

INFORMING KENYA'S PERSPECTIVE ON CLIMATE CHANGE THROUGH CLIMATE LITIGATION

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By

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Declaration

I, OSORO AMRA MONGINA NYAGAKA, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: A.M.O

Date: 29 January 2021

This declaration has been submitted for examination with my approval as University Supervisor.

Signed:

A handwritten signature in blue ink, appearing to read 'Kate Mavuti', with a horizontal line drawn through the middle of the signature.

Ms Kate Mavuti

Abstract

Progress lies in economic development; however, it causes environmental harm. This dissertation examines the ability of transformative adjudication to combat the current unsustainable development trend in Kenya. It explores sustainable development as the middle ground for economic development that safeguards the ecosystem. It further examines climate justice in tackling government inactivity in adequately implementing climate change legislation and policies to uphold environmental rights.

This study employs doctrinal legal research in the analysis of case law, statute, academic literature, and grey literature in examining the legal avenues to combat climate change in Kenya. The outcome of the study suggests that climate litigation is the appropriate means to secure environmental rights to combat climate change despite the presence of a global climate change regime. The study recommends the implementation of this regime to address climate change in Kenya. This study is therefore aimed at examining the possibility of using Kenya as a blueprint for addressing climate change in developing nations.

List of abbreviations

African Charter on Human and Peoples' Rights ACHPR

African Commission on Human and Peoples' Rights ACmHPR

Centre for International Governance Innovation CIGI

Environment and Land Court ELC

Environmental Management and Coordination Act EMCA

Greenhouse Gas GHG

Inter-American Commission on Human Rights IACmHR

Intergovernmental Panel on Climate Change IPCC

National Climate Change Action Plan NCCAP

Sustainable development goals SDGs

United Nations Framework Convention on Climate Change UNFCCC

United Nations Environmental Programme UNEP

United Nations General Assembly UNGA

List of cases

Ashgar Leghar v Federation of Pakistan (2015), The High court of Pakistan.

Belize, Maya indigenous community of the Toledo district v Belize, IACmHR Case 12.053 (2004).

Centre for minority rights in development (Kenya) and minority rights group international on behalf of Endorois welfare council v Kenya, ACmHPR Comm. 276/2003, (2010).

Community of San Mateo de Huanchor v Peru, IACmHR (2004), Report No 69/04, Petition 504/03.

Mendoza Beatriz Silva & Others v State of Argentina & Others (2008), The Supreme Court of Argentina.

The social and economic rights action center and the center for economic and social rights v Nigeria, ACmHPR Comm. 155/96, (2002).

Urgenda Foundation v The State of Netherlands (2015), The Hague District Court of Netherlands.

List of legal instruments

International instruments

African Charter on Human and Peoples' Rights, 27th June 1981, OAU Doc CAB/LEG/67/3 Rev 5, 21 ILM 58.

International Covenant on Social and Cultural Rights, 16 December 1966, 993 UNTS 3.

Kyoto Protocol to the United Nations Framework Convention on Climate Change, 11 December 1997, UNTC 30822.

Paris Agreement, 12 December 2015, UNTC 54113.

Protocol to the African Charter on Human and People's Rights on the Establishment of the African Court on Human and People's Rights.

Rio Declaration on Environment and Development

Treaty for the Establishment of the East African Community.

United Nations Framework Convention on Climate Change, 9 May 1992, UNTC 30822.

Universal Declaration of Human Rights, 10th December 1948, 217 A (III).

Kenyan instruments

Climate Change Act, (Act No 11 of 2016).

Constitution of Kenya (2010).

Environment and Land Court Act (Act No 19 of 2011).

Environmental Management and Co-ordination Act (Cap 387 of 2012)

CHAPTER 1: CLIMATE CHANGE AND ITS CATASTROPHES

1.1 Introduction

Climate change refers to the shift in the climatic system because of considerable alterations of greenhouse gas (GHGs) in the atmosphere over time.¹ Despite the necessity of GHGs for all life to continue, the environment can no longer balance the natural and anthropological GHGs emitted. Resulting in temperature elevation due to the amount of GHGs in the atmosphere that traps more heat recognised as global warming.²

Climate change is the scientific theory that explores the relationship between human beings and the planet in society.³ Climate change is an undeniable reality in the globe as it affects every country on all continents.⁴ The 2014 Intergovernmental Panel on Climate Change (IPCC) assessment report outlined the contribution of human activities such as deforestation towards global warming.⁵ The report showed that climatic changes within the environment disproportionately affects the poorest and most vulnerable in society.⁶ Calling for world leaders to address the issue in an effort to maintain the viability of the ecosystems.⁷ This is to maintain and sustain all life forms on earth.

In the recent past developing nations have had to grapple with intensifying extreme weather events such as cyclones in Mozambique, droughts in East Africa and flash floods.⁸ These natural disasters are directly linked to climatic changes within the earth's atmosphere. Requiring developing countries such as Kenya to work diligently to address climate change.

¹ Section 2, *Climate Change Act*, (Act No 11 of 2016).

² Maslin M, *Climate Change: A very short introduction*, 3rd ed, Oxford University Press, Oxford, 2014, 5.

³ Maslin M, *Climate Change: A very short introduction*, 16.

⁴ Hulme M, Doherty R, Ngara T and New M, 'Global warming and African climate change: a reassessment' in Low PS (ed) *Climate change and Africa*, Cambridge University Press, Cambridge, 2005, 30.

⁵ Skoglund A and Jensen T, 'Uncertainty in the professionalisation of sustainable development: the case of the intergovernmental panel on climate change (IPCC)' in Redclift M and Springett D (ed), *Routledge international handbook of sustainable development*, Routledge, New York, 2015, 74-88.

⁶ Bodansky D, Brunnee J and Rajamani L, *International climate change law*, Cambridge University Press, Cambridge, 2017, 8.

⁷ Sands P, Peel J, Fabra A and MacKenzie R, *Principles of international environmental law*, 3rd ed, Cambridge University Press, Cambridge, 2012, 3.

⁸ 'Cyclone Idai and Kenneth cause devastation and suffering in Mozambique', December 2019 -<
<https://www.unicef.org/mozambique/en/cyclone-idai-and-kenneth> > on 4 May 2020.

1.2 Background of the problem

Developing nations in Africa, South Asia and the Middle East such as Kenya are currently striving to achieve economic development unlike their counterparts the developed first world countries who already underwent industrial revolutions and are economically developed.

The economies of the developing nations are heavily reliant on agricultural products.⁹ This line of production is highly dependent on the environment hence climatic changes that affect the region's weather patterns in turn impedes agriculture and the economic development of the region. They are objectively the most affected by climatic changes in the environment.¹⁰

As a safeguard the developing nations have tried to combat climate change both internationally and domestically through legislation.¹¹ However, these obligations are not sufficiently implemented by these nations as these countries are now forced to explore alternatives to agriculture to develop economically. However, this economic development in some cases is at the expense of the people and the environment.¹²

1.3 Statement of the problem

The result of the inefficient implementation of the obligation undertaken by the developing nations to combat climate change are devastating. They cut across the economic, social and environmental sectors of life. This ranges from uneconomical development due to the use of unsustainable practices that lead to the degradation of the environment which further accelerates climatic changes in the region leading to loss of life.

The persistent condonement of this environmental degradation has led to the continued suffering of the people of these nations who are subject to the devastating consequences of climatic shifts with inadequate redress possibilities. In developing nations such as Kenya the lack of accountability of the government in undertaking their duties under the relevant environmental treaties and conventions adopted to address climate change along with similar domestic legislation must be tackled.

⁹ UNGA, *Climate change and its possible security implications*, 3 June 2009, UN A/Res/63/281.

¹⁰ Toulmin C, *Climate change in Africa*, Zed Books, London, 2009, 18.

¹¹ Bodansky D, Brunnee J and Rajamani L, *International climate change law*, 6.

¹² Shue H, *Climate justice: Vulnerability and protection*, Oxford University Press, Oxford, 2014, 180.

Therefore, transformative adjudication to deal with the government's inaction in adequately implementing climate change policies and legislation in the developing nations is necessary.¹³

1.4 Purpose of the study

This study aims to investigate the existing international, regional and domestic regulations and obligations on the climate change framework in Kenya.

It aims to determine whether the failure to hasten implementation of the Climate Change Act (the Act)¹⁴ is a human rights violation.

The study seeks to contribute to the conversation on the issues of climate change in the Kenya using international law to safeguard environmental rights

1.5 Hypothesis

There is a transnational right to a clean environment that is jeopardised by unsustainable development resulting in an increase in climate change effects globally. Since the developing nations are the most affected by climate change governmental inaction cannot be condoned.¹⁵ Kenya has the responsibility to address climate change for its citizens' benefits. The failure by the government of Kenya to adapt and employ policies to address climate change and environmental degradation is a human rights violation.¹⁶

1.6 Research questions

1. What are the emerging trends in the legal and regulatory framework of climate change in Kenya?
2. What are the resulting obligations stemming from the climate change regime and environmental protection in Kenya?
3. What is the impact of delayed realisation of climate change in environmental preservation provisions within the legal and regulatory framework in Kenya?

¹³ Hulme K, 'International environmental law and human rights' in Sheeran S and Rodley SN (ed) *Routledge handbook on international human rights law*, Routledge, New York, 2013, 286.

¹⁴ *Climate Change Act* (Act No 11 of 2016).

¹⁵ Githumbi E, Marchant R and Olago D, 'Using the past to inform a sustainable future: palaeoecological insights from East Africa' in Ramutsindela M and Mickler D (ed), *Africa and the sustainable development goals*, Springer, Switzerland, 2020, 187-196.

¹⁶ Uddin K, 'Climate change and global environmental politics: North-South divide' *47 Environmental Policy and Law* 3, 2017, 106.

1.7 Justification of the study

The developing nations perspective on climate change addresses environmental degradation through human rights. This elicits ethical issues calling for a diverse multi-sectional solution to climate change in an effort to establish climate justice for the people of the region.¹⁷

This study seeks to look at Kenya's effort to adapt and mitigate climatic changes in the country. However, it recognises the inequalities it faces as opposed to the developed nations both historically and presently while providing solutions in the quest to achieve both development and climate justice.¹⁸

1.8 Conceptual framework

The study examines the concept of climate justice to solve the greater human rights issue that is the climate change crisis.¹⁹ Climate justice explains how a rights-based approach to climate change affects environmental justice.²⁰ Since climate change compounds existing resource insecurities and makes it even harder for poor households to secure basic subsistence needs for living with dignity.²¹ It tries to ensure social justice is guaranteed through international law. This is through its commitment to reforming international law to cater to the developing nation's concerns. It aims at ensuring human rights including environmental rights cater to the developing world.²²

The implementation of climate justice requires sustainable development to simultaneously protect the environment while achieving financial stability. Sustainable development is a principle of economic development that supports the natural resources and ecosystems. Critiques are present on the implementation of sustainable development since it purports to be both an environmental and human rights objective. The critics maintain that it is impossible to focus on both safeguarding environmental interests and achieving economic development. They assert that when pursuing these goals, one would have to take priority over the other. Hence the impracticality of the concept of sustainable development to promote

¹⁷ Ouguergouz F, 'The reform of the African system of human rights protection' 10 *American Society of International Law* 1, 2007, 427.

¹⁸ Carlarne C, 'Delinking international environmental law and climate change' 4 *Michigan Journal of Environmental & Administrative Law* 1, 2014, 2.

¹⁹ Shue H, *Climate justice: Vulnerability and protection*, 181.

²⁰ Cullet P, 'Definition of an environmental right in a human rights context' 13 *Netherlands Quarterly of Human Rights*, 1995, 28.

²¹ Skillington T, *Climate justice and human rights*, Springer, New York, 2017, 81.

²² Mutua M, 'Savages, Victims, and Saviors: The Metaphor of Human Rights', 42 *Harvard International Law Journal* 1, 2001, 201-245.

the divergent interests it purports to uphold. As articulated by the Brundtland Commission report the goal of sustainable development is to ensure the current generations requirements are fulfilled without undermining next generations capacity to realise their needs.²³ This focuses on intra-generational equity and inter-generational equity.

The idea then morphed into the need to balance ecological protection while encouraging economic and social development.²⁴ However, from the beginning, economic development was given priority. Ignoring the fact that the environment is the foundation of the economy and society and not simply an inert input into the production process. Even the recently promulgated sustainable development goals (SDGs) assume that poverty will be addressed by simply increasing economic growth.²⁵

The study advocates for the adoption of sustainable development by the governments of the developing nations in their efforts to promote economic development. It also encourages the use of litigation by citizens of the developing nations to preserve their environment in cases of governmental failure in protecting their environmental rights.

1.9 Methodology

This study adopts the qualitative study research method. This research focuses on doctrinal analysis, including the analysis of literature, scholarly material, legislation and case law.

This is the most appropriate research method for this study as it allows for the thorough investigation of the current regional and international trends in climate change implementation and litigation.

1.10 Literature review

Transboundary destruction necessitates global governmental action.²⁶ Climate change poses threats that are uncertain and unquantifiable yet potentially catastrophic.²⁷ Currently the

²³ Adams WA, 'Conservation, sustainability and economic growth' in Redclift M and Springett D (ed), *Routledge international handbook of sustainable development*, Routledge, New York, 2015, 199.

²⁴ Mahanti A and Navarrete DM, 'From sustainable development to governance for sustainability' in Redclift M and Springett D (ed), *Routledge international handbook of sustainable development*, Routledge, New York, 2015, 416.

²⁵ Darkoh MBK and Khayesi M, 'Spatialising development and environmental discourses: the case of sustainable development and globalisation' in Salih MAM (ed), *Climate change and sustainable development: new challenges for poverty reduction*, Edward Elgar, Cheltenham, 2009, 185.

²⁶ Etsy CD, 'Revitalizing Environmental Federalism' 95 *Michigan Law Review*, 1996, 615.

²⁷ Trombetta MJ, Environmental security and climate change: analysing the discourse, *Cambridge Review of International Affairs*, 2008, 589.

developing nations are the most vulnerable to the effects of climate change.²⁸ For this reason the African continent has been advocating for environmental protection.²⁹ This is through ratification of treaties and conventions that safeguard environmental protection as well as implementing legislation and policies on the same.

Since the developing nations are striving for economic growth, they are undertaking many development initiatives. The economies of developing countries depend highly on the effective management of natural resources to benefit the population while achieving sustainable development.³⁰ Sustainable development is multifaceted as it does not exclusively affect the natural environment but also lives dependent on the environment.³¹ Human rights provides for this through environmental rights such as the right to a clean and healthy environment.³²

Dan Farber brings the idea that environmental laws and policies are incapable of anticipating and responding to catastrophic events brought upon by climate changes.³³ Hence the need to ensure the effective ability of the current environmental laws to cater to climate change, especially in the developing nations.³⁴ However, since legislation grants environmental rights and places obligations on the government to enhance these rights, litigation can be used to enforce the implementation of these rights.

1.11 Scope

The scope of the research shall mostly focus on the Kenyan context for its perspective on environmental issues pertaining to climate change.

²⁸ Failler P and Seide W, 'Assessment of the environment pollution and its impact on economic cooperation and integration initiatives of the IGAD Region' 2016.

²⁹ Lyster S, 'International wildlife law: an analysis of international treaties concerned with the conservation of wildlife' *Cambridge University Press*, 1993.

³⁰ Archine AK, 'Fiscal opportunities and challenges derived from the management of extractive resources revenues' *European Centre for Development Policy Management*, Discussion Paper 151, 2013, VI.

³¹ Dernbach JC and Mintz JA, 'Environmental laws and sustainability: an introduction' *Open Access Sustainability*, 2011, 3.

³² 'Special rapporteur on the adverse effects of the movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights' < <http://www2.ohchr.org/english/issues/environment/waste/> > accessed 10 June 2020.

³³ Farber D, 'Navigating the Intersection of Environmental Law and Disaster Law' *Berkley Law Review*, 2011, 1786.

³⁴ Carmen GG, 'Environmental Justice, Human Rights, and the Global South' 13 *Santa Clara Journal of International Law* 8, 2015, 155.

1.12 Chapter summary

Chapter 1: Introduction to climate change

The study introduces global warming and its general effects.

Chapter 2: Legal framework for climate change in Kenya

The study focuses on climate change in Kenya by examining the climate change regime in Kenya.

Chapter 3: The concept of sustainable development and climate justice

The study explores sustainable development as a solution to reduce environmental degradation while encouraging economic development. It focuses on climate justice as a tool to address violations of environmental rights by engaging in unsustainable development practices.

Chapter 4: Governmental inaction

The study investigates the impact of climate change in various sectors in Kenya.

Chapter 5: Transformative adjudication

The study explores climate litigation on the violation of environmental rights and its possible implications in Kenya.

Chapter 6: Recommendations and conclusion

The study concludes the research.

CHAPTER 2: LEGAL AND REGULATORY FRAMEWORK

2.1 Introduction

From the above chapter we can conclude that climate change is a polycentric problem.³⁵ The assessment of future climatic impacts must deal with uncertainty. Efficiently addressing climate change requires recognising a dynamic physical environment.³⁶ This gives rise to disputes and problems not easily addressed by existing legal doctrines and frameworks.³⁷

The chapter appraises the efforts that developing nations are undertaking to mitigate and adapt to counter the crippling effects of climate change by looking at the legislation and policies adopted by Kenya.

2.2 International framework

The United Nations Framework Convention on Climate Change (UNFCCC) is the central point for the development of principles of international environmental law in the context of climate change.³⁸ It calls for initiatives that are diverse, innovative and resource-efficient in order to pursue the protection of the climate system.³⁹ The aim is to achieve a global reduction in greenhouse gas concentrations in the atmosphere.⁴⁰ The approach critically emphasizes the reduction and not the cessation of pollutant emissions.⁴¹

After the Earth Summit the international community adopted the Kyoto Protocol.⁴² It addresses the common but differentiated responsibilities principle.⁴³ The principle requires that developing nations assert a right to prioritize their economic development and to increase their standard of living, demanding that developed states take responsibility for their historical contribution to transboundary pollution.⁴⁴ They acknowledge that developed

³⁵ Bodansky D, Brunnee J and Rajamani L, *International climate change law*, 5.

³⁶ Trombetta MJ, 'Environmental security and climate change: analysing the discourse' *Cambridge Review of International Affairs*, 2008, 585-602.

³⁷ Sands *et al*, *Principles of international environmental law*, 15.

³⁸ Article 2, *United Nations Framework Convention on Climate Change*, 9 May 1992, UNTC 30822.

³⁹ Article 3(1), *United Nations Framework Convention on Climate Change*.

⁴⁰ Article 2, *United Nations Framework Convention on Climate Change*.

⁴¹ Boas G, *Public international law: contemporary principles and perspectives*, Edward Elgar, Cheltenham, 2012, 32.

⁴² *Kyoto Protocol to the United Nations Framework Convention on Climate Change*.

⁴³ Boas G, *Public international law: contemporary principles and perspectives*, 33.

⁴⁴ Article 10, *Kyoto Protocol to the United Nations Framework Convention on Climate Change*.

countries are primarily responsible for the current high greenhouse gas emissions in the Atmosphere.⁴⁵

The Kyoto Protocol requires countries to achieve their reduction targets primarily through national measures. The measures help to encourage green investments and achieve emissions targets in a cost-effective manner.⁴⁶ This further emphasizes the principle of equity and common but differentiated responsibility that the UNFCCC⁴⁷ emphasizes, in accordance with Principle 7 of the Rio Declaration that recognizes the needs of developing countries to pursue development.⁴⁸

The Paris Agreement aims to achieve development by increasing adaptability to the adverse effects of climate change and promoting climate resilience and low-carbon development.⁴⁹ The Paris Agreement addresses climate change at both the cause-and-effect level. The causes must be mitigated by reducing greenhouse gases, while their consequences are addressed by adopting climate-resilient investments.⁵⁰

2.3 Regional framework: East Africa

Agenda 2063 addresses climate change by prioritizing adaptation mechanisms in all measures aimed at the survival of the most vulnerable populations. During the African Ministerial Conference for Environment Ministers, an assurance to take concrete measures to address environmental problems and climate action to enable inclusive wealth creation that protects the society and economic well-being of Africa was made.⁵¹

In 2010 the Secretariat of the East African Community developed a policy plan on climate change.⁵² This steers the implementation of collective action to combat climate change in the region. Improving the adaptability to weather changes and building socio-economic resilience of vulnerable populations and ecosystems.

⁴⁵ Getu M, 'Accommodating the interests of developing countries in the climate change regime: lessons from the ozone layer regime' 6 *Mizan Law Review* 1, 2012, 12.

⁴⁶ Andersen SO, 'Opportunities for Africa to integrate climate change protection in economic development policy' in Low PS (ed) *Climate change and Africa*, Cambridge University Press, Cambridge, 2005, 326.

⁴⁷ Article 3(1) *United Nations Framework Convention on Climate Change*.

⁴⁸ French D and Rajamani L, 'Climate change and international environmental law: Musings on a journey to somewhere' 25 *Journal of Environmental Law* 3, 2013, 437.

⁴⁹ Article 7, *Paris Agreement*, 12 December 2015, UNTC 54113.

⁵⁰ Article 6 and 11, *Paris Agreement*.

⁵¹ Republic of Kenya: Ministry of Environment and Forestry, *National climate change action plan 2018-2022*, 2018, 36.

⁵² *Climate Change Policy and Strategy* 2010.

2.4 Domestic framework: Kenya

Domestically, Kenya has a broad regulatory framework comprising laws, policies, plans, and institutions that address climate change. The foundation of the legal framework for climate change action is the Constitution of Kenya. Article 42 provides for the right to a clean and healthy environment for every Kenyan.⁵³ This includes the right to have the environment protected for the benefit of present and future generations.⁵⁴ This provision caters to climate change as it impedes the ecosystem and in turn affects the health of the environment.

The Constitution further articulates the state's mandate with respect to the environment as well as the enforcement of environmental rights.⁵⁵ Article 71 addresses the exploitation of resources in the natural environment with a focus on sustainability of resources.⁵⁶ Article 162 sets up the Environment and Lands Court (ELC) that has the mandate to deal with environmental matters including climate change.⁵⁷ Article 189 as read with Article 191 calls for cooperation between national and county governments in implementation of environmental policies and protection of the environment.⁵⁸ The constitution further mandates the passing of legislations that relate to the environment.⁵⁹ It must be noted that the constitution recognises the international treaties and protocols ratified by Kenya.⁶⁰

The Act guides Kenya's climate change response by mainstreaming climate change into sector functions.⁶¹ It is the legal foundation of the National Climate Change Action Plan (NCCAP) that recommends mainstreaming of climate change actions in development planning, budgeting and implementation processes.⁶² Kenya has developed the National Climate Change Response Strategy 2010.⁶³ Along with the first NCCAP 2013-2017, National Adaptation Plan 2015-2030, Kenya Climate Smart Agriculture Strategy 2017- 2026, Climate Risk Management Framework 2017, National Climate Change Policy 2018, National Climate Finance Policy 2018 and the second NCCAP 2018-2022 to address aspects of climate change.

⁵³ Article 42, *Constitution of Kenya* (2010).

⁵⁴ Article 42(a), *Constitution of Kenya* (2010).

⁵⁵ Article 69 and 70, *Constitution of Kenya* (2010).

⁵⁶ Article 71, *Constitution of Kenya* (2010).

⁵⁷ Article 162(2)(b), *Constitution of Kenya* (2010).

⁵⁸ Article 189 and 191(3)(c), *Constitution of Kenya* (2010).

⁵⁹ Article 72, *Constitution of Kenya* (2010).

⁶⁰ Article 2(6), *Constitution of Kenya* (2010).

⁶¹ *Climate Change Act*, (Act No 11 of 2016).

⁶² Republic of Kenya: Ministry of Environment and Forestry, *National climate change action plan 2018-2022*, 2018.

⁶³ Republic of Kenya: Ministry of Environment and Mineral Resources, *National climate change response strategy*, 2010.

The National Climate Change Response Strategy 2010 recommends incorporation of climate change responses within Kenya.⁶⁴ Its focus is to ensure that adaptation and mitigation measures are integrated into all government planning, budgeting and development objectives. The National Climate Change Framework Policy 2018 requires the government to mainstream climate change. It complements and reinforces the actions called for in the Act, thus providing the enabling environment for its execution. The Medium-Term Plan III on Vision 2030 provides opportunities to mainstream climate actions into development planning, decision making and implementation to ensure sustainable development. This ensures that development does not adversely impact on the environment.

2.4.1 Climate Change Act

In 2016 Kenya adopted the Act.⁶⁵ The Act provides both a legal and institutional framework for mitigation and adaptation of the effects of climate change.⁶⁶ It aims to enhance climate change resilience and low carbon development for sustainable development in Kenya.⁶⁷

The Act defines climate change and further sets out to name the GHG that it refers to as the cause of climatic changes.⁶⁸ However, it does not limit the GHG to the comprehensive list it gives but rather leaves an avenue for addition of gases subject to scientific research and recommendations.

The Act aims to attain sustainable development in Kenya through climate resilience and low carbon development.⁶⁹ This is an effort to continue development in the country, as development is necessary to sustain both the economy and the people of Kenya. However, the Act recognises that this development must consider the adverse impact it may have on the environment. And recommends that the development operates at an optimum level, for both economic and environmental satisfaction.

The Act gives its scope to all sectors of the economy in the county and national level.⁷⁰ It aims to integrate climate change responses into development plans.⁷¹ It aims to enhance the

⁶⁴ Republic of Kenya: Ministry of Environment and Mineral Resources, *National climate change response strategy*, 2010.

⁶⁵ *Climate Change Act*, (Act No 11 of 2016).

⁶⁶ Section 3, *Climate Change Act*, (Act No 11 of 2016).

⁶⁷ Section 3(1), *Climate Change Act*, (Act No 11 of 2016).

⁶⁸ Section 2, *Climate Change Act*, (Act No 11 of 2016).

⁶⁹ Section 3(1), *Climate Change Act*, (Act No 11 of 2016).

⁷⁰ Section 3(2), *Climate Change Act*, (Act No 11 of 2016).

⁷¹ Section 3(2)(a), *Climate Change Act*, (Act No 11 of 2016).

county's adaptive capacity to climate change.⁷² Reinforce climate change disaster risk reduction efforts in both the public and private sector.⁷³ Mainstream intergenerational, intragenerational and gender equity in its responses to climate change.⁷⁴ Incentivise and obligate the private sector to achieve a low carbon climate resilience development.⁷⁵

The Act aims to advance sustainable development into plans and decisions regarding climate change responses.⁷⁶ This shows that the Act recognises that sustainable development is the only way to both build the economy of Kenya and maintain her ecosystem to cater to the present and future generation's needs.⁷⁷

Guiding values and principles of the Act include the national values in Article 10 of the constitution of Kenya.⁷⁸ These values provide for devolution of power, participation of the people, human dignity, equity, social justice, good governance and sustainable development.⁷⁹ This is reiterated in the Act.⁸⁰

It establishes a National Climate Change Council, chaired by the President, and gives an overarching national climate change coordination mechanism.⁸¹ The council has the mandate to hear from non-state actors and key national and sub-national government institutions.⁸² The authority of the council is provided as an overarching coordination mechanism to deal with climate change.⁸³ The composition of the council is inclusive of academics, the marginalised, civil society and private sector members.⁸⁴ The inclusivity of all stakeholders within the economy and the community manifests the inclusivity of the Act in the finance, legal, economic, environmental and public administration sectors.⁸⁵ This representation ensures adequate voicing of concerns by various participants on climate change, its effects

⁷² Section 3(2)(b), *Climate Change Act*, (Act No 11 of 2016).

⁷³ Section 3(2)(d), *Climate Change Act*, (Act No 11 of 2016).

⁷⁴ Section 3(2)(e), *Climate Change Act*, (Act No 11 of 2016).

⁷⁵ Section 3(2)(f), *Climate Change Act*, (Act No 11 of 2016).

⁷⁶ Section 3(2)(k), *Climate Change Act*, (Act No 11 of 2016).

⁷⁷ Section 4(2)(c), *Climate Change Act*, (Act No 11 of 2016).

⁷⁸ Section 4, *Climate Change Act*, (Act No 11 of 2016).

⁷⁹ Article 10(2), *Constitution of Kenya* (2010).

⁸⁰ Section 4(2)(c), (d), (e) and (f), *Climate Change Act*, (Act No 11 of 2016).

⁸¹ Section 5, *Climate Change Act*, (Act No 11 of 2016).

⁸² Section 6, 7 and 24, *Climate Change Act*, (Act No 11 of 2016).

⁸³ Section 6, *Climate Change Act*, (Act No 11 of 2016).

⁸⁴ Section 7, *Climate Change Act*, (Act No 11 of 2016).

⁸⁵ Section 7(3), *Climate Change Act*, (Act No 11 of 2016).

and the responses taken by the country to address them. The Act provides for delegation of powers by the council to exercise its functions.⁸⁶

Climate response measures include a national climate action plan.⁸⁷ This plan prescribes mechanisms to achieve sustainable development, adapt to climate change and mitigate against climate change. It also seeks to enhance energy conservation and renewable energy in various sectors such as transport and review GHG emission levels in the country.

Duties imposed on the public sector include the integration of climate action plans into sectoral strategies, report on sectoral GHG emissions and enhance sustainability in performance of sectoral mandates.⁸⁸ Duties of the private sector according to the Act shall be guided by the council.⁸⁹ These climate obligations enhance compliance of private and public bodies to the climate response strategies.

Climate action in county governments.⁹⁰ The Act strives to enhance cooperation between the national and county government in tackling climate change.⁹¹ County governments are to integrate and mainstream climate change actions into various sectors. The county may enact further legislation to enhance its fulfilment of its climate change obligations. A county executive committee member is to coordinate climate affairs.

The Act supplements the obligations and rights provided by other law, such as the Constitution of Kenya and the relevant treaties ratified by Kenya.⁹² The Act provides for the enforcement of rights relating to climate change.⁹³ Article 70 of the Constitution allows a person to apply to the ELC on rights relating to climate change, alleging that a person has or is likely to act in a manner that will adversely affect efforts towards mitigation against the adverse effects of climate change.⁹⁴

The Court may issue an injunction to prevent an act or omission that is harmful to the environment. It may compel a public officer to take measures to discontinue an act or omission that is harmful to the environment or provide compensation to a victim of a

⁸⁶ Section 11, *Climate Change Act*, (Act No 11 of 2016).

⁸⁷ Section 13 and 14, *Climate Change Act*, (Act No 11 of 2016).

⁸⁸ Section 15, *Climate Change Act*, (Act No 11 of 2016).

⁸⁹ Section 16, *Climate Change Act*, (Act No 11 of 2016).

⁹⁰ Section 19, *Climate Change Act*, (Act No 11 of 2016).

⁹¹ Section 3(2)(1), *Climate Change Act*, (Act No 11 of 2016).

⁹² Section 3(3), *Climate Change Act*, (Act No 11 of 2016).

⁹³ Section 23, *Climate Change Act*, (Act No 11 of 2016).

⁹⁴ Section 23(1), *Climate Change Act*, (Act No 11 of 2016).

violation relating to climate change duties.⁹⁵ Further an applicant does not have to demonstrate that he has incurred loss or suffered injury.⁹⁶

This is a provision in line with Article 70 of the Constitution of Kenya that recognises the enforcement of environmental rights.⁹⁷ Section 23 demonstrates that Kenya is taking a positive step to counter climate change as it provides a route for GHG emitters to be sued for their contributions to climate change. It enshrines climate change mitigation and adaptation as an enforceable right and allows an individual or organization to enforce such rights in court.⁹⁸ Further the lenient standard required to prove liability is a plus for petitioners. As one does not have to demonstrate personal injury but rather an inefficiency in the mechanisms required to address climate change by the respondent which may include corporations.

Section 24 provides for the funding of climate change actions by the council.⁹⁹ Offences relating to climate change along with the penalties it would incur if violated are also provided.¹⁰⁰ The penalty upon conviction of these offences is a fine of up to ten million shillings, a five year or less imprisonment term or both. This is dependent on the court.

Incentives for promoting climate change are set out by the cabinet secretary.¹⁰¹ These incentives are guided by international standards and are to be accorded to individuals who place measures to eliminate climate change, mitigate against the adverse effects of climate change or are involved in the accredited training programs aimed at eliminating climate change.

2.5. Conclusion

This chapter shows the strong foundation of the climate change regime within Kenya. It demonstrates the active role that the constitution of Kenya takes to safeguard the people of Kenya and their livelihood. Through provisions that ensure the protection of environmental

⁹⁵ Section 23(2), *Climate Change Act*, (Act No 11 of 2016).

⁹⁶ Section 23(3), *Climate Change Act*, (Act No 11 of 2016).

⁹⁷ Olashore OO, 'Implementation of the international framework regarding climate change in developing countries; a review of Nigeria, Kenya and Botswana's environmental provisions governing climate change' 21 *Environmental Law Review* 3, 2019, 199.

⁹⁸ Olashore OO, 'Implementation of the international framework regarding climate change in developing countries; a review of Nigeria, Kenya and Botswana's environmental provisions governing climate change' 201.

⁹⁹ Section 24, *Climate Change Act*, (Act No 11 of 2016).

¹⁰⁰ Section 33, *Climate Change Act*, (Act No 11 of 2016).

¹⁰¹ Section 26, *Climate Change Act*, (Act No 11 of 2016).

rights within the country for all people. It provides the foundation of the Act that further enhances the states obligations to address climate change in Kenya.

The constitution and the Act aim to achieve climate protection; however, they recognise that if all safeguards fail, the people of Kenya can seek further environmental protection from the treaties, conventions and protocols ratified by it. These obligations can be enforced in court by the vulnerable population, those affected by the adverse effect of climate change inaction.

CHAPTER 3: SUSTAINABLE DEVELOPMENT AND CLIMATE JUSTICE

3.1 Introduction

The previous chapter elaborates on the environmental rights that the people of Kenya are guaranteed by the state. It recognises the need for continued development and environmental protection given that Kenya is currently exploring economic development. It touches on the function of the court in upholding these environmental rights in case violations occur.

Therefore, the ethical course to combat climate change pursues a human rights-based approach to protect lives, livelihoods and reduce suffering.¹⁰² In a bid to eradicate poverty and unsustainable consumption levels while preventing resource depletion and GHGs increase. This approach can be framed as sustainable development.¹⁰³

3.2 Sustainable development

The Brundtland Commission defined it as development that caters to both intergenerational and intragenerational concerns.¹⁰⁴ Sustainable development links the social, environmental and economic sectors of life.¹⁰⁵ It strives to achieve and maintain an intragenerational standard of living that can preserve the viability of supporting ecosystems.¹⁰⁶ It reiterates the need to integrate environmental protection with development for both developed and developing nations.¹⁰⁷

Sustainable development requires the enhancement of environmental protection, conservation and sustainable use of natural resources. It is guided by the right to a satisfactory environment and the right to development when realising these objectives.¹⁰⁸ The right to development has been defined as a right to a process and outcomes aiming to realise all human rights in the context of equitable growth.¹⁰⁹ Keba Mbaye commented that the right to development was

¹⁰² Maslin M, *Climate Change: A very short introduction*, 17.

¹⁰³ Sands *et al*, *Principles of international environmental law*, 9.

¹⁰⁴ World Commission on Environment and Development, *Our common future*, 20 March 1987, 16.

¹⁰⁵ Moran EF, *Environmental social science; human-environment interactions and sustainability*, Wiley Blackwell, Oxford, 2010, 153.

¹⁰⁶ Springett D and Redclift M, 'Sustainable development: history and evolution of the concept' in Redclift M and Springett D (ed), *Routledge international handbook of sustainable development*, Routledge, New York, 2015, 3-37.

¹⁰⁷ *Report of the United Nations Conference on Sustainable Development*, 2012, UN Doc A/Conf.216/16.

¹⁰⁸ Springett D and Redclift M, 'Sustainable development: history and evolution of the concept', 4.

¹⁰⁹ *Declaration on the right to development* UN GAOR Supp No 53, 186, UN Doc A/41/53, 4 December 1986.

implicit in the other rights that had already been recognised as a necessary precondition for the satisfaction of the social and economic rights of the individual.¹¹⁰ The law provides the most systematic definition of human rights in development by making development itself a human right and all governments are obligated to enhance it.¹¹¹

The 1992 Rio Declaration on Environment and Development (Rio Declaration) gave principles for global consensus on managing the environment.¹¹² Principle 3 of the Rio Declaration addresses the right to development.¹¹³ Principle 4 of the Rio Declaration states that environmental protection is an integral part of development.¹¹⁴ While Principle 25 of the Rio Declaration points to the interconnection between development and environmental protection.¹¹⁵ This recognition of environmental protection when seeking development calls for the implementation of sustainable development.

Principle 15 of the Rio Declaration touches on the precautionary principle.¹¹⁶ This approach calls for preventative measures to be taken even in cases of scientific uncertainty on threats that could degrade the environment. In this case since climate change is a highly contested issue this principle can be used to address the potential causes despite fully knowing the extent of inaction. And further when it comes to development precaution must be taken to ensure sustainability of the earth and its resources.

The United Nations Environment Programme (UNEP) is the authority responsible for the global environmental agenda. UNEP promotes the implementation of the environmental dimension of sustainable development. The UNFCCC caters for sustainable development in the environment when catering to climate change.¹¹⁷ While the Kyoto Protocol calls for clean development mechanisms to address climate change in the environment.¹¹⁸ This affirms the global support of the adoption of sustainable development to mitigate environmental degradation especially when addressing climate change.

¹¹⁰ Gathii JT, 'The agenda of third world approaches to international law', 28.

¹¹¹ Springett D and Redclift M, 'Sustainable development: history and evolution of the concept', 30.

¹¹² *Rio Declaration on Environment and Development*, date, UNTS.

¹¹³ Principle 3, *Rio Declaration on Environment and Development*, 3-14 June 1992.

¹¹⁴ Principle 4, *Rio Declaration on Environment and Development*.

¹¹⁵ Principle 25, *Rio Declaration on Environment and Development*.

¹¹⁶ Principle 15, *Rio Declaration on Environment and Development*.

¹¹⁷ Article 3(4), *United Nations Framework Convention on Climate Change*, 4 June 1992, 1771 UNTS 164.

¹¹⁸ Article 12, *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 11 December 1997, UNTC 30822.

Moreover, the 17 United Nations Sustainable Development Goals (SDGs) all encompass an aspect of climate change, thus it is an important tool in the response to climate change.¹¹⁹ The SDGs create an opportunity for adopting effective multidimensional approaches to combat climate change.¹²⁰ For example, Goal 13 aims to take urgent action to combat climate change and its impact.¹²¹

Sustainable Development commits parties to ensuring that conservation and management of natural resources are treated as an integral part of development plans. Full consideration is given to ecological, economic, cultural and social factors in the promotion of sustainable development.¹²² If sustainable development is adequately adopted by Kenya, it would ensure that the people of Kenya are the focus of sustainable development and are entitled to a healthy balanced life with nature.

Sustainable development requires the maintenance of the environment so that it can benefit both the current and future generation by adjusting activities conducted on it. This involves active measures to protect the people's interests even when seeking economic development. This requires actions to be implemented to ensure that raw materials and non-renewable resources are conserved and efficiently used, including reuse, reduce, recycle and safe disposal of non-degradable materials. This is an effort to ensure that Kenya's nature remains balanced to maintain its benefits to the people of Kenya. It highlights the application of preventative measures and the adaptation of the precautionary principle in the interest of present and future generations.¹²³

¹¹⁹ Ramutsindela M and Mickler D, 'Global goals and African development' in Ramutsindela M and Mickler D (ed), *Africa and the sustainable development goals*, Springer, Switzerland, 2020, 1-12.

¹²⁰ Sorokin LV and Mondello G, 'Entering the new +2°C global warming age and a threat of world ocean expansion for sustainable economic development' in Singh RB and Huggel C (ed), *Climate change, extreme events and disaster risk reduction: towards sustainable development goals*, Springer, Switzerland, 2018, 189.

¹²¹ Maweu JM and Paterson C, 'Minding the gap? The media and the realisation of SDG 13 in Kenya' in Ramutsindela M and Mickler D (ed), *Africa and the sustainable development goals*, Springer, Switzerland, 2020, 71-80.

¹²² Marks SP, 'Human rights and development' in Joseph S and McBeth (ed) *Research handbook on international human rights law*, Edward Elgar, Cheltenham, 2010, 173.

¹²³ Anghie A, 'International human rights law and a developing world perspective' in Sheeran S and Rodley SN (ed) *Routledge handbook on international human rights law*, Routledge, New York, 2013, 119.

3.3 Climate justice

This points to the link between democracy and climate justice.¹²⁴ Centring on justice in relation to the distribution of the burdens of global climate change.¹²⁵ The general agreement is that human-driven ecological destruction has become a reality resulting in the deprivation for many people globally.¹²⁶ Further, the extent to which the people in developing nations shoulder most of the burdens generated by such global destruction is astronomical. This is drawn from the severe drought, flooding, desertification and storm conditions they endure.¹²⁷

Scholars have questioned the viability of a model of justice in a world where ecological devastation is globally sustained. With the core issue being intentionality of harm.¹²⁸ Nevertheless, there is a need for a greater justification of arguments regarding non-intentional harm when evidence of harm, in terms of devastation of lands, rivers, seas, quality of air, and so on, is widespread.¹²⁹ It also calls attention to the need to account for absent justifications, especially those of the poor who continue to suffer greatly because of ongoing polluting practices and that of future generations who are unable to defend themselves against the pollution practices of present generations.¹³⁰

Climate justice mandates the recognition of ecological unity and the interdependence of all species on earth. Climate justice calls for the recognition of the environmental rights that people have.¹³¹ It views engaging in unsustainable practices that degrade the environment by state and non-state actors as a violation of these rights. In areas where environmental damage has occurred climate justice demands a clean-up of the site and in most cases compensation for the damage caused.¹³²

Climate justice requires an equitable system to be created to make decisions so as not to burden the disadvantaged communities seeking environmental protection.¹³³ It demands for

¹²⁴ Heath J, 'Rawls on Global Distributive Justice: A Defense', *Canadian Journal of Philosophy* 31, 2005, 212.

¹²⁵ Skillington T, *Climate justice and human rights*, 42.

¹²⁶ Sands *et al*, *Principles of international environmental law*, 283.

¹²⁷ Skillington T, *Climate justice and human rights*, 44.

¹²⁸ Skillington T, *Climate justice and human rights*, 57.

¹²⁹ Heath J, 'Rawls on Global Distributive Justice: A Defense' *Canadian Journal of Philosophy* 31, 2005, 195.

¹³⁰ Skillington T, *Climate justice and human rights*, 58.

¹³¹ Cullet P, 'Definition of an environmental right in a human rights context' 13 *Netherlands Quarterly of Human Rights*, 1995, 26.

¹³² Beer CT, 'Climate justice, the global south, and policy preferences of Kenyan environmental NGOs' 8 *Indiana University Press* 2, 2014, 88-93.

¹³³ Mendez JE and Cone C, 'Transnational justice' in Sheeran S and Rodley SN (ed) *Routledge handbook on international human rights law*, Routledge, New York, 2013, 763.

the civil education of the masses on their rights duties and responsibilities to cater to the environment.¹³⁴ As climate justice acknowledges that climate change can have differing social, economic, public health among other impacts on underprivileged populations. And climate impacts can exacerbate inequitable social conditions.

Climate justice affirms the right to participate in decision making processes regarding the environment such as planning assessment, needs assessment, implementation and enforcement.¹³⁵ It considers governments acts of environmental injustice as a violation of the environmental rights provided by international and domestic laws.¹³⁶

Principle 13 of the Rio Declaration empowers states to develop national law regarding liability and compensation for the victims of pollution and other environmental damage. This reiterates Principle 22 of the Stockholm Declaration on the Human Environment 1972. This displays the effort by the international community to achieve climate justice.

3.4 Kenya

Kenya is a rapidly developing nation facing environmental degradation because of this development. While development is essential for Kenya, environmental protection is crucial and necessary for the survival of its population. Therefore, development efforts should be pursued while utilizing ecologically safe methods to attain sustainable development. Its constitutional and statutory regime is taking the right step towards attaining sustainable development and environmental justice.

In Kenya sustainable development is supported by the constitution that provides the right to a clean and healthy environment.¹³⁷ This right encompasses the intragenerational aspect of sustainable development.¹³⁸ This is a bid to sustain the current population's needs from the environment while they enhance development while safeguarding the environment's viability for the next generation. The constitution also provides for sustainable development in its

¹³⁴ Anghie, 'International human rights law and a developing world perspective', 116.

¹³⁵ Wilde R, 'The extraterritorial application of international human rights law on civil and political rights' in Sheeran S and Rodley SN (ed) *Routledge handbook on international human rights law*, Routledge, New York, 2013, 650.

¹³⁶ Ssenyonjo M, 'Economic, social and cultural rights: an examination of state obligations' in Joseph S and McBeth (ed) *Research handbook on international human rights law*, Edward Elgar, Cheltenham, 2010, 47.

¹³⁷ Article 42, *Constitution of Kenya* (2010).

¹³⁸ Article 42(a), *Constitution of Kenya* (2010).

values.¹³⁹ It further addresses sustainable development in its principles of land use that calls for sustainable and productive management of land resources.¹⁴⁰

The Environmental Management and Coordination Act (EMCA) recognizes the right to a clean and healthy environment and the duty to protect and improve the environment for everyone.¹⁴¹ EMCA describes sustainable development as development that maintains the viability of the supporters.¹⁴² It characterizes it as the principle of international cooperation, the principle of equality between generations and sustainable use, the polluter pays principle and the precautionary principle.¹⁴³ As such, these principles should guide all environmental decisions to ensure sustainable development.¹⁴⁴

As for climate justice the Kenyan constitution recognises environmental rights and has a strong bill of rights with provisions that secure the protection of both the environment and the people. These rights can be enforced against all people when violated especially through the use of unsustainable practices that threaten the current and future generations and their healthy environment.

3.5 Conclusion

Sustainable development and environmental protection are linked by the values of social justice and accountability. This link brings about the notion of environmental democracy when dealing with sustainable development activities. It is a remedy to unsustainable development since damage to the environment is often irreversible. Climate justice allows people to act urgently to avoid such damage. This is by allowing individuals and associations to carry out their duty to protect and improve the environment for present and future generations.¹⁴⁵

¹³⁹ Article 10(2)(d), *Constitution of Kenya* (2010).

¹⁴⁰ Article 60(1)(c), *Constitution of Kenya* (2010).

¹⁴¹ Section 3(1), *Environmental Management and Co-ordination Act* (Cap 387 of 2012).

¹⁴² Section 2, *Environmental Management and Co-ordination Act* (Cap 387 of 2012).

¹⁴³ Section 3(5), *Environmental Management and Co-ordination Act* (Cap 387 of 2012).

¹⁴⁴ Section 18, *Environment and Land Court Act* (Act No 19 of 2011).

¹⁴⁵ Letmathe PB, 'Climate change, resource efficiency and sustainability' in Biswas AK and Tortajada C (ed), *Water security, climate change and sustainable development*, Springer, Singapore, 2016, 10.

CHAPTER 4: GOVERNMENT INACTION: DELAYED REALISATION

4.1 Introduction

Climate change has expanded the frequency of intense climate activities in Kenya from inflicting loss of life, dwindled livelihoods, decreased crop and cattle production, and poor infrastructure amongst other detrimental impacts. Climate change is likely to negatively affect Kenya's development goals depicted in Kenya's Vision 2030 that seeks to expand production.¹⁴⁶

From the previous chapters we see that Kenya takes climate change seriously, as verified with the enactment of the Act. The Act calls for the government to increase climate action plans to mainstream variation and mitigation movements in the country. This recognises the effects of weather pattern changes on Kenya's socioeconomic sectors. It acknowledges that climate change restricts the fulfilment of Kenya's goals for example food security threatened by the decline in agricultural productivity.

4.2 The impact of climate change in various sectors in Kenya

Heat, drought and floods are impacting Kenya, and human health is more at risk. Kenya's economy is extremely dependent on climate-sensitive sectors such as agriculture, energy and tourism. The increasing intensity and magnitude of weather-related disasters in Kenya aggravates the lives and livelihoods of the people.¹⁴⁷

Floods have led to loss of human lives in Kenya. Roads and infrastructure are destroyed. Droughts are generally large-scale disasters in Kenya destroying livelihoods, triggering conflicts over scarce resources and hindering the power of communities to cope with these effects. The water level rise is impacting coastal cities and communities. The rising ocean temperatures off the coast of Kenya have triggered mass coral bleaching and mortality on reef systems. This impacts the abundance and composition of fish species and negatively impacts coastal fisheries. The glaciers of Mount Kenya are declining and are expected to disappear in

¹⁴⁶ Republic of Kenya: Ministry of Environment and Forestry, *National climate change action plan 2018-2022*, 2018, 13.

¹⁴⁷ Republic of Kenya: Ministry of Environment and Forestry, *National climate change action plan 2018-2022*, 2018, 14.

the coming years, mostly due to climate change. Mount Kenya is one amongst the country's water towers and a source of various rivers and streams.¹⁴⁸

Droughts have destroyed livelihoods, sparked conflicts over sparse resources and scoured the flexibility of communities to cope. It is reducing the productivity of the land and negatively impacting communities. Climate change is additionally contributing to land degradation, that encompasses changes in the chemical, physical and biological properties of the soil. However, human activities caused this threat through unsustainable land management practices such as the destruction of natural vegetation, over cultivation, over grazing and deforestation.¹⁴⁹

Climate change is contributing to the loss of Kenya's diversity. Deforestation and forest degradation in Kenya is essentially a result of human activities, though global climate change is also going to influence the growth, composition and regeneration capability of forests leading to reduced biodiversity and capacity to deliver vital forest products and services. Deforestation could be a major explanation for climate change as a result of clearing forests that absorb large amounts of GHGs from the atmosphere. The economic impacts of floods are severe as rain and flooding wipes out resources such as roads and infrastructure valued in billions of shillings.¹⁵⁰

4.3 Government Action

Actions in the agriculture, energy, forestry, industry, transport and waste sectors set out in the UNFCCC are expected to lead to a reduction in Kenya's emissions. The NCCAP 2018-2022 provides the mechanisms and measures for the transition to low-carbon and climate-resilient development.¹⁵¹ This pathway emphasizes sustainable development and prioritizes adaptation, recognising the importance of increasing the climate resilience of vulnerable groups, including women, youth, people with disabilities, and marginalized and minority communities.¹⁵²

¹⁴⁸ Republic of Kenya: Ministry of Environment and Forestry, *National climate change action plan 2018-2022*, 2018, 14.

¹⁴⁹ Republic of Kenya: Ministry of Environment and Forestry, *National climate change action plan 2018-2022*, 2018, 15.

¹⁵⁰ Republic of Kenya: Ministry of Environment and Forestry, *National climate change action plan 2018-2022*, 2018, 16.

¹⁵¹ Republic of Kenya: Ministry of Environment and Forestry, *National climate change action plan 2018-2022*, 2018, 32-35.

¹⁵² Republic of Kenya: Ministry of Environment and Forestry, *National climate change action plan 2018-2022*, 2018, 17.

Climate change action is a shared responsibility between the national government and county governments. The NCCAP 2018-2022 coincides with the second generation of county governments responsible for various delegated functions that will contribute to the achievement of this climate change resilience in Kenya.¹⁵³

The government must support the achievement of adaptation and mitigation goals, ensuring priority actions are identified for agriculture, energy, biodiversity conservation and use and disaster risk reduction. The government should ensure that the NCCAP addresses the issues of vulnerable groups, including women, older members of society, people with disabilities, children, youth, and members of minority and marginalized communities. These efforts should be overseen by the National Council on Climate Change.¹⁵⁴

These actions seek to address the risk of flood and drought disasters in communities and infrastructure because of climate-related disasters. Its aim is to provide food and water security by improving the productivity and resilience of the agricultural sector in such a low carbon way and the blue economy of the water sector.¹⁵⁵

Improving waste management to improve health, sanitation and human settlements. Resource efficiency in the manufacturing sector, through the provision of climate-proof energy and transport infrastructure, promoting the development of renewable energy and the development of sustainable transport systems.¹⁵⁶

4.4 Predicted impacts of climate change in Kenya

The impact on crops would result in food insecurity due to a decline in overall crop yields in most of the country due to insufficient water availability, excessive humidity conditions, more pests, diseases and weeds. Reduced access to water and continued heat stress are expected along with changes in disease patterns.¹⁵⁷

¹⁵³ Republic of Kenya: Ministry of Environment and Forestry, *National climate change action plan 2018-2022*, 2018.

¹⁵⁴ Republic of Kenya: Ministry of Environment and Forestry, *National climate change action plan 2018-2022*, 2018, 51.

¹⁵⁵ Republic of Kenya: Ministry of Environment and Forestry, *National climate change action plan 2018-2022*, 2018, 57.

¹⁵⁶ Republic of Kenya: Ministry of Environment and Forestry, *National climate change action plan 2018-2022*, 2018.

¹⁵⁷ Republic of Kenya: Ministry of Environment and Forestry, *National climate change action plan 2018-2022*, 2018, 18.

In the blue economy there will be a submergence of low-lying areas and an increase in flooded areas. Intrusion of saltwater along the coastline due to sea level rise, with implications for domestic, industrial and agricultural uses, as well as for coastal ecosystems and the tourism sector is expected. A large number of people are expected to lack access to clean water.¹⁵⁸

In the energy sector, an anticipated decline in forest productivity will restrict availability of energy sources. Reduced hydropower production capacity due to water flows decrease in rivers is predicted. For forestry, increased exposure to fire, pathogens and invasive species, as well as a lower provision of environmental resources and economic activity is expected. Damage to infrastructure, including roads and bridges, during storms and more disruptions are expected in the maritime, road, rail and air networks due to flooding and heavy rains.¹⁵⁹

4.5 Conclusion

Thus, it can be ascertained that Kenya is the first country in Africa to enact a comprehensive legal policy to guide the county and national responses to climate change.¹⁶⁰ This legal framework demonstrates that Kenya must address environmental issues such as climate change. It also shows the various avenues a petitioner can use to address concerns about climate change in Kenya.

The enactment of the Act further demonstrates the internalization of Kenya's obligations under international law when addressing climate change issues. These obligations are also guaranteed in the Constitution of Kenya.¹⁶¹ This boosts resolution of environmental issues and the Act is the main legislation guiding Kenya's response to climate change by integrating climate change into the functions of the government. It is also the legal basis for the NCCAP.

However, there is no indication that many of the provisions of the Act are in force, such as the establishment of the National Climate Change Council and Climate Change Directorate. The approval of subsidiary legislation for the creation of the national climate change fund is among the provisions yet to be implemented. Awareness-raising efforts of all stakeholders on

¹⁵⁸ Republic of Kenya: Ministry of Environment and Forestry, *National climate change action plan 2018-2022*, 2018, 19.

¹⁵⁹ Republic of Kenya: Ministry of Environment and Forestry, *National climate change action plan 2018-2022*, 2018, 20.

¹⁶⁰ Olashore OO, 'Implementation of the international framework regarding climate change in developing countries; a review of Nigeria, Kenya and Botswana's environmental provisions governing climate change' 202.

¹⁶¹ Arts 69 and 70, *Constitution of Kenya* (2010).

the Act and its implications is lacking. Along with the development of the required guidelines provided by the Act. Thus, the Act has not yet met Kenya's obligations under the treaties to which it is a party due to delayed realisation of these provisions.

The study recognises the government's effort to combat climate change through the climate regime depicted in the previous chapter. However, it recognises the need for the implementation of these policies and guidelines to present day Kenya to provide proper benefit to the people. This is due to the risks of climate change including rising temperatures, uncertain rainfall patterns, rising sea levels, storm surges, increased risk of extreme weather events such as droughts, floods and landslides, melting glaciers and ocean acidification. This is generating vulnerability within the country such as high levels of multidimensional poverty, gender inequality, environmental degradation, increasing levels of water scarcity, insecure land tenure and a high burden of disease and limited access to quality health care.¹⁶²

The effects currently being felt in the country along with the anticipated impacts are too far reaching to accommodate government inaction in the fight against climate change. The policies enacted provide guidance on combating climate change that should be implemented and not archived by the government.

¹⁶² Republic of Kenya: Ministry of Environment and Forestry, *National climate change action plan 2018-2022*, 2018, 22-29.

CHAPTER 5: TRANSFORMATIVE ADJUDICATION IN ADDRESSING GOVERNMENT INACTION

5.1 Introduction

The chapter above addresses the effects of climate change in Kenya. The devastating reality calls for immediate government action in implementing the adequate climate regime already present. However, as a safeguard this chapter looks at climate litigation in an effort to further secure the people's environmental rights and hasten government action especially in implementing the provisions of the Act. This is to efficiently tackle climate change in Kenya.

5.2 Transformative adjudication

The developing nations are dealing with the consequences of climate change in significant and devastating ways such as extreme weather, crop, life and territory loss. Resulting in litigation to address climate change. In these countries, litigation connects climate concerns to disputes over land use, constitutional rights, environmental protection, disaster management and natural resource conservation.¹⁶³ Activists have taken to court to enforce the upholding of the provisions provided in law that guarantee these human and environmental rights.¹⁶⁴ Several international tribunals have concluded that failure to protect the environment violates a variety of human rights such as the rights to life.¹⁶⁵

5.2.1 The Ogoniland case

The Ogoni case in Nigeria dealt with the destruction of land in the Niger Delta by the armed forces, the state's oil company and the transnational oil company, a non-state actor. The African Commission on People and Peoples Rights (ACmHPR) was of the opinion that Article 24 of the African Charter on Human and Peoples' Rights (ACHPR) requires the state to take reasonable measures to prevent pollution and environmental degradation. This is to promote environmentally sustainable development and use of natural resources.¹⁶⁶

¹⁶³ Peel J and Lin J, 'Transnational Climate Litigation: The Contribution of the Global South' *American Journal of International Law* 1, 2019, 3.

¹⁶⁴ Setzer J and Vanhala LC, 'Climate change litigation: A review of research on courts and litigants in climate governance' 10 *Wiley Interdisciplinary Reviews* 3, 2019, 15.

¹⁶⁵ Setzer J and Vanhala LC, 'Climate change litigation: A review of research on courts and litigants in climate governance', 17.

¹⁶⁶ *The social and economic rights action center and the center for economic and social rights v Nigeria*, ACmHPR Comm. 155/96, (2002), para. 61-67.

The ACmHPR believed that states, in compliance with Articles 16 and 24 of the ACHPR, should enable independent scientific monitoring of threats to the environment. These environmental and social impact assessments are a precondition for any major developments. The state should then monitor and provide information to communities exposed to hazardous materials and activities. The people ought to be heard and participate in development decisions that affect their communities. The ACmHPR mandated the rehabilitation of the land and rivers damaged by oil operations along with the provision of an impact assessment prior to further oil development.¹⁶⁷

For Kenya, a country party to the ACHPR and is currently exploring oil in Turkana county this case is vital. As the ACmHPR interpretate Article 24 of the ACHPR to impose an obligation on the government to take measures to prevent ecological degradation and promote sustainable development when using natural resources. Further the government should conduct environmental and social impact assessment prior to commencing development plans.

5.2.2 The Endorois case

The case dealt with the eviction and displacement of the Endorois to make way for a game reserve. However, in 2002 the government granted ruby mining concessions in the areas, leading to the construction of a road to the mining site with pollution risks.¹⁶⁸

The ACmHPR found that the Kenyan government had violated Article 1 of the ACHPR on the obligation of states parties and Article 22 of the ACHPR on the right to development. The ACmHPR also considered the significant involvement of those groups affected by development decisions to be appropriate and guaranteed by Article 14 of ACHPR.¹⁶⁹

These measures help curb environmental degradation that may lead to worsening climatic changes in the region. For Kenya, the obligations of the government as interpreted by the ACmHPR is to protect the people from environmental degradation. This can be the basis of a claim for violation of the state's duty under Article 1 of the ACHPR in pursuit of climate justice.

¹⁶⁷ *The social and economic rights action center and the center for economic and social rights v Nigeria*, ACmHPR Comm. 155/96, (2002), para. 61-67.

¹⁶⁸ *Centre for minority rights in development (Kenya) and minority rights group international on behalf of Endorois welfare council v Kenya*, ACmHPR Comm. 276/2003, (2010), para. 209.

¹⁶⁹ *Centre for minority rights in development (Kenya) and minority rights group international on behalf of Endorois welfare council v Kenya*, ACmHPR Comm. 276/2003, (2010), para. 209.

5.2.3 The San Mateo de Huanchor v Peru case

San Mateo's residents are dependent on subsistence farming for their livelihood. They sought a collective human right petition due to the effects of pollution from a private mining company. The company deposited sludge which contained heavy metals such as arsenic, lead, mercury. The state allowed the company to dispose of toxic mining waste in the area despite the foreseeable hazardous contamination.¹⁷⁰

The Inter American Commission on Human Rights (IACmHR) stated that claims for violations of the American Convention's rights to life, humane treatment, family, property and judicial protection were permissible. The petitioners requested precautionary measures in the form of the immediate removal of the toxic waste to avoid further health dangers to the people and the environment which were granted.

5.2.4 The Mendoza case

In the Argentina case, the applicants lived on a basin of land due to the lack of adequate water and sanitation infrastructure provided by the state; it was polluted and contaminated by the activities of private companies. The application of Article 41 on the right to a healthy environment and Article 43 on the right to appeal to prevent violations of the Argentine Constitution was made by the court.¹⁷¹

The court ordered the state to take measures to protect and improve the environment in the river basin, including remedying the environmental damage. This concerned the water and sanitation infrastructure needed to prevent further environmental damage. Monitoring mechanisms were placed to ensure compliance with the orders given.

5.2.5 The Urgenda case

The lawsuits focused on issues of vulnerability and human rights abuses. Urgenda justified the case with the duty of care under Article 21 of the Dutch Constitution and Article 6 of the Dutch Civil Code to ensure the liability of the country and the protection and safety improvement of the living environment. The District Court of The Hague ruled that Article 6 of the Civil Code by an illegal act committed by the state had been violated. In the appeal process, the appellate court ruled that due diligence is informed by human rights.¹⁷²

¹⁷⁰ *Community of San Mateo de Huanchor v Peru*, IACmHR (2004), Report No 69/04, Petition 504/03.

¹⁷¹ *Mendoza Beatriz Silva & Others v State of Argentina & Others* (2008), The Supreme Court of Argentina.

¹⁷² *Urgenda Foundation v The State of Netherlands* (2015), The Hague District Court of Netherlands.

The Court recognized the state's obligation to take concrete action to prevent any future violation of Articles 2 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The appellate court ruled that climate change poses a great risk to the citizens who face loss of life and disruption of family life.

These cases demonstrate a situation where the government actively fails to protect its people by engaging, ignoring or permitting unsustainable and destructive environmental activities without considering the health of the people. Since climate justice is a means to frame environmental protection as a human rights issue, this approach can be used to protect the people of Kenya.¹⁷³

This could be demonstrated by the communities in Changanwe who are facing the vast effect of lead poisoning from pollutants that found their way into the drinking water. Given that the companies polluting the water sources are regulated by the government. The government is also the provider of essential services such as water, hence a duty of care is owed to the people.

The communities can sue the government for inadequate protection of their environment and health citing the above cases.¹⁷⁴

5.2.6 Leghari v Federation of Pakistan

In this case since the Pakistani Constitution lacks a precise right for environmental protection, the judge focused on Articles 9 and 11 of the Constitution. These provisions relate to the protection of the rights to life, human dignity, property and access to information. These provisions in conjunction with international environmental principles such as sustainable development, precautionary principle, doctrine of public trust and the intergenerational justice were applied. He found that these legal provisions, when applied together, provided sufficient tools for the judiciary to make a positive decision on the effects of climate change.¹⁷⁵

¹⁷³ Cullet P, 'Definition of an environmental right in a human rights context' 13 *Netherlands Quarterly of Human Rights*, 1995, 26-34.

¹⁷⁴ Sands *et al*, *Principles of international environmental law*, 734.

¹⁷⁵ *Ashgar Leghari v Federation of Pakistan* (2015), The High Court of Pakistan.

5.2.7 Earthlife Africa Johannesburg v Ministry of Environmental affairs & others

The South African High Court ruled that global climate change is a relevant consideration in the assessment plans for a coal power plant.¹⁷⁶ This is relevant in all development plans as the environment's health is pertinent to sustainability of life. This case outlines the potential environmental degradation that arises from unsustainable development. It highlights a situation where despite the possible economic benefits a development project may bring its effects on climate change must be considered.¹⁷⁷

5.3 Government inactivity

From the above we can conclude that climate change cases arise when the government fails to consider the impacts of climate change in making decisions and when there is a failure for statutes to take more regulatory action to mitigate climate change.¹⁷⁸ The lack of implementation of climate action plans and the magnitude of people affected, both now and into the future, increases the moral gravity of decisions being made today regarding emissions levels and adaptation measures.¹⁷⁹ The expectation is that justice will consider the impact of deteriorating ecological circumstances on all peoples and support a redistribution of resources equitably based on present-day responsibilities.¹⁸⁰

The relationship between human right and environmental protection has been developed by jurisprudence in the domestic and international level. Courts and other international bodies have interpreted substantive human rights to incorporate adequate environmental protection. Litigation can play a role in forcing government regulatory action and perhaps in providing remedies for harm from GHG emissions¹⁸¹ Courts accept the science of climate change and conclusions from the IPCC and other groups that anthropogenic emissions of GHGs are a major cause of climate change.

¹⁷⁶ *Earthlife Africa Johannesburg v Minister of environmental affairs & Others* (2017), The High Court of South Africa.

¹⁷⁷ Sands *et al*, *Principles of international environmental law*, 206.

¹⁷⁸ Setzer J and Vanhala LC, 'Climate change litigation: A review of research on courts and litigants in climate governance', 10.

¹⁷⁹ Skillington T, *Climate justice and human rights*, 70.

¹⁸⁰ Skillington T, *Climate justice and human rights*, 72.

¹⁸¹ Markowitz KJ and Gerardu JJA, 'The importance of the Judiciary in environmental compliance and enforcement' 29 *Pace Environmental Law Review*, 2012, 540.

However, for a successful litigation the court needs to recognize its judicial role in enforcing public trust obligations, identifying government obligations to protect the environment as a public trust asset. And finally crafting remedies that will ensure that the executive branch of government fulfils their obligation.¹⁸²

5.4 Significance to Kenya

From the previous chapter we can conclude that despite the enactment of the Act and other legislations and policies the Kenyan government has yet to tackle climatic changes in the environment to the detriment of the people of Kenya.¹⁸³ This inaction calls for transformative adjudication as Kenyans are burdened by environmental degradation and should seek environmental justice through environmental human rights.¹⁸⁴

The cases above highlight the outward-looking objective of combating ongoing environmental degradation and the use of rights-based principles.¹⁸⁵ Developing nations generally use existing legislative tools and human rights discourses to highlight the vulnerability of their populations to climate change and protect their valuable ecosystems.¹⁸⁶

In Kenya since there already exists a large number of laws that safeguard these environmental rights, litigation of climate change issues is a possible avenue to address violations of environmental rights. Moreover, the domestic courts are empowered with the transformative 2010 Constitution that carries a bill of rights that safeguards environmental rights and recognises treaties and conventions ratified by Kenya as part of its laws.¹⁸⁷

The Environment and Land Court Act was passed pursuant to Article 162(2) (b) of the Constitution of Kenya 2010. Its overarching goal is to facilitate the just, expeditious, proportionate and accessible settlement of land and environmental disputes.¹⁸⁸ It establishes

¹⁸² Setzer J and Vanhala LC, 'Climate change litigation: A review of research on courts and litigants in climate governance', 21.

¹⁸³ Gathii JT, 'Saving the Serengeti: Africa's New International Judicial Environmentalism' 16 *Chicago Journal of International Law* 2, 2016, 388.

¹⁸⁴ Carmen GG, 'Environmental Justice, Human Rights, and the Global South' 13 *Santa Clara Journal of International Law* 8, 2015, 170.

¹⁸⁵ Carmen GG, 'Environmental Justice, Human Rights, and the Global South' 13 *Santa Clara Journal of International Law* 8, 2015, 170.

¹⁸⁶ Peel J and Lin J, 'Transnational Climate Litigation: The Contribution of the Global South' *American Journal of International Law* 1, 2019, 13.

¹⁸⁷ Mbote PK and Odote C, 'Courts as champions of sustainable development lessons from East Africa' *Sustainable Development Law & Policy*, 2009, 83-84.

¹⁸⁸ Section 3, *Environment and Land Court Act* (No 19 of 2011).

the ELC and confers it the jurisdiction to oversee disputes related to environment and land. These include issues on environmental planning and protection, climate issues, land use planning and land administration and management.¹⁸⁹ The ELC is steered by the principles of sustainable development.¹⁹⁰ It is not tied by procedural technicalities to ensure efficient and expedient justice for all.¹⁹¹

Therefore, this study believes that a petition that outlines, Kenya's environmental laws and climate policies, the duty of care, public trust doctrine along with its commitments under the Paris Agreement, UNFCCC and Kyoto Protocol would be able to ensure that the government implements the required actions to mitigate against climate change immediately.

¹⁸⁹ Section 13, *Environment and Land Court Act* (No 19 of 2011).

¹⁹⁰ Section 18(a)(i), *Environment and Land Court Act* (No 19 of 2011).

¹⁹¹ Section 20(1), *Environment and Land Court Act* (No 19 of 2011).

CHAPTER 6: RECOMMENDATIONS AND CONCLUSION

6.1 Conclusion and findings

A recently accrued awareness of risks to the environment has prompted a multitude of international and domestic regimes targeting a large array of issues from pollution, biodiversity conservation to sustainability.¹⁹² These areas are usually enlightened by social priorities so disagreements regarding the extent of responsibility of various states along with the right to development arise.

Subsequently international environmental law lacks the focus and accord present in various fields of international law. This legal disruption has resulted in the creation of legal regimes and consequently a horde of legal disputes that require adjudication.¹⁹³ Hence, climate change is classified as legally disruptive since it needs the reconciliation of the legal issues raised by climate change with existing legal orders.¹⁹⁴

Climate change is a challenge that has forcefully caused alterations in our planet's climate system.¹⁹⁵ The greatest impacts are ascertained in the developing and most vulnerable regions of the world.¹⁹⁶ The study sees climate justice as an endeavour to guard the vulnerable in society.¹⁹⁷ This is by ensuring human rights obligations are respected, protected and consummated by states. Given that international climate change law focuses on mitigation, adaptation, support and monitoring climate change and its harmful effects.¹⁹⁸

The common but differentiated responsibilities principle detailed in essence in Principle 7 of the Rio Declaration, encourages states to work to conserve, defend and restore the health and integrity of the ecosystem. Keeping in mind the varying contributions to global atmospheric pollution, states have a common but differentiated responsibilities to address climate change. The developed nations ought to acknowledge their responsibility in the international pursuit of sustainable development considering the pressure they have placed on the environment and of the advanced technologies and financial resources they command. However, the

¹⁹² Boas G, *Public international law: contemporary principles and perspectives*, 31.

¹⁹³ Carmen GG, 'Environmental justice, human rights and the global south' 190.

¹⁹⁴ Fisher E, Scotford E and Barritt E, 'The Legally Disruptive Nature of Climate Change' *Modern Law Review*, 2017, 183–185.

¹⁹⁵ *Ashgar Leghari v Federation of Pakistan* (2015), The High Court of Pakistan.

¹⁹⁶ Shue H, *Climate justice: Vulnerability and protection*, 160.

¹⁹⁷ Skillington T, *Climate justice and human rights*, 41.

¹⁹⁸ French D, Rajamani L, 'Climate Change and International Environmental Law: Musings on a Journey to Somewhere', 437.

developing nations parties should take part in combating climate change and the adverse effects.

The wide reach of the effects of climatic changes within the ecosystem demands immediate and effective responses to protect the environment. These accelerated efforts are especially necessary for Kenya.

Climate change is a universal drawback and Kenya is a lively participant in international efforts to tackle it. Kenya has signed and sanctioned many treaties and conventions relating to climate change. It has conjointly developed several guidelines that guide the management of the response to climate change. Kenya paves the way for African countries to begin to increase environmental protection while pursuing economic growth. Despite this the implementation of these policies have been inadequate. Hence legal proceedings will help enforce government regulation and remedial action for damage that could lead to climate change.

Kenyan is grappling with the effects of climate change. Higher temperatures, unpredictable precipitation patterns, magnified droughts and floods, and rising ocean levels are affecting individuals across the country. Extreme weather events have resulted in loss of life and livelihoods, decreased crop and animal production and broken infrastructure, among different detrimental effects. Kenya must begin to preserve the earth for future generations by insistence on property development, which links environmental protection, social justice and economic benefits to the advance of the country.

6.2 Recommendations

There is a pressing need for a comprehensive and binding standard to guide the catering for climate change by nations and companies in general. There is a need to apply a human rights-based approach to guide global policies designed to address climate change. This should be furthered by sanctions for non-conformity to the implemented regulations. This should be implemented in any conventions, protocols and revisions of the international climate change framework.

The study recommends a people led model of climate justice since climate change is a human rights and environmental justice issue. This is most likely to voice the issues of those most affected at the local, national, and international level. Further by reconceptualizing all peoples as obligation bearers operating within a framework of regional, national, and transnational

reciprocity, an all-subjected model of climate justice increases the likelihood of cooperation. This will also advance climate litigation efforts in developing nations to ensure that climate change issues are adequately catered to.

Mickelson shows how the most significant developments in international environmental law such as the adoption of the principle of sustainable development is still contentious. Tension between the developed nations concerns for environmental protection and sustainability and the developing nations concerns of poverty and development is evident.¹⁹⁹ The study recommends the recognition of the inequality that the developing nations face and calls for action to mitigate it.²⁰⁰ Further a distinction between the global environment which is a common concern and the African environment which is a primary concern of Africans and the responsibility of individual states in Africa is made.

Pursuant to this, Africa should create a coherent and comprehensive treaty regime on the environment, that contains fundamental principles which African states subscribe to as well as measures and obligations agreed upon as necessary to tackle the region's environmental problems. A common strategy will help concentrate efforts in implementation. It also ensures the adoption of obligations more suited to the unique situation of African countries.²⁰¹

The study recommends the proper implementation of Principle 13 of the Rio Declaration; that empowers states to cooperate in developing further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their borders.

Finally, the study recommends the proper implementation of the provisions within the Act in Kenya. This is to streamline adaptation and mitigation efforts in Kenya. This implementation will enhance environmental and human rights protection. It will avail the funds needed to execute the nation action plan within the counties. It will provide obligations to both the private and public sector towards the achievement of a proper climate response in Kenya. This will safeguard Kenya's environment and protect the vulnerable groups within it.

¹⁹⁹ Gathii JT, 'The agenda of third world approaches to international law', 26-27.

²⁰⁰ Shue H, *Climate justice: Vulnerability and protection*, 180.

²⁰¹ Gathii JT, 'The agenda of third world approaches to international law' in Dunoff J and Pollack (ed) *International legal theory: foundations and frontiers*, Cambridge University Press, 2019, 12.

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