekers (Amit, 2011), court orders in favor of RRO re-openings have reinforced legal and normative connections between rights and these cities. However, in light of ongoing non-compliance and lack of political will for urban RROs, RRO re-openings also represent a limited and uncertain form of urban management, rights protections, and legal success. Therefore, litigation concerning access to asylum procedures in specific cities provides an insightful case representing the limitations and opportunities of constituting legal norms and protections that are not explicitly stated in international and national law.

Future research could therefore address the opportunities and limitations of legal strategies of appealing to specific urban and local conditions to uphold rights for refugees and asylum seekers in comparative perspective across Global South and North cities. As the majority of refugees and asylum seekers continue to live in protracted and precarious situations across cities in the Global North and South, further comparative research could look at the possibilities and limitations of legal contention connecting urban politics and access to legal documentation, in addition to the varying legal and political opportunities that may structure the different forms of legal and political contention among civil society actors.

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Notes

¹ Minister Malusi Gigaba: Re-opening of Port Elizabeth Refugee Reception Office, 19 October 2018; accessed at <https://www.gov.za/speeches/statement-minister-home-affairs-19-oct-2018-0000>.

² *Scalabrini Centre, Cape Town and Others v. Minister of Home Affairs and Others*, [2013]11681/12, ZAWCHC; *Somali Association for South Africa, Eastern Cape (SASA) EC and Another v. Minister of Home Affairs and Others*, [2013] 3338/2012, ZAECHCPE; *Minister of Home Affairs and Others v. Somali Association of South Africa and Another*, [2015] 831/13, ZASCA.

³ *Consortium for Refugees and Migrants in South Africa and Others v. Minister of Home Affairs and Others*, [2011] 573756/11, ZANGHC; *Scalabrini Centre, Cape Town and Others v. Minister of Home Affairs and Others*, [2017] 1107/2016, ZASCA.

⁴ While outside the scope of this paper, more recent protests by refugees starting in 2018 in Cape Town have targeted UNHCR offices and occupied urban spaces. The municipality has taken legal action to have protestors removed from these and related areas (Margele, 2019).

⁵ Interviews, 22 February 2018; 12 March 2018; 13 March 2018.

⁶ See the Democratic Alliance (DA) Immigration Plan, 15 October 2018 (<https://www.da.org.za/2018/10/das-immigration-plan-will-secure-our-borders-and-stop-illegal-immigration>).

⁷ The City of Johannesburg established a Migrant Help Desk in 2007 and the Johannesburg Migrants' Advisory Committee (JMAC); see CoRMSA, 2011.

⁸ *City of Cape Town v. All those adult male and females whose names are set out in Annexure "H51" to the founding affidavit and who reside at Bluewaters Site B and C, Lukannon Drive, Strandfontein Western Cape and Another*, [2010] 5083/09, ZAWCHC.

⁹ Interviews, 17 November 2017; 31 January 2018; 16 February 2018.

¹⁰ *Minister of Home Affairs and Others v. Watchenuka and Another*, [2003] 10/2003, ZASCA.

¹¹ *Union of Refugee Women and Others v The Director: The Private Security Industry Regulatory Authority*, [2006] 39/06, ZACCT.

¹² Research was approved by the Institutional Review Board at UCLA (IRB#16-000991). Interview participants provided prior signed informed consent.

¹³ Accessed in *DeGaulle Kiliko and Others v Minister of Home Affairs and Others*, [2008] 2739/05, ZACGHPD.

¹⁴ ANC "Peace and Stability" Policy Discussion Document, March 2012.

¹⁵ See Refugees Amendment Act 33 of 2008, Refugees Amendment Act 12 of 2011, and Refugees Amendment Act 11 of 2017. The amendments in these acts were implemented with the Refugee Regulations, 19 December 2019 and officially enacted on 1 January 2020.

¹⁶ Interview, 12 March 2018.

¹⁷ Since March 2020, RROs were closed for in-person services due to Covid-19 regulations and an online renewal process was implemented. RRO re-openings have been delayed as compared to other government services (Washinyira, 2021).

¹⁸ Interview, 16 March 2018.

¹⁹ The department only registered 24,174 new asylum applications in 2017 (Department of Home Affairs Annual Report 2018).

²⁰ Minutes of the Stakeholder Consultation Pertaining to the Future of the Cape Town Refugee Reception Office, 5 December 2013, accessed in *Scalabrini Centre and Others v. The Minister of Home Affairs and Others*, [2016] 8132/14, ZAWCHC.

²¹ See *Minister of Home Affairs and Others v. Somali Association of South Africa and Another*, [2015] 831/13, ZASCA, Judgment, 25 March 2015, paras. 21-22; *Scalabrini Centre, Cape Town and Others v. Minister of Home Affairs and Others*, [2016] 8132/14, ZAWCHC, First to Fourth Respondents Answering Affidavit, para. 121.

²² The Director-General has referred to the Musina RRO as a “processing centre” in addition to the proposed Lebombo office; see Portfolio Committee on Home Affairs, 19 May 2020, <https://pmg.org.za/committee-meeting/30253/>.

²³ Director-General, Home Affairs, 7 February 2014, accessed in *Scalabrini Centre, Cape Town and Others v. Minister of Home Affairs and Others*, [2017] 1107/2016, ZASCA.

²⁴ E.g. *Scalabrini Centre, Cape Town and Others v. Minister of Home Affairs and Others*, [2016] 8132/14, ZAWCHC, Judgment, 26 June 2016.

²⁵ *Scalabrini Centre, Cape Town and Others v. Minister of Home Affairs and Others*, [2017] 1107/2016, ZASCA, Judgment, 29 September 2017, para. 63.

²⁶ *Minister of Home Affairs and Others v Somali Association of South Africa and Another*, [2015] 831/13, ZASCA, Judgment, 25 March 2015, para. 28.

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