Article

Protection of Rights of Urban Refugees in Kenya: Revisiting *Kituo Cha Sheria v The Attorney General*

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Abstract

This article discusses the judgment in the landmark case of *Kituo Cha Sheria & Others v Attorney General* in the light of the emerging rights jurisprudence in the area of refugee rights. It also explores the impact the judgment could have on the articulation of the rights of urban refugees in Kenya. Based on the assumption that Kenya's 2010 Constitution provides an opportunity for the robust enforcement of rights, the article analyses the key rights and protection imperatives that were at the centre of the dispute. These include the right to dignity, freedom of movement and to work, and also the principle of *refoulement*. These rights are at the core of the protection agenda for urban refugees.

Keywords: refugee protection; urban refugee rights; *refoulement*; encampment

Introduction

Profound inconsistency exists between human-rights law and government policy on the management of urban refugees in Kenya. The inconsistency is manifest in the poor implementation of existing refugee law, the improper calibration of refugee rights by governmental organs, and the pervasive faith in the policy of encampment. The challenges that arise from the inability of the State to bridge the gap between human-rights standards and policy have attracted the attention of scholars through the years.[1] But change has been slow in coming. Among the factors inhibiting change is the

[1] See, for example, Marc-Antoine Perouse de Montclos and Peter Kagwanja, 'Refugees Camps or Cities: Socio-economics of Dadaab and Kakuma Camps in Northern Kenya' (2000) 13(2) J Refugee Studies 205; Elizabeth Campbell, 'Urban Refugees in Nairobi: Problem of Protection Mechanism of Survival and Possibilities Integration' (2006) 19(3) J Refugee Studies 396.

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inability of the legal system to live up to expectations. Consistently, interventions meant to improve refugee protection are frustrated by poor legal infrastructure and inept mechanisms for rights protection. And while there is a sense that bridging the gap between law and policy could benefit from a more active judicial system, cases relating to the flagrant abuse of refugee rights rarely reach the courts. This is probably because the system does not appear to have any appetite to deal with them or parties are directly or indirectly unable to find access to the courts. For good reason, scholars have continually lamented the diminished contribution of the legal system in general, citing its poor interaction with refugee issues and its inability to enforce the government's commitments in both international treaties and domestic laws.[2]

Although the state of affairs appears oblique, recent developments provide cause for some optimism. A combination of factors that have unfolded since the adoption of the new Constitution in 2010 indicate that the role of the judiciary in rights enforcement is becoming more pronounced. The new constitutional dispensation has created a new dynamic in the relationship between citizens and the courts, one that is likely to lessen the traction in the development of rights jurisprudence. In particular, the new dispensation has opened up space for human-rights litigation which may, in the long run, help condition policy directions. As courts become more accommodating of human-rights disputes, refugee concerns are now finding their way into the courts more often than in the past. One example is the case of *Kituo Cha Sheria & Others v The Attorney General*,[3] decided by the High Court in the second half of 2013. In this landmark case, the court embraced without limitation a strong vision of the rights of refugees living in urban or any other environment away from the camps. Its holding that government policy that denied refugees the right to reside and work in Nairobi and other urban centres in Kenya was null and void was indeed a major breakthrough in consolidating the rights of urban refugees in Kenya. I hesitate to draw the conclusion that the decision marks a complete departure from the conservatism of the past, because in the following year (2014) the same Court in *Samow Mumin Mohamed v Cabinet Secretary, Ministry of Interior Security and Co-Ordination*[4] declined to grant the same rights. The reasons for the decision in *Samow Mumin Mohamed* include some technical and procedural matters that have little to do with rights per se.[5] For that reason, this article focuses on *Kituo Cha Sheria* case, because it offers more progressive jurisprudence, and legal scholars and activists may benefit from the manner in which the Court articulates the rights relevant to urban refugees.

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2 Guglielmo Verdirame, 'Human Rights and Refugees: The Case of Kenya' (1998) 12(1) J Refugee Studies 54.

3 High Court of Kenya, Nairobi, Petition no 19 and 115 of 2013; (2013) eKLR 2.

4 (2014) eKLR 2.

5 A short discussion of this decision can be found in Robert Nanima, 'An Evaluation of Kenya's Parallel Legal Regime on Refugees and the Courts Guarantee of Their Rights' (2017) 21 Law Democracy & Development 42.

As already mentioned, this article discusses the High Court decision in *Kituo Cha Sheria* in the light of the emerging rights jurisprudence in the area of refugee rights and then explores the impact it could have on the articulation of the rights of urban refugees if stakeholders were serious about improving the protection of the rights of urban refugees in Kenya. It proceeds on the explicit assumption that there is indeed an opportunity to better enforce rights within the new constitutional order. Indeed, the *Kituo Cha Sheria* case provides a prism upon which to reflect on the trends in enforcement of refugee rights that could evolve from this new constitutional order.

The discussion is in three main parts. The first part exposes the rationality embedded in the notion that refugee issues in the Kenyan environment present unique challenges that the refugee protection regime must necessarily engage with. From its geographical location to the unfolding security situation, the Kenyan context presents a dynamic yet complex locus of study. The article explores this dynamism and isolates the challenges. The second part deals with the framework for protecting refugees and its limitations and sets the stage for understanding how the issues that arose in *Kituo Cha Sheria* were objectively resolved. The third part is the analysis of the case, with an emphasis on the rights jurisprudence.

The Context

The current refugee question should be understood in the context of Kenya's geographical location and its unique transitory problems. Kenya has regarded itself as an island of stability in a region rocked by all manner of debilitating political and social upheavals. Almost all of its neighbours, from east to west and north to south, have at one time been engulfed in armed struggles that have led to their nationals' crossing their borders into Kenya. According to the United Nations High Commissioner for Refugees (UNHCR), approximately 12 000 refugees were living in Kenya in the late 1980s.[6] The number had risen to 120 000 by the early 1990s. And by 2013 Kenya was home to an estimated 600 000 refugees.[7] The rise in numbers reflects the patterns of the eruption of violence and political instability in the neighbouring countries. The major inflows in the 1980s were mainly from Uganda; currently, the bulk of refugees come from Somali, Sudan, Rwanda and the Democratic Republic of the Congo (DRC). Despite the increasing numbers, the government has been slow to establish a robust refugee management and protection system. The refugee policy has been ad hoc and often implemented in an unco-ordinated fashion. Apart from financial constraints, several other factors may explain this phenomenon.[8] The first is complacency. Prior to the

6 UNHCR 2004.

7 See Hannah Elliot, 'Refugee Resettlement; The View from Kenya' Centre for Advanced Studies, European University Institute (2012) <http://www.know-reset.eu/files/texts/00695_20130530121940_carim-knowresetrr-2012-01.pdf> accessed 26 July 2016.

8 Edwin Odhiambo Abuya, 'United Nations High Commissioner for Refugees and Status Determination Imtaxaan in Kenya: An Empirical Survey' (2004) 48(2) J African Law 206.

1990s, there was no official policy on refugee management: most refugees got into the country freely and integrated with the local population. The government's approach to refugees was described as 'generous and hospitable'.[9] In fact, the majority of Ugandan refugees who arrived in the 1980s lived in urban areas. But even as the numbers began to rise in early 1990s, the Kenyan government officials never really considered refugee management to be part of their job – refugees were a UNHCR problem. The downside of this approach was that no effort was made to develop the law and policy required to manage and protect refugees.

The second factor relates to turning the refugee question into a security issue. This is a phenomenon that is currently playing itself out and is likely to consume all the gains made in protecting refugee rights. One thing that should be noted is that refugee protection is always undertaken in a politically charged environment. Therefore, reconciling legitimate State interests and refugee-protection principles has always been a challenge. What we see, however, is that whenever the security situation deteriorates and the inept security infrastructure is called into question, it is the refugees who become the target of blame. This is because the law is crafted in such a way that security takes precedence. The Refugee Act, for example, gives the government the power to suspend the protection given to refugees on account of concern for security and public order. Sections 19 and 21 spell out the extensive powers that the minister for the time being in charge of refugees has.[10] These powers override any claims that a refugee may make to their rights to remain in the country. Insecurity also fuels public animosity towards refugees, especially if their perception of the source of insecurity coincides with a community that is also a source of refugees. Often the government then capitalises on public fury to impose drastic measures that curtail refugee rights. Recently, for instance, Kenya has become a prime example of a country where communities with a larger number of refugees have become the target of continued police harassment whenever threats to security emerge.

This linkage of insecurity to refugees has been a feature of Kenya's effort to deal with threats brought about by the infiltration of terrorist elements since 1998, when Al Qaeda terrorists bombed the US embassy in Nairobi. With the increasing threat of terrorism from the Al Shabaab and other groups linked to Al Qaeda, members of the Somali community have been rounded up violently and placed in makeshift camps for

9 Campbell (n 1) 401.

10 Both ss 19 and 20 of the Refugee Act 13 of 2006 (revised 2016) deal with the withdrawal of refugee status by the Commissioner. Section 19 establishes the blanket authority conferred to the Commissioner to effect such withdrawal on security grounds, whereas s 20 deals with situations of withdrawal when the status has already been conferred. It establishes the standard of 'reasonable grounds'.

'processing'.[11] The linking of refugees to insecurity has had the unintended consequence of placing a spotlight on the government's poor refugee management and protection policy, especially since the government feels forced to resort to ad hoc measures that violate refugee rights.[12]

The third factor is the rising xenophobia fuelled by careless political talk and the inchoate implementation of refugee policies.[13] Elizabeth Campbell's study of the Somali refugees in urban centres reveals how the general Kenyan population harbour fears that the refugees are taking away their jobs and their businesses.[14] Although much of the fear is unfounded, it appears to drive executive approaches to refugee management. The factors discussed above show that the refugee-rights discourse is embedded in a panoply of issues that Kenya needs to resolve. At the same time, they also indicate that the rights-enforcement paradigms emerging from the reordering of society brought about by the new Constitution may have substantial consequences for the rapidly changing nation.

Legal Frameworks for Protecting Refugees

Before analysing the decision in *Kituo Cha Sheria*, it may be useful briefly to outline some of the mechanisms that the law creates for protecting the rights of urban refugees. Kenya has ratified the major international and regional treaties dealing with refugees, such as the 1951 Convention Relating to Status of Refugees,[15] as amended by 1967 Protocol Relating to Status of Refugees,[16] and the 1969 AU Convention Governing the Specific Aspects of Refugee Problems in Africa.[17] These regional and international instruments speak to each other on fundamental issues, but there are variations that respond to regional peculiarities and emerging issues at the time of drafting. The African Union (AU) Convention, for example, recognises that the 1951 Convention and the Protocol constitute the basic and universal statement of the principles governing refugee protection. However, the instruments are designed to offer protection to refugees. In examining how they do this, I will focus here on the AU Convention because it is the

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11 See, for example, *Amnesty International News*, 'Kenya: Somalis Scapegoated in Counter-terror Crackdown' (27 May 2014) <http://www.amnesty.org/en/news/kenya-somalis-scapegoated-counter-terror-crackdown-2014-05-26> accessed 10 October 2016.

12 An example of such an ad hoc and knee-jerk reaction was the enactment of the Security Law (Amendment) Act 19 of 2014 to limit the movement of refugees. There has also been a series of executive orders, some of which are a subject of discussion in the *Kituo Cha Sheria* case.

13 Catherine Wambua-Soi, 'Rising Xenophobia against Somalis in Kenya' *Aljazeera News* (20 November 2012) <http://www.aljazeera.com/blogs/africa/2012/11/50161.html> accessed 20 July 2016.

14 Campbell (n 1) 403.

15 Acceded to on 16 May 1966.

16 Adopted 16 December 1966, entered into force 4 October 1967, 606 UNTS 267.

17 Adopted by the Assembly of Heads of State and Government at its Sixth Ordinary Session (Addis Ababa, 10 September 1969), entered into force 20 June 1974 ('OAU Refugee Convention').

latest instrument and it relates more directly to the situation in Africa. Also, the Convention introduces certain notions that were not covered by the 1951 Convention.

The Meaning of 'Protection'

Refugee laws and policies are structured around the principle of protection. The realisation that refugees are people who have lost the benefit of a 'normal relationship of citizens and state' and are 'effectively stateless'[18] supports the need to address problems that arise from the peculiar circumstances in which they find themselves. It is important to note, however, that states have acquiesced in refugee protection simply because they believe it is in their national interest to do so. States have been forced to reconcile the inevitability of mobility and the consequences that arise from it, on the one hand, and their own sovereignty, on the other, and that is why refugee-protection laws are grudgingly adopted and their substance is often tilted to suit the state's agenda. And even where laws are already in place, their impulse has always been towards narrowing the protection given to refugees and asylum-seekers.[19] This might partly explain the gap between the refugee law and implementation strategies in most countries.[20] The law needs to be reformed in such a way that its implementation does not rest solely in the hands of individual states but becomes a system of 'common but differentiated responsibility'.[21] Therefore, protection can be a nebulous term unless it is perceived within a contextualised framework. That is probably the reason why the term is not defined in any of the international instruments dealing with refugees.

But, this aside, there are certain key aspects of the law that one could characterise as describing the protection agenda in the host of laws dealing with refugees. According to the UNHCR, 'effective protection' exists only where certain conditions are met. These include the absence of any likelihood of persecution, of *refoulement* or of torture or any other cruel and degrading treatment, the prospect of accessible, durable solutions, and respect for human integrity and human rights.[22] Based on a conglomerate of ideas and law, Phuong has described refugee protection as encompassing 'physical security,

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18 Guy Goodwin-Gill, 'Refugee: Challenges to Protection' (2001) 35(1) International Migration Review 130.

19 A good example is South Africa, where, despite elaborate refugee legislation, the government has been closing down refugee centres in most urban areas. See also *Minister of Home Affairs & Others v Scalabrini Centre, Cape Town* 2013 (6) SA 421 (SCA).

20 Loren Landau, 'Protection and Dignity in Johannesburg: Shortcomings of South Africa's Urban Refugee Policy' (2006) 19(3) J Refugee Studies 308.

21 James Hathaway and R Alexander Neve, 'Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-oriented Protection' (1997) 10 Harvard Human Rights J 120.

22 Statement by Ms Erika Feller, Director, Department of International Protection, at the fifty-fifth session of the Executive Committee of the High Commissioner's Programme, 7 October 2004 (cited in Catherine Phuong, 'The Concept of "Effective Protection" in the Context of Irregular Secondary Movements and Protection in Regions of Origin' Global Migration Perspectives 2005 <http://www.refworld.org/pdfid/42ce51df4.pdf>).

avoidance of torture or *refoulement* and adequate and dignified means of subsistence'.[23] From this description, one can discern three main pillars of a protection regime:

- recognising the vulnerability and special needs of individuals uprooted by persecution and violence;
- ensuring respect for fundamental human rights, and
- honouring the principle of *non-refoulement*.

These three pillars are encapsulated in the paragraphs of the Preamble to the AU Convention. It outlines, as one of the purposes of the convention, the need to alleviate the 'misery and suffering' of refugees and to provide them with a 'better life in future'.[24]

In a nutshell, the three pillars of a refugee-protection regime have become the benchmark for assessing the State's performance in this regard. Although discussing them in detail is not within the remit of this article, it may be worthwhile to offer some person the opportunity to remain without being subjected to deportation or extradition, prosecution, punishment or any form of restriction on individual liberty.[25] These elements, by and large, define the core imperatives of a protection regime. Indeed, the most fundamental principle of refugee protection is that states will grant asylum to individuals entering their territory who acquire the status of refugees. This is the so-called 'protection norm' which is legitimated, not by states' acquiescence in some limitation on its autonomous exercise of sovereignty over the movements of people alone, but by the commitment by states that those foreign nationals who have a preferred right of admission will enjoy the benefit of protection. This protection, which is galvanised around the right to remain in the country, has to be guaranteed through appropriate policy and laws. It is for this reason that the 1951 Convention is considered to be the key international statement of the law on refugee protection.

Asylum is the protection accorded to individuals or groups that permits them enter the territory of a state and remain within it.[26] Asylum has four important components: the admission of a person into the territory; allowing them to remain in the territory;

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23 Catherine Phuong, 'The Concept of ''Effective Protection'' in the Context of Irregular Secondary Movements and Protection in Regions of Origin' (2005) Global Migration Perspectives 3–4.

24 AU Convention (n 9).

25 Cristiano d'Orsi, 'The AU Convention on Refugees and the Concept of Asylum' (2012) Pace International LR 228.

26 EW Vierdag, 'Asylum and Refugee in International Law' (1977) 24 Netherlands International LR 287, 288; Pirkko Kourula, *Broadening the Edges: Refugee Definition and International Protection Revisited* 273 (Martinus Nijhoff Publishers 1997) (quoting Lassa Oppenheim and Hersch Lauterpacht (eds), *International Law: A Treatise* (Longmans, Green 1967) 678.

ensuring their non-expulsion or extradition; and *non-refoulement.*[27] (The principle of *non-refoulement* is dealt with later as part of the analysis of the *Kituo Cha Sheria* judgment.) Asylum may be either temporary or long term. Temporary asylum may be granted to persons who are not yet recognised as refugees to allow them to live in the territory without being subjected to deportation. According to Cristiano d'Orsi, asylum has four major elements:

- admission into the territory of a state;
- allowing a person to remain in that territory;
- refusing to expel or extradite a person and
- avoiding prosecution , punishment or other restrictions on the person's liberty.[28]

The human-rights question is prominent in any protection regime. Obviously, because protection is a multifaceted project, the human-rights question should be conceptualised beyond the anachronistic belief that when states make commitments in international treaties they must readily translate those into domestic guarantees. Moreover, circumstances of inevitable mobility change are contextualised. Therefore, the protection imperatives in the African context may present different dilemmas and challenges not envisaged when the 1951 Convention was formulated. For this reason, protection must be defined beyond the conventional parameters of asylum and status. No matter how one looks at it, protection can become meaningful and effective only if it is situated within the broader human-rights context, where standards are set and the rules of the game are more or less agreed upon.

Admittedly, human rights can be a tricky proposition: How far should the human-rights mandate go? Should it include, as suggested by Garvey, accountability for those states responsible for refugee flows so that the receiving states can claim compensation?[29] These questions may be partly answered by looking at the legal instruments themselves.

The Refugees Act 2006

By enacting the Refugees Act 2006, Kenya adopted the international standards for managing refugees established by the United Nations Refugee Convention of 1951.[30] Therefore, many of the international principles that govern refugee management have

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27 Phil Chan, 'The Protection of Refugees and Internally Displaced Persons: *Non-refoulement* under Customary International Law?' (2006) 10 International J Human Rights 231; Aoife Duffy, 'Expulsion to Face Torture? *Non-refoulement* in International Law' (2008) 20 International J Refugee Law 373.

28 D'orsi (n 35) 228.

29 Jack Garvey, 'The New Asylum Seekers: Addressing Their Origin' in David Martin (ed), *The New Asylum Seekers: Refugee Law in the 1980's* (Kluwer Academic Publishers 1988) 188–191.

30 Act 13 of 2006.

become domesticated. Aside from this, by virtue of article 2(5) and (6), the Constitution has made international law part of the law in Kenya: article 2(5) provides that 'the general rules of international law shall form part of the law of Kenya'[31] and also that 'Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution'.[32] Although the rules of customary international law are not expressly mentioned, one would assume that it was a mere drafting error and that the provision would be interpreted inclusively rather than exclusively. The other provision that is equally instructive is article 132, which lists, as part of the functions of the president, the duty to 'ensure that the international obligations of the Republic are fulfilled through the actions of the relevant Cabinet Secretaries'. There is enough in these provisions to infer that the international obligations that Kenya has committed to must be taken seriously. Moreover, the Constitution has created an opportunity for the use of international and foreign law in resolving domestic disputes.[33] Indeed, there is ample evidence that international and foreign laws are already influencing domestic litigation in Kenya.[34] This phenomenon also correlates with the intensification of the reform movements, the re-emergence of regional and sub-regional frameworks for the administration of justice and the mobility and cross-pollination of rights that we now see occurring across Africa.[35]

The Act reinforces the notion that the benefits of the rule of law accrue to all refugees living within Kenya. Section 16 provides that refugees and members of their families are 'entitled to the rights and be subject to the obligations contained in the international conventions to which Kenya is party', and are 'subject to all laws in force in Kenya'. The Act has no provision that deals exclusively with urban refugees. Nonetheless, all refugees are a homogenous group of persons who qualify to be referred as such because they meet certain criteria established by the Act. The Act establishes the mechanism for recognising refugees; these include application and registration. It also contains safeguards that include protection against discrimination and *non-refoulement*.

The *Kituo Cha Sheria v Attorney General* Case

This case was brought by Kituo Cha Sheria, a non-government organisation (NGO), on behalf of seven petitioners, all of them refugees from Somalia, Ethiopia, the DRC and Rwanda. All of them had initially filed separate petitions in the High Court. These petitions were then consolidated into one case because they raised similar legal issues. The petitioners had all been in Kenya for period ranging from 7 to 19 years and were

31 Constitution of Kenya 2010 article 2(5).

32 Article 2(6).

33 Laurence Juma, 'Nothing but a Mass of Debris: Urban Evictions and the Right of Access to Adequate Housing in Kenya' (2012) 12(2) African Human Rights LJ 470.

34 ibid.

35 Tiyanjana Maluwa, 'The Incorporation of International Law and Its Interpretational Role in Municipal Legal Systems in Africa: An Exploratory Survey' (1998) 23 SA Yearbook Intl L 45.

engaged in some kind of gainful occupation in Nairobi. Their families were integrated into the Kenyan community and were all speaking the local language, Kiswahili. Because of the increase in insecurity in Nairobi, the government issued a directive aimed at relocating all refugees living in the city back to the refugee camps.[36] The directive included three main components that had serious repercussions for refugees living in Nairobi and other urban centres:

- the stoppage of registration in all urban areas;
- the order that all refugees must go back to the camps, and
- the prevention of all humanitarian assistance to refugees living in urban centres.

But even before the directive was implemented, the police had started harassing and seeking bribes from refugee communities living in the city. The petitioners' main concern was that a forceful relocation would completely destroy their lives. Moreover, they all raised concerns about the insecurity in the refugee camps. One of them, the 5th Petitioner, even feared that his life would be in danger if he were to be relocated to the camp.

Their complaints raised concerns that are similar to those of any urban refugee in Kenya. But there are a few aspects of this case which raise fundamental issues regarding the rights of urban refugees that are useful to examine. The first obviously is the framework of protection provided by domestic and international law. Were the petitioners in this case entitled to protection in law, and how could legal instruments translate into tangible beacons of protection for them? The second is how compatible is the regime of rights that protects refugees against the encampment policy? The third is, does the status of urban refugees attract any special protection? In other words, do the peculiar circumstances of urban refugees and the conditions that they face require that the rights regime be interpreted to meet the protection threshold established under international and regional instruments?

The Human-rights Question

The international instruments and the domestic laws discussed above provide the general framework of legal protection for refugees that covers their status, security and other management issues. These are necessary for defining their status and generally

[36] This directive was issued on 12 December 2012: 'The Government of Kenya has decided to stop reception, registration and close down all registration centres in urban areas with immediate effect. All asylum-seekers/refugees will be hosted at the refugee camps. All asylum-seekers and refugees from Somalia should report to Dadaab refugee camps while asylum-seekers from other countries should report to Kakuma refugee camp. UNHCR and other partners serving refugees are asked to stop providing direct services to asylum-seekers and refugees in urban areas and transfer the same services to the refugee camps.'

setting the basis upon which human-rights standards apply in refugee situations. Therefore, they also form the basis of articulating the rights of urban refugees. These rights do not exclusively devolve from domestic legislation: their articulation must go beyond these laws because human-rights standards are elaborated in many international and regional instruments and in a range of principles that form part of international law. So when talking about rights, one cannot lose sight of international and regional human-rights instruments such as the Universal Declaration of Human Rights, the two international covenants (the Covenant on Civil and Political Rights (ICCPR) and Covenant on Economic Social and Cultural Rights (ICESCR)), and the African Charter on Human and Peoples Rights (the 'Banjul Charter'). Again, the general principle is that any person who is within the territory of Kenya is entitled to all fundamental rights except those rights that are limited to citizens.[37] Therefore, a person to whom the status of a refugee is due or who has been accorded such status should necessarily be able to claim a range of rights, irrespective of whether they live in an urban or any other environment.

The first issue that needs to be disposed of relates to the status of refugees vis-à-vis the human-rights regime. I shall not repeat the definition of refugees here because there are many studies that have done this eloquently.[38] Moreover, both the international and domestic law define the status of refugees.[39] What is important for our purposes is to draw from the definition the special vulnerability of refugees in order to help determine the weight of responsibility that states have towards their protection. The vulnerability of refugees arises from the fact that they have left their homes for fear of persecution, human-rights abuse and conflict and have moved to a different country. They are foreigners, therefore they are susceptible to all manner of discrimination and abuse. In addition, they lack the necessary support systems of family, some of whom may have died as the result of conflict in their homeland.[40]

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37 See the holding in the South African case of *Lawyers for Human Rights v Minister of Home Affairs & Another* 2004 (4) SA 125 (CC) para 113 (the dissenting opinion of Mokgoro J and O'Reagan J).

38 See, for example, Andrew Shacknove, 'Who is a Refugee?' (1985) Ethics 274; Jennifer Hyndman and Bo Nylund, 'UNHCR and the Status of Prima Facie Refugee in Kenya' (1998) International J Refugee Law; Guglielmo Verdirame, 'Human Rights and Refugees: The Case of Kenya' (1999) J Refugee Studies; Edwin Abuya, 'From Here to Where? Refugees Living in Protracted Situations in Africa' in Alice Edwards and Carla Ferstman (eds), *Human Security and Non-Citizens: Law, Policy and International Affairs* (Cambridge University Press 2010) 125.

39 Section 3 of Kenya's Refugee Act 2006 defines a refugee as a person who, 'owing to a well-founded fear of being persecuted.' The AU Convention has the following definition in article 1(2): '[E]very person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.'

40 See, for example, the South African case of *Union Refugee Women & Others v Director, Private Security Industry Regulatory Authority & Other*s 2007 (4) BCLR 339 (CC).

The idea of special vulnerability has a constitutional basis. The case is based mainly on human rights, particularly the guarantees in the Bill of Rights. The main question that the Court had to deal with was whether the government directive that refugees living in the urban areas should relocate to the refugee camps violated a range of rights, namely, the right to dignity,[41] the prohibition of discrimination,[42] to fair administrative action[43] and to freedom of movement[44].

Thirdly, there is the issue of interpretation. The Court relied on article 259 to interpret the Constitution purposively and to give effect to the constitutional values and principles.[45] There is an interesting appendage to this argument that is raised by the inclusion in article 259 of the idea of 'developing the law'. This is something new in Kenya's constitutional jurisprudence, but it is crucial considering that refugee rights have not been well articulated in the past. A similar approach is found in article 20(3), where the Court is required to 'develop the law' so as to give optimal effect to fundamental freedoms and rights.

Right to Work

Article 17 of the 1951 Convention places an obligation on member states regarding the refugees' right to work. It requires that states 'shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment.' Other instruments that guarantee right to work include the Universal Declaration of Human Rights (UDHR) in article 23, the ICCPR in article 6 and the African Charter in article 15. Despite the clear articulation of this right in these international instruments, domestic laws and governmental policies still inhibit refugees and asylum-seekers from accessing employment or securing self-employment. In all countries, refugee employment is regulated by domestic law and refugees are treated in the same manner as other foreigners because they are required to obtain work permits.[46] This apart,

41 Article 28.

42 Article 27.

43 Article 47.

44 Article 39.

45 These are mentioned severally in the Constitution. In art 259(1) these values are encompassed in the rule of law as well as human rights and fundamental freedoms. In art 20(4) the values are mentioned much more succinctly to include, human dignity, equality, equity and freedom and the spirit and purport of the Bill of Rights. In art 10 the list is even longer: human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised. Articles 10 and 259 include good governance as a constitutional value.

46 Katarzyna Grabska, 'Who Asked Them Anyway? Rights, Policies and Wellbeing of Refugees in Egypt', Forced Migration and Refugee Studies, American University in Cairo and Development Research Centre on Migration, Globalisation and Poverty, University of Sussex, July 2006 <http://www.migrationdrc.org/publications/research_reports/Kasia_Egypt_Research_ReportEDITED.pdf> accessed 20 July 2016.

considerable scepticism still exists about the opening up of the domestic space for refugees and other foreign nationals to participate in the economy. This is evident in the fact that some countries have not ratified the 1951 Convention, whereas others, such as Egypt, have ratified it with reservations on labour legislation and social security. In the majority of countries, however, the right to work exists on paper but there is no goodwill on the part of the government to implement it. This situation is indeed regrettable. Yet, ample research demonstrates that refugees and asylum-seekers can contribute significantly to the national economy if allowed to work.[47] Moreover, when refugees are able to secure employment, many other rights, such as the right to dignity, family and life, are fulfilled.

The situation in Kenya is therefore not unique. But the case of *Kituo Cha Sheria* presented rather interesting dimensions. Firstly, all the petitioners were either already employed or engaged in some form of gainful activity. In other words, they were not claiming the right in abstraction. In addition, they were not a burden on the State in any way. Take, for example, the 7th Petitioner, who was a lecturer in Nairobi: for him and his family, relocation to the camp had real economic consequences. Secondly, the petitioners were not receiving any social grant from government. This is crucial to understanding why the right to work in these circumstances is very important and that its impairment without constitutional justification is impermissible.

Freedom of Movement

The government directives that sparked off the dispute in *Kituo Cha Sheria* had the effect of restricting the movement of refugees in urban centres. The refugees in Nairobi were supposed to be rounded up and transported to Thika stadium before being taken to the camps. According to the petitioners, this directive and the intended manner of its execution violated their right of freedom of movement enshrined in article 39 of the Kenyan Constitution. Freedom of movement is an elaborate right that is provided for in all major human-rights instruments. It is contained in article 12 of the ICCPR (liberty of movement and freedom to choose residence) and article 12 of the African Charter. Concerning refugees, article 26 of the 1951 Convention provides as follows:

> Each contracting state shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory subject to any regulation is applicable to aliens generally in the same circumstances.

In both treaties, freedom of movement is guaranteed, but with exceptions. The African Charter for example, allows for restrictions of the right in a manner prescribed by law and for the protection of national security, law and order, public health and morality.

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47 Emily Arnold-Fernández and Stewart Pollock, 'Refugees Right to Work' (2013) 44 Forced Migration Review 92 <http://www.fmreview.org/detention/arnoldfern%C3%A1ndez-pollock> accessed 10 October 2016.

Therefore, states may be at liberty to impose regulations that limit movement, but only within these exceptions. The idea is that restriction placed on the movement of refugees may be unlawful if such restriction does not generally apply to all aliens, is not mandated by law or is not made to protect national security, public order, public health or safety.[48] Restrictions must be

> provided by law, must be necessary, in a democratic society for the protection of these purposes (*national security, public order, safety, morality and the right of freedoms of others*) and must be consistent with all other rights.[49]

These provisions are adopted in section 16 of the Refugee Act of Kenya. They are also consistent with article 39 of the Constitution.

The court in *Kituo Cha Sheria* considered these provisions in the light of the claim by the petitioners that their right of freedom of movement had been impaired. It observed that although article 39(3) of the Constitution accorded to citizens the right to 'enter, remain and reside anywhere in Kenya' and thereby allowed the State to impose 'reasonable conditions' upon non-citizens to enjoy this right, that did not affect the refugees' right to move freely within Kenya. Furthermore, the Constitution did not expressly designate places of residence for refugees; therefore any interpretation that limits the rights of refugees to reside anywhere in the Republic must meet the threshold for permissible limitations established by article 24. In conclusion, the court found that the government directives that targeted refugees and asylum-seekers in urban centres was a threat 'to their right of movement enshrined in article 26 of the 1951 Convention as read with section 16 of the Act.'[50]

Right to Fair Administrative Action

The right to fair administrative action is provided for in article 47 of the Constitution:

> Every person has a right to administrative action that is *expeditious*, *efficient*, *lawful*, *reasonable* and *procedurally fair* (emphasis added).

The court in *Kituo Cha Sheria* did not interrogate the elements of these rights to determine whether the petitioners claim could be supported. This is regrettable because a chance to develop the law was woefully lost. Administrative action could include any regulation, legislation or administrative decision made by the executive.[51] Therefore, the directives made by the Commissioner in this regard could be considered an administrative action and consequently subject to article 47. The question is whether the

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48 ICCPR art 12.

49 Human Rights Committee General Comment no 27 (adopted at the 67th Session of the Human Rights Committee Meeting, 2 November 1999) para 11.

50 ibid para 59.

51 George Devenish, Karthy Govender and David Hulme, *Administrative Law* (Butterworths 2001) 126.

action was *expeditious*, *efficient*, *lawful*, *reasonable* and *procedurally fair*. The first three elements are fairly easy to determine. What may be problematic is the elements of reasonability and procedural fairness.

The court should have determined whether these two elements were not satisfied so as to come to the conclusion that the petitioners' rights had been violated. Procedural fairness refers to the notion of natural justice and encompasses the principles of *audi alteram partem* and *nemo ius suo causa*. Reasonableness, on the other hand, refers to the substantive elements of natural justice. The learned judge observed that since the 'blanket directives' did not take into account the individual circumstances of each of the petitioners, they amounted to 'taking away accrued or acquired rights without due process of the law'.[52] The judge was probably asserting the importance of granting some form of hearing to the petitioners whose rights and interests would be affected by the administrative action. The directives were bound to inflict tremendous suffering and hardship on the petitioners because some petitioners were living in Nairobi for medical reasons, others were working and thus meaningfully contributing to the economy, whereas others faced the risk of persecution in the camps because of their ethnicity. Since the directives did not take these problems into account, the judge found them to be arbitrary and discriminative. He also found them to be unreasonable and devoid of fairness because they were meant to circumvent the petitioners' efforts to abide by the law by making it hard for them to register and maintain their refugee status.

The jurisprudence on the right to fair (just) administrative action is fairly developed in South Africa because its Constitution has an analogous provision. A number of cases, such as *Minister of Health & Others v Treatment Action Campaign & Others*,[53] *Grey's Marine Hout Bay (Pty) Ltd & Others v Minister of Public Works & Others*,[54]; *Union of Refugee Women & Others v Director: Private Security Industry Regulatory Authority & Others*,[55] *President of the Republic of South Africa v South African Rugby Football Union*,[56] have dealt with the issue.

Right to Dignity

Dignity is often used in reference to the condition of 'humanness' that recognises the 'human worth' or 'inherent human worth' of people.[57] Rhoda Howard defines human

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52 Paragraph 62.

53 2002 (5) SA 721 (CC).

54 2005 (6) SA 313 (SCA).

55 2007 (4) SA 395 (CC).

56 1999 (10) BCLR 1059 (CC).

57 In *National Coalition for Gay & Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) paras 60–61, the Court observed that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals. See also LWH Ackerman, 'Equality and Non-Discrimination: Some Analytical Thoughts' (2006) SA Human Rights J 597–612; Sandra Liebenberg, 'The Value of Human

dignity as 'the particular cultural understandings of the inner moral worth of the human person and his or her proper relations with society'.[58] In her view, human dignity is not a claim an individual can make against society, but rather something granted at birth or incorporated into a community and earned by the individual upon their compliance with society values, customs and norms. The right to dignity is contemporaneous with the right to life; the two

> share a common core of fundamental standards which are applicable at all times, in all circumstances, and to all parties, and which no derogation is permitted.[59]

Moreover, the enjoyment of all other fundamental rights are contingent upon life.

The right to dignity is articulated in all modern constitutions. The 1996 Constitution of the Republic of South Africa, for example, makes numerous references to human dignity. In section 1, it states that the Republic is founded on the values of 'human dignity, the achievement of equality, and the advancement of human rights and freedoms'. In section 7 reference is made to the democratic values of human dignity. Section 10 states that everyone has an inherent right to have their dignity respected and protected. Section 36 refers to an open and democratic society based on human dignity; and section 39 refers to the promotion of values that underlie an open and democratic society based on human dignity. The Constitutional Court has held human dignity to be the fundamental statement of human value, but also an enforceable right.[60]

In Kenya, the right to dignity is provided for in article 28 of the Constitution in the following words: 'Everyone has inherent dignity and to have that dignity respected and protected.' The provision does not distinguish between citizens and non-citizens. The petitioners claimed that the directives that had the effect of destabilising their lives robbed them of their inherent dignity. The judge agreed with this claim, noting that the petitioners had established firm roots in Kenya and therefore uprooting them from their homes and neighbourhood was impermissible. The judge also referred to their special vulnerability and the associated risks of relocating to the refugee camps. He observed

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Dignity in Interpreting Socio-economic Rights' (2005) SA J Human Rights 1; Arthur Chaskalson, 'Human Dignity as a Foundational Value of Our Constitutional Order' (2000) SA J Human Rights193.

58 Rhoda Howard, 'Dignity, Community and Human Rights' in Abdullahi An-Na'im (ed), Human Rights in Cross-Cultural Perspectives (University of Pennsylvania Press 1992) 81.

59 See Prosecutor v Delalić, Appeal Judgment no IT-96-21-A (20 February 2001) para 149.

60 For example, in Dawood v Minister of Home Affairs 2000 (3) SA 936 (CC) para 35, the Court had this to say: 'Human Dignity … informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights … (section 10) However, it makes it plain that dignity is not only a value fundamental to our constitution; it is a justiciable and enforceable right that must be respected and protected. In many cases however, breach occasioned may be of a more specific right, such as the right to bodily integrity, the right to equality, or the right not to be subjected to slavery, servitude, or forced labour.'

that refugees who have established some normality and residence in urban areas would have their dignity violated in the event that the directives were to be effected.[61]

Encampment

The policy of encampment was initially implemented as a response to the burgeoning number of refugees entering the country in the early 1990s. The *imprimatur* came from the dire need to provide humanitarian assistance and also to move the refugee population away from the urban centres. The encampments were set up in locations that respected the nationalities of the refugees: refugees from Somalia were therefore settled in Dadaab and Mombasa, and those from Ethiopia in Mandera; Kakuma camp in Turkana was initially intended for unaccompanied minors from Sudan. The entire refugee policy was then developed to regulate settlement in camps. Even the matters of status determination and support were aligned to this policy.

After 1991, refugee inflows increased and it was not possible to contain all the refugees in camps. Moreover, with humanitarian action driving the policy, the UNHCR and other international NGOs became more active than government in handling the refugee issue. That is why the government was quite happy to allow the UNHCR to handle the status determination almost exclusively until 1998 (after the terrorist bombing of the US embassy in Nairobi). The UN body even set up a refugee- and asylum-processing centre in Nairobi, where it issued 'letters of protection' that designated whether a refugee was to proceed to the camp or, in exceptional circumstances, remain in Nairobi. These letters were respected by government officials until 1998, when the government revoked UNHCR authority and announced that Kenya would henceforth be a 'transit country'. This meant that refugees were required to remain in camps, awaiting their transfer to other countries. It should be noted that the policy of encampment has enjoyed latent support from ordinary Kenyans, given their belief that refugees are an economic burden on their country.[62]

But the encampment policy has not succeeded in keeping refugees outside the urban centres. Moreover, with inadequate means of controlling movements within and outside camps, the policy of encampment has not been able to prevent refugees from moving out of the camps and filtering into Nairobi and other cities. As a result, there are a sizeable number of refugees who live and work in Nairobi: the majority of them, as already stated, are doing business and are self-employed. Instead, the policy has created a *lacuna* in the regulatory system that allows for urban refugees to be exploited, abused and persecuted. Law-enforcement personnel extort bribes and favours from refugees because of the threat of deportation that always hangs over their heads. In many respects therefore, the directives complained of in the *Kituo Cha Sheria* case were not new. The

61 ibid para 68.

62 Campbell (n 1) 403.

respondents in this case argued that the establishment of registration centres in urban areas had no basis in the Act and, therefore, the Petitioners' claim was not supported by law. As far as registration is concerned, the Act does not require that all refugees in Kenya should live in camps; moreover, it defines a refugee camp as any place designated as such by the Minister—section 16(2) gives the Minister that power. Then, in section 17, the Act sets out the procedure for the management of a refugee camp. For example, it creates the position of a camp officer, whose responsibility it is to manage the camp and exercise a range of functions specified under section 17. These include registering refugees, maintaining environmental standards, co-ordinating humanitarian assistance, providing assistance to vulnerable women and children and ensuring that the national law is complied with in the treatment of asylum-seekers and refugees.

In the *Kituo Cha Sheria* case, the respondents had alleged that by establishing these functions, the Act had intended to restrict the residence of all refugees and asylum-seekers to the camps. The court rejected this argument, stating:

> The argument made on behalf of the respondent cannot stand scrutiny as section 17 of the Act is merely facilitative in the sense that it sets out the responsibilities of a refugee camp officer. It does not require that all refugees and asylum-seekers to ordinarily reside in camps nor does it preclude the state from providing refugee services in urban centres.

The Principle of *Non-refoulement*

Refoulement is the forcible return of refugees or asylum-seekers to a country where they are liable to be subjected to persecution; both international and EU law prohibit it.[63] The arguments before the court regarding the principle of *non-refoulement* were not particularly complex. Some of the Petitioners in the *Kituo Cha Sheria* case attacked the impugned directives on the basis that their implementation might breach the principle. In particular, they claimed that if they were forcefully resettled in the camps, they would be exposed to persecution or torture by groups sympathetic to their tormentors. The 5th Petitioner testified that he had fled from eastern DRC because of persecution and that some of the groups responsible for this were now living in the refugee camps in Kenya. He alleged that instead of going back to the camps, he would rather go back home, even though that would expose him to the same threats that had made him leave. Apart from persecution in the camps, other Petitioners claimed that the government's real intention was to repatriate them to their home countries irrespective of the insecurities in those places. The respondent disputed these claims, vehemently denying the imputation that they intended to repatriate the refugees and thereby violate the principle of *non-refoulement*.

63 *Oxford English Dictionary* <https://en.oxforddictionaries.com/definition/refoulement>.

The principle of *non-refoulement* has acquired the status of customary international law.[64] It is also part of domestic law in Kenya, being embodied in section 18 of the Refugee Act. The government can neither refuse entry nor remove a person from its territory if by doing so the person would be exposed to 'persecution on account of race, religion, nationality, membership of a particular social group or political opinion'[65] or their

> life, physical integrity or liberty would be threatened on account of external aggression, occupation, foreign domination or events seriously disturbing public order in part or the whole of that country. [66]

The Court made some inroads into asserting the position of the principle of *non-refoulement* in Kenya. It observed that the principle had acquired the status of customary international law and, as a general principle of international law, had become part of domestic law by virtue of article 2(5) of Kenya's Constitution. The Court invoked the notion of indirect *refoulement* affirmed by the African Commission on Human and Peoples Rights in *Institute for Human Rights and Development in Africa v Guinea*.[67] The Commission found that the order for arrest and confinement in camps of Sierra Leonean refugees in Guinea that eventually forced many refugees to go back to Sierra Leone violated the principle of *non-refoulement*. The Commission held, further, that if the host nation created a situation in which the refugees would be forced to go back to their countries, then it violated the principle of *non-refoulement*. Applying this reasoning to the case before it, the Court assessed the effect of the government directives and found that they would have the effect of forcing the refugees back to their countries, in so doing violating the principle of *non-refoulement*.

Conclusion

This article is not solely about the *Kituo Cha Sheria* case. It is about finding an appropriate method for protecting the rights of urban refugees. Also, it is a reflection of how a rights framework can withstand a volatile political climate in order to offer some hope to urban refugees. But the issues highlighted in the case illustrate rather starkly the problems that confront urban refugees in Kenya and how opaque government responses based solely on the policy of encampment diminish the opportunity for considering other avenues for managing refugee affairs. Given that a wealth of studies demonstrate how refugees contribute positively to the economy of our urban centres, especially

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64 Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of *Non-refoulement*: Opinion' in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press 2003) 149.

65 Section 18(a).

66 Section 18(b).

67 Comm 249 of 2002.

Nairobi, there is need for new strategies and approaches. Therefore, policies that are designed to favour encampment over integration and other approaches imperil rights and diminish the protection of refugees. Recognition of this fact is the beginning of a more realistic approach to the urban refugee question in Kenya. Undoubtedly, there is much more to be done and improvement will require more than just a single High Court judgment.

The above notwithstanding, the *Kituo Cha Sheria* case must also be seen in the light of a combination of efforts by the civil society groups that put together materials for the case, especially the applicants, and by the media that highlighted the plight of urban refugees to the goodwill of Kenyan communities that for years have embraced their neighbours who flee from conflict and violence in their own countries. The role of non-state actors, especially civil society must, however, be emphasised: these organisations fulfil important functions that are either abdicated or simply ignored by the government. In fact, in many situations, the organisations have simply taken over government functions. In certain instances, they have even partnered with government departments to provide services and ensure that protection measures are put in place.[68]

As for the legal fraternity in Kenya, the case affirmed that the courts can be key players in the protection of urban refugees and that policies should be tested against constitutional standards that put a premium on individual rights and freedoms. In a broader sense, the case establishes a new trend, where advocates of refugee rights can look to activist judges to deal with refugees' concerns from a rights perspective; such cases therefore open up space for articulating the rights activists' agenda and confronting the overbearing Executive attitude and restrictions based purely on security and economic concerns. There is no doubt that this case placed government policies under the spotlight and highlighted the existing gaps in refugee-management law. Although revamping the system will require much work, rights activists and civil society groups now have a platform on which to build as they continue to put pressure on the government to take seriously its responsibility for protecting refugees.

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[68] Armando Barrientos and David Hulme, *Social Protection for the Poor and the Poorest: Concepts, Policies and Politics* (Palgrave Macmillan 2008) 56.

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