

THE EFFECTS OF CLIMATE CHANGE ON THE REALISATION OF THE RIGHT
TO ADEQUATE FOOD IN KENYA

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DECLARATION

I, KHAYUNDI FRANCIS MAPATI BULIMO declare that the effects of climate change on the realisation of the right to adequate food in Kenya is my own work, that it has not been submitted for any degree or examination in any other university or institution, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

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25 January 2012.

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ABSTRACT

This thesis examines the interplay between the effects of climate change and human rights. It seeks to interrogate the contribution of human rights in addressing the effects of climate change on the enjoyment of the right to food in Kenya. Climate change has been recognised as a human rights issue. Despite this acknowledgement, many states are yet to deal with climate change as a growing threat to the realisation of human rights. The situation is made worse by the glacial pace in securing a binding legal agreement to tackle climate change. The thesis also reveals that despite their seemingly disparate and disconnected nature, both the human rights and climate change regimes seek to achieve the same goal albeit in different ways.

The thesis argues that a considerable portion of the Kenyan population has not been able to enjoy the right to food as a result of droughts and floods. It adopts the view that, with the effects of climate change being evident, the frequency and magnitude of droughts and floods has increased with far reaching consequences on the right to food. Measures by the Kenyan government to address the food situation have always been knee jerk and inadequate in nature. This is despite the fact that Kenya is a signatory to a number of human rights instruments that deal with the right to food. With the promulgation of a new Constitution with a justiciable right to food, there is a need for the Kenyan government to meet its human rights obligations.

This thesis concludes by suggesting ways in which the right to food can be applied in order to address some of the effects of climate change. It argues that by adopting a human rights approach to the right to food, the State will have to adopt measures that take into consideration the impacts of climate change. Furthermore, the State is under an obligation to engage in activities that will not contribute to climate change and negatively affect the right.

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African Charter on the Rights and Welfare of the Child.

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women.

European Convention on Human Rights and Fundamental Freedoms.

American Convention on Human Rights ("Pact of San Jose, Costa Rica").

LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights.
ACRWC	African Charter on the Rights and Welfare of the Child.
ASAL	Arid and semi-arid areas.
AU	African Union
CEDAW	Convention on the Elimination of All Forms for Discrimination against Women.
CESCR	Committee on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child.
DRD	Declaration on the Right to Development.
ERS	Economic Recovery Strategy
ESC	Economic, Social and Cultural rights
FAO	United Nations Food and Agricultural Organization.
FSNS	Food Security and Nutrition Strategy.
GHG	Greenhouse Gases.
GoK	Government of Kenya.
HRC	United Nations Human Rights Council.
IACHR	Inter-American Commission on Human Rights.
ICCPR	International Covenant on Civil and Political Rights.
ICESCR	International Covenant on Economic, Social and Cultural Rights.
ICHRP	International Council on Human Rights Policy.
ILO	International Labour Organisation.
IPCC	The Intergovernmental Panel on Climate Change.
KNCHR	Kenyan National Commission on Human Rights.
MDGs	Millennium Development Goals.
NEMA	National Environmental Management Authority.
NGOs	Non-Governmental Organizations.
OHCHR	Office of the UN High Commissioner for Human Rights.
PIL	Public Interest Litigation.
SRA	Strategy for Revitalizing Agriculture.
TNCs	Trans-national corporations.
UDHR	Universal Declaration of Human Rights.
UN	The United Nations.

UNCCD	United Nations Convention to Combat Desertification.
UNDP	United Nations Development Programme.
UNFCCC	The United Nations Framework Convention on Climate Change.
UNHCR	Office of the United Nations High Commissioner for Refugees.
UNICEF	United Nations Children's Fund.
WHO	World Health Organization.

CHAPTER ONE

INTRODUCTION

Climate change is already increasing the risk of exposure to hunger, malnutrition and food insecurity among the poorest and most vulnerable people. Natural disasters are becoming more frequent and intense, land and water are becoming more scarce and difficult to access, and increases in agricultural productivity are becoming more difficult to achieve.¹

1.1 Description and context of the research

Climate change has been described as the defining human development issue of our generation.² It poses a direct threat to a wide range of universally recognized fundamental rights, such as the rights to life, food, adequate housing, health, and water.³ It further threatens to scatter all the efforts put in place for achieving the Millennium Development Goals⁴ meant to improve the living standards of millions who are living in extreme poverty.⁵ This is because; climate change is at the root of destruction and disruptions brought about by extreme weather events that include floods and droughts. In Kenya for instance, it is at the root of recent increased intensity and frequency of droughts and floods which affect the ability of many Kenyans to access food.⁶

It was not until 2005 that a small number of vulnerable states, indigenous groups and non-governmental organizations made a deliberate linkage between climate change and human rights.⁷ The Small Island states led by the Maldives appealed to the United Nations to consider the human rights implications of climate change.⁸ The Inuit on the other hand petitioned the Inter - America Commission on Human Rights,

¹ D Stevenson - Director, -Policy, Planning and Strategy Division, World Food Programme Foreword in M Parry, A Evans, MW Rosegrant and T Wheeler *Climate Change and Hunger Responding to the Challenge* (2009) 4.

² UNDP Human Development Report 2007/2008 Fighting Climate Change: Human Solidarity in a divided World 1 <http://hdr.undp.org/en/reports/global/hdr2007-2008/> (accessed 24 June 2010).

³ UN HRC, Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights A/HRC/10/61 15 January 2009. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/103/44/PDF/G0910344.pdf?OpenElement> (accessed 24 June 2010).

⁴ UNDP Human Development Report 2007/2008 1.

⁵ UNDP Human Development Report 2007/2008 v.

⁶ M Boko *et al* Africa. *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (2007) 433 at 436.

⁷ M Limon *Human Rights and Climate Change: Constructing A Case for Political Action+* (2009) 43 *Harvard Environmental Law Review* 439.

⁸ The Maldives Declaration on the Human Dimension of Global Climate Change 2007 www.ciel.org/Publications/Maldives_Declaration_Nov07.pdf (accessed 24 June 2010).

alleging that climate change was violating their human rights.⁹ In 2008, the United Nations Human Rights Council (HRC), expressed concern that climate change posed an immediate and far-reaching threat to people and communities worldwide having grave implications for the full enjoyment of human rights.¹⁰ In a report released on 15 January 2009, containing a comprehensive assessment of the complex and multifaceted inter-linkages between climate change, environmental degradation, and human rights,¹¹ the UN unequivocally noted that climate change-related impacts have a range of implications for the effective enjoyment of human rights, among them the right to adequate food.¹²

The right to food is firmly established in international law.¹³ It is inseparably linked to the inherent dignity of the human person and is indispensable for the fulfilment of other human rights enshrined in the International Bill of Human Rights. The essence of this right is to see to it that individuals do not suffer from hunger.¹⁴ Article 25 of the Universal Declaration of Human Rights (UDHR), together with article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁵ require states to ensure the right to adequate food. At the regional level, the African Commission has acknowledged the contention that the right to food is implicit in the African Charter on Human and Peoples' Rights (ACHPR), in such provisions as the right to life, the right to health and the right to economic, social and cultural development.¹⁶ The climate change regime is governed by the United Nations

⁹ Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States (Dec. 7, 2005), 70 <http://www.inuitcircumpolar.com/files/uploads/icc-files/finalpetitionicc.pdf> (accessed 24 June 2010).

¹⁰ United Nations Human Rights Council, Resolution 7/23 Human rights and climate change+ (28 March 2008) http://www2.ohchr.org/english/issues/climatechange/docs/Resolution_7_23.pdf (accessed 24 June 2010).

¹¹ Limon 2009 *Harvard Environmental Law Review* 439, 445. See also UN Report on Climate Change para 3.

¹² Including the right to life, the right to adequate food, the right to water, the right to health, the right to adequate housing, and the right to self-determination.

¹³ Article 25 Universal Declaration of Human Rights, Article 11 ICESCR, Articles 24(2) (c) and 27(3) CRC and Article 12(2) CEDAW.

¹⁴ CESCR General Comment 12 para 12.

¹⁵ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. Entered into force 3 January 1976, in accordance with Article 27.

¹⁶ *Social & Economic Rights Action Centre (SERAC) & another v Nigeria* (2001) AHRLR 60 (2001) 71, para 64-65.

Framework Convention on Climate Change (UNFCCC)¹⁷ and Kyoto protocol¹⁸ whose main aim is to avoid dangerous climate change and allow for adaptation and mitigation.¹⁹ Kenya has signed and ratified a number of international and regional human rights treaties.²⁰ Accordingly, Kenya is bound under articles 5 and 6 of the Constitution and international law²¹ to honour the provisions enshrined in the treaties it has ratified and in respect of the right to food to progressively realise it. However, not all the internationally acknowledged standards are fully incorporated into domestic law.²²

Moreover, the institutional and legislative framework²³ governing the right to adequate food in Kenya is incoherent given the duplicity in government ministries occasioned by the Government of National Unity formed after the 2007 disputed polls.²⁴ It is only recently that a right to food was included in article 43 (c) of the new Kenya Constitution.²⁵ The new Constitution also recognises international law including international human rights treaties already ratified as forming part of the national laws.²⁶ Moreover, judicial tribunals have not played a critical role in the enforcement of socio-economic rights in Kenya because of Kenya's past legal system being monist.²⁷ Courts of law have ruled on various occasions that international obligations not incorporated into municipal law have no legal force, implying that almost the entire corpus of ICESCR has no relevance in the State's

¹⁷ United Nations Framework Convention on Climate Change 1992.

¹⁸ Kyoto Protocol to the United Nations Framework Convention on Climate Change, 1998.

¹⁹ Article 2 of the UNFCCC contains the main objective of this Covenant.

²⁰ International Covenant on Economic, Social and Cultural Rights (ICESCR) ratified in 1976, Convention on the Rights of the Child (CRC) ratified in 1990, Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) ratified in 1984, United Nations Convention to Combat Desertification (UNCCD) ratified in 1997, and ACHPR among others later discussed in Chapter 3.

²¹ See Article 26 Vienna Convention on the Law of Treaties 1969.

²² Replies by the Government of Kenya to the list of issues (E/C.12/KEN/Q/1) to be taken up in connection with the consideration of initial report of Kenya (E/C.12/KEN/1) para 1 . para 6.

²³ A number of Acts and programmes exist that directly impact on this right. They include but are not limited to The National Produce More Food Campaign, The Agriculture Act (Cap 318), the Crop Production and Livestock Act (Cap 32) and the Price Control Act. See discussion in chapter 5.

²⁴ At least four ministries have a say in ensuring food security. These are the Ministries of Agriculture, Special Programmes, Office of the Prime Minister and Treasury.

²⁵ Section 43(c) read with s 20 of The Constitution of Kenya which was promulgated on the 27th August 2010.

²⁶ In terms of articles 5 and 6 of the Constitution of Kenya 2010.

²⁷ In terms of Section 3 of the Judicature Act cap 8 of 1967.

jurisprudence.²⁸ The task of interpreting and applying this provision is arguably going to be a challenging task for the Kenyan judiciary. The situation is exacerbated by poor environmental management policies by government institutions.²⁹

Apart from legislation and judicial approaches, several policy instruments have been developed in the recent past to deal with the effects of climate change which will have possible impacts on the right to adequate food in Kenya. For instance, the government engaged in a process of preparing a comprehensive and integrated National Food and Nutritional Policy (NFNP)³⁰ with the involvement of various stakeholders including the Food and Agriculture Organization (FAO). Despite the formulation of this draft policy, parliament is yet to enact it to pave way for its implementation.³¹ In addition, the *Kenya Vision 2030* is a long term plan to guide Kenya's development agenda up to 2030 and has been touted as having a number of priority areas that are of a great impact to the realisation of human rights including right to adequate food.³²

1.2 Problem Statement

As already discussed, the realisation of the right to adequate food in Kenya is hampered by institutional and legal constraints. Indeed, poor economic policies and a deficient legislative framework, together with the apparent lack of a creative judicial intervention have rendered the enjoyment of this right almost impossible. With climate change being superimposed on already existing constraints, the situation is likely to get worse. The question, therefore, is; how can the right to adequate food be

²⁸ See for instance *Okunda v Republic* [1970] EA 512, *Pattni & Another v Republic* [2001] Kenya Law Reports (KLR) 262. Although fundamental rights and freedoms have over the years acquired an international character, which can no longer be ignored by municipal law *Martha Karua v Radio Africa Ltd t/a Kiss FM Station 2006 eKLR*.

²⁹ *Charles Lekuyen Nabori & 9 others v Attorney General & 3 others* [2007] eKLR. See also R Grimble, C Cardoso and S Omar-Chowdhury, *Poor People and the Environment: Issues and Linkages* (2002) Policy Series 16, 6 . 8. <http://www.nri.org/publications/policyseries/PolicySeriesNo16.pdf> (accessed 24 June 2010)

³⁰ Republic of Kenya, *Food Security and Nutrition Strategy* v http://www.fao.org/righttofood/inaction/countrylist/Kenya/Kenya_FSNS_finaldraft.pdf (accessed 24 June 2010).

³¹ FIAN, *Kenya's Hunger Crisis - The Result of Right to Food Violations* (2010) 18 <http://www.fian.org/resources/documents/others/kenyas-hunger-crisis-the-result-of-right-to-food-violations/pdf> (accessed 24 June 2010).

³² Human Rights Council, Kenya, National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1, A/HRC/WG.6/8/KEN/1 Working Group on the Universal Periodic Review Eighth session Geneva, 3. 14 May 2010 Para 9 . 13. http://www.upr-info.org/IMG/pdf/A_HRC_WG_6_8_KEN_1.pdf (accessed 25 August 2010).

improved in Kenya in light of the debilitating effects of climate change? It has been suggested that a human rights based approach can help address the effects of climate change on the realisation of rights.³³ But perhaps more significantly, it provides an appropriate way in which to evaluate the effects of climate change on the realisation of the right to adequate food. This approach has the effect of not only ensuring that rights are respected but that whatever measures are designed to deal with the effects of climate change do not result in the further violation of human rights.³⁴ This approach presupposes that a legal framework for the protection of rights exists and that claims of rights violations can be adjudicated and enforced. In the Kenyan context, this is not the case. Although the new constitutional dispensation, which came into effect in August this year, guarantees this right, a lot more in terms of legislative reform and institutional reorganisation still needs to be done.

This research, consequently, will investigate the promise of a rights based approach in dealing with the effects of climate change on the realisation of the right to food in Kenya. It will outline the degree to which climate change is adversely affecting the enjoyment of human rights. In particular, the research will deal with the right to adequate food, and design a rights based approach to the problem. The research is based on two assumptions. Firstly, that the current climate change regime shares a core objective with the human rights regime: they both strive for, at different levels, to safeguard human dignity for present and future generations. In the climate change regime, states have common but differentiated responsibilities to implement their international commitments, including the duty to limit adverse climate change effects. Under human rights law, states ought to act according to their available resources to realise individuals' rights.³⁵ This sharing of core objectives can be explored with the

³³ Deputy High Commissioner for Human Rights, Office of the United Nations High Commissioner for Human Rights, Address at the Conference of the Parties to the UNFCCC and its Kyoto Protocol (Dec. 14, 2007)
<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=200&LangID=E>
(accessed 24 June 2010).

³⁴ Deputy High Commissioner for Human Rights, Office of the United Nations High Commissioner for Human Rights, Address at the Conference of the Parties to the UNFCCC and its Kyoto Protocol (Dec. 14, 2007).

³⁵ E Caesens and M Padilla Rodríguez, *Climate Change and the Right to Food; A Comprehensive Study* (2009) 15
http://www.boell.de/downloads/ecology/Series_Ecology_Volume_8_Climate_Change_and_the_Right_to_Food.pdf (accessed 24 June 2010).

aim of dealing with the realisation to the right to adequate food and addressing the effects of climate change as two mutually reinforcing concerns for Kenya. Secondly, food security is an explicit concern under climate change. Thus, in promoting the realisation of the right to food in light of the threat posed by climate change, a whole range of concerns, including those of a social and political nature, will be addressed.

1.3 Goals of the research

The goals of the research are to:

1. Examine the effects of climate change on the realisation of the right to adequate food in Kenya.
2. Establish ways in which a human rights-based approach can be used to address the effects of climate change.
3. To demonstrate how the Kenyan legal system and institutions that are crucial to the protection and promotion of rights and particularly the right to adequate food could be strengthened.
4. To suggest legislative reform necessary for the implementation of policy and the soft-law instruments necessary for the realisation of the right to adequate food in Kenya.

1.4 Research Methodology

This research will rely on a number of methodologies. Firstly, doctrinal legal research will be relied upon to analyse the current and relevant existing legal framework in Kenya. Doctrinal research asks what the law is on a particular issue. It is concerned with analysis of the legal doctrine and how it has been developed and applied.³⁶ As such, the Constitution, legislative texts and domestic courtsqjurisprudence shall be analysed to determine what Kenya's response has been to the problem under inquiry. In so far as the right to adequate food is concerned, the International Human Rights regime³⁷ shall be relied upon to highlight the normative content of this right and the various benchmarks that states are required to fulfil. This will also include

³⁶ Adilah Abd Razak, 'Understanding Legal Research+in Integration and Dissemination 19 . 24, 20 <http://econ.upm.edu.my/researchbulletin/artikel/Vol%204%20March%202009/19-24%20Adilah.pdf> (accessed 24 August 2010).

³⁷ Made up of the UDHR, ICCPR, ICESCR, CEDAW, CRC and the general comments by treaties subsidiary bodies.

the regional jurisprudence emanating from the African Charter on Human and Peoples' Rights (ACHPR).

A comparative approach will then be adopted to situate the Kenyan experience within the broader regional context. Thus, the extensive human rights jurisprudence from South Africa, which is based on a constitutional framework similar to the newly adopted Kenyan Constitution, will be relied upon. Such a comparative methodology will help illustrate the approach the judiciary can adopt in interpreting socio-economic rights in general.

This research will also rely on the work of the Intergovernmental Panel on Climate Change (IPCC) as it the most authoritative body on Climate change issues. To supplement these, secondary sources such as journal articles, studies by international human rights organizations and policy documents will also be relied upon in seeking to determine the effects of climate change on the realisation of the right to food. This is because the doctrinal methodology is not wide enough³⁸ to tackle the broad and social nature of climate change and the right to adequate food.

In conclusion, the overarching research methodology will be desktop research of relevant international, regional and national legal texts, journal articles, cases, policy documents and soft law all-available in hard copy and/or on the internet.

1.5 The Significance of the Study

Climate change is a great human development concern. It threatens to derail and impede efforts to raise the living standards of individuals the world over, especially their food security.³⁹ To this end, there has been increased interest in linking human rights to climate change in the recent past. Whereas this interest is a step in the right direction, it is submitted that, more studies with a particular focus on country situations need to be done. Current research points out to information on linkages based on the continental or sub-regional level with few to no studies specifically focusing on groups of individuals within a specific municipal jurisdiction.⁴⁰ With the path cleared by the OHCHR's report, the focus should now shift to domestic

³⁸ Anthony Bradney 'Law as a Parasitic Discipline' (1998) 25 *Journal of Law and Society* 71 at 76.

³⁹ Parry et al *Climate Change and Hunger Responding to the Challenge* 24.

⁴⁰ ICHRP *Climate Change and Human Rights: A Rough Guide* 2.

jurisdictions where more research on the link between climate change and human rights should be conducted.

The significance of this study becomes apparent when one considers the increasing frequency of droughts, floods and environmental degradation that are taking place in Kenya. With the effects of climate change the situation is bound to become worse. These events (floods, droughts and environmental degradation) will be superimposed on other factors such as economic instability and the increasing cost of living to make access to food a challenge for many.⁴¹ Kenya is greatly dependent on rain fed agriculture, which will be adversely affected by climate change.⁴² This study seeks to highlight climate change as a serious concern towards the Kenyan government's efforts to achieve food security. Any efforts to ensure food security cannot ignore the effects of climate change on food and the fact that food is a human right that should be respected, fulfilled, protected and observed accordingly. The new Kenyan Constitution contains a justiciable right to food together with the right to a healthy environment. States have been called upon to implement the right to food to address immediate challenges to the realisation of this right and as such there is need to evaluate how this can be done.⁴³ The right to food as enshrined in the Kenyan Constitution is also yet to be considered by the courts in general and in light of the effects of climate change and the government's response to it. This study will proffer some guidelines on how the courts can go about interpreting the right.

1.6 Structure of the research

The research is divided into six distinctive chapters. Chapter one serves as a general introduction to the thesis. The chapter sets out the context of the research and the focus of the thesis. Climate change is a complex scientific phenomenon and this research will aim to focus on the aspects of climate change that are relevant to

⁴¹ Climate change is but one of the many challenges that affect agriculture and food. Kenya will have to deal with economic and administrative issues affecting food security. See Parry et al *Climate Change and Hunger Responding to the Challenge* 24.

⁴² See WR Cline, *Global Warming and Agriculture: Impact Estimates By Country* (2007) discussing the effects of global warming on agricultural production in the world.

⁴³ CESCR, The World Food Crisis, 20 May 2008, E/C 12/2008/1 Para 10 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/420/56/PDF/G0842056.pdf?OpenElement> (accessed 24 June 2010).

human rights and more specifically, the right to adequate food in Kenya. It also sets out the goals of the research, together with the methodology applied in the study.

Chapter two will focus on the linkage between climate change and human rights. It will therefore begin with a brief description of climate change. Given the scientific nature of Climate change, great reliance will be made on the works of the Intergovernmental Panel on Climate Change (IPCC), which is considered the most authoritative body on the said topic. In addition to this, climate change will also be discussed from a human rights perspective in a bid to illustrate the relationship between climate change and human rights.

Chapter three will provide a detailed discussion on the content right to adequate food in the context of international human rights law climate change. This will entail an expansion of the traditional right to food as enshrined in International law to include the threat and effects of climate change. Having identified the content of this right, the chapter will then proceed to look at the national framework with regard to the right to adequate food in Kenya.

Chapter four will focus on two main aspects. Firstly, as much as climate change is a global concern, its effects on the enjoyment of human rights in general, and efforts to deal with it will be in national jurisdictions. The effects of climate change on food in Kenya will be addressed in this chapter. Secondly, it will focus on the adjudication of human rights by the Kenyan courts in the recent past and the likely direction such litigation will take with the coming into force of the new Kenyan Constitution. It will analyse the courts approach in dealing with socio-economic rights and how this will affect the interpretation of the right to food that is threatened by climate change.

Chapter five will build up on chapter four and discuss the national legal and policy framework dealing with food and its suitability in dealing with the right to food in the face of climate change.

The thesis will conclude in Chapter six with a summary of specific findings of the research. It will then proffer recommendations which can be applied to provide for

greater access to right to food and freedom from hunger while at the same time dealing with the effects of climate change on the population.

1.7 Limitations of the Study

The research was carried out from February 2010 to December 2011. As such, the time frame limited the proper evaluation of certain facts that would require more time. Additionally, the field of climate change is currently evolving and the time which the study was concluded would necessarily mean that some of the information is out of date. Bearing this in mind, all the information used in this research is up to date as at November 2011. The understanding of climate change and human rights worldwide should be seen as a work in progress. This it is hoped that other studies will develop this in future. This also holds true for the right to food in Kenya where a justiciable Bill of Rights is still being implemented and interpreted by the courts.

CHAPTER TWO

CLIMATE CHANGE AND HUMAN RIGHTS

Climate change, as successive reports of the Intergovernmental Panel on Climate Change ably documents, is a present and real phenomenon. There is a growing realization among policy makers, and indeed all segments of society, that the effects of climate change will make significant demands on all aspects of life.⁴⁴

2.1 Introduction

This chapter will examine the link between climate change and human rights with the aim of suggesting the need to deal with climate change as a human rights concern. The link between climate change and human rights is not clear-cut. Whereas climate change is a largely scientific and environmental affair, human rights law is a largely legal affair. The chapter will start with a brief examination of climate change in light of the Intergovernmental Panel on Climate Change (IPCC) main findings set out in its assessment reports. By examining the report of the IPCC chapter will seek to present scientific evidence that climate change is already happening and is significantly affecting human well-being with attendant harmful human rights implications.

After grappling with the scientific dimensions of climate change, the contribution of other disciplines, especially human rights that has been lacking until recently, will be explored. In effect, this part of the discussion will focus on linking climate change and human rights and the promise a human rights perspective will have in tackling the effects of climate change together with adaptation and mitigation measures put in place to address it. It will highlight the human rights impacted by the effects of climate change, and then proceed to illustrate the various ways in which the human rights movement can add value to the climate change debate.

At the end of this chapter, a critical understanding of the connection between climate change and human rights will be exemplified. The discussion will also highlight the contribution of human rights as a means by which the climate change phenomenon can be tackled.

⁴⁴ NA Robinson %Climate Disruption; Remaking the Agenda of MEAs in Asia and the World+in Koh, Kheng-Lian, Heng Lye Lin and Lin, Jolene (eds) *Crucial Issues in Climate Change and the Kyoto Protocol: Asia and the World* (2009)3.

2.2 The Science of Climate Change and its Human Impacts

Climate change is a complex biophysical process. The IPCC is the international body tasked with co-ordinating research on climate change. It was founded in 1988 by the World Meteorological Organization (WMO) and the United Nations Environment Programme (UNEP); with the chief aim of assessing the scientific, technical and socio-economic information relevant to understanding the scientific basis of human induced climate change; as well as its potential impacts and options for mitigation and adaptation.⁴⁵ It has published four comprehensive and analytical assessment reports since 1990 with the most recent one being the Fourth Assessment Report issued in 2007. It thus follows that the IPCC's assessments provide the most authoritative picture of the contemporary climate change science.⁴⁶

Developed and strengthened from its previous assessment reports, the IPCC Fourth Assessment Report is based on the contributions of three working groups focusing on: the physical science basis (Working Group I);⁴⁷ impacts, adaptation and vulnerability (Working Group II);⁴⁸ and mitigation of climate change (Working Group III).⁴⁹ There is also a Synthesis report⁵⁰ and a Summary for policy Makers. For purposes of this research, the above-mentioned findings will be relied upon to set the basis of understanding climate change. The working methods and background of the IPCC and its working groups will not be canvassed in this chapter as it is beyond the scope of this research. Suffice it to say though, that only the salient features of climate change that are of significance to the enjoyment of human rights will be briefly mentioned to provide us with a basis of linking the effects of climate change and the enjoyment of human rights.

⁴⁵ EA Page *Climate Change, Justice and Future Generations* (2006) 7.

⁴⁶ Page *Climate Change, Justice and Future Generations* 22.

⁴⁷ IPCC, *Climate Change 2007: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, S Solomon, D Qin, M Manning, (eds) *et al* (2007).

⁴⁸ IPCC *Climate Change 2007: Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* ML Parry, OF Canziani, JP Palutikof (eds) *et al*

⁴⁹ See IPCC, *Climate Change 2007: Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, 2007 B Metz, OR Davidson, PR Bosch, R Dave, LA Meyer (eds) *et al* (2007).

⁵⁰ *Climate Change 2007: Synthesis Report An Assessment of the Intergovernmental Panel on Climate Change* 1 http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf (accessed 3 August 2010).

Climate change has been defined by the IPCC as:⁵¹

ō any change in climate over time, whether due to natural variability or as a result of human activity. This usage differs from that in the United Nations Framework Convention on Climate Change, where climate change refers to a change of climate that is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and that is in addition to natural climate variability observed over comparable time periods.

The changing of the climate system is indisputable, as is now evident from observations of increases in global average air and ocean temperatures, widespread melting of snow and ice and rising global average sea level.⁵² Observational evidence from all continents and most oceans shows that many natural systems are being affected by regional climate changes, particularly temperature increases.⁵³ After an increase of 0.74°C during the last century, globally averaged surface temperature is projected to rise by between 1.1°C up to 6.4°C by the last decade of the 21st century.⁵⁴ Carbon dioxide is the most significant anthropogenic greenhouse gas.⁵⁵ The primary source of the increased atmospheric concentration of carbon dioxide since the pre-industrial period results from fossil fuel use, with land-use change providing another noteworthy but smaller contribution.⁵⁶ Additionally, changes in the atmospheric concentrations of Green House Gases (GHGs) and aerosols, land cover and solar radiation alter the energy balance of the climate system thus becoming drivers of climate change. Subsequently, they affect the absorption, scattering and emission of radiation within the atmosphere and at the earth's surface.⁵⁷

⁵¹ IPCC, Summary for Policymakers. In: *Climate Change 2007: The Physical Science Basis. Contribution of Working Group I 1*.

⁵² Climate Change 2007: Synthesis Report *An Assessment of the Intergovernmental Panel on Climate Change 1*. http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf (accessed 3 August 2010).

⁵³ IPCC, Summary for Policymakers. In: *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II 2*.

⁵⁴ IPCC, Summary for Policymakers. In: *Climate Change 2007: The Physical Science Basis. Contribution of Working Group I 13*.

⁵⁵ IPCC Summary for Policymakers *Climate Change 2007: The Physical Science Basis 1*.

⁵⁶ IPCC Summary for Policymakers *Climate Change 2007: The Physical Science Basis 2*.

⁵⁷ IPCC *Climate Change 2007: Synthesis Report An Assessment of the Intergovernmental Panel on Climate Change 37*.

For brevity's sake, the main observed and projected changes in weather pattern related to global warming because of climate change are:

- a) Contraction of snow-covered areas and shrinking of sea ice;
- b) Sea level rise and higher water temperatures;
- c) Increased frequency of hot extremes and heat waves;
- d) Heavy precipitation events and increase in areas affected by drought; and
- e) Increased intensity of tropical cyclones (also known as typhoons and hurricanes).

The IPCC further outlines a range of adaptation and mitigation measures that would modify human practices to better fit in with climate changes when they occur. Adaptive capacity across the sectors is crucial since GHGs will not stabilise for many decades even if mitigation measures are pursued aggressively.⁵⁸ Past emissions are at the root of the current effects of climate change evident across the globe.⁵⁹ Furthermore, the IPCC observes that climate change will impact on; freshwater resources and their management, ecosystems; food, fibre and forest products, coastal systems and low-lying areas, industry, settlement and society; and health.⁶⁰ Most importantly, some of the areas observed as likely to be impacted by climate change are of relevance to agricultural productivity and human health with subsequent effects on the realisation of the right to food.⁶¹

In Africa, climate change is predicted to have a number of impacts on people. For instance, more people will be exposed to water stress. Furthermore, agricultural production, including access to food, in many African countries and regions is highly likely to be reduced by climate variability and change. The area suitable for agriculture, the length of growing seasons and yield potential, particularly along the margins of semi-arid and arid areas, are expected to decrease. This would further adversely affect food security and exacerbate malnutrition in the continent.⁶² Most disconcerting about the effects of climate change is the fact that they are going to be

⁵⁸ Page *Climate Change, Justice and Future Generations* 28.

⁵⁹ IPCC *Climate Change 2007: Impacts, Adaptation and Vulnerability* 18.

⁶⁰ IPCC *Climate Change 2007 Synthesis Report* 48-53.

⁶¹ IPCC *Climate Change 2007: Impacts, Adaptation and Vulnerability* in Chapters 3 (Fresh waters resources and their management), Chapter 4 (Ecosystems) and Chapter 5 (Food, Fibre and Forest Products).

⁶² IPCC *Climate Change 2007: Impacts, Adaptation and Vulnerability Working Group II* 13.

added on already existing and devastating climate shocks such as droughts, floods and storms, which affect the poor most. Increased droughts might lead to increased desertification, which would have far-reaching implications on the eco-system leading to a strain on the livelihoods of most people.

2.3 The Environment and Human Rights

Before commencing on a discussion of the environment, climate change and human rights it is necessary to clarify some definitional parameters concerning the term human rights and what it entails in this research. In this research, the term human rights refers to the core set of rights proclaimed under international law and enjoyed by all individuals, regardless of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status in terms of common article 2 of the 1966 International Covenant on Civil and Political Rights (ICCPR)⁶³ and ICESCR. These rights are contained in two primary texts; the 1966 International Covenant on Civil and Political Rights (ICCPR) and ICESCR, both of which derive from the 1948 UDHR. The two Covenants are legally binding on all states that have ratified them . the vast majority of the world's countries . and are supplemented by further binding treaties that protect the rights of children, migrant workers, and people with disabilities, and that prohibit torture as well as racial and gender discrimination.⁶⁴ Regional human rights treaties also exist within Africa, the Americas and Europe. All these texts are expounded by the case law of international, regional and national courts, by a body of soft law and by the doctrinal analyses of international lawyers and scholars. Thus, when reference is made to human rights in this chapter and subsequent parts of this work, these human rights will be concerned. Additionally, the terms human rights perspective and human rights approach will also be used interchangeably in this research.

As it is challenging to link climate change and human rights directly, the approach taken by the UN and adopted in this research is to link the two phenomena through the environment. Efforts to link human rights and the environment can be traced

⁶³ Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966. Entered into force 23 March 1976 in accordance with Article 49.

⁶⁴ United Nations Treaty Collection, Ratifications and reservations Status by Treaty <http://www.unhcr.ch/tbs/doc.nsf/Statusrset?OpenFrameSet> (accessed 20 October 2010).

back to the 1972 Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) which reflects a general recognition of the interdependence and interrelatedness of human rights and the environment. Principle 1 of the Stockholm Declaration states that, "there is a fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being."⁶⁵ This very principle has been crucial in establishing a foundation for linking human rights and environmental protection that would ordinarily not be linked.⁶⁶ Additionally, the United Nations through its human rights treaty bodies⁶⁷ and regional tribunals⁶⁸ recognises the intrinsic link between the environment and the realization of a range of human rights, such as the right to life, to health, to food, to water, and to housing. It is now trite and in line with the progressive development of international law that the environment is a *conditio sine qua non* for the enjoyment of a broad range of human rights.⁶⁹ Environmental protection is a necessary precondition for the enjoyment of human rights and is therefore central towards the fulfilment and realisation of human rights.⁷⁰ In his Millennium Report in 2000, Koffi Annan emphasised the need for sustainable environmental use in order to achieve the Millennium Development Goals in the face of global warming and climate change.⁷¹

⁶⁵ Declaration of the United Nations Conference on the Human Environment 1972 <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=97&articleid=1503> (accessed 20 August 2010).

⁶⁶ D Shelton, Human Rights and Environment Issues in Multilateral Treaties adopted between 1991 and 2001 Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment 14-16 January 2002, Geneva: Background Paper No. 1 <http://www2.ohchr.org/english/issues/environment/envIRON/bp1.htm> (accessed 5 August 2010).

⁶⁷ UN Human Rights Committee, UN Committee on Economic, Social and Cultural Rights, Committee on the Elimination of Discrimination against Women and Committee on the Rights of the Child.

⁶⁸ The Inter-American Court of Human Rights and Inter-American Commission on Human Rights extends throughout the Americas; the European Court of Human Rights has jurisdiction over complaints against all 47 Council of Europe Member States; and the African Commission on Human and Peoples Rights and the African Court on Human and Peoples Rights.

⁶⁹ See the separate judgement of Judge Weeramantry in *Gabcikovo-Nagymaros (Hungary v Slovakia)* 1997 ICJ 91 . 92 <http://www.icj-cij.org/docket/files/92/7375.pdf> (accessed 20 October 2010).

⁷⁰ Arts *Climate Change and Sustainable Development* 87.

⁷¹ KA Annan *We the People's: The Role of the UN in the 21st Century* Report of the Secretary-General at The Millennium Assembly of the United Nations A/54/2000 Para 254 . 273. <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan000923.pdf> (accessed 4 August 2010).

2.4 Climate Change and Human rights

From the outset, climate change seems to be an environmental problem⁷² that is not simple to depict in legal terms.⁷³ This has had the consequence of making the causal link between climate change and human rights not readily apparent.⁷⁴ Because of this, in responding to climate change, governments have traditionally approached it as an ecological and economic problem.⁷⁵ Regrettably, despite its catastrophic effects, the social and human rights implications of climate change were given little or no attention since it had been greatly understood as a scientific, environmental and economic concern.⁷⁶ These implications have led to some authors describing climate change as a profound moral crisis for the 21st century. The issue of morality becomes clear when the effects, both present and future, of climate change across the globe are considered.⁷⁷ With the help of scientific evidence, it has now been noted beyond any doubt, that it is already having negative impacts and is likely to have calamitous consequences on millions of people in the world.⁷⁸ Indeed, it is already undermining the realisation of a broad range of internationally protected human rights. Most disconcerting is the fact that, individuals and groups whose rights protections are already precarious including women, children and the poor members in society are the ones feeling the worst effects of climate change, yet they are the

⁷² The Copenhagen Accord of 18 December 2009 identified Climate change as one of the greatest challenges of our time.+See UNFCCC, The Copenhagen Accord of CP 15 18 December 2009 para 1 <http://unfccc.int/resource/docs/2009/cop15/eng/l07.pdf> (accessed 11 October 2010).

⁷³ SC Aminzadeh Moral Imperative: The Human Rights Implications of Climate Change+(2006 . 2007) 30 *Hastings International and Comparative Law Review* 231 at 233.

⁷⁴ Aminzadeh 2006-2007 *Hastings International and Comparative Law Review* 241.

⁷⁵ Human Rights and Equal Opportunity Commission (HREOC) Background Paper Human Rights and Climate Change (2008) 1.

⁷⁶ Aminzadeh 2006 -2007 *Hastings International and Comparative Law Journal* 257 - 258. See also K Arts Child Rights Perspective on Climate Change+in M.A Mohammed Salih (ed) *Climate Change and Sustainable Development: New Challenges for Poverty Reduction* (2009) 79. S Caney, Human Rights, Climate Change and Discounting+in K O'Brien (eds) *et al Climate Change, Ethics and Human Security* 116. For instance, the Stern Review looks at the economic impacts of climate change. See Sir Nicholas Stern, *The Economics of Climate Change: the Stern Review* (2007).

⁷⁷ Arts, *Climate Change and Sustainable Development* 79. See also S Caney, Climate Change, Human Rights and Moral Thresholds+in S Humphreys (ed) *Human Rights and Climate Change* 69. S Caney Cosmopolitan Justice, Responsibility, and Global Climate Change+(2005) 18 *Leiden Journal of International Law* 747. 775.

⁷⁸ Climate Change and Human Rights+, Address by Ms. K Kang Deputy High Commissioner for Human Rights, Office of the United Nations High Commissioner for Human Rights Conference of the Parties to the United Nations Framework Convention on Climate Change and its Kyoto Protocol 3-14 December 2007 Bali, Indonesia <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=200&LangID=E> (accessed 11 October 2010).

ones who have least contributed to climate change.⁷⁹ Additionally, the most dramatic impacts of climate change are not only expected to occur but are already being experienced in the world's poorest countries, where coincidentally, rights protections too are often weak.⁸⁰

Despite the human impacts of climate change, there has been a conspicuous absence of efforts to understand some of the impacts of this phenomenon in terms of human rights until recently. The absence of human rights in addressing climate change has been attributed to its scientific nature, which is the fact that climate change has long been understood in scientific terms. The reason for this has been that the study of climate change began among meteorologists, and then became firmly entrenched in the physical sciences. This has resulted in what has been referred to as "path exclusivity."⁸¹ The quest to understand climate change has only recently, steadily reached into the social sciences with several attempts to look at it as a concern affecting other disciplines.⁸² The scientific approach has not been without criticisms. It has been described as "a kind of line graph stretching into the future with abstract measurements based on parts per million, degrees centigrade or centimetres."⁸³ Unfortunately, there has been a glaring failure by the international community to take advantage of the scientific consensus to deal with climate change as a human concern.

⁷⁹ N Roht-Arriaza, "Human rights in the climate change regime" (2010) 1 *Journal of Human Rights and the Environment* 211.

⁸⁰ ICHRP *Climate Change and Human Rights: A Rough Guide* (2008) 1. See also World Bank, *World Development Report 2010: Development and Climate Change* (2010) 42 (accessed 10 October 2010).

⁸¹ M Limon, "Human Rights and Climate Change: Constructing a Case for Political Action" (2007) 33 *Harvard Environmental Law Review* 439 at 459. See also ICHRP *Climate Change and Human Rights* 3, which has referred to this as "path dependency" given the make-up of the IPCC as a body of scientists with no human rights experts.

⁸² ICHRP *Climate Change and Human Rights: A Rough Guide* 3. So far, Climate Change has been tackled by as a scientific, environmental, security, energy and political issue. See C Hepburn and N Stern "A new global deal on climate change" (2008) 24 *Oxford Review of Economic Policy* 259 at 260. R Mearns & A Norton, "Equity and Vulnerability in a Warming World: Introduction and Overview" in R Mearns & A Norton (eds), *The Social Dimensions of Climate Change: Equity and Vulnerability in a Warming World* (2010) 1 . 2.

⁸³ Statement by his Excellency Mr. Maumoon Abdul Gayoom President of the Republic of Maldives at the Panel Debate on "Climate Justice in a Shared Global Ecosphere" at the Annual Meeting 2008 of the Global Humanitarian Forum: The Human Face of Climate Change Tuesday, 24 June 2008
Hotel Intercontinental, Geneva 3
http://www.maldivesmission.ch/fileadmin/Pdf/Environment/HEP_Speech_to_GHF_final.pdf
(accessed 5 August 2010).

The very complex and global nature of climate science has been attributed as the main difficulty in efforts to characterise the effects of climate change in legal terms.⁸⁴ However, some commentators have sought out means that can connect the physical manifestations of climate change with peoples entitlements to certain rights and freedoms and the responsibilities of states, including to persons residing outside their jurisdictions in light of the resistance of many states to the very notion of extra-territorial obligation.⁸⁵ With the notion of sovereignty, many states are only ready to take responsibility for the effects of climate change that takes place within their territory.⁸⁶ Notwithstanding this willingness, this too has been plagued with difficulties as demonstrated by climate change related litigation in the USA.⁸⁷ This is further compounded by the different approaches taken by states when addressing climate change. For instance, most African States have little to no capacity to deal with the effects of climate change. On the other extreme, there has been a failure to reduce carbon emissions by Annex 1⁸⁸ countries.⁸⁹ Furthermore, legal action arising from climate change and its effects raise multifaceted causation and legal redressability issues because of the many single polluters across the world that produce only marginal quantities of GHGs, which all contribute to climate change and its deleterious effects. As a result, any judicial remedy is likely to have any impact on solving the global problem, as ideally all these polluters should be held liable for their contribution to the harmful human impacts of climate change.⁹⁰

The first direct linkage of climate change and human rights before a judicial body occurred in December 7, 2005. The Inuit, with the assistance of the Inuit Circumpolar Council (ICC), petitioned the Inter-American Commission on Human Rights (IACHR) alleging that a number of their human rights had been infringed by the failure of the

⁸⁴ Aminzadeh 2006 . 2007 *Hastings International and Comparative Law Review* 233.

⁸⁵ S McInerney-Lankford Climate Change and Human Rights: An Introduction to Legal Issues+ (2007) 33 *Harvard Environmental Law Review* 433.

⁸⁶ See S Adelman, Rethinking Human Rights: the impact of climate change on the dominant discourse+in S Humphreys (ed) *Climate Change and Human Rights* (2010) 166 . 167 discussing the central role played by the notion of sovereignty on dealing with climate change.

⁸⁷ See HM Osofsky The Intersection of Scale, Science, and Law in *Massachusetts v. EPA in W Burns and HM Osofsky (eds) Adjudicating Climate Change: State, National, and International Approaches* 129 . 144.

⁸⁸ Identified in the UNFCCC as industrialised countries and economies in transition.

⁸⁹ See W Burns and HM. Osofsky (eds) *Adjudicating Climate Change: State, National and International Approaches* (2009) 10 . 19 discussing the debate the response of the USA and EU in adhering to the UNFCCC and Kyoto Protocol.

⁹⁰ Aminzadeh 2006 . 2007 *Hastings International and Comparative Law Review* 233.

United States of America to curb its greenhouse gas emissions.⁹¹ The Inuits contended that the effects of global warming constituted violations of Inuit human rights for which the United States is responsible under international law.⁹² The petition highlighted the fact that climate change was indeed affecting the enjoyment of human rights and that the existing human rights framework could be used to seek redress for the effects of climate change on those most vulnerable.⁹³ Despite the unfavourable ruling by the Inter- American Commission on Human Rights, this suit marked the beginning of attempts by communities most affected by climate change to call for others means of addressing the challenge posed by climate change. On the African front, a community in Nigeria approached the court seeking an order to stop the act of gas flaring which it argued affected their environment and to a small extent contributed to climate change.⁹⁴ The significance of these two cases is that they have demonstrated the ability to shape climate change effects into legally defensible causes of action where courts can make a determination on and hold those responsible for harmful practices that contribute to climate change accountable. They thus set the tone for further judicial claims based on the effects of climate change before regional and domestic courts.

The Maldives and other Small Island States have spearheaded at state level, the quest to have climate change considered a human rights concern.⁹⁵ The Maldives, a small Island State threatened by inundation due to the effects of climate change, led the way in calling for the United Nations to look at climate change as a human rights concern. Through the Maleq Declaration on the Human Dimension of Global Climate

⁹¹ Limon 2007 *Harvard Environmental Law Review* 441. See M Wagner and D Goldberg, *An Inuit Petition to the Inter – American Commission on Human Rights for Dangerous Impacts of Climate Change* http://www.ciel.org/Publications/COP10_Handout_EJCIEL.pdf (accessed 11 October 2010). Aminzadeh 2006-2007 *Hastings International and Comparative Law Journal* 239.

⁹² Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States (Dec. 7, 2005), 5 - 7 <http://www.inuitcircumpolar.com/files/uploads/icc-files/finalpetitionicc.pdf> (accessed 11 October 2010).

⁹³ Aminzadeh 2006-2007 *Hastings International and Comparative Law Review* 241. See also *Rights Focus Sought over Climate*, B.B.C. NEWS, Dec. 11, 2006, <http://news.bbc.co.uk/2/hi/europe/6166835.stm> (accessed November 2009).

⁹⁴ See *Gbemre v Shell Petroleum Development Corporation Nigeria Limited* 2005 AHRLR 151 (NgHC).

⁹⁵ M Limon, *Human Rights Obligations and Accountability in the Face of Climate Change* (2010) 38 *Georgia Journal of International and Comparative Law* 543 a546.

Change⁹⁶, a number of Small Island States gravely noted their concern over the effects of climate change on human rights. They were concerned that, climate change has clear and immediate implications for the full enjoyment of human rights.⁹⁷ It is with this concern that they sought the cooperation of the Office of the United Nations High Commissioner for Human Rights (OHCHR) and the United Nations Human Rights Council in assessing the human rights implications of climate change in terms of article 7.2(l) of the UNFCCC. Prior to this declaration, it is only the work of the UNDP through its Human Development Report 2007 that a large-scale attempt had been made to elaborate the human impacts of climate change.⁹⁸

These concerns were raised at the 13th Conference of Parties to the UNFCCC (COP13) in Bali. The situation changed with more individuals and organisations starting to call for the use of a human rights framework to address the effects of climate change. At the same conference, the Deputy United Nations High Commissioner for Human Rights Kyung-wha Kang fittingly noted, any strategy to deal with climate change, whether in terms of adaptation or mitigation, must incorporate the consequences for humans, as individuals and communities, and the human rights framework is the most effective way to do so.⁹⁹ Subsequently, the UN adopted its first resolution on Human Rights and Climate Change in March 2008.¹⁰⁰ This resolution was important as it explicitly acknowledged the threat posed by climate change on human populations and its implications in relation to the full enjoyment of a range of human rights.¹⁰¹

⁹⁶ Maleq Declaration on the Human Dimension of Global Climate Change, adopted November 14, 2007 http://www.ciel.org/Publications/Male_Declaration_Nov07.pdf (accessed 3 August 2010).

⁹⁷ Maleq Declaration on the Human Dimension of Global Climate Change 2. See also JH Knox Linking Human Rights and Climate Change at the United Nations+ (2009) 33 *Harvard Environmental Law Review* 477 at 481-484 discussing Maldives role in linking climate change and human rights.

⁹⁸ Limon 2007 *Harvard Environmental Law Review* 443 . 444; Knox 2007 *Harvard Environmental Law Review* 482 - 484 for a detailed account of the process leading up to the study conducted by the UNHRC. M Limon A Rights Informed Approach to Tackling Climate Change+ *MEA Bulletin* November 21, 2008 <http://www.iisd.ca/mea-l/guestarticle58.html> (accessed 10 October 2010).

⁹⁹ Kyung-wha Kang, the UN Deputy High Commissioner for Human Rights (n 26 above).

¹⁰⁰ United Nations Human Rights Council (UNHRC) Resolution 7/23, U.N. Doc. A/HRC/7/78 (March 28, 2008) http://www2.ohchr.org/english/issues/climatechange/docs/Resolution_7_23.pdf (accessed 11 October 2010).

¹⁰¹ Limon 2007 *Harvard Environmental Law Review* 444.

The works of international non-governmental organisations (NGOs) and academic commentators¹⁰² in linking climate change and human rights is particularly worth mentioning as it provides a glimpse at the various ways the human rights framework can contribute to the climate change debate. Most of these organizations conducted their work parallel to the efforts of the UN to draw a relationship between climate change and human rights.¹⁰³ These actors have done extensive work in drawing the link between climate change and human rights as it affects their areas of practice. Such actors whose work has been greatly instrumental in this nascent bid to link climate change and human rights include the International Council on Human Rights Policy (ICHRP) which is considered as the unofficial human rights think tank, Global Humanitarian Forum,¹⁰⁴ Human Rights and Equal Opportunity Commission of Australia,¹⁰⁵ and Oxfam International¹⁰⁶ to mention but a few. The result has been that their work has greatly helped advance the conceptual understanding and legal underpinnings of this intricate linkage between climate change and human rights.¹⁰⁷

By way of summary, these works have identified the rights impacted by climate change and suggested other ways in which this phenomenon can be dealt with. Most importantly, they have brought into focus the human impacts of climate change with human rights implications that had hitherto largely been left untouched. It is thus submitted that this non-scientific focus has opened the door for several human rights actors to consider climate change as a real human rights concern worth looking into. Furthermore, these works have also managed to illustrate the legal and human rights underpinnings of climate change as an additional element to the scientific and technical nature attributed to it. This is advantageous as knowledge from a range of disciplines is vital for analysis, process, instrument design, operational and policy

¹⁰² For ease of reference, these will be referred to as actors hereinafter.

¹⁰³ Limon 2007 *Harvard Environmental Law Review* 443.

¹⁰⁴ See Global Humanitarian Forum Geneva, Forum 2008: *The Human Face of Climate Change* (2008) http://www.preventionweb.net/files/9668_humanimpactreport1.pdf (accessed 11 October 2010).

¹⁰⁵ Human Rights and Equal Opportunity Commission Human Rights and Climate Change (2008) http://www.humanrights.gov.au/word/about/media/papers/hrandclimate_change.doc (accessed 4 August 2010).

¹⁰⁶ See Oxfam International, *Climate Wrongs and Human Rights: Putting People at the Heart of Climate-Change Policy* (2008) <http://www.oxfam.org/sites/www.oxfam.org/files/bp117-climate-wrongs-and-human-rights-0809.pdf> (accessed 4 August 2010).

¹⁰⁷ See S McInerney-Lankford "Climate Change and Human Rights: An Introduction to Legal Issues" (2007) 33 *Harvard Environmental Law Review* 432, commenting on how such works have brought a sharp focus on the link between human rights and climate change.

implementation, and ultimately substantive outcomes.¹⁰⁸ On the African continent, the African Commission passed a resolution in 2009 on climate change and human rights and the need to study it but until now, no concrete study has come from it.¹⁰⁹ Nevertheless, this was an important step in acknowledging that climate change would have implications for the enjoyment of human rights on the African continent.

2.4.1 Concerns over the silence and contribution of Human Rights to the Climate Change Debate

A number of reasons have been put forward for the silence and at times even absence of human rights in the climate change debate. At the forefront of these reasons is the very fact that climate change has majorly been construed as a scientific issue. Consequently, quantifying it as a human rights problem is fraught with many complications lucidly captured as follows by the OHCHR in its report:¹¹⁰

While climate change has obvious implications for the enjoyment of human rights, it is less obvious whether, and to what extent, such effects can be qualified as human rights violations in a strict legal sense. Qualifying the effects of climate change as human rights violations poses a series of difficulties. First, it is virtually impossible to disentangle the complex causal relationships linking historical greenhouse gas emissions of a particular country with a specific climate change-related effect.... Second, global warming is often one of several contributing factors to climate change-related effects, such as hurricanes, environmental degradation and water stress. . . . Third, adverse effects of global warming are often projections about future impacts, whereas human rights violations are normally established after the harm has occurred.

The concerns highlighted above have been due to a number of reasons. Firstly, the rights at issue are difficult to enforce, as most of the rights affected by climate change - as will later on be illustrated in this chapter - are economic, social and cultural rights. These rights are widely known to have notoriously weak enforcement mechanisms under international law.¹¹¹ Even in domestic jurisdictions, they are treated differently depending on how they are provided for within the legal system.¹¹²

¹⁰⁸ E Cameron, 'Human Rights and Climate Change: Moving from an Intrinsic to an Instrumental Approach' (2010) 38 *Georgia Journal of International and Comparative Law* 673 at 677.

¹⁰⁹ Resolution on Climate Change and Human Rights and the Need to Study its Impact in Africa ACHPR/Res153 (Xlvi) 09. http://www.achpr.org/english/resolutions/resolution153_en.htm (accessed 4 August 2010).

¹¹⁰ UN Report on Climate Change para 70.

¹¹¹ ICHRP *Human Rights and Climate Change: A Rough Guide* 4.

¹¹² Some jurisdictions provide for these rights in their constitutions whereas others provide for them as

In addition to enforcement concerns, economic, social and cultural rights require progressive realisation. This programmatic realisation of the rights has been increasingly used as an explanation for the slow implementation of measures to realize them. Secondly, the origins of climate change straddle different jurisdictions and this becomes a problem in determining responsibility. Governments are the ones with the primary responsibility for human rights and even the impacts of climate change. Extraterritoriality is a fraught area of international human rights law. Nevertheless, it has recently been recognised that human rights of individuals, groups and peoples are affected by and dependent on the extraterritorial acts and omissions of States.¹¹³ In such a scenario it is virtually impossible to disentangle the complex causal relationships+especially when one tries to link the emissions of a particular country to a specific effect.¹¹⁴

The complexity of the matter is amplified by the fact that both climate change and human rights are governed by two separate international regimes that have different origins.¹¹⁵ The UNFCCC together with the Kyoto Protocol govern the climate change regime whereas the International Bill of Human Rights (ICESCR and ICCPR) govern the international human rights regime. Furthermore, Humphreys is of the opinion that until recently there has been a mutual disregard between human rights on the one hand and climate change on the other yet the two disciplines deal with issues of justice, albeit from different viewpoints.¹¹⁶ This, however, should not be a concern given the fact that, despite their differences the two international legal frameworks share certain similar principles that can be exploited to promote the realisation of human rights in the face of climate change.¹¹⁷ In fact, the current climate change regime shares a core objective with the human rights regime: both strive for at different levels, to safeguard human dignity for present and future generations. In the climate change regime, states have common but differentiated responsibilities to

directive principles. In others, they are entirely omitted.

¹¹³ ICHRP *Human Rights and Climate Change: A Rough Guide* 4. See also Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights 2011, preamble.

¹¹⁴ Knox 2007 *Harvard Environmental Law Review* 488 . 490. See also UN Report on Climate Change para 70.

¹¹⁵ McInerney . Lankford 2007 *Harvard Environmental Law Review* 434.

¹¹⁶ S Humphreys, 'Competing claims: Human Rights and Climate Harms'+37 - 38 in S Humphreys (ed) (2010) *Human Rights and Climate Change*.

¹¹⁷ McInerney . Lankford 2007 *Harvard Environmental Law Review* 435.

implement their international commitments, including the duty to limit adverse climate change effects. Under human rights law, states ought to act according to their available resources to realize individuals' rights, and they should hold answerable those most responsible for human rights violations.¹¹⁸ What this means and what has come to be the accepted position in international law is that treaties signed ought to be interpreted in such a manner that they are compatible.¹¹⁹

Thirdly, there is great concern about the accountability of governments for the fulfilment of social, economic and cultural rights within their jurisdictions, even without factoring in the challenges posed by climate change. Arguably, with climate change added to the challenges states have to deal with, it is going to be increasingly difficult to establish local accountability of the states and private actors contributing to GHG emissions that might have negative implications for human rights.¹²⁰ Another concern is the fact most of the climate change impacts will be catastrophic, prompting governments to handle them as emergencies. Emergencies at times call for the suspension of normal human rights conditions and in some instances, these situations might even limit the application of human rights.¹²¹ Furthermore, there is great concern about the functional issues of human rights practice such as research and methodology, advocacy and campaigning. The concern here is that human rights practitioners are already overstretched and the addition of climate change, a complex scientific phenomenon, as an issue to deal with will make it difficult for them to carry out their work.¹²² Lastly, rights to be protected might conflict in light of the effects of climate change. The argument put forward is that the adversarial nature of human rights might hinder progressive application of opposing rights claimed by individuals. By extension, this is likely to burden the courts with the task of deciding which set of rights are to be protected more than others are.¹²³

¹¹⁸ *Climate Change and the Right to Food; A Comprehensive Study* 15.

¹¹⁹ International legal commitments relating to climate change, human rights and other relevant regimes should be interpreted, as far as possible, to give rise to compatible obligations. See S McInerney-Lankford, M Darrow, and L Rajamani, *Human Rights and Climate Change* (2011) 21.

¹²⁰ ICHRP *Human Rights and Climate Change: A Rough Guide* 4 -5.

¹²¹ ICHRP *Human Rights and Climate Change: A Rough Guide* 5.

¹²² R Dudai, 'Climate Change and Human Rights Practice' (2009) 1-2 *Journal of Human Rights Practice* 296. OW Pedersen 2010 *Journal of Human Rights and the Environment* 250.

¹²³ ICHRP *Human Rights and Climate Change: A Rough Guide* 5.

Whereas the above misgivings as to the contribution of human rights to the climate change debate are legitimate, they rely extensively on a legalist interpretation of the law.¹²⁴ This is the view that any attempt to look at climate change as a human rights law concern should be strictly steeped in law. This over reliance on the black . letter interpretation and application of human rights to climate change is not progressive given that it is only until recently that an authoritative linkage has been made between climate change and human rights. Instead, the view that human rights can be articulated in registers other than law¹²⁵ is one that should be embraced if human rights are to play a role in dealing with climate change. It is the contention of this research that there is need for a less legalist approach in the application of human rights in addressing the effects of climate change. Human rights can greatly contribute towards efforts to deal with climate change.¹²⁶ It is indefensible to cite political, ideological and economic circumstances as justification for the restricted view that climate change is not a human rights issue and that the human rights movement cannot add anything positive to the current debate and measures to deal with its effects. Human rights are dynamic in nature. They are capable of evolving over time in order to adapt to new circumstances and strengthen the protection of individuals.¹²⁷ It is evident that in most instances, responses to climate change will involve human choices that will in turn influence the response to climate change and its effects. In such situations, a human rights approach to climate change policies holds the promise of putting people first and takes into account human vulnerabilities in the design of climate change programs. This is the position taken by the OHCHR in reiterating that, addressing that harm remains a critical human rights concern and obligation under international law.+ Hence, legal protection remains relevant as a safeguard against climate change related risks and infringements of human rights resulting from policies and measures taken at the national level to address climate change.+¹²⁸

¹²⁴ ICHRP *Human Rights and Climate Change: A Rough Guide* 6.

¹²⁵ ICHRP *Human Rights and Climate Change: A Rough Guide* 6.

¹²⁶ ICHRP *Human Rights and Climate Change: A Rough Guide* 6.

¹²⁷ MM Sepúlveda Carmona *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (2003) 13.

¹²⁸ UN Report on Climate Change para 96.

2.4.2 Rights implicated by climate change.

Having dealt with the misgivings of the human rights discourse contribution to the climate change debate, the focus shifts to the rights implicated by the effects of climate change. The most important and perhaps authoritative link between climate change and human rights has come from the United Nations Human Rights Council (HRC). In its Resolution 7/23 on Human Rights and Climate change, the HRC explicitly recognized that climate change has implications for the full enjoyment of human rights.¹²⁹ The resolution further called for a detailed study on the relationship between climate change and human rights. The ensuing report was presented to the Conference of Parties to the UNFCCC ahead of the Fifteenth Conference of the Parties to the United Nations Framework Convention on Climate Change (COP15) in Copenhagen, to inform their negotiations.¹³⁰ Pursuant to this resolution, the Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights was released on the 15 January 2009.¹³¹ In making its observations on the relationship between climate change and human rights the report seeks to link climate change and the enjoyment of human rights using the environment.

The importance of the report cannot be over emphasised. It has the potential of influencing widespread consideration of the human rights implications of climate change by States and other human rights bodies.¹³² A read through the report gives definitive answers to questions such as whether climate change does indeed affect the enjoyment of human rights and whether human rights obligations make it imperative for States to address the challenges raised by climate change. As conveniently observed by Knox, commenting on the UN report; 'it answers' two key questions: (1) whether climate change violates human rights law; and (2) whether states have obligations under human rights law to address climate change.¹³³ It thus

¹²⁹ UNHRC Resolution 7/23, U.N. Doc. A/HRC/7/78 (March 28, 2008) preamble paragraph 1.

¹³⁰ UNHRC Resolution 7/23 paras 1 . 3. COP 15 was held in December 2009.

¹³¹ United Nations Human Rights Council, Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights A/HRC/10/61 (hereinafter UN Report on Climate Change).

¹³² Knox 2007 *Harvard Environmental Law Review* 477. See also Dudai 2009 *Journal of Human Rights Practice* 296.

¹³³ Knox 2007 *Harvard Environmental Law Review* 478. See also Limon 2010 *Georgia Journal of International and Comparative Law* 545.

marks a clear and authoritative connection between human rights and climate change while at the same time setting the stage for consideration of the human rights implications in future climate change related negotiations and response measures.

Based on the works of the IPCC, it is evident that climate change affects the environment, which is in turn necessary for the enjoyment of human rights. Such effects include sea level rise, the hydrological cycle is expected to intensify, which essentially means more droughts and floods; generation-old patterns of rainfall may be changing with subsequent consequences for plants, animals and people, decreased access to water and diseases and malnutrition. The situation is likely to get worse with time.¹³⁴ For that reason, climate change in itself is not a human rights violation; it is a threat to the enjoyment and realisation of human rights. The fact that it affects a broad range of rights makes it a contributing factor to a disabling environment for the realisation of human rights.¹³⁵ Given this intrinsic link, the UN report, confidently and quite rightly so, notes a range of human rights that will be implicated by climate change directly and indirectly.¹³⁶ It should be noted that the OHCHR's conclusion that a number of rights are going to be implicated by climate change is informed by sound scientific evidence gleaned from the most recent and authoritative IPCC 4th Assessment Report. Furthermore, the participation of a number of states and organisations in the compilation of the report is indicative of a strong acknowledgement by these actors of not only the implications, but also the promise that a human rights perspective holds to addressing the problems posed by climate change the world over. From all the submissions received twenty nine (29) were from States, ten (10) were from UN bodies/agencies, seventeen (17) from non-

¹³⁴ See IPCC Fourth Assessment Report Working Group II 393, 402.

¹³⁵ Arts *Climate Change and Sustainable Development* 87. See also UN Report on Climate Change para 70. OW Pedersen 'Climate Change and Human Rights: Amicable or Arrested Development?' (2010) 1 *Journal of Human Rights and the Environment* 236 at 244. See also J Knox, 'Climate Change and Human Rights Law' (2009) 50 *Virginia Journal of International Law* 163 at 165.

¹³⁶ UN Report on Climate Change paras 20 . 42. See also Adelman *Climate Change and Human Rights* 160 noting some of the human rights affected by climate change.

governmental organizations and four national human rights institutions, as well as the European Commission and the Organization of American States.¹³⁷

Among the rights impacted by climate change are the rights to life, adequate food, water, health, adequate housing, and self-determination.¹³⁸ These rights will be and are being impacted indirectly, mostly through the policy measures undertaken to respond to climate change.¹³⁹ Nevertheless, the increased focus on reducing carbon emissions, by governments and private actors, has ignored some of the negative effects on human existence.¹⁴⁰ What follows is a brief exposition of how some of these rights are implicated by climate change. A full exposition of all the rights is not possible in this chapter as it only seeks to illustrate the link between climate change and human rights in general. However, as far as the right to adequate food is concerned, the impact of climate change on the said right will be explored in later chapters of this work.

2.4.2.1 *Right to life*

A number of observed and projected effects of climate change will pose direct and indirect threats to human lives. The Fourth Assessment Report, projects with high confidence, an increase in people suffering from death, disease and injury from heat waves, floods, storms, fires and droughts. Equally, climate change will affect the right to life through an increase in hunger and malnutrition and related disorders affecting child growth and development in addition to; cardio respiratory morbidity and mortality related to ground level ozone. Climate change will exacerbate weather-related disasters, which already have devastating effects on people and their enjoyment of the right to life, particularly in the developing world.¹⁴¹

2.4.2.2 *The right to adequate food*

Because of climate change, crop productivity is projected to decrease, increasing the risk of hunger and food insecurity in the poorer regions of the world, at lower

¹³⁷ OHCHR study on the relationship between climate change and human rights: Submissions and reference documents received <http://www2.ohchr.org/english/issues/climatechange/submissions.htm> (accessed 20 August 2010). See also Knox 2007 *Harvard Environmental Law Review* 485.

¹³⁸ UN Report on Climate Change paras 21 . 42.

¹³⁹ See Cameron 2010 *Georgia Journal of International and Comparative Law* 676.

¹⁴⁰ See discussion in N Roht-Arriaza 2010 *Journal of Human Rights and the Environment* 213 -219.

¹⁴¹ UN Report on Climate Change paras 22- 24.

latitudes.¹⁴² An additional 600 million people will face malnutrition due to climate change¹⁴³ with a particularly negative effect on sub-Saharan Africa.¹⁴⁴ Poor people living in developing countries are particularly vulnerable, given their disproportionate dependency on climate-sensitive resources for their food and livelihoods.¹⁴⁵ Moreover, efforts to deal with climate change are likely to affect access to food for many. For instance, the production of bio-fuels from food crops has become an impediment to the enjoyment of the right to food and other human rights.¹⁴⁶ The right to food is fundamental to the inherent dignity of the human person and indispensable for the fulfilment of other human rights enshrined in the International Bill of Rights.¹⁴⁷ It is because of this fact that this research will focus on the enjoyment of this right in light of the effect of climate change.

2.4.2.3 *The right to water*

Climate change will exacerbate existing stresses on water resources and compound the problem of access to safe drinking water, currently denied to an estimated 1.1 billion people globally and a major cause of morbidity and disease.¹⁴⁸ Factors such as the frequency and intensity of rainfall can tilt the balance in the water supply of many.

2.4.2.4 *The right to health*

Climate change is a significant and emerging threat to public health, and affects the response mechanisms traditionally used in protecting vulnerable populations.¹⁴⁹ Climate change is projected to affect the health status of millions of people, including through increases in malnutrition, increased diseases and injury due to extreme weather events, and an increased burden of diarrhoeal, cardio respiratory and

¹⁴² IPCC Climate Change 2007: Synthesis Report 48.

¹⁴³ See UNDP Human Development Report 2006, *Beyond Scarcity: Power, poverty and the global water crisis*. <http://hdr.undp.org/en/media/HDR06-complete.pdf> (accessed 10 August 2010).

¹⁴⁴ IPCC Fourth Assessment Report Working Group II Report 275.

¹⁴⁵ IPCC Fourth Assessment Report Working Group II 359. See also A Agrawal, %ocal Institutions and Adaption to Climate Change+in R Mearns & A Norton (eds) *The Social Dimensions of Climate Change: Equity and Vulnerability in a Warming World* (2010) 173.

¹⁴⁶ See Roht-Arriaza (2010) 1 *Journal of Human Rights and the Environment* 220 . 221 discussing the impact bio-fuel production is likely to have on humans rights in general.

¹⁴⁷ The ICCPR and ICESCR for the International Bill of Human Rights.

¹⁴⁸ UN Report on Climate Change para 29.

¹⁴⁹ See the WHO for more information at <http://www.who.int/globalchange/en/> (accessed 20 August 2010).

infectious diseases.¹⁵⁰ Climate change is also likely to lead to increased incidence of climate sensitive diseases such as malaria and dengue fever especially in Africa.¹⁵¹

It is now unambiguous that climate change presents a new and unprecedented threat to the human rights of millions. Undoubtedly, the international human rights regime and human rights institutions cannot afford to keep quiet. The human rights implications of climate change necessitate the evolution of international human rights law and institutions to protect the rights of these peoples. Most importantly, there is need for states to take urgent action to avoid more serious and actionable violations of human rights.¹⁵²

2.4.3 The Added Value of Human Rights

The effects of climate change on the enjoyment of human rights are apparent and real. The protracted IPCC negotiations to come up with a working agreement mean that those being affected have been left on their own. These protracted negotiations have failed to yield a legally binding international agreement to address climate change. The Copenhagen Accord is the latest effort to come up with an agreement but is still non-binding.¹⁵³ The question that remains to be answered is; of what value will a human rights approach have to the already protracted and complex process? Simply answered, human rights can add value to efforts to deal with climate change in a number of ways.¹⁵⁴ Legally binding human rights norms can greatly contribute to climate change mitigation and adaptation efforts, negotiations and policy-making.¹⁵⁵ The elaboration of a range of human rights implicated by climate change is significant as it provides an opportunity to identify right holders and duty bearers. It also provides an opportunity to identify the sources of human rights under

¹⁵⁰ IPCC Climate Change 2007 Synthesis 48. See also UN Report on Climate Change para 32.

¹⁵¹ See K Antram, "Climate Change and Health in Africa: Incidence Of Vector-Borne Diseases and HIV/AIDS" in PK Thornton (eds) *et al, Mapping Climate Vulnerability and Poverty in Africa* (2006) 156.

¹⁵² M Robinson: Climate change is an issue of human rights *The Independent* December 10, 2008 <http://www.independent.co.uk/opinion/commentators/mary-robinson-climate-change-is-an-issue-of-human-rights-1059360.html> (accessed 20 August 2010).

¹⁵³ D Bodansky, "Climate Change and Human Rights: Unpacking the Issues" (2010) 38 *Georgia Journal of International and Comparative Law* 511 at 512.

¹⁵⁴ "Human rights law is relevant because climate change causes human rights violations. But a human rights lens can also be helpful in approaching and managing climate change." M Robinson Foreword in ICHRP *Human Rights and Climate Change: A Rough Guide* iii.

¹⁵⁵ McInerney . Lankford *Human Rights and Climate Change* 29 . 30.

consideration. In this instance, it would mainly be the rights contained in the ICESCR together with other international human rights treaties,¹⁵⁶ as domesticated in different jurisdictions.

Moreover, a look at the ratification of the legal instruments speaking directly to climate change and human rights respectively points to an interesting juridical fact that has consistently been ignored. The 194 parties¹⁵⁷ who have ratified the UNFCCC and the Kyoto Protocol, at the same time also happen to be parties to a number of international human rights instruments.¹⁵⁸ The contention here is that, with such juridical facts, these states are unambiguously obliged to consider the human rights-specific impact of climate change and to act accordingly.¹⁵⁹ It is submitted that by framing the human impacts of climate change as human rights impacts, states thus have a legal duty to respect, protect and fulfil their human rights obligations as contained in the treaties they have ratified, more so the ICESCR which has most of the rights that are bound to be affected. This being the case, human rights principles, law and mechanisms can easily be used to respond to the effects climate change as they are already established in addition to being widely accepted.¹⁶⁰ Moreover, the fulfilment of human rights obligations should be at all times including those times when the effects of climate change are going to interfere with everyday life.¹⁶¹

A corollary of the identified human rights and their obligations in terms of international human rights law, specifically the ICESCR, to the climate change debate is in the form of encouraging international co-operation among states. The international human rights regime identifies the key role played by international co-operation. The importance of such cooperation is unequivocally stated in provisions of the ICESCR, the Convention on the Rights of the Child (CRC), the Convention on

¹⁵⁶ McInerney . Lankford 2007 *Harvard Environmental Law Review* 433 -434.

¹⁵⁷ UNFCCC Status of Ratification of the Convention http://unfccc.int/essential_background/convention/status_of_ratification/items/2631.txt.php (accessed 4 October 2010).

¹⁵⁸ See United Nations Treaty Collection, Ratifications and reservations Status by Treaty.

¹⁵⁹ Arts *Climate Change and Sustainable Development* 79. See also UN Report on Climate Change para 69 - 88.

¹⁶⁰ Limon 2007 *Harvard Environmental Law Review* 450. See also McInerney . Lankford *Human Rights and Climate Change* 30.

¹⁶¹ See Tully 2007 *New Zealand Journal of Public and International Law* 184.

the Rights of Persons with Disabilities (CERD), and in the Declaration on the Right to Development (DRD), which have garnered wide acceptance the world over.¹⁶² Coincidentally, the Climate Change legal framework also recognizes the importance of international cooperation in tackling it. Thus, from a human rights perspective, states have a legal duty to limit and eventually reduce their GHG emissions, as they are likely to affect people outside their jurisdictions. Additionally, the Annex 1 countries in the Kyoto Protocol would have a legal obligation to support the developing and most vulnerable countries in their adaptation and mitigation efforts. These obligations, it has been suggested, quite rightly so, should extend to genuine efforts to negotiate a post-Kyoto climate change regime that will take into consideration the human rights implications of climate change.¹⁶³ According to the OHCHR, international human rights law complements the United Nations Framework Convention on Climate Change by underlining that international cooperation is not only expedient but also a human rights obligation and that its central objective is the realization of human rights.¹⁶⁴ Furthermore, it is submitted that the obligation to co-operate under the ICECR implies the need for States to fulfil both positive and negative obligations outside their territory in dealing with climate change in such a way that it leads to the realisation of the economic, social and cultural rights in such territories.

By linking climate change and human rights, the human rights perspective shifts the focus to the vulnerable groups who identify with the effects of climate change.¹⁶⁵ The vulnerable groups in society made up of indigenous groups, women, children and the poor, have always have been afforded special protection under international law.¹⁶⁶ They have continually derived such protection due to the disparate impacts of human rights violations on them and their situation. With the effects of climate change superimposed on their already precarious position, things are only bound to be

¹⁶² See UN Report on Climate Change paras 84 . 88.

¹⁶³ Limon 2007 *Harvard Environmental Law Review* 455.

¹⁶⁴ UN Report on Climate Change para 99. See also McInerney . Lankford *Human Rights and Climate Change* 30.

¹⁶⁵ UN Report on Climate Change para 93. See also McInerney . Lankford *Human Rights and Climate Change* 30. Pedersen 2010 *Journal of Human Rights and the Environment* 238 - 239.

¹⁶⁶ United Nations Declaration on the Rights of Indigenous Peoples General Assembly Resolution 61/295 on 13 September 2007. See also Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

tougher on them.¹⁶⁷ The indigenous people, for instance, are vulnerable as they normally live in eco-systems prone to the effects of climate change or are affected by measures to adapt to and deal with climate change.¹⁶⁸ With the human rights perspective, it becomes possible to examine the effects of climate change from the individual victims' point of view. The human rights discourse relies on facts supported by evidence, thus making it imperative to identify those who have to struggle for food and water because of the effects of climate change brought about by increased global warming. It is only after identifying such individuals or groups of people that meaningful measures can be taken to address the effects of climate change, which will be greatly influenced by local vulnerabilities such as discrimination, poverty and powerlessness.¹⁶⁹ To this end, the works of actors such as Oxfam, The Global Humanitarian Forum, The Inuit and the Maldives Island have had the effect of taking the technocrats from their comfortable negotiations positions to the harsh realities of a changing planet for the most vulnerable.¹⁷⁰ More still needs to be done, especially in the municipal jurisdictions where it is advisable that the various human rights actors take it upon themselves to carry out detailed studies of the human rights implications of climate change within their areas of practice.

Another value of human rights to the climate change debate comes from the OHCHR's report. Other than identifying the link between climate change and human rights and the very rights implicated, the report goes a step further in its analysis of climate change and human rights. It makes the key observation that: "Often the effects of climate change on human rights are determined by non-climatic factors, including discrimination and unequal power relationships."¹⁷¹ From the OHCHR's study, it subsequently becomes apparent that choices made in response to climate change may result in human rights violations.¹⁷² This brings about the issue of accountability, a central premise in human rights. The OHCHR notes this importance as such: "The human rights framework also stresses the importance of

¹⁶⁷ UN Report on Climate Change para 94. See also ICHRP *Climate Change and Human Rights: A Rough Guide* 6; UNDP HDR 2007/2008 *Climate Change: Human Solidarity* 16.

¹⁶⁸ Cameron 2010 *Georgia Journal of International and Comparative Law* 688

¹⁶⁹ ICHRP *Climate Change and Human Rights: A Rough Guide* 8.

¹⁷⁰ DB Hunter, "Human Rights Implications for Climate Change Negotiations" (2009) 11 *Oregon Review of International Law* 333 at 344 . 345.

¹⁷¹ UN Report on Climate change para 95.

¹⁷² Hunter 2009 *Oregon Review of International Law* 333.

accountability mechanisms in the implementation of measures and policies in the area of climate change and requires access to administrative and judicial remedies in the case of human rights violations.¹⁷³ Within the municipal jurisdiction, it can be easy to pursue a judicial remedy for violations of human rights that emanate from government policies implemented to deal with the effects of climate change. In such an instance, the *Gbemre* case of Nigeria being a case in point. Moreover, procedural guarantees to access to information and access to decision making by those affected by climate change will allow for greater participation by the population and with it the necessary accountability of governments to keep in check processes that would unnecessarily contribute towards climate change.¹⁷⁴

In addition, the moral traction offered by human rights is great. The idea of human rights grew from increased sense of morality, and as such, human rights can lend moral authority to those affected by climate change. Such moral authority as witnessed in the 2010 COP meetings in Copenhagen can be used as a counterweight to the technocratic and economic approaches that continue to dominate the climate change debates.¹⁷⁵ The wide acceptance of the human rights approach gives it the power, and with it, the promise to overcome the self-centeredness and short sightedness witnessed in past climate change negotiations and in efforts to deal with its effects.¹⁷⁶ From the aforementioned, it becomes increasingly clear that a human rights approach can, in reality, be used in responding to some of the effects of climate change.¹⁷⁷ Such an approach provides an additional way in which states ought to look at the challenges and opportunities emanating from climate change.¹⁷⁸ By tackling the human rights implications of climate change, it becomes possible to also deal with the human impacts of climate change.

¹⁷³ UN Report on Climate Change para 83. See also McInerney . Lankford *Climate Change and Human Rights* 30.

¹⁷⁴ OHCHR Resolution 10/4. See also Limon 2007 *Harvard Environmental Law Review* 452.

¹⁷⁵ Hunter 2009 *Oregon Review of International Law* 343.

¹⁷⁶ M Anderson Human Rights Approaches to Environmental Protection: An Overview+ in AE Boyle and MR Anderson (eds) *Human Rights Approaches To Environmental Protection* (1996) 21. See also ICHRP Climate change and Human Rights; A Rough Guide 7.

¹⁷⁷ See S Tully, The Contribution of Human Rights as an additional Perspective on Climate Change Impacts within the Pacific+(2007) 5 *New Zealand Journal of Public and International Law* 182.

¹⁷⁸ McInerney . Lankford 2007 *Harvard Environmental Law Review* 434.

Furthermore, through a human rights perspective, it is possible to design and implement adaptation and mitigation policy measures that are human rights sensitive.¹⁷⁹ Through the human rights perspective, fairness and appropriateness of these response measures can be guaranteed.¹⁸⁰ Moreover, a human rights perspective will inspire the focusing of attention on the human rights aspects of climate change. In this regard, Hunter has noted that, "a rights based perspective can inform a re-prioritization of policy responses to climate change away from one focused solely on carbon accounting and toward one that considers more fully principles of equity, fairness, and the impact on the most vulnerable."¹⁸¹ Additionally, according to Adelman "human rights provide an important means of addressing climate change, either through the construction of a new overarching or meta-right to a sustainable environment or by deploying existing rights."¹⁸² It will allow for immediate responses to the effects of climate change such as floods and droughts by calling on states to have measures in place to deal with such situations, most importantly to help individuals adapt to changing climatic conditions.

It is important to note that a human rights perspective does not claim to solve the challenge that climate change is. The human rights framework is not equipped to deal with the complex and technical nature of climate science, the so-called substance of climate change. Instead, it offers an alternative way of looking at the effects of climate change, an alternative that should be included in current and future efforts to address climate change at domestic and international levels. This is because it offers to add something to the debate on how best to deal with climate change. It brings with it the promise of fairness and appropriateness of responses to it.¹⁸³ Human rights capture, as has been discussed in the preceding sections, a range of concerns that have been ignored for some time now yet evidently relevant to addressing climate change.

¹⁷⁹ Arts *Climate Change and Sustainable Development* 80.

¹⁸⁰ Dudai 2009 *Journal of Human Rights Practice* 299.

¹⁸¹ Hunter 2009 *Oregon Review of International Law* 334 -335.

¹⁸² Adelman *Human Rights and Climate Change* 159.

¹⁸³ Dudai 2009 *Journal of Human Rights Practice* 299.

2.5 Conclusion

Whereas climate change science and the certainty of its predictions are not 100%, the evidence it has put forward up to now clearly shows that the environment is changing because of human activities, with concomitant devastating human rights impacts. It is also quite clear that a traditional human rights approach to climate change is not possible given the complexities involved. Existing international legal frameworks on climate change and on human rights are not only mutually compatible they powerfully reinforce each other. Human rights have a lot to offer in dealing with the effects of climate change as it presents a set of internationally agreed values around which common action can be negotiated and motivated.¹⁸⁴ Additionally, it can serve as useful tool in the design and implementation of climate change adaptation and mitigations measures adopted by countries. By focusing on the vulnerable, the human rights perspective highlights the harm felt by individuals and communities at large. This focus then makes it imperative for the national governments to act accordingly in fulfilling the human rights obligations in the face of the effects of climate change.

In conclusion, the objective of this chapter was to provide a substantive outline of how climate change affects human rights and how the human rights regime can be used to address some of these effects. Granted there are a number of challenges and weaknesses in applying the human rights perspective to climate change. This study does not seek to ignore the challenges and weaknesses the human rights framework might have. Even so, the account included herein is based on a weighing of the progress that is likely to be achieved if a human rights framework is considered in dealing with the effects of climate change. There is a strong case for the inclusion of a human rights perspective in addressing the effects of climate change. Having laid out the link between climate change and human rights, the next stage of this research will detail the content of the right to adequate food in international law in the face of climate change and its effects.

¹⁸⁴ ICHRP, *Climate Change and Human Rights: A Rough Guide* 8.

CHAPTER THREE

THE RIGHT TO ADEQUATE FOOD IN THE CONTEXT OF CLIMATE CHANGE

3.1 Introduction

The right to food is a basic human right as well as a basic human need which should be guaranteed to all people.¹⁸⁵ Food is the most basic necessity of life. As of 2010 there were 925 million hungry people in the world, down from an estimated 1 023 million in 2009¹⁸⁶ which is disappointingly high compared to set targets and previous years.¹⁸⁷ A breakdown of the statistics show that developing countries account for 98% (percent) of the world's undernourished people.¹⁸⁸ The proportion of undernourished people remains highest in sub-Saharan Africa, at 30% in 2010.¹⁸⁹ The hunger situation has been attributed to many factors ranging from armed conflict and natural disasters, of which climate change is of great concern, often in combination with weak governance or public administration, scarce resources, unsustainable livelihoods systems and breakdown of local institutions.¹⁹⁰

Against this background of hunger in a world of plenty, this chapter shall build up from the previous one by defining the right to adequate food in international law. The previous chapter dealt with the general linkage between the effects of climate change and the realization of human rights. The current chapter shall be more specific as it shall outline the content of the right as enshrined in international human rights law and regional human rights arrangements, together with the concomitant obligations of states in light of the implications climate change is already having and is likely to have on food. To do this, this research will look at the right to food obligations in the context of climate change, i.e. to examine the right to food and its obligations through the lens of climate change.¹⁹¹

¹⁸⁵ UN General Assembly Resolution 166 Food and Agricultural Problems A/RES/39/166 (1984) <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/461/43/IMG/NR046143.pdf?OpenElement> (accessed 25 February 2011).

¹⁸⁶ The State of Food Insecurity in the World 2010: Addressing food Insecurity in Protracted Crises 8 <http://www.fao.org/docrep/013/i1683e/i1683e.pdf> (accessed 25 February 2011).

¹⁸⁷ See The State of Food Insecurity in the World 2010 8.

¹⁸⁸ See The State of Food Insecurity in the World 2010 8 . 9.

¹⁸⁹ See The State of Food Insecurity in the World 2010 10.

¹⁹⁰ See The State of Food Insecurity in the World 2010 4.

¹⁹¹ This is an idea first propagated by the Columbia Law School . Human Rights Institute in *Climate Change and the Right to Food: A Comprehensive Study* 42 http://www.boell-afghanistan.org/downloads/Series_Ecology_Volume_8_Climate_Change_and_the_Right_to_Food

The first part of this chapter will be a definition of the right to food in the face of climate change. This is because the right to food has been recognized in numerous international instruments including several meetings attended by world leaders or their representatives, where they have increasingly committed themselves to promoting this right. Unfortunately, the international legal recognition of the right to adequate food and numerous commitments to its fulfilment has not translated into widespread acknowledgement and incorporation domestically by all states.¹⁹² The discussion will then proceed to look at the international human rights instruments dealing with the right to food in the context of climate change. Much of the content of the right to food has been developed as a result of these instruments; therefore it is necessary to look at them. The next part of the chapter will deal with the regional human rights framework pertaining to food given the regional complexities that come into play when considering the effects of and response to climate change. The content of the right to adequate food has been enumerated upon to assist States in implementing this right within their jurisdiction. Before concluding the focus will be on this enumeration and how it is important in the face of climate change. A more in depth discussion of the right to adequate food in Kenya shall be undertaken in Chapter 4. The discussion will now turn to the definition of the right to adequate food in the face of climate change.

3.2 Definition of the right to food in the face of Climate Change

The legal basis of the right to food in international human rights law has been fully outlined by the Special Rapporteur to the Right to Food. According to the Special Rapporteur:

The right to food is the right to have regular, permanent and free access, either directly or by means of financial purchases, to food that is quantitatively and qualitatively adequate, corresponds to the cultural traditions of the people to which the consumer belongs, and that ensures a physical and mental life, both individual and collective, that is fulfilling and dignified, free of fear.¹⁹³

.pdf (accessed 25 February 2011).

¹⁹² Food and Agriculture Organization, *The Right to Food in Practice Implementation at the National Level* (2006) 1.

¹⁹³ J Ziegler, *The right to food* Report by the Special Rapporteur on the right to food submitted in accordance with Commission on Human Rights resolution 2000/10 E/CN.4/2001/53 para 14 <http://www.righttofood.org/new/PDF/ECN4200153.pdf> (accessed 28 February 2011). See also

The right further encompasses the duty to be assisted when one cannot be able to feed himself. The United Nations Committee on Economic, Social and Cultural Rights (CESCR), has also defined the right to food extensively and in addition to the Special Rapporteur's definition has further asserted that "the right to adequate food is realized when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement."¹⁹⁴ Simply put, the right to adequate food is the "embodiment of the practical idea that all people should have a decent standard of living which entails having enough to eat at all times."¹⁹⁵ Most importantly, the right entails the idea of allowing one to enjoy the right to feed oneself in dignity as each human being is entitled to their dignity. Accordingly, the CESCR has fittingly noted that the enjoyment of the right to adequate food is:

is indivisibly linked to the inherent dignity of the human person and is indispensable for the fulfilment of other human rights enshrined in the International Bill of Human Rights. It is also inseparable from social justice, requiring the adoption of appropriate economic, environmental and social policies, at both the national and international levels, oriented to the eradication of poverty and the fulfilment of all human rights for all."¹⁹⁶

The definition adopted in this research is closely related to the definition given to the term food security, which is an upshot of the right to food. Although it is not the focus of this research, it is still important to understand how food security is defined and appreciate the fact that states' endeavours to ensure food security might have far reaching consequences for the enjoyment of the right to adequate food.¹⁹⁷ Thus according to the World Food Summit, food security is defined as follows: "Food security exists when all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life."¹⁹⁸ The four pillars of food security are availability,

General Comment No.12 whose contents and significance will be discussed in later parts of this chapter.

¹⁹⁴ Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 12 The right to adequate food (Art.11) 12th May 1999. E/C/ 12/1999/5 para 6.

¹⁹⁵ Ziegler, *The right to food* E/CN.4/2001/53 para 18.

¹⁹⁶ CESCR General Comment 12, para 4.

¹⁹⁷ Ziegler, *The right to food* E/CN.4/2001/53 para 15.

¹⁹⁸ World Food Summit Plan of Action para 1 <http://www.fao.org/docrep/003/w3613e/w3613e00.HTM> (accessed 28 February 2011).

stability of supply, access and utilization. Subsequently, it becomes clear from this definition that there are some similarities between the notion of food security and the definition of what the right to adequate food should entail. Despite the similarities, the right to adequate food and food security are two different notions and should not be confused to mean one and the same thing. Suffice it to say that food security is an important aspect of the right to adequate food and where applicable shall be appropriately referred to in this research.

3.3 Effects of Climate change on Food

From the above definition, it is clear that climate change was not a consideration at the time of defining the content of the right to adequate food. According to recent scientific research produced by the Inter-governmental Panel on Climate Change (IPCC), climate change is now a reality that is having devastating effects on the livelihoods of many in the world.¹⁹⁹ Climate change is believed to be the leading cause of recurrent droughts, floods and storms that have been witnessed across the world, particularly in Africa, which in turn have led to more people facing hunger. In light of this challenge to the realisation of the right to adequate food and halving of the number of those who are hungry, the definition is still befitting. This research suggests that the definition of the right to adequate food is wide enough to encompass the challenge posed by climate change. Where such wide interpretation is impossible, it is suggested that perhaps the threat posed by climate change to the realisation of majority of the socio-economic rights, provides the right opportunity for a redefinition of the right so as to render it realisable in light of the changing times.²⁰⁰

It is becoming increasingly evident that climate change will affect all the four dimensions of food security: i.e. food availability, food accessibility, food utilization and food systems stability together with the ability of consumers to utilize food including food safety and nutritional value.²⁰¹ Already, food security across the world is under pressure without factoring in climate change from issues such as financial

¹⁹⁹ See IPCC Summary for Policy Makers 9, 16
http://www.ipcc.ch/publications_and_data/ar4/syr/en/spm.html (accessed 25 February 2011).

²⁰⁰ Climate Change and Human Rights: A Rough Guide 20.

²⁰¹ See for instance FAO Climate Change and Food Security; A Conceptual Frame Work (2008) 20 .
27 <http://ftp.fao.org/docrep/fao/010/k2595e/k2595e00.pdf> (accessed 25 February 2011)

crises, conflict and HIV/AIDS not to mention the role of global actors.²⁰² The effects of climate change will be an additional challenge to efforts to achieve food security.²⁰³ Climate change is predicted to alter the conditions necessary for the production of food through agriculture, animal and fish habitats and forests. The resultant climate variability might have positive impacts in some areas such as the Arctic by making it conducive for plants to be grown but in other areas it is going to have a negative effect.²⁰⁴ Increased droughts, floods, water scarcity and increasingly unpredictable weather conditions are likely to cause disruptions to human livelihood and crop yields,²⁰⁵ thus having negative implications towards the achievement of the right to adequate food.

As a consequence of climate change, the potential for food production is projected to decrease, increasing the risk of hunger and food insecurity in the poorer regions of the world.²⁰⁶ This will result in additional people facing hunger and malnutrition, particularly in sub-Saharan Africa where most of the population depends on agriculture for food and employment.²⁰⁷ The situation as it is, without the influence of climate change, is critical. According to the IPCC, observation %Sub-Saharan Africa is one example of an area of the world that is currently highly vulnerable to food insecurity. Drought conditions, flooding and pest outbreaks are some of the current stressors on food security that may be influenced by future climate change.²⁰⁸ Increased world population means that food production has to keep pace if everyone is to be free from hunger while at the same time making sustainable utilization of the food resources for the benefit of future generations. Thus, in order to respond to the

²⁰² These include Transnational Corporations (TNCs), and multi-state actors, such as International Financial Institutions (IFIs). For an extensive discussion on how global actors affect the right to adequate food, see S Narula %The Right to Food: Holding Global Actors Accountable Under International Law+(2006) 44 *Columbia Journal of Transnational Law* 691 -800.

²⁰³ Idea modified from PJ Gregory, JSI Ingram & M Brklacich %Climate change and food security+(2005) 360 *Philosophical Transactions of the Royal Society B* 2139 at 2141.

²⁰⁴ See FAO *Climate Change and Food Security; A Conceptual Frame Work* 21.

²⁰⁵ FAO *Climate Change and Food Security; A Conceptual Frame Work* 21 -22.

²⁰⁶ IPCC Summary Fourth Synthesis Report 275.

²⁰⁷ See UNDP Human Development Report 2006. See also IPCC Fourth Assessment Report Working Group II 359.

²⁰⁸ WE Easterling, PK Aggarwal, P Batima, KM Brander, L. Erda, SM Howden, A Kirilenko, J Morton, JF Soussana, J Schmidhuber and FN Tubiello, 2007: Food, fibre and forest products. *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, ML. Parry, OF Canziani, JP Palutikof, PJ van der Linden and CE. Hanson (eds) 280.

threat posed by climate change towards the realization of the right to adequate food there is an urgent need for increased special attention to be accorded to the implementation of the right. The same special attention should also be extended to the most vulnerable and disadvantaged groups, including people living in disaster prone areas and indigenous peoples whose livelihood may be threatened.²⁰⁹

On the other hand, agriculture and other means of food production also greatly contribute towards climate change. States' obligations arising from the right to adequate food call for the respect of means of food production²¹⁰ which is largely from agriculture. According to the IPCC, agriculture accounts for 13.5 % of global greenhouse gas (GHG) emissions, mainly in the form of methane (CH₄) and nitrous oxide (N₂O) from fertilized soils, enteric fermentation, biomass burning, rice production, as well as manure and fertilizer production.²¹¹ It becomes a concern when population increase necessitates the intensification of food production across the globe as there is a likelihood of the emissions attributable to agriculture to increasing as more land is put into use and forests cut down.²¹² However, not all hope is lost as methods employed in agricultural production²¹³ and states' efforts to guarantee the right to adequate food can greatly contribute to the adaptation to and mitigation of climate change if proper policies can be put in place.

Another cause for concern and one of the indirect impacts of climate change on food is the use of bio-fuels as a measure to mitigate climate change. There has been a rush to convert a number of food crops such as maize, wheat, sugar and palm oil into bio-fuels. As much as the intentions are noble, such conversion is being done at the expense of food which could help in alleviating hunger. There have been concerns as to the ill-conceived nature of such practices as they are detrimental to

²⁰⁹ Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights 15 January 2009 A/HRC/10/61 paras 25 . 27.

²¹⁰ See discussion in part 3.4 on the obligations of States.

²¹¹ See IPCC 2007b Technical Summary. In *Climate Change 2007: Mitigation. Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*. 27 <http://www.ipcc.ch/pdf/assessment-report/ar4/wg3/ar4-wg3-ts.pdf> (accessed 25 February 2011).

²¹² Land-use change and forestry represent 17.4 percent of total GHG emissions or 2.3 GtC eqv./yr (8.4 Gt CO₂ eqv./yr. See *FAO Profile for Climate Change* 4 <ftp://ftp.fao.org/docrep/fao/012/i1323e/i1323e00.pdf> (accessed 25 February 2011).

²¹³ For a more detailed discussion see *FAO Profile for Climate Change* 4.

food security and accessing the right to adequate food across the world.²¹⁴ The production of bio fuels is now in direct competition with food production as land previously used to produce food crops is being turned into land for bio-fuels. Moreover, the cultivation of bio fuels has been found to be water intensive compared to the production of food crops, thus stretching the scarce water resources in areas where it is undertaken.²¹⁵ The water could best be used in food production and in improving access to the right to food.

3.4 The Right to Food in International Law

After defining the right to food in the face of climate change, this discussion now turns to the sources of the right to adequate food. The human right to food is established in several international human treaties, regional human rights treaties and numerous domestic legal instruments. The first articulation of the right to adequate food in international law can be found in article 25 of the Universal Declaration on Human Rights of 1948, believed to be responsible for the inception of human rights as we know it.²¹⁶ Article 25 reads as follows:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.²¹⁷

Despite being taken as the pillar of International human rights law and its almost world-wide acceptance by all the states, the UDHR is not a legally binding document. Notwithstanding its lack in legal force, its wide acceptance by the international community sets the ground for acceptance of human rights across the globe.²¹⁸ Over time, it became necessary to draft a legally binding document which could afford the

²¹⁴ See J Ziegler, Report of the Special Rapporteur on the right to Food Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development A/HRC/7/5 10 January 2008 paras 53 . 55. See also A Eide, *The Right to Food and the Impact of Liquid Biofuels (Agrofuels)* (2008) 12 . 13.

²¹⁵ Ziegler E/CN.4/2001/53 para 57.

²¹⁶ S Narula, *Reclaiming the Right to Food as a Normative Response to the Global Food Crisis* (2010) 13 *Yale Human Rights & Development Law Journal* 403 at 404.

²¹⁷ Article 25 Universal Declaration on Human Rights General Assembly Resolution 217A UN Doc. A/810 (December 12, 1948).

²¹⁸ See S Liebenberg *The International Covenant on Economic, Social and Cultural Rights and Its Implications for South Africa* (1995) 11 *South African Journal on Human Rights* 359 360.

protection and guarantee of the right to adequate food and other socio-economic rights. This resulted in article 11 of ICESCR,²¹⁹ which, it is contended, is perhaps the most important and comprehensive legally binding provision in the international human rights regime in so far as the right to adequate food is concerned.²²⁰

Article 11 of the ICESCR reads as follows:

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.
2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:
 - a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;
 - b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

Article 11 is all-embracing in comparison to the previous provision in the UDHR. In addition to being extensive, the ICESCR is widely accepted, as evidenced by the status of its ratification by states, which currently stands at 160 parties.²²¹ Elaborating on its contents, paragraph 1 outlines the right to an adequate standard of living which includes food, in addition to clothing and housing, and to the continuous improvement of living conditions. This, it is submitted, highlights the interdependence, interrelatedness and indivisibility of human rights as emphasised in the Vienna Declaration.²²² It illustrates a number of rights which provide for an

²¹⁹ International Covenant on Economic, Social and Cultural Rights (ICESCR) General Assembly resolution 2200 A (XXI). It entered into force on 3 January 1976 and has been ratified by 151 countries to date.

²²⁰ The ICSECR contains some of the most significant international legal provisions establishing economic, social and cultural rights...+ as noted in The Committee on Economic, Social and Cultural Rights Fact Sheet No 16 (Rev.1), <http://www.ohchr.org/Documents/Publications/FactSheet16rev.1en.pdf> (accessed 12 April 2011).

²²¹ This is the status as at 25-02-2011 01:49:02 EDT. See United Nations Treaty Collection http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en (accessed 25 February 2011).

²²² Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna 14 . 25 July 1993, A/CONF.157/23 12 July 1993 para 5 <http://www.unhchr.ch/huridocda/huridoca.nsf/%28symbol%29/a.conf.157.23.en> (accessed 25 February 2011). See also the 3rd preamble paragraphs of the ICESCR and ICCPR highlighting this interrelation. Article 6, Declaration on the Right to Development General Assembly Resolution

adequate standard of living, which in turn guarantee the right to life which is protected in the ICCPR. Paragraph 2 is categorical that state parties have an obligation to put in place measures to make sure that the fundamental right of everyone to be free from hunger is achieved. Both provisions (i.e. paragraphs 1 and 2) are important in light of the threat posed by climate change to the enjoyment of the right to adequate food, especially since it is predicted to affect the food production capacity of many states, with Kenya being no exception. It is contended that States do not only have to meet their duties in terms of ensuring the right to adequate food but also have to go over and above these obligations when it is clear that its citizens' ability to feed themselves is affected by climate change. Furthermore, the wording of paragraph 2 is illustrative of the importance of human beings being free from hunger. In fact, the right to be free from hunger is the only fundamental right in the whole of the ICESCR.²²³ Despite being drafted over 40 years ago, article 11 finds relevance and application in the face of climate change predicted effects as more people are going to require food with the multiplication of the effects of climate change over time. Thus, States will always have the responsibility to guarantee the right to adequate food at all time, more so when access to the right is disrupted or threatened by climate change.

There are additional treaties which protect the right to adequate food of special groups in the field of human rights. These groups are thought to need further protection over and above that provided for by the ICESCR and ICCPR because of their vulnerability when it comes to violation of their rights.²²⁴ For instance, the right to food for children is also specifically protected under the Convention on the Rights of the Child (CRC).²²⁵ The right to food has thus been recognized for women in the Convention on the Elimination of All Forms of Discrimination against Women

41/128, 4 December 1986 <http://www.un.org/documents/ga/res/41/a41r128.htm> (accessed 25 February 2011).

²²³ S Sollner, *The Breakthrough of the Right to Food: The Meaning of General Comment No. 12 and the Voluntary Guidelines for the Interpretation of the Right to Food+* (2007) 11 *Max Planck Year Book of United Nations Law* 391 at 398.

²²⁴ C Golay & M Özden, *The Right to Food, A fundamental human right affirmed by the United Nations and recognized in regional treaties and numerous national constitutions* (CETIM) 11 <http://www.cetim.ch/en/documents/Br-alim-A4-an.pdf> (accessed 25 February 2011).

²²⁵ Articles 24 (c) and 27 (3) Convention on the Rights of the Child (Resolution 44/25) 20 November 1989.

(CEDAW)²²⁶; for refugees in the Convention Relating to the Status of Refugees²²⁷; for stateless persons in the Convention Relating to the Status of Stateless Persons²²⁸; and for indigenous peoples and tribes in the Indigenous and Tribal Peoples Convention.²²⁹ Coincidentally, the effects of climate change are going to disproportionately affect the poor and most vulnerable members of society compared to those that are well off.²³⁰ Such women, children and indigenous parties are made vulnerable due to a number of factors which can be summarised as their gender, age, status and population within a given area. The States party to the above mentioned treaties therefore, have a legal obligation to uphold the provisions therein relating to food and also promote human rights in general within their jurisdictions. This obligation also stretches beyond their borders in order to shield these groups of people from hunger. With climate change likely to lead to increased desertification, the United Nations Convention on Combating Desertification (UNCCD)²³¹ is also applicable as it places obligations on states with regard to combating desertification and helping those affected by desertification.²³²

3.5 Regional legal framework relating to the right to food

There are also several regional human rights agreements that also deal with the right to food. Regional human rights agreements are significant as they mirror certain regional cultural perspectives with regard to the means for realizing human rights. They also form important bases for developing innovative institutional arrangements for ensuring the realization of human rights.²³³ Thus, Europe has the European Convention on Human Rights and Fundamental Freedoms; the Americas have the

²²⁶ Articles 12 (2) and 14 Convention on the Elimination of All Forms of Discrimination against Women New York, 18 December 1979.

²²⁷ Articles 20 and 23 Convention relating to the Status of Refugees (General Assembly resolution 429 (V) of 14 December 1950) 22 April 1954.

²²⁸ Articles 20 and 23 Convention Relating to the Status of Stateless Persons (Economic and Social Council Resolution 526 A (XVII) of 26 April 1954) 28 September 1954.

²²⁹ Articles 14 to 19 Convention concerning Indigenous and Tribal Peoples in Independent Countries (Indigenous and Tribal Peoples Convention adopted on 27th June 1989) date of coming into force: 5 September 1991.

²³⁰ UNDP Summary Human Development Report 2007/2008 7- 8 http://hdr.undp.org/en/media/HDR_20072008_Summary_English.pdf (accessed 25 February 2011). See also IPCC, *Third Assessment Report* (2001) 121 for a discussion on how the poorest members of society will be hardest hit by climate change.

²³¹ United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa A/Ac.241/27 12 September 1994.

²³² See articles 2 (2) and 4 (2) (c).

²³³ G Kent, *Freedom from want; the human right to adequate food* (2005) 34.

American Convention on Human Rights; and in Africa the regional set up is formed on the basis of the African Union (AU) and the adoption of the African Charter on Human and Peoples Rights (African Charter).²³⁴ Asia is the only region without a regional human rights agreement.

As already mentioned, the African Charter is the leading human rights instrument within the African regional human rights mechanism.²³⁵ It contains several rights contained in articles 1 to 26 and has been hailed as being the first regional instrument to contain both civil and political rights together with socio-economic rights in addition to being wholesomely committed to the promotion and protection of human rights.²³⁶ In article 1, the Charter calls upon member states to undertake to adopt legislative or other measures to give effect to the rights and duties therein²³⁷ as a violation of any provision in the African Charter automatically means a violation of Article one.²³⁸ Notably, the African Charter does not call for the progressive achievement of the rights enshrined therein, thus making a strong case for the immediate fulfilment of these rights.²³⁹ Article 1 reads as follows: "The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them." Additionally, the Charter in itself does not have an explicit provision that protects the right to adequate food as is the case with the UDHR and the ICESCR. This however, does not mean it does not envisage the protection and fulfilment of this right. In fact several provisions allude to the provision of the right to adequate food such as the right to health.²⁴⁰ This was

²³⁴ African (Banjul) Charter on Human and Peoples' Rights Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

²³⁵ The African Charter should be read together with the Constitutive Act of the African Union 2011 which seeks to promote and protect human rights. See preamble paragraph of the Constitutive Act of the African Union adopted by the Thirty-Sixth Ordinary Session of the Assembly of Heads of State and Government 11 July, 2000 - Lome, Togo http://www.africa-union.org/root/au/aboutau/constitutive_act_en.htm (accessed 15 April 2011).

²³⁶ MK Addo *The Legal Nature of International Human Rights* 346.

²³⁷ Article 1 of the African Charter reads as follows:

"The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them."

²³⁸ *Sir Dawda Jawara v The Gambia* Communication No. 147/95 and 149/96, para 17.

²³⁹ CA Odinkalu, "Analysis of Paralysis or Paralysis of Analysis? Implementing Economic, Social and Cultural Rights under the African Charter on Human and Peoples' Rights" (2001) 23 *Human Rights Quarterly* 327 at 346-347.

²⁴⁰ Article 16 of the African (Banjul) Charter on Human and Peoples' Rights.

well illustrated when the African Commission, which is mandated with the interpretation of the ACHPR, made its ruling in the matter of *Social and Economic Rights Action Centre (SERAC) v Nigeria*.²⁴¹ In this matter the commission had to make a ruling as to whether certain acts by the Nigerian government in association with the Shell petroleum company amounted to a violation of rights including, health, food; and safe and clean environment.²⁴² Making reliance on article 60²⁴³ of the African Charter and its call for a progressive interpretation on human rights, the commission found that the right to adequate food is implicit in other provisions of the charter especially the rights to health and to a clean environment.²⁴⁴ This interpretation is commendable and progressive as it underlines the interconnectedness of all human rights and the need to ensure all the rights are fulfilled equally by the states in keeping with their obligations under international human rights law.²⁴⁵ It has further implications given the contribution of trans-national corporations (TNCs) operating in Africa as well as some of their activities, such as mining and oil drilling and prospecting, that greatly contribute towards environmental degradation and climate change. It is the responsibility of states to control, by exercising due diligence, all those who operate within their jurisdiction in such a manner that the activities of third parties do not hamper access to food or contribute to climate change.

There are a number of regional human rights treaties that likewise afford the right to adequate food in one form or the other for vulnerable members of the community

²⁴¹ *Social and Economic Rights Action Centre (SERAC) and another v Nigeria* (2001) AHRLR 60 (ACHPR 2001).

²⁴² *SERAC v Nigeria paras 1 – 6; 64 – 66. See also F Coomans, “The Ogoni Case before the African the African Commission on Human and Peoples’ Rights” (2003) 52 International and Comparative Law Quarterly 749 – 760.*

²⁴³ Article 60 of the African (Banjul) Charter reads:

The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members.+

²⁴⁴ Articles 16 and 24, respectively of the African Charter.

²⁴⁵ *SERAC v Nigeria* para 44 underscores the obligations of the states to protect, promote and fulfil. This judgement also heeds the call for its creative interpretation. See M K Mbondenyi (2009) *The African System on Human and Peoples' Rights: Some Strategies for Reforming Its Economic, Social and Cultural Rights Norms*+2 http://works.bepress.com/morris_mbondenyi/6/ (accessed 12 April 2011).

within the African context in addition to making provisions for matters not covered in the African Charter.²⁴⁶ For instance, the African Charter on the Rights and Welfare of the Child (ACRWC) is unequivocal in its wording in article 14 (2) (c) that states party to the Charter have to take measures to ensure the provision of adequate nutrition and safe drinking water for the child.²⁴⁷ Article 20 (2) of the ACRWC also envisages the protection and promotion of the right to adequate food by calling upon the state parties to assist parents and caregivers in making sure children have access to the right nutrition. Furthermore, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa also protects women's right to food security. It accordingly requires state parties to ensure that women have the right to adequate and nutritious food in addition to ensuring food security by establishing adequate systems of supply and storage.²⁴⁸ It is submitted that, it will become increasingly imperative for African states to meet their human rights obligations with the worsening effects of climate change which will be superimposed on the already dire socio-economic conditions experienced by many of these states.²⁴⁹ Moreover, respect and implementation of human rights by African States is likely to come with the necessary improvement on the standard of life of the many poor in Africa.

Alongside the developments in international law described in the preceding sections, numerous conferences and non-binding international declarations and resolutions have helped to shape the emerging international consensus on norms regarding the human right to adequate food. As much as an in-depth analysis of these documents cannot be embarked on in this research, it is equally important that they are mentioned as they serve as part of the huge corpus of material on the right to adequate food to which governments have or can commit themselves to if the right is

²⁴⁶ See Mbondenyi, *The African System on Human and Peoples' Rights* 2.

²⁴⁷ Article 14 (2) (c) African Charter on the Rights and Welfare of the Child OAU Doc. CAB/LEG/24.9/49 (1990), entered into force Nov. 29, 1999.

²⁴⁸ Article 15 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Adopted by the 2nd Ordinary Session of the Assembly of the Union Maputo, 11 July 2003) <http://www.achpr.org/english/women/protocolwomen.pdf> (accessed 28 February 2011).

²⁴⁹ There is a need for Africa to fast track the implementation of Socio-economic rights given its deplorable socio-economic conditions as argued by SC Agbakwa, *Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights* (2002) 5 *Yale Human Rights and Development Journal* 177 at 178.

to be fully realized and the number of those hungry in the world reduced.²⁵⁰ Furthermore, there are a number of international actors relevant to the right to food. Apart from the Food and Agricultural Organization of the United Nations already mentioned, the right to food is relevant to the mandate of the World Health Organization (WHO), the International Labour Organisation (ILO), the United Nations Children's Fund (UNICEF), the Office of the United Nations High Commissioner for Refugees (UNHCR), the United Nations Development Programme (UNDP), the World Bank and many others. Besides finding mention in the field of international human rights law, the right to adequate food is extensively protected under International Humanitarian law provisions to ensure that even during times of war, those afflicted are guaranteed this right.²⁵¹

3.6 Climate change and the importance of General Comment 12

The United Nations human rights treaty bodies elaborate the major treaties through their responses to National Reports and through the issuance of General Comments. The Committee on Economic, Social and Cultural Rights (CESCR) has done a lot of work in elaborating the content of the ICESCR through its General Comments.²⁵² Before examining the importance²⁵³ of General Comment 12 it is necessary to look at how it came about. The origins of this seminal comment can be traced to the 1996 World Food Summit. The summit brought increased focus on the right to adequate food like never before. Concerned about the state of food security in the world, the Food and Agricultural Organisation of the United Nations (FAO) held the World Food Summit in Rome which culminated in the Rome Declaration on World Food Security adoption.²⁵⁴ The Rome Declaration included states' commitment to reduce the state of hunger by 2015 to half the total population of those hungry at the time of the

²⁵⁰ See Food and Agriculture Organization of the United Nations Legislative Study (1999) Extracts from International and Regional Instruments and Declarations, and other Authoritative Texts Addressing the Right to Food 7 . 18.

²⁵¹ See the FAO Legislative Study 19 . 26. See also J Ziegler A56210 (n 10 above) para 37- 57 on the right to food in armed conflict.

²⁵² Compilation of general comments and general recommendations adopted by Human Rights Treaty Bodies: 12 May 2004. HRI/GEN/1/Rev.7. (General Comments) [http://www.unhcr.ch/tbs/doc.nsf/0/ca12c3a4ea8d6c53c1256d500056e56f/\\$FILE/G0441302.pdf](http://www.unhcr.ch/tbs/doc.nsf/0/ca12c3a4ea8d6c53c1256d500056e56f/$FILE/G0441302.pdf) (accessed 25 February 2011).

²⁵³ General Comment 12 has also been referred to as a landmark. See C Courtis, 'The Right to Food as a Justiciable Right: Challenges and Strategies' (2007) 11 *Max Planck Year Book of United Nations Law* 317 at 321.

²⁵⁴ Rome Declaration on World Food Security, World Food Summit Rome, 13 November 1996 <http://www.fao.org/docrep/003/w3613e/w3613e00.HTM> (accessed 25 February 2011).

declaration as captured in the Food Summit Plan of Action.²⁵⁵ The Plan of Action contained seven commitments which were to act as guiding principles to all stakeholders involved in formulating the policies for its practical implementation at national and international levels. All the commitments are correspondingly important but one that speaks directly to the right to adequate food is the call for an extensive enumeration of the content of the right to adequate food in Commitment Seven as a whole, and more particularly objective 7.4 of the Declaration.

World Food Summit Plan of Action Objective 7.4:

To clarify the content of the right to adequate food and the fundamental right of everyone to be free from hunger, as stated in the International Covenant on Economic, Social and Cultural Rights and other relevant international and regional instruments, and to give particular attention to implementation and full and progressive realization of this right as a means of achieving food security for all.

To this end, governments, in partnership with all actors of civil society, will, as appropriate:

- a) Make every effort to implement the provisions of Article 11 of the International Covenant on Economic, Social and Cultural Rights (the Covenant) and relevant provisions of other international and regional instruments;
- b) Urge States that are not yet Parties to the Covenant to adhere to the Covenant at the earliest possible time;
- c) Invite the Committee on Economic, Social and Cultural Rights to give particular attention to this Plan of Action in the framework of its activities and to continue to monitor the implementation of the specific measures provided for in Article 11 of the Covenant;
- d) Invite relevant treaty bodies and appropriate specialized agencies of the UN to consider how they might contribute, within the framework of the coordinated follow-up by the UN system to the major international UN conferences and summits, including the World Conference on Human Rights, Vienna 1993, within the scope of their mandates, to the further implementation of this right;
- e) Invite the UN High Commissioner for Human Rights, in consultation with relevant treaty bodies, and in collaboration with relevant specialized agencies and programmes of the UN system and appropriate intergovernmental mechanisms, to better define the rights related to food in Article 11 of the Covenant and to propose ways to implement and realize these rights as a means of achieving the commitments and objectives of the World Food Summit, taking into account the possibility of formulating voluntary guidelines for food security for all.²⁵⁶

It is the appeal of member States, during the 1996 World Food Summit, for an enhanced elucidation of the rights relating to food in article 11 of the ICESCR, which led to the writing up General Comment No. 12.

²⁵⁵ Rome Declaration on World Food Security.

²⁵⁶ World Food Summit Plan of Action <http://www.fao.org/docrep/003/w3613e/w3613e00.HTM> (accessed 25 February 2011).

The Committee on Economic, Social and Cultural Rights (CESCR) of the United Nations, the expert body in charge of monitoring compliance with the ICESCR, presented in its General Comment 12 of 1999 on the Right to Adequate Food²⁵⁷, a detailed and authoritative interpretation of the international law provisions contained in the ICESCR. The CESCR has used its General Comments, informed by analyses of State reports, to elucidate the meaning of ambiguous provisions of the ICESCR, thus providing States with reasoned interpretations of the normative content of economic, social and cultural rights.²⁵⁸ The writing of the general comment involved in-depth research and involvement of experts on the human right to food. It was also based on an assessment of practical problems related to implementing the right.²⁵⁹ The significance of General Comment 12 is that despite being only 8 pages in length, it constitutes a definitive contribution to international jurisprudence relating to the right to food.²⁶⁰ The Comment sets out the normative content of the right to adequate food, which can only be realized when everyone (man, woman and child) has uninterrupted access (physical and economical) to adequate food or to the means necessary to acquire it.²⁶¹ From this elaboration of what realizing the right to food encompasses, the fact that almost a billion people in the world are hungry means a lot of states are failing to meet their obligations as expected by the ICESCR. Furthermore, the right to food is not only achieved when individuals in a State have access to food but after they get this access, the food should be of sufficient quantity and quality to satisfy the dietary needs of individuals. Such food ought to be free from adverse substances, and tolerable within a given culture. In ensuring the accessibility to such food, States must do so in ways that are sustainable and that do not interfere with the enjoyment of other human rights.²⁶² Despite being written at a time when climate change had not yet been thrust into international limelight, it is the contention of this research that General Comment 12 still has significance in guaranteeing the realisation of the right to food in the face of

²⁵⁷ See note 12 above.

²⁵⁸ Food and Agricultural Organization, *Implications of the Voluntary Guidelines for Parties and Non-Parties to the International Covenant on Economic, Social and Cultural Rights* in *The Right to Food Guidelines: Information Papers and Guidelines* 98 para 5 - 6. http://www.fao.org/docs/eims/upload/214344/RtFG_Eng_draft_03.pdf (accessed 7 March 2011).

²⁵⁹ See CESCR General Comment 12 para 3 for the process involved in drafting the final report.

²⁶⁰ Kent *Freedom from Want; The Human right to adequate Food* 54.

²⁶¹ CESCR General Comment 12 para 6.

²⁶² CESCR General Comment 12 para 8 -13.

climate change given its elaboration on what the content of article 11 entails. In fact, with the effects climate change is having on food production and the realisation of the right to food in general, it is imperative that States implement the right to adequate food as enumerated in General Comment 12.

General Comment 12 does not stop at describing the normative content of the right to adequate food enshrined in article 11 of the ICESCR. It goes further by elaborating States obligations and possible violations of the right to adequate food. Interestingly enough, the nature of obligations contained in article 2 of the ICESCR had earlier on been enunciated in 1990 in General Comment 3.²⁶³ What is notable regarding the nature of the obligations according to the Committee is its emphasis on the principal obligation to take steps to achieve progressively the full realization of the right to adequate food. This obligation should be taken to mean moving expeditiously as possible towards the goal of providing access to food to its citizens. Furthermore, there is an immediate obligation on States to ensure non-discrimination of its citizens in accessing their rights.²⁶⁴ Discrimination has been found to be a stumbling block to the access of socio-economic rights for large portions of the population the world over as it is a historically entrenched phenomenon.²⁶⁵ Moreover, and equally important, is the duty of every State is to ensure for everyone under its jurisdiction, access to the minimum essential food which is sufficient, nutritionally adequate and safe, to guarantee their freedom from hunger.²⁶⁶ This obligation is significant, as climate change is likely to lead to more people being exposed to hunger than ever before. Thus Kenya will have the responsibility of ensuring that freedom from hunger is guaranteed, as envisaged by the ICESCR which it has ratified.

Following on its earlier interpretation of the obligations imposed by the ICESCR in General Comment 3, the Committee notes that the right to adequate food, like any other human right, imposes three types of obligations on States parties: the

²⁶³ Committee on Economic, Social and Cultural Rights (CESCR), General Comment 3 The nature of States Parties Obligations (Art. 2, para. 1 of the Covenant) Contained in document E/1991/23).

²⁶⁴ Committee on Economic, Social & Cultural Rights, General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (Art 2 para 2 E/C.12/GC/20 (July 2, 2009), para 2).

²⁶⁵ CESCR General Comment No 20 para 1.

²⁶⁶ CESCR General Comment 12 para 14.

obligations to respect, to protect and to fulfil. Thus a State will be seen to be meeting its obligation to fulfil if it were to facilitate and provide access to the right to food.²⁶⁷ The obligation to respect means that States should not take any measures that might impede existing access to adequate food.²⁶⁸ The obligation to protect requires measures by the State to ensure that third parties (companies or individuals) do not deprive persons of their access to adequate food. The obligation to fulfil (facilitate) means that the State must pro-actively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security.²⁶⁹ As such, the state would be required to formulate programmes with the help of its citizens to strengthen access to food within its jurisdiction at all times. Finally, whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to fulfil (provide) that right directly. This obligation also applies for persons who are victims of natural or other disasters and those faced with hunger causing situations.²⁷⁰ This provision envisions the putting in place of food safety nets and food interventions for the most vulnerable members of the community.²⁷¹ It is contended that para 15 should be read closely with para 6 which categorically states that "States have a core obligation to take the necessary action to mitigate and alleviate hunger as provided for in paragraph 2 of article 11, even in times of natural or other disasters."²⁷²

The above-mentioned obligations are very important if the right to adequate food is to be realised in light of the negative effects of climate change. The climate change regime is governed by the UNFCCC and its Kyoto protocol, which impose obligations on states to deal with climate change. It is argued that, the right to adequate food would best be guaranteed if the human rights regime and the climate change regime are read together. Thus, in fulfilling the duty to respect, states should avoid activities that are bound to eventually contribute to climate change.²⁷³ They should thus

²⁶⁷ CESCR General Comment 12 para 15.

²⁶⁸ CESCR General Comment 12 para 15.

²⁶⁹ CESCR General Comment 12 para 15.

²⁷⁰ CESCR General Comment 12 para 15.

²⁷¹ K Mechlem "Food Security and the Right to Food in the discourse of the UN+(2004) 10 *European Law Journal* 631 at 640.

²⁷² CESCR General Comment para 6.

²⁷³ See *Climate Change and the Right to Food: A Comprehensive Study* 44: Brot fur die Welt Report

control the activities within their territory that might contribute excessive Green House Gas (GHG) emissions especially as this is likely to impact on the right to adequate food. Such control would be keeping in line with the states obligation to protect, which require the state to take measures to prevent others from violating the right to adequate food.²⁷⁴ Thus, activities such as bio-fuel production by Multi-National Corporations, which are a direct threat to food production, should not be allowed if the right to adequate food is to be guaranteed since bio-fuel production requires large amounts of feedstock.²⁷⁵ Additionally, such measures would also address the States commitment to dealing with climate change as a serious developmental concern in terms of the obligations under the UNFCCC and Kyoto Protocol. Lastly, the obligation to fulfil the right to adequate food in light of climate change, it is submitted, would require states to create the necessary conditions for its citizens to acquire food and adapt to climate change including feeding them when they cannot access food.

Being aware of the differing contexts that might exist within national borders, the Committee underscores the need for each State party to take whatever steps necessary to ensure that everyone is free from hunger and can enjoy the right to adequate food. What this means is that each State is required to adopt a national strategy to ensure the right to food. Such a strategy should include clear policies and corresponding benchmarks and should also identify the resources available to meet the objectives.²⁷⁶ This recommendation accords with the call for States to take bold steps in dealing with climate change and putting in place mitigation and adaption measures to help soften the effects of climate change.²⁷⁷ It would therefore become an obligation for States to take into cognisance the effects of climate change and ways to mitigate and adapt to it in their national food policies. It is further submitted that such policies dealing with the right to adequate food will have to promote other socio-economic rights such as the rights to health, water and safe environment

Climate Change and Food Crisis: Study (2008) 60 . 61 http://www.brot-fuer-die-welt.de/downloads/fachinformationen/analysis06_food-crisis.pdf (accessed 25 February 2011).

²⁷⁴ Climate Change and the Right to Food: A Comprehensive Study 44.

²⁷⁵ See Eide *The Right to Food and the Impact of Liquid Biofuels (Agrofuels)* 12 - 19.

²⁷⁶ CESCR General Comment 12 para 21.

²⁷⁷ See article 2 of the United Nations Framework Convention on Climate Change and provisions of the Kyoto Protocol on the responsibility of States in dealing with climate change.

which are interlinked, interdependent and interrelated not to mention equally threatened by climate change. As a state party to the ICESCR and other international human rights instruments mentioned earlier on, Kenya has implemented some measures to achieve the right to adequate food. The recently promulgated Constitution²⁷⁸ provides for the right to adequate food in article 43 by explicitly stating that everyone has the right to be free from hunger, and to have adequate food of acceptable quality²⁷⁹

Noting the negative impact that discrimination has had on the enjoyment of rights, the Committee further notes the importance of any strategy meant to promote access to food avoiding discrimination of whatever nature.²⁸⁰ Women and other groups that are discriminated against should be given assurances of full and equal access to economic resources, the right to inherit and own land and other property, credit, natural resources and appropriate technology. Moreover measures should be put in place to respect and protect self-employment and work which provides remuneration, hence ensuring a decent living for wage earners and their families and maintaining registries on rights to land (including forests).²⁸¹

According to the CESCR, States also have responsibilities with respect to the realization of the right to food in other countries through international cooperation.²⁸² Therefore, states should take steps to respect, protect and fulfil this right in other countries. They should facilitate access to food and provide necessary food aid where required in a way that does not threaten sustainable local food security. Additionally, in the face of globalization and international agreements between states, they ought to take into account their obligations regarding the right to food

²⁷⁸ After being approved by popular referendum, the new Constitution of Kenya was adopted and signed on 27th August 2010 by the President H.E Mwai Kibaki.

²⁷⁹ Article 43 (1) (b) The Constitution of Kenya 2010.

²⁸⁰ CESCR General Comment 12 para 26.

²⁸¹ This is an idea propagated by Food First Information and Action Network (FIAN), see *FIAN Kenya hunger crisis* 13. See also J Ziegler *Peasant Farmers and the Right to Food: A History of Discrimination and Exploitation* paras 24 - 27 <http://www2.ohchr.org/english/bodies/hrcouncil/docs/advisorycommittee/A.HRC.AC.3.CRP.5.pdf> (accessed 12 April 2011)

²⁸² CESCR General Comment 12 para 36. Article 11(2) ICESCR calls for international cooperation to ensure freedom from hunger.

when negotiating and concluding such agreements.²⁸³ This obligation is very important when one considers the widespread nature of the effects of climate change on developing countries that do not have the mechanisms to deal with the predicted effects it is going to have on almost all aspects of life.²⁸⁴ It is submitted that, this obligation could also be instrumental in the negotiation and conclusion of a binding post-Kyoto climate change agreement the as majority of the member states party to the UNFCCC and Kyoto protocol also have human rights obligations by virtue of being member states to international human right instruments. They should thus always bear in mind these human rights obligations in all the negotiations they are party to.²⁸⁵

The right to food, in the face of climate change, thus entails the availability of food and access to it at all times. Firstly, a culturally acceptable diet, sufficient in both quantity and quality to satisfy the nutritional needs of the individual, must be available to each person. In other words, each person should be able to obtain nutrition from the land or other natural resources or from distribution systems that spread the food to those who require it within an area. Secondly, every person must have access, physically and economically, to food. Physically means that every person, including those physically vulnerable must have access to an adequate diet. Economically means that expenditure on an adequate diet should not jeopardize the enjoyment of other human rights necessary for the full dignity of the individual.²⁸⁶ Nonetheless, in practice, the right to food ought to protect first and foremost the most vulnerable individuals and groups in society, among who are those suffering from discrimination, women and children, landless rural workers, indigenous peoples and tribes, slum dwellers, the unemployed and others.²⁸⁷

²⁸³ CESCR General Comment 12 para 36. See also O De Schutter, *Building Resilience: A Human Rights Framework on the World Food and Nutrition Security*, UN Doc A/HRC/9/23, September 8, 2008.

²⁸⁴ Climate Change and the Right to Food: A Comprehensive Study 45.

²⁸⁵ Narula 2006 *Columbia Journal of Transnational Law* 742 has noted it succinctly as follows %member states do not leave their human rights obligations at the door when entering these corridors of power.+

²⁸⁶ C Golay & M Özden, *The Right to Food A Fundamental Human Right affirmed by the United Nations (CETIM)* 7- 8.

²⁸⁷ Golay & Özden *The Right to Food* 8.

3.7 Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food

The World Food Summit: Five Years Later²⁸⁸ was called as a follow up to the World Food Summit held in 1996. This follow up Summit marked a great milestone in the elucidation of the right to adequate food by not only reaffirming the importance of strengthening the respect of all human rights and fundamental freedoms, but also went on to request the FAO to establish an Intergovernmental Working Group to develop a set of Voluntary Guidelines to support Member States efforts to achieve the progressive realization of the right to adequate food in the context of national food security.²⁸⁹ This was necessitated by the slow progress made in implementing the Rome Plan of Action, despite the commitment to expeditiously move towards guaranteeing access to food.²⁹⁰ Through a consultative process involving human rights and food stakeholders, the work of FAO culminated in the approval and publication of the Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food on November 2004.²⁹¹ It is interesting to note that at the moment of its drafting the issue of climate change had not taken centre stage and was not considered in the discussions, despite the works of the IPCC dating back to 1990.²⁹² Perhaps if Climate Change had been considered at the time, with the necessary political backing a lot of progress would have been made in guaranteeing the right to food in the face of climate change as it would be imperative for States to deal with climate change as a factor limiting the achievement of national and global food security.

Be that as it may, the drafting of the Voluntary Guidelines witnessed the active involvement and willingness by governments and pertinent stakeholders to interpret

²⁸⁸ Took place from 10 to 13 June 2002 in Rome, Italy.

²⁸⁹ *The World Food Summit: Five years later* International Alliance against Hunger para 10 <http://www.fao.org/DOCREP/MEETING/005/Y7106E/Y7106E09.htm#TopOfPage> (accessed 25 February 2011).

²⁹⁰ At the time almost 800 million people worldwide were facing hunger.

²⁹¹ Food and Agriculture Organization of the United Nations, Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security (2005), (Adopted by the 127th Session of the FAO Council November 2004).

²⁹² The first IPCC Assessment Report of 1990 unveiled the importance of climate change as a topic deserving a political platform among countries to tackle its consequences. It therefore played a decisive role in leading to the creation of the United Nations Framework Convention on Climate Change (UNFCCC), the key international treaty to reduce global warming and cope with the consequences of climate change. http://www.ipcc.ch/organization/organization_history.shtml (accessed 12 April 2011).

the right to adequate food in a manner that would lead to its realization given the rising number of hungry people and increasing failure by States to deal with hunger.²⁹³ Whereas some countries led by Norway wanted a binding code of conduct with legal force others, such as the United States of America, were opposed to such an arrangement.²⁹⁴ A compromise had to be reached in deciding to draft the Voluntary guidelines instead of a having a binding code of conduct on the right to adequate food. Nonetheless, the Voluntary Guidelines do provide practical guidance to states in their implementation of the progressive realization of the right to adequate food in the context of national food security, in order to achieve the goals they committed themselves to in the World Food Summit Plan of Action.²⁹⁵

The Voluntary guidelines are crucial to the realization of the right to adequate food as they cover a full range of actions to be considered by governments at the national level in order to build an enabling environment for people to feed themselves in dignity and to establish appropriate safety nets for those who are unable to do so.²⁹⁶ They aim to give meaning to the interpretation of the right to adequate food as enumerated in General Comment 12. As such, if implemented accordingly even in the midst of the effects of climate change, they will have the result of guaranteeing the availability of food in quantity and quality sufficient to satisfy the dietary needs of individuals; physical and economic accessibility for everyone, including vulnerable groups, to adequate food, free from unsafe substances and acceptable within a given culture; or the means of its procurement.²⁹⁷

The Voluntary Guidelines are divided into three parts, Part I deals with the Preface and Introduction whereas Parts II and III deal with providing an Enabling Environment, Assistance and Accountability; And International Measures, Actions

²⁹³ The end result i.e. the Voluntary Guidelines has been termed as outstanding. See Sollner 2007 *Max Planck Year Book of United Nations Law* 392.

²⁹⁴ See for instance Food and Agriculture Organization (2002) *Explanatory notes/reservation to the declaration of the World Food Summit: five years later*. <http://www.fao.org/DOCREP/MEETING/005/Y7106E/Y7106E03.htm#TopOfPage> (accessed 25 February 2011).

²⁹⁵ FAO Voluntary Guidelines Foreword iii. See also para 5.

²⁹⁶ FAO Voluntary Guidelines Foreword iii; See also para 6 . para 8.

²⁹⁷ FAO Voluntary Guidelines para 16.

and Commitments respectively. Given the extensive nature of the document it is not possible to discuss each of the guidelines in this research. Instead, I will attempt to reproduce the relevant parts of the guidelines that stand out and could be termed as very important in addressing the right to adequate food in the face of climate change. The omission of all other guidelines does in no way mean that they are less important; the document should be looked at as a whole.²⁹⁸ Some of the guidelines given to States to realize the right to adequate food includes calls for states to: adopt the measures needed to improve the functioning of and access to the agricultural and food markets that benefit particularly disadvantaged groups,²⁹⁹ access to resources and assets by vulnerable populations,³⁰⁰ work opportunities,³⁰¹ security of land tenure, especially with respect to women, the poor and disadvantaged segments of society³⁰², protection of ecological sustainability and the carrying capacity of ecosystems.³⁰³ Most importantly, the Voluntary Guidelines emphasise the importance of international co-operation among nations to implement the right to food in part III which addresses international measures, actions and commitments.³⁰⁴ International co-operation is going to be very important given the disproportionate manner in which climate change is going to affect food among countries. Despite the Voluntary Guidelines being only recommendatory in nature it is contended that they will provide further detail to the definition of the legal rights and obligations contained in the ICESCR, General Comment 12 and other international and regional treaties dealing with the right to adequate food.³⁰⁵ To this end countries such as Kenya would best benefit in applying the voluntary guidelines so as to meet their obligations under international human rights law and as provided for by article 43 (1) (b) of the Constitution to increase access to the right to food for its citizens.

²⁹⁸ Applicable guidelines will be canvassed in the Chapter focusing on the food situation in Kenya.

²⁹⁹ FAO Voluntary Guidelines; Guideline 4.

³⁰⁰ FAO Voluntary Guidelines; Guideline 8.

³⁰¹ FAO Voluntary Guidelines; Guideline 8A.

³⁰² FAO Voluntary Guidelines; Guideline 8B.

³⁰³ FAO Voluntary Guidelines; Guideline 8E. For a further exposition of these guidelines, see Sollner 2007 *Max Planck Year Book of United Nations Law* 410 . 414.

³⁰⁴ See FAO Voluntary Guidelines; Guideline 19. See also SI Skogly *Right to Adequate Food: National Implementation and Extraterritorial Obligations+* (2007) 11 *Max Planck Year Book of United Nations Law* 339 at 348.

³⁰⁵ Due to its nature the Voluntary Guidelines there have been suggestions that it might gain the status of customary international law if States adhere to its recommendations. See Sollner 2007 *Max Planck Year Book of United Nations Law* 408 . 409; 414 - 415.

3.8 Conclusion

Today, the normative content of the right to food, and the ensuing obligations of states to those within their territory or jurisdiction, enjoys far greater clarity than when the right was first codified under international human rights law several decades ago. This is largely due to the continuous articulation of the content of the right to adequate food by the CESCR, FAO, and the Special Rapporteur to the right to adequate food together with the voluntary guidelines.³⁰⁶ As a result of intensive international negotiation and subsequent litigation, established human rights standards are relatively detailed, realistic and practical, fashioned for concrete application by governments.³⁰⁷ It therefore is inconceivable that many have to suffer of hunger largely due to governments' inability to fulfil their human rights obligations as enumerated above. As has continuously been mentioned, the cause of hunger around the world is not the lack of sufficient food but is largely due to the inability of the various stakeholders,³⁰⁸ mostly states, to put in place measures that would lead to a wider enjoyment of the right. Already, extensive research has generated information on how many people lack food security and causes for the food insecurity in different parts of the globe. Despite the abundance of this vital information and ways to tackle hunger there has been a laxity by states to move forward.³⁰⁹ By fully implementing the right to adequate food it is contended that states can reduce the number of its citizens facing hunger and starvation. Additionally, in the face of climate change and its disastrous effects, states obligations need to be urgently and fully met. This renewed commitment would to some extent go a long way in mitigating and adapting to climate change, given the unique relationship between the means of food production and climate change.

From the above analysis, it is evident that there is a basic human right to adequate food, coupled with a right to be free from hunger. In addition, States have clearly,

³⁰⁶ Narula 2010 *Yale Human Rights and Development Law Journal* 406.

³⁰⁷ Climate change and Human Rights: A Rough Guide 21.

³⁰⁸ T Hirsch, C Lottje and M Windfuhr %Deepening the Food Crisis? Climate Change, Food Security and the Right to Food+ in *The Global Food Challenge – Towards a Human Rights Approach to Trade and Investment Policies* 78. <http://www.fian.org/resources/documents/others/the-global-food-challenge/pdf> (accessed 25 February 2011).

³⁰⁹ R Haug, & E Rauan %Realising the Right to Food by Integrating Human Rights in Poverty Reduction Strategies?+ (2002) 29 *NUPI Forum for Development Studies* 265 at 265. http://kms1.isn.ethz.ch/serviceengine/Files/ISN/27499/ichaptersection_singledocument/9149077a-46f2-4772-970c-556ae01f3074/en/2002_02_a.pdf (accessed 12 April 2011).

voluntarily, ratified international and regional treaties that require them to fulfil specific obligations in order to guarantee access to human rights. Governments have the obligation to respect, to protect and to fulfil the right to food, in addition to the obligation to facilitate this right. They also have to make possible full enjoyment of the right within their jurisdictions without discrimination. It is thus, on the face of statistics of those hungry in the world, a massive violation of the right to adequate food when millions have to go hungry or die because of lack of food. The impact of climate change will lead to more people being hungry, with others being exposed to hunger as a result of frequent droughts, floods and an increase in extreme weather events. This will necessitate the need for states to act on the right to adequate food in addition to taking concrete steps to mitigate and adapt to climate change.³¹⁰

On reviewing the hunger data, it is further contented that the number of hungry people in the world makes the right to adequate food by far the most flagrantly and commonly abused of human rights. Interestingly enough, despite the widespread endorsement of the right to adequate food and almost universal consensus on the need to act on it, not enough is being done by States. This is the position taken by Alston some 27 years ago when he appositely noted that the right to food has been endorsed more often and with greater unanimity and urgency than most other human rights, while at the same time being violated more comprehensively and systematically than probably any other right.³¹¹ It is thus a violation of the right to adequate food when a large number of the world's population is lacking food. The violation of this right does not only stop in the many countries afflicted by hunger, but is also an indictment of the international community's role in the fulfilment of human rights as a whole. States have an obligation in international law to ensure the enjoyment of rights of its citizens and those outside its jurisdiction.

It is only through the diligent fulfilment of these obligations that the number of hungry in the world can be reduced and the pace towards reaching Millennium Development Goal number one of halving the number of hungry people can be achieved. For this

³¹⁰ Hirsch *The Global Food Challenge – Towards a Human Rights Approach to Trade and Investment Policies* 89.

³¹¹ P Alston *International Law and the Human Right to Food* in P Alston and K Tomazevski eds, *The Right to Food* (1984) 9.

to happen though, there has to be concerted effort and international co-operation among states and other actors in the arena of human rights, and specifically, the right to adequate food. The content of the right to adequate food in international law and the concomitant obligations are wide enough to address the added threat brought about by the effects of climate change. States should be ready and willing to take on their national and extra-territorial obligations. They should adopt a rights-based approach to food as such a policy shift will allow for the State to take all necessary measures to deal with challenges to the right to food and human rights as a whole. Since climate change is going to be a threat multiplier over an extended period of time quick action now is likely to reduce the magnitude of harm predicted to occur with climate change. The guaranteeing of human rights in these challenging times is going to be very important.

CHAPTER FOUR

THE CONSTITUTIONAL RIGHT TO FOOD AND CLIMATE CHANGE IN KENYA

4.1 Introduction

The previous two chapters canvassed the link between climate change and human rights on the one hand, and the international human rights regime that deals with the right to adequate food on the other. The interpretation of the right to adequate food in international law exerts pressure on national legal orders to uphold human rights in their jurisdictions.³¹² Since the protection of human rights is the first preserve of the State, this chapter will focus on the food situation and the constitutional protection of the right to adequate food in Kenya. The respect and promotion of socio-economic rights and a human rights approach to food security issues has been inadequate in Kenya despite its formal commitment to a number of international human rights instruments callings for such promotion and respect. Since the right to adequate food can only be fully enjoyed if other rights are fulfilled, this chapter shall also analyse these interdependent and interrelated rights and how their application and interpretation by the courts is likely to influence the realisation of the right to food.

4.2 Climate change and the Food Situation in Kenya

Droughts have plagued Kenya in the recent past with increased intensity and frequency,³¹³ with far-reaching socio . economic consequences on many sectors including agriculture.³¹⁴ There have also been instances of flooding which have caused disruption to the livelihoods of many. The predicted effects of climate change are already being experienced in parts of the country, more so in the North East and Eastern provinces, which have experienced prolonged droughts due to failed

³¹² R van Alebeek & A Nollkaemper *The Legal Status of Decisions by Human Rights Treaty Bodies in National Law* ACIL Research Paper No 2011-02, 1 <http://ssrn.com/abstract=1817532> (accessed 1 May 2011). See also C Heyns & F. Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level* (2002) 1.

³¹³ In the distant past major droughts used to occur every ten years. The frequency of droughts later reduced to 5 years and now drought is experienced almost every year. Droughts experienced in January 1997, December 2000, 2004 and 2005. See also Drought in Kenya: Climatic, Economic and Socio-Political Factors <http://www.worldagroforestry.org/downloads/publications/PDFs/NL06291.pdf> (accessed 24 June 2010).

³¹⁴ See SW Muchemi, *Adaptation Lessons Learnt in Kenya on Climate Variability and Change* <http://www.climateadaptation.net/docs/papers/muchemi.pdf> (accessed 24 June 2010). See also VA Orindi (et al) *Pastoral Livelihood Adaptation to Drought and Institutional Interventions in Kenya* (2007) 1 http://hdr.undp.org/en/reports/global/hdr2007-8/papers/Orindi_Nyong_Herrero.pdf (accessed 24 June 2010).

rains.³¹⁵ Ironically, after the droughts and when the rains have fallen, the same areas have experienced flash floods. The food situation in Kenya has been a precarious one due to climate variability. With the effects of climate change leading to increased climate variability, the situation is set to become worse³¹⁶ as climate change will be superimposed on the already existing vulnerabilities.³¹⁷ In the recent past, Kenya has experienced a succession of at least four poor or failed seasons³¹⁸ attributable to climate variability.³¹⁹ Climate change has been identified as a leading cause of hunger and malnutrition, because of reduced agricultural yields of cereals, fruits, vegetables, and livestock products, including cash crops which generate income.³²⁰ Environmental and soil degradation, landslides and loss of biodiversity coupled with the drying up of river sources, are some of the effects of climate change that have affected food production in the country.³²¹ The situation is dire due to the fact that most of those affected have little to no adaptive capacity to deal with these climatic changes.

According to the Food and Agriculture Organization of the United Nations (FAO), nearly 11 million people in Kenya are malnourished.³²² Almost 70 percent of the population depend on agricultural livelihoods, most of them unable to meet their daily

³¹⁵ P Beaumont 'The last nomads: drought drives Kenya's herders to the brink' *The Observer* 13 September 2009 <http://www.guardian.co.uk/world/2009/sep/13/drought-kenya-nomads> (accessed 24 June 2010). See also UNICEF, *Climate Change in Kenya: Focus on Children* 3 <http://www.unccd.int/cso/docs/climatechangekenya2010web.pdf> (accessed 30 September 2011).

³¹⁶ WJ Burroughs, *Climate Change; a Multidisciplinary Approach* 2nd edition (2007) 287. See also Global Humanitarian Forum, *Human Impact Report The Anatomy of a Silent Crisis* (2009) 15 http://www.ghf-geneva.org/Portals/0/pdfs/human_impact_report.pdf (accessed 24 June 2010).

³¹⁷ Poverty and Climate change, *Reducing the Vulnerability of the World Poor through Adaptation* ix. http://ec.europa.eu/development/icenter/repository/env_cc_varg_poverty_and_climate_change_en.pdf (accessed 24 June 2010).

³¹⁸ Kenya Food Security Outlook 2 http://www.kenyafoodsecurity.org/monthly_bulletins/2010/jan_june10.pdf (accessed 24 June 2010).

³¹⁹ Mark Kapchanga 'Maize shortage to affect 4 million Kenyans' *The East African* 3 January 2010, <http://www.theeastafrican.co.ke/news/-/2558/835144/-/px0jfnz/-/&ct=ga&cd=QEf6O7cxwPY&usg=AFQjCNG-Eg6nxaFuWjtMBP-qzQ9fgCh0ZQ> (accessed 24 June 2010).

³²⁰ Global Humanitarian Forum, *Human Impact Report* (2009) 24. See also Government of Kenya, Office of the Prime Minister, 2009, *Statement of the Rt. Hon. Prime Minister Raila Odinga on the State of Food Security, Water and Energy in the Country*, July 22, 2009, <http://www.primeminister.go.ke/docs/PM%20on%20food%20water%20and%20energy.pdf> (accessed 24 June 2010).

³²¹ UNICEF, *Climate Change in Kenya: Focus on Children* 3.

³²² This is almost a third of the country's population estimated at 34 million given the disputed nature of the most recent census held in Kenya.

food requirements.³²³ Agriculture is the main sector of Kenya's economy and its performance greatly influences the overall economic performance of the country.³²⁴ The government has also noted that rising climate irregularity posed a major threat to subsistence farming, and stressed the need to develop agricultural practices that can endure changing climates.³²⁵ About 10 million people live in arid and semi-arid (ASAL) areas, which cover 80% of Kenya's land mass. Poverty is also a major concern when it comes to accessing food. As of 2005 a large number of Kenyans lived in poverty, with an estimated 56% of the population, majority of which were women.³²⁶ Over 60% of these people live below the poverty line.³²⁷ This state of affairs has far reaching consequences on the ability of Kenyans to enjoy economic, social and cultural rights in general. Kenya's agriculture is largely rain fed, making it highly susceptible to drought and other natural and man-made disasters.³²⁸ The Economic Review of Agriculture 2007 reveals that 51% of the Kenyan population require access to adequate food.³²⁹ The 2010 State of Food Insecurity Report has recognized Kenya as a country in protracted crisis as a result of some of the above mentioned factors.³³⁰ In addition to natural causes and institutional and governance challenges, the recent rising inflation rates have also adversely affected poor households' ability to buy food. The increasing prices of maize, the main staple, have tripled from about Kshs. 1,300 in January to Kshs. 4,500 (\$50) for a 90kg bag as of

³²³ FAO Country Briefs Kenya <http://www.fao.org/countries/55528/en/ken/> (accessed 24 June 2010).

³²⁴ P O Ailila and R Atieno *Agricultural Policy in Kenya: Issues and Processes*, A paper for the Future Agriculture Consortium workshop, Institute of Development Studies, 20-22 March 2006 3 www.future-agricultures.org/pdf%20files/Ag_policy_Kenya.pdf (accessed 24 June 2010).

³²⁵ Kenya calls climate change a threat to food security, *People's Daily Online* February 20, 2009 <http://english.people.com.cn/90001/90777/90855/6597836.html> (accessed 24 June 2010).

³²⁶ Republic of Kenya Report on the African Charter on Human and People's Rights (June 2006) 1 http://www.achpr.org/english/Archives/State%20reports/eng/Kenya/Kenya%20Report_1_eng.pdf (accessed 24 June 2010). See also Republic of Kenya, Millennium Development Goals Status Report for Kenya 2005 8,

³²⁷ R Kiome *Food Security* (2009) Ministry of Agriculture Kenya 4 http://www.reliefweb.int/rw/rwb.nsf/retrieveattachments?openagent&shortid=SNAA-7WG3UR&file=Full_Report.pdf (accessed 24 June 2010).

³²⁸ FIAN *Kenya's Hunger Crisis – The Result of Right to Food Violations* (2010) 7 <http://www.fian.org/resources/documents/others/kenyas-hunger-crisis-the-result-of-right-to-food-violations/pdf> (accessed 24 June 2010).

³²⁹ Kiome *Food Security* 7.

³³⁰ See State of Food Insecurity 2010, 12 . 13. Countries in protracted crisis affecting the right to food exhibit the following characteristics: conflict, Weak governance or public administration, Breakdown of local institutions, unsustainable livelihood systems and poor food security outcomes and Kenya meets the threshold used to identify such countries.

June 2011.³³¹ It is against this backdrop that an analysis of the right to food and climate change in Kenya will be undertaken.

4.3 Constitutional Provision for the right to Food

Civil and political rights have traditionally received, both at the international and national levels, much more prominence than Economic, Social and Cultural (ESC) rights.³³² Kenya was no exception in this regard until recently when it adopted a new constitution containing a fairly comprehensive list of socio-economic rights alongside civil and political rights. The renewed commitment to human rights as enshrined in the Constitution is in line with the realization that no drive for development will be successful unless they are based on the sure foundation of respect for human dignity.³³³ As such among the national values and principles of governance recognized by the new Constitution is human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised.³³⁴ It is submitted that this marks a complete break, at least on paper, with the past where respect for socio-economic rights and human rights in general was found wanting as the previous Bill of Rights only contained civil and political rights.³³⁵ In fact, by having a Bill of Rights that takes into account its international human rights obligations,³³⁶ especially socio-economic rights, entrenched in its Constitution, Kenya has undertaken to ensure that its laws and policies reflect these legal obligations and its willingness to achieve rather than undermine them.³³⁷ Kenya is thus legally obliged to ensure that its development plans (whether social or

³³¹ Eastern Africa: Severe food crisis hits region <http://www.irinnews.org/report.aspx?reportid=93092> (access 12 July 2011).

³³² J Nakuta, *The justiciability of social, economic and cultural rights in Namibia and the role of the non-governmental organisations* 89. <http://www.kas.de/upload/auslandshomepages/namibia/HumanRights/nakuta.pdf> (accessed 17 May 2011).

³³³ K Annan *In Larger Freedom: Towards Development, Security and Human Rights for All* Report by the Secretary General 21 March 2005 A/59/2005 Para 128. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/270/78/PDF/N0527078.pdf?OpenElement> (accessed 17 May 2011)

³³⁴ Article 10 (2) (b) Constitution of Kenya 2010.

³³⁵ M Laibuta *Socio-economic rights in Kenya's new Constitution First steps to the future* (2010) 11 3 *ESR Review* 20.

³³⁶ Kenya is a signatory to a number of International Human Rights Instruments that include the African Charter, ICESCR, and CRC among others.

³³⁷ P Twomey *Human Rights-Based Approaches to Development: Towards Accountability* in MA Baderin & R McCorquadale (eds) *Economic, Social, and Cultural Rights in Action* (2007) 47.

economic), as well as development assistance to other states, are assessed in terms of their human rights impact before and during implementation.³³⁸

In so far as the right to food is concerned, the Kenyan Constitution makes an explicit provision for the right to food in section 43 which generally deals with socio-economic rights. As the supreme law of the land, the fundamental role of the Constitution cannot be overemphasised especially in efforts to realize the right to food in the face of climate change. In terms of article 43 (1) (c), the Constitution declares:

43. (1) Every person has the right-
(c) to be free from hunger, and to have adequate food of acceptable quality;³³⁹

It makes further mention of elements characteristic of the right to adequate food by making provision for the guaranteeing of access to nutrition by children.³⁴⁰ These provisions dealing with the right to food cannot be read in isolation and should be read together with other parts of the Constitution that give effect to them. Closely linked to the right to food are the other provisions contained in article 43, which is accordingly titled, economic and social rights. Thus the rest of article 43 reads as follows:³⁴¹

43. (1) Every person has the right-
a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;
b) to accessible and adequate housing, and to reasonable standards of sanitation;
c) to clean and safe water in adequate quantities;
d) to social security; and
e) to education.
f) ..
3) (3) The State shall provide appropriate social security to persons who are unable to support themselves and their dependants.

To ensure that the right to food is fulfilled, the above-mentioned rights, in article 43 and by implication the whole Bill of Rights, will also have to be fully implemented so that all citizens can enjoy them equally with the hope that such enjoyment will

³³⁸ P Twomey Human Rights-Based Approaches to Development: 47.

³³⁹ Article 43 (1) (c) Constitution of Kenya 2010.

³⁴⁰ Article 53 (1) Every child has the right . (c) to basic nutrition, shelter and health care.

³⁴¹ See article 43 (1) (a), (b), (d), (e), (f) and (3) Constitution of Kenya 2010.

ultimately lead to decent lives for all³⁴² within Kenya given the threat posed by climate change to the enjoyment of rights.

Fundamental to the fulfilment of these rights is the provision dealing with the responsibility of the State to fulfil the rights enshrined in article 21³⁴³ of the Kenyan Constitution and the role played by the Bill of Rights. This direct provision for the protection of the right to food is important in guaranteeing the right as everyone can claim the right before the courts, unlike in the past when a lot of judicial activism would have to be relied upon, had the right been provided for indirectly.³⁴⁴ This is further strengthened by the role of the bill of rights in Kenya. According to article 19 (1), the Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and social policies. This underlines the central role of the bill of rights in everyday matters of the Kenyan state and goes a long way in guaranteeing the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings.³⁴⁵ The respect of human dignity is thus going to be of central importance³⁴⁶ in the courts' interpretation of human rights in Kenya. Furthermore the drafting of State's policies on all matters should be guided and read in light of the Bill of Rights and the Constitution as a whole at all times.

Given the environmental impact climate change is likely to have, it is necessary that the environment is protected and treated in a sustainable manner. The Constitution recognises the central importance of the environment in guaranteeing quality human

³⁴² See E Wiles 'Aspirational Principles of Enforceable Rights? The Future for Socio-Economic Rights in National Law' 22 (2006-2007) *American University International Law Review* 35 at 49.

³⁴³ This provision and its importance are dealt with in later parts of this chapter.

³⁴⁴ See DM Chirwa *An Overview of the Impact of the International Covenant on Economic, Social and Cultural Rights in Africa* 7, discussing the advantages of having direct provision of socio-economic rights in the Constitution http://www.communitylawcentre.org.za/clc-projects/socio-economic-rights/research/socio-economic-rights-international-and-comparative-law/socio-economic-rights-international-and-comparative-law-1/Socio-economic_rights_in_Africa.pdf (accessed 17 May 2011).

³⁴⁵ Article 19 (3) Constitution of Kenya 2010.

³⁴⁶ See S Liebenberg 'The Value of Human Dignity in Interpreting Socio-Economic Rights' (2005) 21 *South African Journal of Human Rights* 1 at 13-18 discussing of human dignity and its value in socio-economic rights jurisprudence. See also A Sachs *The Judicial Enforcement of Socio-Economic Rights: The Grootboom Case* 9. <http://www.lawsociety.ie/documents/committees/hr/lectures/23.6.2005.pdf> (accessed 18 July 2011).

life. In fact, the Constitution provides for a right to a clean and healthy environment. Accordingly, article 42 of the Kenyan Constitution reads:

Every person has the right to a clean and healthy environment, which includes the right-

- a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and
- b) to have obligations relating to the environment fulfilled under Article 70.

To clearly understand the extent of protection to the environment it is necessary that it be reproduced herein as stated in the Constitution. Article 69 reads as follows;

1. The State shall-
 - (a) ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits;
 - (b) work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya;
 - (c) protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities;
 - (d) encourage public participation in the management, protection and conservation of the environment;
 - (e) protect genetic resources and biological diversity;
 - (f) establish systems of environmental impact assessment, environmental audit and monitoring of the environment;
 - (g) eliminate processes and activities that are likely to endanger the environment; and
 - (h) utilise the environment and natural resources for the benefit of the people of Kenya.
2. Every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.

The protection of the environment as a human right is critical, as a good and sound environment is necessary for the enjoyment of other human rights; and in Kenya's instance, to the right to food and in dealing with climate change. The importance of a clean environment has been highlighted on several occasions and in different fora. For instance the 1972 United Nations Conference on the Human Environment declared that "man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights--even the right to life itself."³⁴⁷ Furthermore, there are a number of decisions from human rights bodies dealing with the link between human rights and the environment.³⁴⁸ It will thus be

³⁴⁷ Stockholm Declaration of the United Nations Conference on the Human Environment para 1.

³⁴⁸ For instance *EHP v. Canada* Communication No. 67/1980; *Awasi Tingni Mayagna (Sumo) Indigenous Community v Nicaragua* Inter American Court on Human Rights (Ser. C) No. 79 (2001) <http://www1.umn.edu/humanrts/iachr/AwasTingnicase.html> (accessed 21 August 2011).

incumbent upon the state of Kenya to respect its human rights obligations in so far as the right to food and the right to a clean environment overlap, in which case it will be in most instances. This overlap is implicit in the definition of the right to food as elaborated by the CESCR, which is that in addition to access to food at all times, such accessibility should be in a sustainable manner.³⁴⁹ The overlap is also inevitable when one considers the link between the realisation of the right to food and the effects of climate change.

It is expected that these human rights norms will swiftly find a new special eminence, in Kenya because they prescribe new rules for appropriate behaviour, and help define the roles to be played by the State. These rights further have constitutive effects because good human rights performance by Kenya is going to be one crucial signal to other States to identify Kenya as a member of the community of liberal states that have respect for human rights.³⁵⁰ The rights in the Constitution belong to each individual and do not originate from the state.³⁵¹ Moreover, the Constitution is clear that the bill of rights applies to all law and binds all State organs and all persons, meaning that no one within the jurisdiction of Kenya is above the law.³⁵² It will thus be essential to develop a culture of human rights in Kenya as this has been lacking. The implementation of the new Constitution and human rights will not be without challenges and these will have to be overcome if Kenya is to fulfil its human rights obligations. This can only be achieved with the help of other institutions that have a role to play in the promotion, protection and fostering of a human rights culture. These include the Kenya National Human Rights Commission, the Judiciary, the Legislature and even the Executive and the commissions and independent offices envisioned in Chapter 15 of the Constitution of Kenya 2010.

4.4 Duties of the State in implementing Socio-economic Rights

The responsibility for the implementation of the Bill of Rights falls squarely on the State within any jurisdiction. The Kenyan context is no different, as substantiated by

³⁴⁹ Committee on Economic and Social Rights, General Comment 12, paras 6-8.

³⁵⁰ T Risse & K Sikkink %The Socialization of International Human Rights Norms into Domestic Practices+in T Risse, K Sikkink & SC Ropp (eds) *The power of human rights: International Norms and Domestic Change* (1999) 1at 8.

³⁵¹ Article 19 (3) (a) Constitution of Kenya 2010.

³⁵² Article 20 (1) Constitution of Kenya 2010.

the wording of article 21 (1) which states that; it is a fundamental duty of the State and every State Organ to observe, respect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.³⁵³ This further supports the provisions in article 20 when a court is ruling on the states measures to implement the right to food. It is further submitted that the obligations of the state in terms of articles 20 and 21 are in line with each states obligations under international human rights law. Thus, borrowing from these, the state should refrain from restricting individuals access to food. The government should also put in place measures to increase its citizens access to food at all times, and lastly protects its citizens from the acts of third parties that may limit access to food. It is further submitted that the obligation to protect citizens from third parties would necessitate ratifying or acceding to international agreements that are favourable to the countrys population as well.

Since the state has these obligations, the Constitution gives it room to decide the manner in which it can go about meeting its obligations. As such, in order to achieve the socio-economic rights enshrined in article 43, the State is required to take legislative, policy and other measures including the setting of standards, to achieve the progressive realisation³⁵⁴ of the right to adequate food. Some of the measures currently in place and affecting the right to adequate food shall be addressed later on in this chapter. This provision has yet to be fully interpreted by the Kenyan courts. There is a dearth of judicial pronouncements on socio-economic rights in Kenya, largely due to the fact that this category of rights is a recent addition in the constitutional arrangement of the country. Be that as it may the Kenyan courts have shown a great willingness to embrace the central importance of human rights to the dignity of the individual since the new Constitution came into being.³⁵⁵ Besides, in the task of interpreting the new constitution the Kenyan Courts will be confronted with an uncertain and imprecise human rights heritage in which precedent on socio-economic rights is limited.³⁵⁶ It will be a tug of war between changing old ways of thinking and trying to infuse a new way of thinking within the judiciary and country as

³⁵³ Article 21 (1) Constitution of Kenya 2010.

³⁵⁴ Article 21 (2) Constitution of Kenya 2010.

³⁵⁵ See for instance the courts decision in *Susan Waithera Kariuki & 4 Others v Town Clerk, Nairobi City Council & 2 others* 2011 eKLR High Court at Nairobi (Nairobi Law Courts) Petition 66 of 2010.

³⁵⁶ This rings true for most of the African continent which only until recently has become amenable to embracing international human rights standards in their constitutions. See MK Addo *International Law of Human Rights* (2006) 386.

a whole that promotes human rights. The courts will have an important role to play in turning the rights contained in the Constitution into reality for many who do not enjoy them. To this end, the Kenyan Judiciary is being overhauled as a result of the new Constitution. It is hoped that by the time such restructuring and reform process is completed, a human rights friendly judiciary will have been created as they will play a central role in turning the rights on paper into reality.

4.4.1 Duty to Respect

The discussion will now focus on an elaboration of the duties of the state as provided by the Constitution. In a nutshell the duties incumbent upon the government are contained in articles 21 (1) and 21 (2) of the Constitution. Article 21 (1) states that it is the fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights. The importance of the provision in article 21 (1) is that it has an implication for all the other rights in the Bill of Rights. The State has legal obligations that include the duties to observe, respect, promote and fulfil human rights without fail. Thus, the first and foremost legal obligation is the duty to respect the right to adequate food. The essence of the duty to respect entails the state and its organs refraining from impairing people's existing access to adequate food.³⁵⁷ Furthermore, it has been rightly suggested that the State should refrain from placing unnecessary obstacles in the way of people newly gaining access or enhancing existing access to food.³⁵⁸ This, of course, is taking into consideration that no rights can be absolute and there are times that human rights might necessarily have to be limited for the greater good of all.³⁵⁹ This will be important as the quest to produce food should ideally not lead to further environmental degradation instead it should be sustainable. Accordingly, any limitation should be in line with set guidelines as found in the Constitution.

4.4.2 Duty to Protect

Closely linked to the duty to respect, is the duty to protect the right to food. This duty requires the state to protect the existing enjoyment of this right against third party

³⁵⁷ A good example of a State failing to respect the right to food is the Nigerian case of *Social and Economic Rights Action Centre (SERAC) v Nigeria* (2001) AHRLR 60 (ACHPR 2001).

³⁵⁸ D Brand, 'The right to Food' in C Heyns (eds) *Socio-economic Rights in South Africa* (2005) 165.

³⁵⁹ Article 24 of the Kenyan Constitution 2010 provides for the limitation of rights and fundamental rights.

interference. Thus, where private business activities within the state threaten access to food for a significant part of the population, the state should be able to protect those whose right to access food is threatened. Such protection should also extend to protecting the capacity of people to enhance their enjoyment of this right or to newly gain access to the enjoyment of this right, against third party interference.³⁶⁰ Under the obligation to protect the State will have to regulate the conduct of third parties engaged in activities that have a bearing on the right to food. In particular, when such activities threaten to violate or interfere with the enjoyment of the right to food and other rights, the state has a responsibility to safeguard the interests of its citizens.³⁶¹ Such entities would thus include those involved in employment of individuals, production and the distribution of food. This protection should ideally result in the state being able to regulate activities with the aim of achieving a balance with other rights that might be in competition. To this end, the need for an enforceable regulatory framework to guide private conduct affecting the right to food within the Kenyan jurisdiction is essential.³⁶² In fact, the aim should be for the Kenyan government to regulate such private activities in such a way that, ~~the~~ a balance with other important constitutional principles such as freedom and equality, access to food for everyone is optimised.³⁶³ Furthermore, such regulation should also extend to those activities that might contribute to environmental degradation and emission of large quantities of GHG into the atmosphere.

The duty to promote rights is of great consequence if all Kenyans are to enjoy access to the right to food while faced with the challenge of climate change and its effects. The re-constituted Kenya National Human Rights Commission, should, in terms of article 59 (4) of the Constitution, be at the forefront of the promotion of all human rights. The history of Kenya is such that people have not been able to enjoy their rights because they were not enshrined in the constitution in addition to many to

³⁶⁰ Brand *Socio-economic Rights in South Africa* 170.

³⁶¹ AE Yamin, *The Future in the Mirror: Incorporating Strategies for the Defense and Promotion of Economic, Social and Cultural Rights into the Mainstream Human Rights Agenda* (2005) 27 *Human Rights Quarterly* 1200, 1216.

³⁶² See Brand *Socio-economic Rights in South Africa* 172 who opines that ~~it~~ is important to note that the duty of the state to protect the right to food through the regulation of private conduct does not only require it to create a regulatory framework, but also to implement and enforce that framework effectively.⁺

³⁶³ Brand *Socio-economic Rights in South Africa* 172. See also V Dankwa, C Flinterm and S Leckie, *Commentary to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (1998) 20 *Human Rights Quarterly* 705 at 714.

many not being aware of them. The recently promulgated Kenya Human Rights Commission Act³⁶⁴ establishes the Kenya National Human Rights Commission, whose functions shall include the promotion of respect for human rights and the development of a human rights culture within Kenya.³⁶⁵ This would be in keeping with the State's duty to promote human rights, especially the socio-economic rights that have received less attention. Such promotion, through education and other means should be to all citizens and most importantly, public officers, state organs and institutions that are at the forefront of guaranteeing these rights.

The state also has the important duty to fulfil the right to food. This duty encompasses the obligations already discussed above. It is the duty to take appropriate steps by all means necessary to achieve the right to food. It includes the adoption of all necessary measures, including but not limited, to the adoption of administrative, financial, educational and social measures.³⁶⁶ It is submitted that in light of the food situation in Kenya, the essence of this duty should be seen as the need for the state to make food available for those facing hunger and malnutrition as a result of climate change and other factors. This would mean putting in place measures to see to it that the people in parts of the country prone to droughts and floods have access to food when faced by such hardships which are outside their control. Thus the fulfilment of the right to food would mean making food available either directly from the land or other natural resources or through distribution systems capable of moving food to where it is needed.³⁶⁷

Other important provisions having a direct effect on the right to adequate food, and clearly signalling the obligations of the state, are the provisions in articles 21 (2) and 21(4). Article 21 (2) calls on the State to take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43.³⁶⁸ On the other hand, article 21 (4) demands that the

³⁶⁴ Kenya National Commission on Human Rights Act 14 of 2011.

³⁶⁵ See Section 6 (a) . (j) Constitution of Kenya 2010 for the functions of the Kenya National Human Rights Commission intended to promote human rights within Kenya.

³⁶⁶ See CESCR General Comment 3, *The Nature of States Parties' Obligations* (Fifth session, 1990), U.N. Doc. E/1991/23, paras 3- 5 and 7.

³⁶⁷ Committee on Economic, Social and Cultural Rights, General Comment 12, *The Right to Adequate Food* paras 8, 12.

³⁶⁸ Article 21(2) Constitution of Kenya 2010.

State to enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.³⁶⁹ This is in keeping with the obligation to fulfil economic, social and cultural rights. However such fulfilment is always subject to progressive realisation and as such it is argued that the provisions of article 2 of the ICESCR together with the interpretation of the Covenant by the Committee on Economic, Social, and Cultural Rights (CESCR)³⁷⁰ would be instructive in giving meaning to this provision and by implication the interpretation of the right to food in Kenya. Article 2 of the ICESCR requires States to take steps to progressively realise the rights contained in the Covenant³⁷¹ and resembles the provision in article 21(2) of the Kenyan Constitution. The issue of progressive realisation of socio-economic rights has elicited a lot of debate across the world. In most instances, States have used it as a justifiable defence when brought before a court to answer for the slow implementation of socio-economic rights. It would thus not be a surprise if the Kenyan government were to use it as a defence when such a time comes when they have to answer to court on their fulfilment of socio-economic rights. As much as this is the case, it is submitted that the Kenyan government should immediately embark on fulfilling its obligations in terms of the Constitution and its treaty obligations.

The approach suggested by Koch should be embraced by the Kenyan government that ~~the~~ considers what it takes to overcome obstacles for the full enjoyment of ~~the~~³⁷² the right to food in coming up with programmes to address the food insecurity situation in the country. By calling on the state to implement legislative measures to give effect to socio-economic rights in the Constitution, it is argued, provides the avenue for the application of international human rights law principles, as developed under the UN human rights treaty system within the Kenyan context.³⁷³ The CESCR has called attention to the value of legislation in giving meaning to socio-economic

³⁶⁹ Article 21 (3) Constitution of Kenya 2010.

³⁷⁰ The Committee on Economic, Social and Cultural Rights (CESCR) is the body of independent experts that monitors implementation of the International Covenant on Economic, Social and Cultural Rights by its States parties.

³⁷¹ Article 2 International Covenant on Economic, Social and Cultural Rights (ICESCR).

³⁷² I E Koch, *The Justiciability of Indivisible Rights*(2003) 72 *Nordic Journal of International Law* 3 at 15.

³⁷³ Including the progressive realisation of rights as enumerated in CESCR General Comments.

rights.³⁷⁴ Some of these legislative and other measures will be examined later in this chapter. Suffice it to say that this is in keeping with the state's obligation to fulfil the rights enshrined in the Constitution. What this means is that the State ought to take some action to guarantee access to the right to food for its citizens. It is thus clear that the duties of the state require that it acts towards the realisation of these rights.

4.5 Adjudication of Humans Rights Issues by the Kenyan Courts

Adjudication of human rights issues by the courts is important. What is even more important is access to courts by those whose rights are threatened or denied. It is not always that the state will perform its obligations; therefore it should be held accountable, and this is only possible through the courts. It is thus laudable that the Constitution has allowed for Public Interest Litigation (PIL) by giving *locus standi* to a number of parties. It is hoped that this access to courts will result in wider enjoyment of rights by citizens. This increased *locus standi* by interested parties in human rights matters is very important, especially since most individuals whose rights are violated do not have the means to approach the court for vindication of their rights in their personal capacity.³⁷⁵ The advantage here is that the state can be put to task over its efforts to meet its human rights obligations.³⁷⁶ Consequently, in addition to everyone having a right to institute court proceedings in their own interest,³⁷⁷ they can do so while acting on behalf of another,³⁷⁸ while acting as a member of, or in the interest of, a group or class or persons;³⁷⁹ or acting in the public interest³⁸⁰ or an association acting in the interest of one or more of its members.³⁸¹ The Chief Justice is further mandated to draft rules that are intended to make the procedure in approaching the courts as enumerated in article 22 (2) simple and not restricted by procedural

³⁷⁴ See The Nature of State Parties Obligations (Art. 2, par.1) 14/12/1990. CESCR General comment 3 para 3.

³⁷⁵ On the importance of public interest litigation in vindicating rights see CM Forster & V Jivan %Public Interest Litigation and Human Rights Implementation: The Indian and Australian Experience+(2008) 3 *Asian Journal of Comparative Law* 1-32.

³⁷⁶ The Committee on Economic and Social Cultural Right has recognized the need to have appropriate redress or remedies within the legal order and courts are an appropriate channel to seek such redress. See General Comment No 9: *The Domestic Application of the Covenant* (1998) UN CESCR, UN Doc E/C 12/2000/4 para 2. See also CESCR General Comment No.3, The Nature of State parties Obligations para 5.

³⁷⁷ Article 22 (1) Constitution of Kenya 2010.

³⁷⁸ Article 22 (2) (a) Constitution of Kenya 2010.

³⁷⁹ Article 22 (2) (b) Constitution of Kenya 2010.

³⁸⁰ Article 22 (2) (c) Constitution of Kenya 2010.

³⁸¹ Article 22 (2) (d) Constitution of Kenya 2010.

technicalities.³⁸² Given the transitional nature of the Kenyan legal system, the Constitution is clear that the absence of rules contemplated in clause (3) does not limit the right of any person to commence court proceedings under this Article, and to have the matter heard and determined by a court.³⁸³ This means that any matter can be brought before court alleging an infringement of rights while still awaiting the drafting of rules by the Chief Justice.

The accordance of *locus standi* to a wider range of parties would be futile without empowering the courts to make certain rulings in so far as a matter dealing with the bill of rights is concerned. As such, it is reassuring to see that the Constitution accords the courts the powers to grant appropriate relief which may include one of the following in a matter brought to it under article 22: (a) a declaration of rights (b) an injunction (c) a conservatory order (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under article 24; (e) an order for compensation; and (f) an order of judicial review.³⁸⁴ It is submitted that the courts need these powers in order to make appropriate rulings on human rights matters brought before them. Crucially, for the enjoyment of socio-economic rights, the bill of rights is justiciable. This puts to rest any doubts as to the courts powers to make pronouncement on matters dealing with the right to food together with other socio-economic rights.

In applying the bill of rights, the Constitution calls on the courts to adopt the interpretation that most favours the enforcement of a right or fundamental freedom.³⁸⁵ Understanding the importance of the interpretation of the provisions in the Bill of Rights, the Constitution gives two fundamental guidelines to be applied

³⁸² Article 22 (3) The Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that .

- a) the rights of standing provided for in clause (2) are fully facilitated;
- b) formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation;
- c) no fee may be charged for commencing the proceedings;
- d) the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities; and
- e) an organisation or individual with particular expertise may, with the leave of the court, appear as a friend of the court.

³⁸³ Article 22(4) Constitution of Kenya 2010.

³⁸⁴ Articles 22 (3) (a) to (f) Constitution of Kenya 2010.

³⁸⁵ Article 20 (3) (b) Constitution of Kenya 2010.

when such interpretation is being undertaken. Such interpretation is to promote values that underlie an open and democratic society based on human dignity, equality, equity and freedom;³⁸⁶ and the spirit, purport and objects of the Bill of Rights.³⁸⁷ It is submitted that these two guiding principles will play a central role in the vindication of human rights through the courts and other judicial tribunals.

The interpretation of the right to food and socio-economic rights by the courts of law is likely to put them on a collision course with the executive arm of the government. This stems from the fact that some of the rulings based on socio-economic rights might entail the court encroaching on areas traditionally thought to be the preserve of the executive arm. To avoid such collisions between the two arms of government, the Kenyan Constitution stipulates in article 20 (5) how the courts are to interpret article 43. Thus should the state claim that it has no resources to implement the rights in article 43(socio-economic rights of which the right to food in one of them), then the court should be guided as follows:³⁸⁸

- (a) It is the responsibility of the state to show that the resources are not available
- (b) In allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals; and
- (c) The court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion.

The guidelines above are in line with established and recognised international human rights interpretation by the Committee on Social, Economic and Cultural Rights especially article 20 (5) (a), which is not in great variance with the CESCR's comment that:³⁸⁹

In order for a State Party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources, it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.

It therefore follows that the issue of state resources allocation will be essential if Kenya is to be a human rights respecting State seeking to improve the living standards of its citizens. In making budgetary allocations, the state should be aware

³⁸⁶ Article 20 (4) (b) Constitution of Kenya 2010.

³⁸⁷ Article 20 (4) (b) Constitution of Kenya 2010.

³⁸⁸ Articles 20 (5) (a) to (c) Constitution of Kenya 2010.

³⁸⁹ CESCR General Comment 3 para 10.

that certain government ministries would necessarily need to be allocated more money than others. In so far as the right to food is concerned, it is submitted that the Kenyan government ought to allocate at least 10% of its national budgetary resources to facilitate agriculture and food security.³⁹⁰ Moreover, it should allocate the necessary resources to other departments that deal with the right to food in one way or the other. The requirement for the state to show that it does not have enough resources strongly indicates towards the requirement of a minimum core. This concept established by the CESCR³⁹¹ is meant to make sure that states work towards meeting their obligations as contained in the ICESCR. It is one of the approaches the courts could adopt in deciding matters that deal with article 43 of the Kenyan Constitution.

In the task of interpreting the new Bill of rights, the Kenyan Courts³⁹² will be confronted with an uncertain and imprecise human rights heritage in which precedent on socio-economic rights is limited.³⁹³ The case in Kenya has been such that the absence of a codification of socio-economic rights has made it difficult for the courts to apply international human rights norms directly.³⁹⁴ The absence of socio economic rights in the previous Constitution³⁹⁵ has meant that the courts in Kenya have not had a standard way of dealing with these rights.³⁹⁶ The result has been that the application of civil and political rights and their interpretation has been robust. However, there have been times when the courts have had difficulties interpreting civil and political rights. In the 1989 case of *Maina Mbacha v Attorney*

³⁹⁰ This 10 per cent was agreed to in the Maputo Declaration on Agriculture and Food Security in Africa Assembly/AU/Decl.7 (II) <http://www.nepad.org/system/files/Maputo%20Declaration.pdf> (accessed 28 July 2011).

³⁹¹ See CESCR, General Comment 3. See also KG Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' (2008) 33 *Yale Journal of International Law* 113.

³⁹² The Constitution of Kenya 2010 accords the authority to hear matters dealing with human rights to the high court in terms of article 23 (1). Reference to Kenyan courts in this chapter denotes the High Courts.

³⁹³ This rings true for much of the African continent which only until recently has become amenable to embracing international human rights standards. See Addo *International Law of Human Rights* 386.

³⁹⁴ JO Ambani, 'Navigating past the dualist doctrine: The case for progressive jurisprudence on the application of international human rights norms in Kenya' in M Killander (ed) (2010) *International Law and Domestic Human Rights Litigation in Africa* 25 at 31.

³⁹⁵ The old Constitution of Kenya was promulgated on 12th Dec 1963 after Kenya attained independence. Its interpretation and those of all laws in Kenya was directed by the Judicature Act of 1967.

³⁹⁶ Kenyan Report on the Application of the African Charter on Human Rights para 14.

General,³⁹⁷ in what can only be best described as a baffling ruling, the court failed to exercise its powers in terms of the then section 84 of the old Kenyan Constitution which gave it the powers to enforce the fundamental rights of individuals and the person.³⁹⁸ Despite this one case, Kenya's jurisprudence on civil and political rights can best be described as satisfactorily interpreted by the courts.

In so far as the application of socio-economic rights has been concerned, the high courts' adjudication on such matters can best be described as wanting. Thus, it will be a tug of war between changing old ways of thinking and trying to infuse a human rights way of thinking within the judiciary and country as a whole. In the past, Kenyan Courts have grappled with the application of human rights norms especially socio-economic rights given the dualist nature³⁹⁹ of the previous constitutional dispensation that did not leave room for judicial activism.⁴⁰⁰ By adhering to the dualist doctrine, the courts in most instances ruled that international human rights norms could not find application within Kenya until domesticated through an Act of parliament.⁴⁰¹ The outcome of this was that the courts were curtailed in promoting the respect of socio-economic rights.⁴⁰² Be that as it may, there have been instances where the courts have been willing to invoke international standards and progressive comparative jurisprudence.⁴⁰³ The position has changed with the new Constitution and as such the courts will have to, as appositely noted by one Addo, nurture an entirely new legal mind-set concerning human rights in which the rule of law is paramount and the

³⁹⁷ 1989 17 Nairobi Law Monthly 38 as quoted by GK Kuria & SM Vasquez *Judges and Humans Rights; The Kenyan Experience* 1991 (35) *Journal of African Law* 142.

³⁹⁸ See discussion of the case by Kuria & Vasquez 1991 *Journal of African Law* 142.

³⁹⁹ Kenya followed the dualist approach to treaty implementation and denied any direct internal effect of international treaties without legislative enactment of an enabling statute.

⁴⁰⁰ For a discussion on the application of the dualist doctrine in Kenya see Ambani *International Law and Domestic Human Rights Litigation in Africa* 25 . 35.

⁴⁰¹ See *Okunda v Republic* [1970] EA 512; *Pattni & Another v Republic* [2001] KLR 262. See also Kenya Report on the African Charter on Human and Peoples Rights para 16. GW Mukundi Country Report of the Research Project by the International Labour Organization and the African Commission on Human and Peoples Rights on the Constitutional and Legislative Protection of the Rights of Indigenous Peoples: Kenya (2009) 16.

⁴⁰² Implementation of the International Covenant On Economic, Social And Cultural Rights Initial reports submitted by States parties under articles 16 and 17 of the Covenant KENYA [7 September 2006] E/C.12/KEN/1 para 14.

⁴⁰³ *RM and Another v Attorney General* Kenya Law Reports (Gender and Family) Civil case no 1351 of 2002 at 584 - 585. http://www.law.co.ke/family/case_download.php?go=38557555657590905339934 (accessed 20 August 2011).

individual is the central beneficiary of law and policy.⁴⁰⁴ The situation is also bound to improve given the provision in article 2(5)⁴⁰⁵ and 2(6)⁴⁰⁶ of the Constitution which allows for application of international law standards domestically. The courts would therefore have to consider international law in deciding on matters to do with human rights in general.

In any interpretation by the courts of the state's obligations, and the state and its organs in the fulfilment of their obligations, it is hoped they will always take into account the fact that the right to food is interlinked with, and interdependent on, other rights. This view has been widely accepted to mean that the full enjoyment of the right to food (or any other particular right) both depends on and makes possible the enjoyment of other rights, and in the same breadth other rights can be used to protect or advance the enjoyment of the right to food.⁴⁰⁷ Additionally, there will be a pressing need to re-establish the rule of law within Kenya, together with actual political commitment towards implementing the new Constitution and human rights norms as the enduring implementation of human rights norms requires political systems to establish the rule of law.⁴⁰⁸ This will have the added impact of providing a favourable environment for the nurturing of a human rights culture based on equality and the respect of human dignity for all.⁴⁰⁹ The rule of law is central to the implementation and realisation of human rights by citizens in a country. Through it, the rights guaranteed on paper can be given life and meaning, and in the long run make the lives of the many poor much better.

The limitation of rights is necessary as no right can be termed as absolute. However, such limitation is not unqualified and has to be based on certain established guidelines to avoid the arbitrary limitation of fundamental human rights. In the Kenyan context, the Constitution provides, through article 24, the limitation mechanism. Thus in making a ruling on the limitation of a right in the Bill of Rights,

⁴⁰⁴ Addo *International Law of Human Rights* 386.

⁴⁰⁵ It reads, "The general rules of international law shall form part of the law of Kenya."

⁴⁰⁶ It reads, "Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."

⁴⁰⁷ See P Twomey "Human Rights-Based Approaches to Development: Towards Accountability" in B Mashood, ed (2007) *Economic, Social, and Cultural Rights in Action* 46 -47.

⁴⁰⁸ Risse & Sikkink *The power of human rights: International Norms and Domestic Change* 3.

⁴⁰⁹ Risse & Sikkink *The power of human rights: International Norms and Domestic Change* 3-4.

the courts and any other tribunal ought to consider whether such limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors. These factors include:⁴¹⁰

- a) the nature of the right or fundamental freedom;
- b) the importance of the purpose of the limitation;
- c) the nature and extent of the limitation;
- d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
- e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose

As much as there is a dearth of human rights decisions dealing with the right to adequate food, ever since the new Constitution came into being the courts pronouncement on socio-economic rights so far has been encouraging. The court has had an opportunity to pronounce on article 43 of the Constitution in the case of *Susan Waithera Kariuki & 4 others v Town Clerk, Nairobi City Council & 2 others*.⁴¹¹ In this case the court had to make a ruling as to whether eviction orders to the inhabitants of an informal settlement on a certain parcel of land could be carried out.⁴¹² The applicants in this case made use of the provisions of the new Constitution by instituting these proceedings on their own behalf and on behalf of thousands of poor villagers living in the said areas.⁴¹³ On reading his judgement Justice Musinga relied on the provisions of the Constitution to guide him especially articles 2(5) and (6), which call for the application of relevant international law in making court rulings. Commenting on the importance of international law for socio-economic rights and the right to food in particular, Brand notes that international law is a very useful source for interpreting and developing the content of the right to food largely because much work has been done there to describe the content of the right to food and to translate that content into duties . . . into things that states must do.⁴¹⁴

The learned judge was also guided by article 20 (4) which calls for the promotion of values that underlie an open and democratic society, together with article 259 (1)

⁴¹⁰ Article 24 (1) (a) . (e) Constitution of Kenya 2010.

⁴¹¹ *Susan Waithera Kariuki & 4 Others v Town Clerk, Nairobi City Council & 2 others* 2011 eKLR High Court at Nairobi (Nairobi Law Courts) Petition 66 of 2010

⁴¹² *Susan Waithera Kariuki & 4 Others v Town Clerk, Nairobi City Council & 2 others* 1.

⁴¹³ In terms of article 22 of the Constitution of Kenya 2010.

⁴¹⁴ Brand *Socio-economic rights in South Africa* 154.

which advocates for an interpretation of the Constitution in a manner that promotes its purposes, values and principles and advances the rule of law, human rights and fundamental freedoms.⁴¹⁵ It is submitted that the ruling of the court and the approach taken by the judge should be the approach to be emulated by judges when making ruling on matters dealing with socio-economic rights in Kenya. Reliance on credible comparative human rights jurisprudence from other jurisdictions will also be necessary especially if such jurisdictions have a strong history of human rights. Thus the court's mentioning of the South African case of *Modderklip Boerdery v President Van Die RSA en Andere*⁴¹⁶ should be seen as a willingness by the courts to seek guidance from other jurisdictions with a strong human rights jurisprudence. It is submitted that the South African situation provides a case study on how the Kenyan courts should go about in interpreting socio-economic human rights. The South African Constitution contains a Bill of Rights with economic, social and cultural rights, which have been interpreted by the Constitutional court of South Africa clearly stating the role to be played by the state in implementing these rights. The reasonableness approach adopted by the South African Constitutional Court⁴¹⁷ provides an example on how the Kenya courts can approach matters dealing with the rights contained in article 43 of the Kenyan Constitution.

It is only through such a promising interpretative approach, as adopted in the *Waithera Kariuki* case that the content of the right to food and other socio-economic rights in Kenya can be gradually developed by the courts.⁴¹⁸ The application of international human rights principles enumerated in soft law documents such as General Comment 12 and the voluntary guidelines should be embraced. This should also include adopting appropriate comparative human rights jurisprudence from other judicial jurisdictions based on human dignity and democracy such as South Africa for instance. South Africa has been long praised as

⁴¹⁵ *Susan Waithera Kariuki & 4 Others v Town Clerk, Nairobi City Council & 2 others* 2011 7.

⁴¹⁶ *Modderklip Boerdery v President Van Die RSA en Andere* 2003 (6) BCLR 638 (T).

⁴¹⁷ See the court's ruling in cases such as *Mazibuko v City of Johannesburg* 2010 (3) BCLR 239 (CC); *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC); *Minister of Health v Treatment Action Campaign* 2002(5)SA 721(CC) and *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC).

⁴¹⁸ C. Courtis, 'The Right to Food as Justiciable Right: Challenges and Strategies' (2007) *Max Planck United Nations Year Book* 317 at 323.

a leading example on how countries should entrench socio-economic rights.⁴¹⁹ Additionally, the courts in South Africa have led the way in demonstrating that socio-economic rights can be adjudicated by a highly competent judiciary.⁴²⁰ Human rights standards in Kenya have not been developed to their full potential, despite the broad nature of existing international human rights standards. New human rights standards are needed that will take into cognisance the peculiarities of the Kenyan society. As people become aware of their rights as enshrined in the Constitution, new claims will come before the courts. To this end, the judiciary's role will be instructive as it sets about interpreting the rights enshrined in the Constitution. As an institution the judiciary will be under the glare of public with the hope that it will uphold the rule of law and promote a culture of human rights. It will then be necessary for the judiciary to engage in a wide interpretative process that it was not capable of doing under the previous Constitutional dispensation.⁴²¹ Taking into consideration the circumstances in Kenya it is hoped their judgements will offer relief to those whose socio-economic rights are violated.

Furthermore, the relief given to such victims should better their lives and be capable of timely implementation by the government. Accordingly, if a matter is brought to court where the State has failed to perform its obligations, the Kenyan courts, it is submitted, should take the view taken by the Inter American Court on Human Rights when it stated that the State ought to 'know' or should have known about the existence of real and immediate risk to the right to life of a determinate person or groups of persons, and did not take the necessary measures, within the realm of its powers, which could be deemed adequate to prevent or avoid risk.⁴²²

⁴¹⁹ JC Mubangizi 'The Constitutional Protection of Socio-Economic Rights in Selected African Countries: A Comparative Evaluation' (2006) 2 *Journal of African Legal Studies* 1 at 2. See also MS Kende 'The South African Constitutional Court's Construction of Socio-Economic Rights: A Response to Critics' (2003-2004) 19 *Connecticut Journal of International Law* 617.

⁴²⁰ M Brennan 'To Adjudicate and Enforce Socio-Economic Rights: South Africa Proves That Domestic Courts are a Viable Option' (2009) 9 *Queensland University of Technology Law and Justice Journal* 64 at 83. See also T Usher 'Adjudicating Socio-Economic Rights: One Size Does Not Fit All' (2008) 1 *UCL Human Rights Review* 154 at 159; EC Christiansen 'Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court' 38 (2006-2007) *Columbia Human Rights Law Review* 321 at 323.

⁴²¹ M Mutua 'Justice under Siege: The Rule of law and Judicial Subsistence in Kenya' (2001) 23 *Human Rights Quarterly* 96 at 110. 105 discussing the judiciary prior to democratic changes.

⁴²² *Sawhoyamaxa Indigenous Community v Paraguay* Judgement of March 29, 2006 para 155. <http://www.lawschool.cornell.edu/womenandjustice/legalresources/upload/IACtHR-20Sawhoyamaxa-20Indigenous-20Community-20v-20Paraguay.pdf> (accessed 2 June 2011).

The pressure on the Kenyan judiciary and legal profession in general will be highlighted when one considers the central role played by litigation in the vindication of human rights. This is largely due to the fact that the Kenyan judiciary has not been at the forefront of human rights protection and promotion with allegations of being inept and corrupt.⁴²³ The legal professions (the judiciary and the Law Society of Kenya) have an essential role to play in promoting the protection of economic, social and cultural rights, a role that is particularly important for the most vulnerable groups in society. A reduced role for the judiciary in respect of societal problems appears not only increasingly anachronistic but particularly difficult to sustain in law. The importance of an independent judiciary for the realisation and respect of socio-economic rights within the domestic jurisdiction cannot be overemphasised. This is a fact that has been fittingly acknowledged internationally:⁴²⁴

Only an independent Judiciary is able to render justice impartially on the basis of law, thereby also protecting the human rights and fundamental freedoms of the individual. For this essential task to be fulfilled efficiently, the public must have full confidence in the ability of the Judiciary to carry out its functions in this independent and impartial manner. Whenever this confidence begins to be eroded, neither the Judiciary as an institution nor individual judges will be able fully to perform this important task, or at least will not easily be seen to do so.

The role of the judiciary and the legal profession will call for the respect of the rule of law by all the arms of government and government agents. The important role of the judiciary in a constitutional democracy has been noted as follows %a a constitutional democracy, the supremacy of the Constitution and the Bill of Rights therein are presumed to be protected by an independent and impartial judiciary. If the judiciary fails in its duty, then a constitutional breakdown may follow.⁴²⁵ To this end, the Constitution provides the basis for separation of powers, which is necessary for accountability and fulfilment of government obligations.⁴²⁶ The theory of *separation of powers* promotes the separation of the three branches of government, namely the executive, legislature and judiciary in order to promote a system of checks and

⁴²³ Mutua 2001 *Human Rights Quarterly* 113 . 116.

⁴²⁴ Independence and Impartiality of Judges, Prosecutors and Lawyers in *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers (2003)* 115 <http://www.ohchr.org/Documents/Publications/training9chapter4en.pdf> (accessed 7 June 2011).

⁴²⁵ Kuria & Vasquez 1991 *Journal of African Law* 145.

⁴²⁶ See Constitution of Kenya 2010 Chapter 8 . The Legislature, Chapter 9 . The Executive; and Chapter 10 . The Judiciary.

balances. This is so as to avoid the abuse of power by any of these branches while performing their functions. There is an added benefit of such separation, as the independence of the judiciary means that the Judiciary as an institution and judicial officers deciding particular cases are able to exercise their professional responsibilities without being influenced by the other branches of government or any other inappropriate sources.⁴²⁷

While this is true, the fear that the judiciary might intrude in the executive's sphere of influence is likely to be a reason for the courts to be slow in making rulings that require the state to implement socio-economic rights. However, it is submitted that given the increasing food insecurity faced by many Kenyans and the debilitating effects of climate change; the judiciary will have to take its critical role in the vindication of socio-economic rights and be willing to determine the scope of these rights on a case by case basis without fear or favour. Whereas judicial deference is necessary, it should not be lost to the judiciary that its primary duty should be to the Constitution and the law. It is further submitted that it would be important for the Kenyan courts to establish a set guideline or test for determining the state's efforts in implementing socio-economic rights such as the reasonableness approach⁴²⁸ established by the South African Constitutional Court or the minimum core approach as espoused by the CESCR.

The inclusion of these rights and the fact that treaties ratified by Kenya form part of the law, not to mention the call on the country to fulfil its international law obligations illustrates a clarion call on the state to demonstrate a principled commitment to the protection of human rights.⁴²⁹ Additionally, it advances the moral and political credibility of Kenya in the international community.⁴³⁰ Kenya ratified the ICESCR on 1 May 1972⁴³¹ and should have by now taken concrete measures to implement the

⁴²⁷ The Role of Judges, Prosecutors and Lawyers in Upholding the Rule of Law, Including Human Rights Standards 115.

⁴²⁸ See Brennan 2009 *Queensland University of Technology Law and Justice Journal* 77 - 83. Usher 2008 *UCL Human Rights Review* 166 . 168.

⁴²⁹ Liebenberg 1995 *South African Journal on Human Rights* t 359 . 360.

⁴³⁰ Liebenberg 1995 *South African Journal on Human Rights* 360.

⁴³¹ Status of Treaties International Covenant on Economic, Social and Cultural Rights http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en#EndDec (accessed 7 July 2011).

rights therein within its jurisdiction.⁴³² However, this has not been the case. With the new Constitution, the words of the CESCR still ring true and as such the State should take into cognisance that; while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.⁴³³

In addition to this, the CESCR recognized the need to allow States to choose the appropriate manner in which to implement its obligations in so far as the rights enshrined in the ICESCR are concerned. As such there is no specific manner in which to go about this implementation.⁴³⁴ It is up to the Kenyan Government to adopt whichever measures will lead to both the availability and accessibility of adequate food under conditions prevalent in its territory.

It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d'être*, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.⁴³⁵

Whereas litigation is not the only means to ensure that States comply with their duties relating to ESC rights, the judiciary plays an important role when faced with a matter calling on the pronouncement of rights. It is the chief responsibility of the courts (judiciary) to facilitate the resolution of legal disputes. Since such litigation before courts cannot be the only means used to facilitate access of human rights to the citizens in a country, it is imperative that the other arms of the government together with government bodies/employees, take up their respective roles in the

⁴³² It is now accepted in International law that as a general matter, human rights treaties specify the rights of persons that a state must respect. See OA Hathaway, *Why Do Countries Commit to Human Rights Treaties?* (2007) 51 *Journal of Conflict Resolution* 588 at 591.

⁴³³ CESCR General Comment No. 3 para 2.

⁴³⁴ CESCR General Comment No 12 Para 21.

⁴³⁵ CESCR General Comment No.3 para 9.

implementation of policies put in place to achieve the rights to adequate food, health, education, social security and other socio-economic rights. As has been repeatedly noted, the realisation of economic and social rights cannot only be guaranteed through their justiciability (adjudication). In fact, the realisation of these rights calls for the concrete implementation of a myriad of services and policies that will facilitate the materialisation of these rights.⁴³⁶ This is an acknowledgement of the multi-sectorial focus needed to implement socio-economic rights and to make them a reality for the many that do not enjoy these rights fully. Within the domestic jurisdiction this means the various arms of government together with private entities should work together.

4.6 Conclusion

The entrenchment of socio-economic rights in the new Kenyan Constitution guarantees the right to adequate food. By making the Bill of rights justiciable before the courts it is now easy for individuals or communities to approach the courts seeking vindication of their constitutionally guaranteed rights. Whereas the inclusion of these rights is admirable and sets the stage for the enjoyment of such rights, the devil is in the State's efforts to implement the right to food and socio-economic rights in general. Mere constitutional entrenchment alone cannot provide food for those who are hungry and threatened with starvation. As earlier alluded, Kenya in general and the courts in particular have not had a rosy history in so far as human rights standards are concerned. There has been a glaring disrespect for the rule of law. Almost a year after the coming into force of the Constitution its full implementation is still greatly hampered by the same people who are supposed to promote its implementation.⁴³⁷ For instance, the political leaders and the Executive arm of the government have increasingly failed to show stewardship that would facilitate the full and speedy implementation of the Constitution.⁴³⁸ While this goes on, millions are exposed to hunger that makes it hard for them to lead life to the fullest.

⁴³⁶ Courtis 2007 *Max Planck Year Book of United Nations Law* 319.

⁴³⁷ See Commission for the Implementation of the Constitution Second Quarterly Report April . June 2011, 42 - 43 <http://cickenya.org/sites/default/files/reports/Second%20Quarterly%20Report.pdf> (accessed 19 July 2011).

⁴³⁸ Commission for the Implementation of the Constitution Second Quarterly Report April . June 2011 43.

By fulfilling the obligations incumbent on them as a result of the Constitution and its international human rights obligations, it is submitted that it is possible for a greater representation of the Kenyan population to enjoy the right to food. This would be in keeping with the suggested obligations of conduct and result which are enshrined in the ESCR and the Bill of Rights. According to the obligation of conduct, the state should engage in action reasonably calculated to realize the enjoyment of the socio-economic rights in the Bill of Rights. Furthermore, the obligation of result requires that the state acts in such a way that it achieves specific targets to satisfy a detailed substantive standard.⁴³⁹ It is submitted, in the Kenyan situation, this could include fully implementing the provisions of the Constitution and a concerted effort to execute the plans contained in Vision 2030. In guaranteeing the right to food the courts shall also be instrumental in ensuring the government addresses the issues affecting access to food while indirectly also influencing the state's policy on climate change.

⁴³⁹ Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26, 1997 para 7.

CHAPTER FIVE

LEGISLATIVE AND POLICY FRAMEWORK ON FOOD AND CLIMATE CHANGE

5.1 Introduction

This chapter will build up from chapter four. The focus shall be on the existing and proposed state mechanisms for realising the right to food and their capability to address the effects of climate change. It shall also consider relevant environmental legislation as climate change will affect the environment, which is necessary for the enjoyment of the right to food.

5.2 Acts of Parliament

The legislation guiding the right to food in Kenya is fragmented. This has resulted in a number of Acts of parliament addressing the right to food. The situation is further complicated when one considers the fact that a number of ministries are in charge of different aspects that contribute to the right to food. This ranges from the ministries of Agriculture, Livestock development, Fisheries Development, Co-operative Development and Marketing, Special Programmes, Development of Northern Kenya and other Arid Lands. This has led to the establishment of a co-ordination unit amongst all these ministries to deal with the issue of food security but the pace at which it is working has been criticised as slow.⁴⁴⁰ Kenya being largely dependent on agriculture for its food; it follows that a number of Acts dealing with agriculture affect the right to food. Given the large number of Acts involved, this research shall only mention a few. This is motivated by the fact that with the promulgation of the new Constitution which calls on the State to use legislative measures⁴⁴¹ to ensure the right to food; comprehensive framework legislation will have to be drafted. Be that as it may, a number of Acts do exist that speak to the right to food in one way or another and it is thus essential to analyse them so as to be aware of the situation obtaining in Kenya.

⁴⁴⁰ See FIAN, Kenya Hunger Crisis 18.

⁴⁴¹ Article 21 (2) Kenyan Constitution 2010.

5.2.1 Agriculture Act

According to its preamble, the Act⁴⁴² seeks to promote and maintain a stable agriculture, to provide for the conservation of the soil and its fertility and to stimulate the development of agricultural land in accordance with the accepted practices of good land management and good husbandry.⁴⁴³ From the wording in the preamble it is quite clear that the Act controls many aspects of agriculture that have a direct bearing to food production which impacts on food security an important aspect of the right to food. It seeks to promote and maintain assured markets for defined crops and animal products in such a manner as to make Agricultural production profitable for those involved in it.⁴⁴⁴ From this section and other provisions of the Act, the aim is to make agricultural production a profitable endeavour. Consequently, it is not really concerned with food production for ensuring food security within the country. The Act empowers the Minister in charge and a number of state functionaries to make policy decisions on the Ensured Production of a Sufficiency of Food Crops for the Requirements of Kenya; ⁴⁴⁵The Preservation of the Soil and Its Fertility⁴⁴⁶; Development of Land⁴⁴⁷ General Schemes for Land Preservation and Land Development.⁴⁴⁸ The issue of land preservation is important as land can only be productive if it is taken good care of in a manner that is sustainable. Issues such as land degradation will thus have to be addressed in terms of this Act and any other laws that will improve food production in Kenya.

5.2.2 The Crop Production and Livestock Act⁴⁴⁹

This piece of legislation is meant to make provision for the control and improvement of crop production and livestock, and the marketing and processing thereof.⁴⁵⁰ Whereas the Act's intentions were good and at some point in time it provided meaningful help from the government to farmers, over time the support from

⁴⁴² Chapter 318 available at www.kenyalaw.org

⁴⁴³ Preamble of Agriculture Act Cap 318.

⁴⁴⁴ Section 4 Agriculture Act Cap 318.

⁴⁴⁵ See S100 of Cap 318.

⁴⁴⁶ See Ss 48 . 62.

⁴⁴⁷ Ss64 . 70 Cap 318.

⁴⁴⁸ SS 75 . 78 Cap 318.

⁴⁴⁹ Crop Production and Livestock Act Cap 32.

⁴⁵⁰ Preamble of Crop Production and Livestock Act Cap 32.

government, through its Agricultural Field Officers, has ground to a halt with negative consequences to food production and food security for the country.

There is a need for Kenya and other African countries in general to improve their ability to feed their populations. The only way to do this is to improve agricultural production as it is the most common means of food production in the continent.⁴⁵¹ Where there have been efforts by these African states and the same rings true for Kenya, such efforts have focused on subsidization although without great success and without focusing on the most vulnerable members of society who are ravaged by hunger. This state of affairs has been noted by the Special Rapporteur on the Right to Food as follows:⁴⁵²

Many of these initiatives focus on the subsidization of high-yielding seeds and fertilizers, and they are supported by key international organisations, governments and stakeholders. It is however important to ensure that these efforts are truly focused on the most vulnerable, and that they are sustainable both socially and environmentally: improving productivity will not serve to combat hunger if it does not result in the incomes of the poorest, particularly smallholders, being raised, or if it accelerates climate change, itself already one of the major threats to food security in Africa.

As a result of such interventions, efforts to deal with the hunger and famine affecting the Arid and Semi-Arid Lands (ASALS) in Kenya and those without means to acquire food in urban areas have not been sufficient as the cost of food and the staple, maize, still remains high. In other instances, the maize production has not always reached the targets despite government's efforts to subsidize the ever rising prices of fertilizers.

5.2.3 Price Control Act⁴⁵³

This is a recent piece of legislation promulgated in light of the ever increasing food prices in the country. The Act is meant to control the price of essential commodities in the country.⁴⁵⁴ It is a bold step taken by the government to deal with rising food prices in Kenya which have affected the ability of many Kenyans to access food. Through the Act, the government hopes to keep the price of essential foods at a

⁴⁵¹ O. De Schutter Statement of the UN Special Rapporteur on the right to food The Human Right to food and the Challenges facing an African Green Revolutionq1

⁴⁵² O. De Schutter Challenges facing an African Green Revolutionq4.

⁴⁵³ Price Control Essential Foods Act 26 of 2011.

⁴⁵⁴ See Preamble of the Act.

reasonable price, thus enabling many to afford food. With the effects of climate change being felt across the country it will be necessary to ensure accessibility to food through reasonable pricing. Until now, the provisions of the Act are yet to be put into effect. It is submitted, however, that in order to facilitate access to food, the government will have to do all within its powers to ensure access to food and this is a step in the right direction.

5.2.4 Strategic Grain Reserves

Another significant manner in which the Kenyan government promotes the right to adequate food is through the Strategic Grain Reserves. It was established in terms of sections 34(1) and 36 of Exchequer and Audit Act⁴⁵⁵ by the Minister of Finance. In terms of this section the Exchequer and Audit (Strategic Grain Reserve Trust Fund) Regulations 2002⁴⁵⁶ were promulgated through the Kenyan Gazette Supplement No.34. The law provides for the maintenance of a national strategic grain reserve of 3million bags of maize and a cash equivalent of US\$ 60 million. The reserve is managed by the Strategic Grain Reserve Trust Fund.⁴⁵⁷ The Fund is expected to purchase and maintain up to 8 million bags of grains for National Food Security. The idea to form the Strategic Grain Reserves seems to have stemmed from the repeated drought and food insecurity faced by Kenya before 2002. The stock in the National Reserve is maintained by the Department through the National Cereal and Produce Board (NCPB) under an agency agreement.⁴⁵⁸

The aim of the stocks is to cushion the nation against severe food shortage as well as to assist in stabilization of local prices of grain in times of food insecurity. According to FAO, a food security reserve provides a first line of defence for coping with food emergencies.⁴⁵⁹ It also serves other functions in addition to providing the first line of defence in national food emergency/insecurity situations. Price stabilisation is one such function played by the Strategic Reserve especially during times of price fluctuations that make it hard for people to access food. In the Kenyan

⁴⁵⁵ Exchequer and Audit Act cap 412.

⁴⁵⁶ The Exchequer and Audit (Strategic Grain Reserve Trust Fund) Regulations 2002 http://www.kenyalaw.org/kenyalaw/klr_app/frames.php (accessed 14 July 2011).

⁴⁵⁷ Kenya National Assembly Official Report July 8 2003 Parliamentary Debates 1878.

⁴⁵⁸ See <http://www.ncpb.co.ke> for Roles of the NCPB dealing with the Strategic Grain Reserve.

⁴⁵⁹ Strategic Grain Reserves. Guidelines for their Establishment, Management and Operation <http://www.fao.org/docrep/w4979e/w4979e05.htm#TopOfPage> (accessed 18 July 2011).

context, the Strategic Grain Reserve has been useful in alleviating the effects of hunger but has not always been effective with the State having to call upon international food aid to feed the hungry. With the recent price hikes it has also not been able to assist in price stabilization with increasing claims of private entities out to make a profit from the increasing food prices.⁴⁶⁰

The management of the Strategic reserve is made up of a board of Trustees drawn from the Ministry of State for Special Programmes (MOSSP), Agriculture, Finance, Livestock, Cooperatives and Marketing, and the Managing Director, National Cereal and Produce Board. Additionally, the Strategic Grain Reserve also has a technical arm referred to as the Fund Management Unit.⁴⁶¹ The work of the Strategic Grain Reserve is also influenced by the Global Information and Early Warning System on Food and Agriculture (GIEWS), which has been put in place to gather information relevant to current and expected food situations within Kenya and the world over.⁴⁶² In conclusion, there has been no mention of legislative reform affecting the right to food to bring it in line with the new Constitution. In fact at the moment the focus has been on passing legislation meant to allow for the implementation of the Constitution.⁴⁶³ It would have been desirable to engage in legislative reform of the above-mentioned Acts to bring them in line with the Constitution.

5.2.5 Environmental Management and Co-ordination Act⁴⁶⁴

This is an important piece of legislation and has been described as the principal instrument of government in the implementation of all policies relating to the environment.⁴⁶⁵ The Act establishes the National Environmental Management

⁴⁶⁰ Major Kenyan towns hit by flour rationing *Daily Nation* Online June 21, 2011 <http://www.nation.co.ke/News/Major+Kenyan+towns+hit+by+flour+rationing+/-/1056/1186766/-/ibci91/-/> (accessed 1 July 2011).

⁴⁶¹ Government of Kenya Ministry of Special Programmes http://www.sprogrammes.go.ke/index.php?option=com_content&task=view&id=268&Itemid=164 (accessed 14 July 2011).

⁴⁶² See FAO Global Information and Early Warning System on Food and Agriculture (GIEWS) <http://www.fao.org/giews/english/about.htm> (access 18 July 2011).

⁴⁶³ See Commission for the Implementation of the Constitution, Agreed timelines for the development of priority bills for the period ending 30th August 2011. To guide relevant institutions including Line Ministries, AG, KLRC, CIC and Parliament. http://cickenya.org/sites/default/files/7.5%20Schedule_of_agreed_timeplan_for_pending_Bills-_revised.pdf (accessed 24 September 2011).

⁴⁶⁴ Environmental Management and Co-ordination Act 8 of 1999.

⁴⁶⁵ Ministry of Environment and Natural Resources <http://www.environment.go.ke/archives/category/nema> (accessed 31 January 2011).

Authority (NEMA) which is tasked with the overall management and protection of the environment.⁴⁶⁶ The Act envisions the drawing up of a National Environment Action Plan⁴⁶⁷ to help in the protection and management of natural resources in Kenya but this is yet to be drawn up. Suffice it to say most of the provisions found in this Act are yet to be fully implemented and NEMA as an institution is yet to make a mark as an important player in environmental protection.⁴⁶⁸ In most instances the effective implementation of beneficial programmes has been hindered by inadequate funds, endemic corruption and political interference.

In light of the threat posed by climate change to the environment and access to food as whole, it is important that the provisions of this Act be fully implemented. As indicated in later parts of this chapter, where development is to occur it should only be after the necessary clearance from NEMA. Moreover, as mentioned in the Act's preamble the drawing up of framework environmental legislation should be undertaken as a matter of urgency. Such framework legislation should also consider article 69 of the Constitution which seeks to protect the environment. This will cure the problem noted with the current state of this legislation which is not in line with the national policy on the environment.⁴⁶⁹

5.3 Institutional and Policy Framework

5.3.1 Food Security and Nutrition Strategy

Food insecurity has become a major problem in Kenya. In fact Kenya has been categorized as a low-income food deficit country, that is, a regular importer and occasional exporter of grain.⁴⁷⁰ In order to address food security, the government

⁴⁶⁶ For a complete list of NEMA's functions see; http://www.nema.go.ke/index.php?option=com_content&view=article&id=79&Itemid=469 (accessed 31 January 2011).

⁴⁶⁷ Section 38 Act 8 of 1999.

⁴⁶⁸ See L Juma 'Environmental Protection in Kenya: Will the Environmental Management and Co-ordination Act (1999) Make a Difference+' (2000-2002) 9 *South Carolina Environmental Law Journal* 181 discussing the role of NEMA.

⁴⁶⁹ A bill approved by cabinet to allow for the formulation of policy is yet to be tabled in parliament. See Heinrich Böll Stiftung, East and Horn of Africa *Climate Change Vulnerability and Adaptation Preparedness in Kenya* 34 http://www.boell.or.ke/downloads/Kenya_Climate_Change_Adaptation_Preparedness.pdf (accessed 31 January 2012).

⁴⁷⁰ Food Security Issues in Kenya: Situation Analysis 5. one.wfp.org/operations/vam/documents/ken_sit_an_Report.doc (accessed 13 June 2011).

has since 1981 had a specific food policy.⁴⁷¹ Despite this it has been very difficult for the country to achieve self . food sufficiency. Among the reasons for this difficulty have been policy failures in areas such as agricultural pricing, marketing of inputs and outputs, distribution and extension which have had the effect of lowered agricultural production, and the reduced capability to cope with drought conditions.⁴⁷²

The problem is compounded by the fact that rain-fed agriculture is what many depend on for their food. As a country, food security is generally equated with availability of and access to adequate supplies of maize.⁴⁷³ Maize is the main staple food of Kenya, averaging over 80% of total cereals (rice, wheat, millet and sorghum). Agriculture remains the backbone of the Kenyan economy. It is the single most important sector in the economy, contributing approximately 25% of the GDP, and employing 75% of the national labour force.⁴⁷⁴ According to the drafters of the FSNS, the food and nutrition insecure in Kenya form about a third of the country's total population, which is currently estimated at 34 million given the disputed nature of the recently held National Census. The food situation is dire, with the FAO identifying Kenya among the countries with severe localized food insecurity. The food insecurity is such that about 2.4 million people are food insecure.⁴⁷⁵ Thus in order for the State to meet its obligations in so far as the right to adequate food is concerned, ensuring food security and nutrition it will be paramount. The situation is exacerbated, given the intrinsic link between food and nutrition insecurity on the one hand and poverty on the other. A large part of the Kenyan population, almost half, falls below the poverty line, with some living in extreme poverty. As of 2004, 50 per cent of Kenyans lived on less than (US \$1) per day.⁴⁷⁶ This situation has serious implications on

⁴⁷¹ Food Security Issues in Kenya: Situation Analysis 5. These include Sessional Paper number 1 of 1986 on Economic Management for Renewed Growth and Sessional Paper number 2 of 1994 on Food Policy which did not have much success in ensuring food security.

⁴⁷² Food Security Issues in Kenya: Situation Analysis 6 . 7

⁴⁷³ A Roundtable Discussion on Kenya's Food Situation: Challenges and Opportunities 2 http://www.aec.msu.edu/fs2/kenya/Maize_Round_Table_Proceedings.pdf (accessed 13 June 2011).

⁴⁷⁴ PO Alila and R Atieno, *Agricultural Policy in Kenya: Issues and Processes* 3.

⁴⁷⁵ Food and Agriculture Organization of United Nations, Global Information and Early Warning System %countries Requiring External Assistance for Food <http://www.fao.org/gIEWS/english/hotspots/index.htm> (accessed 11 July 2011).

⁴⁷⁶ See UN Economic and Social Council, Implementation of the International Covenant on Economic, Social and Cultural Rights Initial reports submitted by States parties under articles 16 and 17 of the Covenant, Kenya, E/C.12/KEN/1 para 5.

people's food security as the chronically food insecure suffer from extreme poverty.⁴⁷⁷

At the moment, Kenya has no single guiding document or legislation protecting the right to adequate food. In fact the right to adequate food is affected or ensured through a number of government policies and legislation that have an influence on this right. Simply put government policy relating to the right to food is fragmented in addition to being poorly co-ordinated and implemented.⁴⁷⁸ The lack, or inadequacy of such a single and comprehensive policy dealing with the right to food is further underlined by the hunger and malnutrition experienced by the Kenyan population. There is thus a pressing need to have framework legislation whose objective would be to provide a single document that would guide the implementation of the right to food. It would also be in keeping with the duty of the state to utilize legislation and other means to recognize socio-economic rights as provided for by the Constitution⁴⁷⁹ and recommended by the CESCR⁴⁸⁰. Commenting on the importance of framework legislation dealing with the right to food, Coomans notes that; legislation constitutes the foundation for more specific implementation measures. Legislation is required by the principle of the legality of administration by government and is a cornerstone of the rule of law. It is also of particular importance for the recognition and status of economic, social and cultural rights in domestic law.⁴⁸¹ The authors further opine that a national framework law on the right to food would translate the constitutional and international provision on the right to food into concrete targets, concepts and definitions, guidelines, powers and policies for implementation in terms of food availability and accessibility.⁴⁸² It is submitted that Kenya would greatly benefit from such framework legislation to guide it in its efforts to guarantee the right to adequate food.

⁴⁷⁷ Kenya Government Food Security and Nutrition Strategy, Executive Summary v

⁴⁷⁸ Holness *The Constitutional Right to Food in South Africa* 80.

⁴⁷⁹ Article 21 (2) Kenya Constitution 2010.

⁴⁸⁰ That states adopt a national strategy to ensure food and nutrition security for all, based on human rights principles, that defines the objectives, the formulation of policies and corresponding benchmarks. See General Comment 12 on the right to adequate food, UN Doc E/C12/1999/5 para 21 and 29. See also J Ziegler Preliminary report of the Special Rapporteur of the UN Commission on Human Rights on the right to food UN Doc A/56/210 (2001) para 124.

⁴⁸¹ F Coomans & K Yakpo "A framework law on the right to food - An International and South African perspective" (2004) 4 *African Human Rights Law Journal* 21.

⁴⁸² Coomans & Yakpo 2004 *African Human Rights Law Journal* 22.

As much as the Food Security and Nutrition Strategy (FSNS) is not framework legislation it is a marked improvement from the situation which currently exists whereby several ministries and pieces of legislation govern the right to food. In fact, the policy is a consolidation of relevant sector policies and strategies, initiatives and planning documents, including the Economic Recovery Strategy (ERS), Strategy for Revitalizing Agriculture (SRA) and Vision 2030.⁴⁸³ The policy is formulated within the context of the international conventions, ratified by the country, and the overall national development strategy (ERS), whose key objective is to ensure food security in order to reduce the incidence of malnutrition. The ERS is supported by the SRA whose aim has been to achieve progressive reduction in unemployment and poverty, and by implication guaranteeing food security for Kenyans.⁴⁸⁴ These initiatives to stimulate the economy and rejuvenate agricultural production are in harmony with the declaration of the World Food Summit (WFS) of 1996, the United Nations (UN) Millennium Development Goals (MDGs), and the Comprehensive Africa Agricultural Development Program (CAADP) of the New Partnership for African Development (NEPAD) of 2002.⁴⁸⁵ What is not clear from the wording is whether the Right to Food Guidelines were used in the drafting process. All hope is not lost as in coming up with a comprehensive right to food framework legislation and/or policies the government can make use of these guidelines. The Right to Food Guidelines would be important in coming up with policy measures to deal with the right to food as its main objective is to provide practical guidance to States in their implementation of the progressive realization of the right to adequate food in the context of national food security.⁴⁸⁶ Additionally they are a human rights-based practical tool addressed to all States,⁴⁸⁷ and would greatly help the Kenyan government in meeting its human rights obligations.

The issue of mapping food insecurity and putting in place measures to alleviate such food insecurity is going to be very important in the face of the effects of climate

⁴⁸³ All the above-mentioned documents address Kenya's development plans and policies that affect the right to food and other associated rights that are meant to improve the living standards of all within Kenya.

⁴⁸⁴ PO Alila and R Atieno Agricultural Policy in Kenya, Issues and Processes+13.

⁴⁸⁵ Kenya Government Food Security and Nutrition Strategy, Executive Summary v . vi.

⁴⁸⁶ FAO, The Right to Food Guidelines para 6.

⁴⁸⁷ FAO, The Right to Food Guidelines para 9.

change on food. It will also be important in any government strategies to deal with food insecurity. The ESCR Committee has recommended that states adopt a national strategy⁴⁸⁸ preferably set out in a framework law,⁴⁸⁹ to achieve the realisation of the right to food. The progressive position would be that a State like Kenya should have all the information on the number of hungry and vulnerable people within its territory. Such information, if submitted, should also include those vulnerable to the effects of climate change that include inter alia floods, droughts and displacement as they are likely to impact negatively on food insecurity. Further to this, the State should do all that it can within its powers to ensure that such people get access to food at all times, taking into consideration the prevailing conditions,⁴⁹⁰ as the responsibilities of the state in so far as the right to adequate food is concerned will always remain the same.

5.3.2 Kenya Vision 2030

This is a new long-term development blueprint developed by the government for Kenya. According to the drafters of the document, the blueprint is motivated by the collective aspiration for a much better society than the one we have today, by the year 2030.⁴⁹¹ Kenya Vision 2030 is purposefully aimed at making Kenya a globally competitive and prosperous country with a high quality of life by 2030. It aspires to transform Kenya into a newly industrialising, middle income country providing a high quality of life to all its citizens in a clean and secure environment. In other words, Vision 2030 aims to meet the Millennium Development Goals for Kenyans.⁴⁹² The importance of the MDGs should be noted as it resulted from the Millennium Declaration which stated the primacy of human rights in development programmes by States across the world. By being a party to the Millennium Declaration, Kenya undertook to respect for human rights and fundamental freedoms, respect for the equal rights of all without distinction as to race, sex, language or religion and international cooperation in solving international problems

⁴⁸⁸ CESCR General Comment No 12 para 21.

⁴⁸⁹ CESCR General Comment No 12 para 29.

⁴⁹⁰ Brand argues that states must simply adopt whichever measures will lead to both the availability and accessibility of adequate food under conditions prevalent in their countries. See Brand *Socio-economic rights in South Africa* 160.

⁴⁹¹ Government of Kenya, Ministry of Planning and Development Kenyan Vision 2030 vii http://www.kilimo.go.ke/kilimo_docs/pdf/Kenya_VISION_2030-final.pdf (accessed 4 July 2011).

⁴⁹² Kenyan Vision 2030 vii.

of an economic, social, cultural or humanitarian character.⁴⁹³ It is thus submitted that the government should be held accountable for all measures it takes against the standards agreed to in the Millennium Declaration.

An analysis of Kenya Vision 2030 reveals that it has a number of pillars to guide it. These include; continuity in governance reforms; enhanced equity and wealth creation opportunities for the poor; infrastructure; energy; science, technology and innovation (STI); land reform; human resources development; security; and public sector reforms.⁴⁹⁴ The discussion will now briefly summarise some of these pillars that are likely to affect the right to adequate food and the Kenyan government's response to the effects of climate change in Kenya given the central role to be played by this development blueprint. Vision 2030 is discussed herein on the basis of the recognition by the CESCR that states can implement their human rights obligations through legislative and other means.⁴⁹⁵ Given the far reaching nature of Vision 2030 on the developmental aspirations of Kenya, it is submitted it is going to have a huge bearing on the measures put in place to implement the human rights obligations emanating from the Constitution and other international human rights treaties Kenya has ratified. It is however a great concern that Vision 2030 does not recognize climate change as a challenge towards Kenya's development. The influence of Vision 2030 will be illustrated by the discussion that follows on some of the guiding pillars of the development blueprint while considering the influence climate change might have on each.

5.3.2.1 *Rule of Law*

Kenya Vision 2030 seeks to adhere to and be guided by the rule of law. It essentially seeks to develop the country into a modern, market-based economy in a human rights-respecting state.⁴⁹⁶ The respect of human rights is important as Kenya's past human rights track record is not a flattering one. So far the inclusion of a fairly comprehensive bill of rights in the Constitution, together with the reforms envisioned

⁴⁹³ United Nations Millennium Declaration, approved at the General Assembly of the United Nations session of 6-8 September 2000. A/RES/55/2.

⁴⁹⁴ Kenyan Vision 2030 vii . viii.

⁴⁹⁵ See article 2 of ICESCR. The rule of law is integral to the implementation of rights by the government.

⁴⁹⁶ Kenya Vision 2030 xiii.

by the Constitution is encouraging. Vision 2030 envisages a number of specific strategies to be put in place to enhance a culture that respects the rule of law. These strategies are enumerated as follows : (i) aligning the national policy and legal framework with the needs of a market-based economy, national human rights, and gender equity commitments; (ii) increasing access and quality of services available to the public and reducing barriers to justice; (iii) streamlining the functional capability of legal and judicial institutions to enhance inter-agency cooperation; and (iv) inculcating a culture of compliance with laws, cultivating civility and decent human behaviour between Kenyans, and between Kenyans and outsiders.⁴⁹⁷ Establishing the rule of law would thus create an enabling environment in which the right to food,⁴⁹⁸ together with other human rights, can be freely and widely enjoyed by Kenyans. Additionally, since economic prosperity is the overall aim of Vision 2030, respect for the rule of law is likely to lead to economic development, democracy and political stability which are essential for wider enjoyment of human rights within Kenya.⁴⁹⁹ The respect for the rule of law is important in any efforts meant to deal with the right to food in the face of climate change as they will require action from government departments and private actors who should be bound by the laws of Kenya.

5.3.2.2 *Equity and Wealth Creation*

Closely linked to the rule of law and improving the standard of life of Kenyans, Vision 2030 seeks to focus on **Enhanced Equity and Wealth Creation Opportunities for the Poor.** At the root of guaranteeing the right to adequate food is dealing effectively with the scourge of poverty that is affecting over a third of the Kenyan population.⁵⁰⁰ There is mention of special attention being given to investment in the arid and semi-arid districts where climate change is most evident and already affecting the

⁴⁹⁷ Kenya Vision 2030 xiii.

⁴⁹⁸ See The Right to Food Guidelines, Guideline 1. The Commission on the Legal Empowerment of the Poor views the Rule of Law as **not** a mere adornment to development; it is a vital source of progress. It creates an environment in which the full spectrum of human creativity can flourish, and prosperity can be built+ in *Making the Law Work for Everyone* (2008) Vol 1 at 3 http://www.undp.org/legalempowerment/report/Making_the_Law_Work_for_Everyone.pdf (accessed 20 July 2011).

⁴⁹⁹ See R Peerenboom, **Human Rights and Rule of Law: What's the Relationship?**+ University of California, Los Angeles School of Law *Public Law & Legal Theory Research Paper Series* Research Paper No. 05-31 4 <http://ssrn.com/abstract=816024> (accessed 20 July 2011).

⁵⁰⁰ Vision 2030 recognises this as such; **No** society can gain the social cohesion predicted by Vision 2030 if significant sections of it live in abject poverty.+

livelihoods of many Kenyans. The same areas coincidentally have communities with high incidence of poverty, unemployed youth, women, and all vulnerable groups form the bulk of members of the Kenyan society who do not fully enjoy the right to adequate food.⁵⁰¹ The investment of resources is necessary if the State is to meet its human rights commitments in terms of the Constitution and International Human Rights treaties it has ratified.⁵⁰² This increased commitment to equity it is hoped, will result in reduced levels of poverty and increased enjoyment of human rights for those who have been denied these rights. Furthermore, it should lead to building resilience amongst the poor members of the community against the effects of climate change as climate change will be a great challenge towards any efforts to better the standard of living of Kenyans.

5.3.2.3 *Agriculture*

Another important pillar of the Vision 2030 that will have far reaching ramifications for food security and by implication climate change and the right to adequate food is Agriculture. As already noted Kenya is greatly reliant on rain fed agriculture for its food production. Indeed, agriculture contributes 26 per cent of Kenya's GDP and 60 per cent of the export earnings. For that reason it is an important channel for realization of employment creation and poverty eradication. If properly harnessed and developed it could result in food security for the country. Moreover, about 80 % of the Kenyan population live in the rural areas and derive their livelihood from agriculture.⁵⁰³ In this new development blueprint, Kenya aims to promote an innovative, commercially-oriented, and modern agricultural sector. Whereas this is an admirable aspiration by the Kenyan government, it also brings into focus the role of intensified agriculture production in causing and/or exacerbating climate change. Bringing more land into agricultural production is bound to have consequences to the environment such as land degradation and releasing of more carbon stored in trees into the atmosphere. However, given the fact that the focus is on small farm holdings

⁵⁰¹ Kenyan Vision 2030 viii.

⁵⁰² See RE Robertson "Measuring State Compliance with the Obligation to Devote the Maximum Available Resources to Realizing Economic, Social and Cultural Rights" (1994) 16 *Human Rights Quarterly* 693 at 695 . 702 arguing for the importance of rule of law for economic development.

⁵⁰³ See Implementation of the International Covenant on Economic, Social and Cultural Rights Initial reports submitted by States parties under articles 16 and 17 of the Covenant KENYA* (7 September 2006) E/C.12/KEN/1 para 122.

it is contended that such concerns are not far reaching and that any efforts to expand agriculture should be environmentally sustainable. Be that as it may, as a signatory of the UNFCCC and the Kyoto Protocol such agricultural means of production should be sustainable and friendly to the environment.

Noteworthy is the fact that Vision 2030 seeks to accomplish increased agricultural productivity and hopefully food security and food self-sufficiency through a number of means. The plan is to transform key institutions in agriculture and livestock production to promote agricultural growth. This will be coupled with measures set to increase productivity of crops and livestock. At the same time, it proposes the introduction of new land use policies that will result in improved utilisation of high and medium potential lands. The plan further seeks to extend irrigable areas in arid and semi-arid lands for both crops and livestock; together with improving market access for the smallholders through better supply chain management.⁵⁰⁴ In the same breadth Vision 2030 aims at adding value to the farm and livestock products before they reach local and international markets, thus also focusing on making agriculture a profitable business for those who engage in it. If these efforts are to lead to increased food security for Kenyans then it is going to require increased investment in agriculture by all those involved, backed up with the necessary economic development policies.⁵⁰⁵ The government should show its willingness by making the necessary budgetary allocations towards agriculture and coming up with relevant policy documents to spur such development.⁵⁰⁶ Currently the quest to make Kenya a more food secure country is being driven by the Agricultural Sector Development Strategy 2010 . 2020.⁵⁰⁷ Whereas these plans are well intentioned, the absence of climate change in the planning of governmental programmes is worrying and should be included. Options such as promoting Agro forestry should be encouraged as a means of ensuring food security and combating climate change by farmers.⁵⁰⁸

⁵⁰⁴ Kenya Vision 2030 x. This plan is now contained in the Agricultural Sector Development Strategy 2010 . 2020.

⁵⁰⁵ See Right to Food Guidelines, Guidelines 2 and 8.4.

⁵⁰⁶ This should be at least 10% of the annual budget allocation for every financial year as per the Maputo Declaration.

⁵⁰⁷ Agricultural Sector Development Strategy 2010 . 2020
<http://www.ascu.go.ke/DOCS/ASDS%20Final.pdf> (accessed 24 September 2011).

⁵⁰⁸ World Agro Forestry Centre, Climate Change
http://www.worldagroforestrycentre.org/research/grp5_climate_change (accessed 24 September 2011).

By seeking to focus on bringing more land under irrigation under Vision 2030, it is important to highlight the fact that Kenya is a water-scarce country.⁵⁰⁹ In fact, the document itself notes that the anticipated social and economic developments will require more high quality water supplies than at present.⁵¹⁰ It further recognises the need to be more water sensitive by stating that the country, therefore, aims to conserve water sources and enhance ways of harvesting and using rain and underground water.⁵¹¹ The main thrust of water and sanitation as one of the pillars of the 2030 vision is to ensure that improved water and sanitation are available and accessible to all as this is also a right recognised in international law and a right embedded in the right to adequate food.⁵¹² Thus in order to increase access to water and sanitation for Kenyans, Vision 2030 proposes to do this by: (i) raising the standards of the country's overall water, resource management, storage and harvesting capability; (ii) rehabilitating the hydro-meteorological data gathering network; (iii) constructing multipurpose dams (e.g. on Nzoia and Nyando); and (iv) constructing water and sanitation facilities to support a growing urban and industrial population.⁵¹³ Most importantly, the use of such water for food production and basic human sanitation and hygiene will have to be sustainable,⁵¹⁴ considering that the problem of water scarcity will be exacerbated by climate change.

5.3.2.4 *Land Reform*

As a country that is by and large dependent on agriculture for food production, land is a very critical resource and as such forms another pillar of Vision 2030. The majority of communities in sub-Saharan Africa and Kenya in particular rely on agrarian economies and as such land is a very important factor in their existence.⁵¹⁵

2011). See also BK Twinomugisha 'Climate Change and the Right to Food in Africa' 2010 (16) *East African Journal of Peace and Human Rights* 248 at 263.

⁵⁰⁹ See United Nations International Decade for Action, Water for Life 2005 - 2015 <http://www.un.org/waterforlifedecade/scarcity.html> (accessed 6 July 2011).

⁵¹⁰ Kenya vision 2030 xii.

⁵¹¹ Kenya Vision 2030 18.

⁵¹² See CESCR General Comment No. 15 (2002) The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights) E/C.12/2002/11. See also UN Resolution 64/292 The human right to water and sanitation http://www.unesco.org/water/wwap/news/archives/UNDecWaterHR_EN.pdf (accessed 6 July 2011).

⁵¹³ Kenya vision 2030 xii.

⁵¹⁴ See Right to Food Guidelines 8C and 8E.

⁵¹⁵ GM Wachira *Vindicating Indigenous People's Land Rights in Kenya* (LLD Thesis, University of Pretoria, 2008) 30.

The importance of land is noted by Vision 2030 as a critical resource for the socio-economic and political developments spelt out in Vision 2030.⁵¹⁶ Access to land is directly connected to the right to adequate food and other rights. According to De Schutter, access to land and security of tenure are essential to ensure the enjoyment of not only the right to food, but also other human rights, including the right to work (for landless peasants) and the right to housing.⁵¹⁷ The problem at the moment is that Kenya's land policy is fragmented and governed by a raft of legislation, some of which dates back to the colonial period. Kenya has, since independence, had both Customary and Statutory land tenure systems.⁵¹⁸ It has been rightfully suggested by Akech that there is a need for the establishment of a suitable framework to govern the management of land and land-based resources in Kenya.⁵¹⁹ To this end there is a pressing need for a new legal framework that would encourage the sustainable use of land and land-based resources for the benefit of Kenyans.⁵²⁰ Furthermore, the courts should ensure that land use, whether by government or individuals or groups thereof, adheres to the tenets of sound resource management.⁵²¹

According to the United Nations Special Rapporteur on the Right to Food, 80% of the world's hungry depend on access to land and other natural resources as a means for guaranteeing their livelihoods,⁵²² including shelter and household consumption. The case is no different in Kenya. The situation in Kenya is such that much of the productive land is vested in a few rich people while the rest of the population is made

⁵¹⁶ Kenya Vision 2030 ix.

⁵¹⁷ Report of the Special Rapporteur on the right to food Para 4. http://www.srfood.org/images/stories/pdf/officialreports/20101021_access-to-land-report_en.pdf (accessed 28 September 2011).

⁵¹⁸ Regulated under inter alia: Registration of Titles Act (Cap 281); Government Lands Act (Cap 280) Land Titles Act (Cap 282); Registered Land Act (Cap 300); The Land (Group Representatives) Act (Cap 287); The Trust Land Act (Cap 288); and Sectional Properties Act No.21 of 1987. See also Agricultural Sector Development Strategy 2010 . 2020, 25.

⁵¹⁹ JM Migai Akech *Land, The Environment and the Courts in Kenya*, Background Paper for the Environment and Land Law Reports A Dfid / Klr Partnership (February 2006) 3.

⁵²⁰ Migai Akech *Land, The Environment and the Courts in Kenya* 3.

⁵²¹ Migai Akech *Land, The Environment and the Courts in Kenya* 3.

⁵²² O De Schutter, United Nations Special Rapporteur on the right to food Mandate of the Special Rapporteur on the right to food, Comments on the Zero Draft of the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests (16 May 2011) 1 http://www.landforafricanwomen.org/sites/default/files/docs/Special%20Rapporteur%20for%20R2F-Comments-Zero-draft-VG_2011%2005%2016.pdf (accessed 8 July 2011).

to live in largely unproductive arid and semi-arid land.⁵²³ To redress this inequality there has been a concerted effort to draft a new land policy,⁵²⁴ as called for by Vision 2030 to allow for a transformation in the land ownership.⁵²⁵ Unfortunately, until now the required commitment from the relevant stakeholders, cabinet and parliament, to pass it into law, has been lacking.

It should be noted that such government efforts, if carried out to the fullest will come close to adhering to the recommendation of article 11(2) (a) of the ICESCR that calls on States to reform the agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources.⁵²⁶ However as long as the land laws are not reviewed, the environmental, social, economic and political problems including deterioration in land quality, squatting and landlessness, disinheritance of some groups and individuals, urban squalor, under-utilization and abandonment of agricultural land, tenure insecurity and conflict⁵²⁷ shall remain thus affecting access to the right to food. There is hope as the new Constitution recognizes in Chapter 5(five)⁵²⁸ the importance of land and the need to have proper written laws governing it. The establishment of a National Land Commission, in terms of article 67, to assist in the redrafting of land laws is underway with the publishing of a National Land Commission Bill.⁵²⁹ After the necessary formation of the Land Commission the long overdue revision, consolidation and rationalisation of existing land laws ought to be undertaken as a matter of urgency.⁵³⁰ Ideally this should lead to better land laws that will allow for equitable land distribution as well as ownership and greater food production for individuals and the country as a whole.

⁵²³ African Centre for Open Governance (AfriCog) *Implementing the Ndungu Report Mission Impossible* 6.

⁵²⁴ Republic of Kenya Ministry of Lands Sessional Paper No. 3 of 2009 on National Land Policy August, 2009
http://www.lands.go.ke/index.php?option=com_docman&task=doc_download&gid=81&Itemid=46
(accessed 7 July 2011).

⁵²⁵ Respect for property rights to land, whether owned by communities, individuals or companies, is an important driver of rapid economic transformation everywhere. The transformation expected under Vision 2030 is dependent on a national land use policy, which, therefore, must be completed as a matter of urgency. See Kenya Vision 2030 ix.

⁵²⁶ Article 11 (2) (a) ICESCR. See also Guideline 8B of Voluntary Guidelines on the Right to Food.

⁵²⁷ Sessional Paper No. 3 of 2009 on National Land Policy ix.

⁵²⁸ Chapter 5 of the Constitution of Kenya 2010 deals with Land and the Environment.

⁵²⁹ The Draft National Land Commission Bill, 2011
http://cickenya.org/sites/default/files/bills/National_Land_Commission_Bill.pdf (accessed 19 July 2011).

⁵³⁰ This is to be done by the Legislature in terms of article 68 of the Constitution of Kenya 2010.

Additionally, such a land tenure system should allow for sustainable land use and management together with sound environmental conservation in keeping with the right to a healthy environment. All this will be necessary given the effects of climate change which affect the environment which in turn affects the livelihoods of people.

5.3.2.5 *Sustainable Environmental Management*

The effects of climate change have brought a sharp focus on the need to manage the environment in a more sustainable way. The environment is a gateway to the enjoyment of human rights and most importantly the right to food. The interlink between a good environment and food production is a complex one in that at times the environment has been degraded in efforts to create food and employment too. The handling of environmental matters and climate change thus necessitates an inquiry into aspects of environmental law such as sustainability, intergenerational equity; principle of prevention, the precautionary principle, the polluter pays principle, and public participation.⁵³¹ Equally important there is a need to secure the environment as it is essential to the right to life and all other rights. It is thus essential that sustaining and protecting the environment be enhanced through the promotion of the right to a healthy environment and other human rights in the Constitution. At the moment the Forests Act⁵³² serves the objective of protecting forests, which are important for food security and also have a far reaching effect on the weather and water sources in the country. The implementation of the Act has however not resulted in the better management of forests in Kenya.⁵³³ As a matter of fact there have been instances where such protected lands have been illegally encroached on with far reaching negative consequences for the environment and millions of livelihoods. For instance the Mau forest had been excised illegally to such an extent that the water towers had been severely threatened, hence necessitating the eviction of those who had occupied parts of the forest.⁵³⁴ The need for sustainable environmental use and exploration is thus very crucial. As a pillar in Vision 2030, Kenya aims to be a nation that has a clean, secure and sustainable environment by

⁵³¹ D Hunter, J Salzman and D Zaelke, *International Environmental Law and Policy* (2002) 379-438.

⁵³² The Forests Act 7 of 2005.

⁵³³ Report of the Prime Minister's Task Force on the Conservation of the Mau Forests Complex 23 - 24.

⁵³⁴ Kenya: The Mau Forest Complex threatened <http://www.wrm.org.uy/bulletin/113/Kenia.html> (accessed 24 September 2011). See also Report of the Prime Minister's Task Force on the Conservation of the Mau Forests Complex 18.

2030.⁵³⁵ The plan is to achieve all this through a number of measures that include environmental conservation, improving pollution and waste, commissioning of public-private partnerships (PPPs) for improved efficiency in water and sanitation delivery and most importantly enhancing disaster preparedness in all disaster-prone areas and improving the capacity for adaptation to global climatic change.⁵³⁶

To ensure sustainable management of the environment, there is need for effective monitoring by NEMA. The role of the NEMA will be crucial in ensuring sustainable management of the environment during the course of all developments. Arguably, there will be many developments across the country that will need the necessary clearance from them. All the above-mentioned pillars demonstrate a government well aware of the challenges facing it. However, the problem in Kenya has not been the absence of good policies on paper, but the lack of goodwill and commitment to implement such policies to the fullest. Most disconcerting are the debilitating effects of the scourge of rampant and wide-spread corruption that has characterised many government departments. Thus the achievement of all the goals in Vision 2030 will be conditional on the proper implementation of all plans emanating from this development blueprint. Furthermore, Vision 2030 should be implemented in such a way that it takes into consideration the challenge posed by climate change in the development of Kenya.

5.3.3 Njaa Marufuku Kenya

In order to deal with food insecurity and eradicate hunger, the government in 2005 put in place the Njaa Marufuku Kenya (NMK) programme.⁵³⁷ The programme seeks to support vulnerable communities through agricultural development initiatives geared towards increased agricultural productivity, food utilization, agro-processing and value-addition, health and nutrition improvement, water harvesting and conservation of the natural resource base to ensure sustainability of the current production systems.⁵³⁸ The programme has three main components through which it

⁵³⁵ Kenya vision 2030 xiii.

⁵³⁶ Kenya vision 2030 xiii.

⁵³⁷ Ministry of Agriculture, Njaa Marufuku Kenya
http://www.kilimo.go.ke/index.php?option=com_content&view=article&id=207:njaa-marufuku-kenya&catid=193:njaa-marufuku-kenya-overview&Itemid=148 (accessed 24 September 2011).

⁵³⁸ Ministry of Agriculture, Njaa Marufuku Kenya.

seek to assist members of the community to achieve food security. These are Support to Community-Driven Food Security Improvement Projects; Support to Community Nutrition; and School Meals Programmes and Support to Private Sector Food Security Innovations. So far, the programme has had some success in helping rural communities out of poverty and in ensuring their food security. The school nutrition programme has been helpful in alleviation of hunger and starvation in some areas. As a programme though, it needs to be expanded to other parts of the country, especially those most affected by droughts and floods.⁵³⁹

5.3.4 Climate Change and Disaster Management

The Kenyan government through the Ministry of State for Special Programmes has developed the National Policy for Disaster Management⁵⁴⁰ and the National Disaster Response Plan,⁵⁴¹ to guide it in the disaster risk reduction. These two plans were informed by the need to be better prepared in dealing with disasters and to avoid reactionary and inadequate response measures being taken by the government and its agents in mitigating and adapting to such disasters.⁵⁴² The effects of climate change have played a central role in the drafting of these documents. What has become increasingly clear from information available is the fact that there is need to take into account the impact of climate change in dealing with disaster management.⁵⁴³ The threat posed by climate change has brought to the fore the state of preparedness of countries to deal with tragedies. Bearing in mind that some of the effects of climate change are inevitable, it is necessary that states, Kenya included, engage in what can best be termed as risk reduction by coming up with

⁵³⁹ The School Meals Programme started in 2005/06. So far grants of Kshs. 74,331,395 million to 48 schools in 12 Districts for School Meals Programmes benefit 31,720 pupils.

⁵⁴⁰ Government of Kenya Ministry of State for Special Programmes Office of The President National Policy for Disaster Management in Kenya <http://www.sprogrammes.go.ke/images/ndpo.pdf> (accessed 7 July 2011). This policy provides for an integrated and co-ordinated Disaster Risk Management that focuses on preventing or reducing the risk of disasters, mitigating their severity, improves preparedness, rapid and effective response to disasters and post-disaster recovery.

⁵⁴¹ Ministry of State for Special Programmes (MSSP) National Disaster Response Plan <http://ochaonline.un.org/OchaLinkClick.aspx?link=ocha&docId=1160526> (accessed 7 July 2011).

⁵⁴² National Policy for Disaster Management in Kenya 7 . 8; 15, 17 - 21.

⁵⁴³ According to the Minister in Charge recent disaster events, the successive Reports of the Inter-governmental Panel Climate Change (IPCC), the recent Climate Change Conference (Nairobi, Nov. 2006), and a recent comprehensive environmental reconnaissance survey over the whole country have all stressed the central role of Climate Change in any sustainable planned and integrated National Strategy for Disaster Management.+ See National Policy for Disaster Management in Kenya foreword; 8. See also Parry *et al Climate Change and Hunger: Responding to the Challenge* (2009) 29.

appropriate disaster response plans to alleviate the suffering of victims of climate change.

A read through the National Policy for Disaster Management indicates that on paper the Kenyan government has a concrete framework policy, which complies with the Hyogo Framework for Action 2005-2015.⁵⁴⁴ They should thus be able to respond to any form of disaster especially those that may be attributable to climate change, such as floods and droughts including those which may affect the access to food of the citizens. The disaster management capabilities of Kenya have been put to the test over recent years up till now; the major challenge is timely response and resettlement measures. In most instances the reaction by the government has been too little too late and in some instances outright denial. This unfortunate situation has only served to increase the suffering of millions in situations where a whole lot more lives could be saved and suffering minimised if there was meaningful and timely reaction by the state. It is thus important that any measures to deal with disaster management should also focus on disaster prevention, together with ensuring access to protection systems such as insurance and social security.⁵⁴⁵

Vision 2030 also recognizes the importance played by the meteorological department in improving the state of disaster preparedness and the monitoring of the effects of climate change. The only way to achieve this is through the modernization of the meteorological department. The aim to is to improve the department through three components of: (a) Tsunami early warning systems; (b) Tidal gauge station, marine automatic weather systems and seismic systems; and (c) Introduction of dynamic modelling capabilities for prediction of weather and climate.⁵⁴⁶ Information obtained from this modernization will assist in proper planning and reaction to disasters that might have far reaching consequences for the enjoyment of the right to food.

⁵⁴⁴ The Hyogo Framework for Action 2005 . 2015: Building the Resilience of Nations and Communities to Disasters <http://www.unisdr.org/2005/wcdr/intergover/official-doc/L-docs/Hyogo-framework-for-action-english.pdf> (accessed 7 July 2011).

⁵⁴⁵ See Parry et al *Climate Change and Hunger Responding to the Challenge* 30.

⁵⁴⁶ See Kenya Vision 2030 15.

5.4 Conclusion

This chapter has focused on the legislation and policy framework affecting food on the one hand and climate change on the other. It is clear that the approach taken by the State is to guarantee food security which is in turn meant to guarantee the right to food. There is no single right to food framework legislation and as such the right to food is addressed in an un-coordinated manner. The continued absence of framework legislation dealing with the right to adequate food is a shortcoming that needs to be immediately remedied especially given the failed nature of government attempts to deal with food insecurity. Furthermore, it would also be an indication of the state's commitment to fully implementing the provisions of the new Constitution. Co-ordination between the ministries dealing with the right to food needs to be strengthened to better implement the legislative and policy plans put in place. The continued over reliance on maize as a staple for Kenyans has led to other food crops that are more drought resistant being ignored. It is therefore argued that there is a need for legislative reform to reflect the new constitutional dispensation. Additionally such reform shall treat the issue of food as a serious concern together with providing a government blue print on dealing with climate change. The reform of land laws is also a pressing issue as a huge portion of productive land is in the hands of a few while many do not have land to grow food on. The resettlement of IDPs should also be taken as a priority as many of these people are settled in marginal lands which are not productive.

The path to achieving food security for the whole Kenyan population is going to be littered with many obstacles that will have to be overcome. Vision 2030 with all its plans provides hope, especially if it will be undertaken with full compliance of the Kenyan Constitution and other necessary international treaties governing human rights and climate change. Respect for the rule of law as guided by the Constitution and its provisions is the first step towards creating a conducive environment for the realisation of the right to adequate food, together with all the other socio-economic rights enshrined in the Constitution and international human rights treaties. There is a necessity to have the supporting environment that will allow for sustainable economic growth as this will be essential if the right to food is to be guaranteed. This has been noted by Narula as follows, "the best antidote to hunger and poverty is

sustained and equitable economic growth. Consequently, the right to food is deeply connected to the economic health of a country.⁵⁴⁷ Such economic health and the concomitant respect for human rights and increased food security for the population can only occur in a favourable environment. Chapter six shall seek to recommend some of the measures that can be put in place to create this environment.

⁵⁴⁷ S Narula *The Right to Food: Holding Global Actors Accountable Under International Law* (2006) 44 *Columbia Journal of Transnational Law* 691 at 699.

CHAPTER SIX

CONCLUSIONS AND RECOMMENDATIONS

6.1 Conclusions

This thesis started with the assertion that climate change is a human rights concern. The discussion, in chapter two, revealed that climate change will have far reaching consequences for the enjoyment of human rights in general. These consequences will first affect the environment which shall in turn affect the enjoyment of human rights. Human rights will also be affected by measures taken to adapt to and mitigate against climate change. It further noted that climate change is having negative impacts on the lives of many across the world due to the increased frequency of natural disasters. Worse still, the poor are the most vulnerable to these negative effects of climate change. This has forced the need to look at climate change in nuances other than a scientific problem. Climate change is also a human rights issue as it threatens to curtail the enjoyment of human rights of many. By dealing with climate change as a human rights issue it is possible to address the social impacts that it might have on human beings. Thus, states being signatories to international human rights instruments have a responsibility to guarantee human rights at all times. As a result of this they should consider the impact climate change may have in the fulfilment of states' human rights obligations.

The thesis also focused, in chapter 3, on the right to adequate food. It sought to look at the right to food in the context of climate change. It was discovered that despite its wide acknowledgement across the globe and enumeration by the UN, many people still face hunger. Moreover, climate change and responses to it, would likely lead to an increase in the number of hungry people in the world. It became evident that the right to food will have to be vigorously pursued, in an environmentally sustainable manner, if the MDGs are to be met. Efforts to produce enough food could lead to implementation of mitigation and adoption measures through the pursuance of sustainable means of food production. Additionally, efforts to mitigate and adapt to climate change should not be pursued at the expense of the right to food and other rights. While all this is required, the right to food as traditionally formulated does not take into account the threat posed by climate change. This highlighted the need to develop it to take into consideration the effects of climate change on the realisation

of this important human right. Likewise, it was revealed that efforts to produce food could be engaged in such a manner that climate change is addressed accordingly.

Chapter four focused on the Kenyan situation. It revealed that droughts and floods worked together with other stressors such as poverty in making it difficult to access the right to food. Given the increased frequency of droughts and floods it is necessary that Kenyans adapt to the changing conditions they are exposed to. It also revealed that the guarantee of human rights is the responsibility of the state. Thus, the Kenyan government has the responsibility of guaranteeing the right to food to those within its jurisdiction and arguably outside in terms of international human rights law. State's effort to realize the right to food were found to be wanting as a large number of Kenyans faced hunger and starvation caused by floods and droughts. It was argued that the coming into force of the new Kenyan Constitution, which includes a justiciable right to food together with recognition of the role played by international human rights law, marked an important milestone for Kenya. It means that the government of Kenya is under an obligation to observe, fulfil, promote and protect the right to adequate food at all times. When compared to its constitutional obligations, current measures to promote the right to food on the one hand, and measures to respond to climate change on the other, were found to be wanting. The right to food is not properly provided for in terms of legislation and policy documents with the result that not all enjoy access to the right food. It was observed that several ministries deal with the right to food and this has resulted in the absence of a co-ordinated approach in dealing with the right to food.

In dealing with human rights issues the courts, it was observed, had not done much to promote economic, social and cultural rights in general and more particularly, the right to food. There was evidence of a shift in the willingness of the judiciary to embrace progressive human rights interpretation as a result of the new Constitution. Furthermore, it was revealed that government's efforts to deal with disasters were reactionary and inadequate despite the existence of early warning systems and a dedicated ministry to deal with disasters. Thus, on the basis of available information the Kenyan government is in violation of the right to food as a considerable

population is exposed to hunger and starvation. In order to address the right to food situation in the country, the threat posed by climate change cannot be ignored.

From the foregoing chapters, the following conclusions can be made:

1. That climate change is a human rights issue that needs the urgent attention of the world and specifically the Kenyan government. The effects of climate change have led to more people being exposed to hunger and malnutrition as a result of increased droughts and floods. It has also contributed to the increase in food prices and displacement of individuals.
2. Climate change is affecting and will affect the enjoyment of human rights. Other than the right to food, climate change is going to affect the enjoyment of other rights such as health, water and education which will in turn affect the right to food.
3. Despite the effects of climate change and increased droughts and floods affecting the right to food of Kenyans, the measures put in place by the state are not enough to guarantee the right to food.
4. Kenya is falling short of its obligations in terms of the Constitution and human rights treaties to observe, respect, protect, promote and fulfil the right to food.
5. The Kenyan courts have not developed strong socio-economic rights jurisprudence. Furthermore, they are yet to play the prominent role they would be expected to play in the protection and promotion of human rights in the country.

Understandably, the new Kenyan Constitution is just but over a year old and its implementation by the government and interpretation by the courts is not going to be immediate. Kenya's history with socio-economic rights is unflattering if not non-existent at best. Despite ratifying the ICESCR and other international human rights treaties, the government's response to the right to food has been lacking and inadequate at best.

6.2 Recommendations

In light of the above conclusions, the following recommendations are made with the hope that if they are adopted the realisation of the right to food in the face of climate change will become a reality. The recommendations made are those closely related

to the right to food and human rights law. This is because climate change is an issue that affects all disciplines and as such recommendations on how to deal with it could be many. Nonetheless, no one recommendation is important than the other and as such their layout in this research is for presentation purposes. Most importantly, all arms of government, including their functionaries, have a role to play in guaranteeing the respect for and fulfilment of human rights at all times in Kenya. It has been rightly noted by the UN that the governance of human rights is complex and diffuse.⁵⁴⁸ It would therefore be fool hardy to claim that the fulfilment of the state's human rights obligation can be achieved without the meaningful participation of all stakeholders. Such stakeholders would include but not necessarily be limited to the executive, legislature, judiciary, government departments/ministries, country governments, and other institutions developed to promote democracy and uphold the Kenyan Constitution. Moreover, all the recommendations herein should be adopted together to enable the realisation of the right to food in the face of climate change.

6.2.1 Framework Legislation dealing with Food

With the promulgation of the new Constitution in 2010, many pieces of legislation need to be amended and new ones enacted. There are a number of legislative texts that have been earmarked for immediate reform or promulgation but unfortunately none deal with food.⁵⁴⁹ Most of these pieces of legislation deal with the implementation of the new Kenyan Constitution, such as those dealing with; representation and legislature, judiciary and constitutional commissions, public service and leadership, devolved government among others.⁵⁵⁰ Furthermore, as observed in chapter 4, Kenya does not have framework legislation dealing with the right to food. In discussing this recommendation, the focus is on promulgating new framework legislation that will promote the right to food and climate change. The situation obtaining in Kenya especially with the right to adequate food is such that

⁵⁴⁸ Office of the United Nations High Commissioner for Human Rights, National Human Rights Institutions, History, Principles, Roles and Responsibilities (2010) http://www.ohchr.org/Documents/Publications/PTS-4Rev1-NHRI_en.pdf (accessed 3 October 2011)

⁵⁴⁹ See Commission for the Implementation of the Constitution, Agreed timelines for the development of priority bills for the period ending 30th August 2011. To guide relevant institutions including Line Ministries, AG, KLRC, CIC and Parliament. http://cickenya.org/sites/default/files/7.5%20Schedule_of_agreed_timeplan_for_pending_Bills-_revised.pdf (accessed 24 September 2011).

⁵⁵⁰ See Agreed Timelines for Development of Priority Bills

the legislation and policy documents speaking to the right to food are inadequate at best. Additionally, most of the legislation and policies have been surpassed by the realities on the ground and do not reflect the new constitutional philosophy adopted by Kenya in 2010. It would thus be necessary if the food situation is to change, that a reform of all existing legislation affecting the right to food is engaged upon. It is therefore of critical importance that appropriate means be put forward on how to best remedy the shortcomings and in so doing better and adequately realise the right to food.⁵⁵¹

The need for legislative reform in general and a new framework law is further underscored by the Constitution's obligation to the state to, "take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43."⁵⁵² This very same provision is mirrored in article 11(2) of the ICESCR of which Kenya has ratified and is under an obligation to uphold. Framework legislation has been encouraged by the CESCR as a means by which states can implement national strategies dealing with the right to food.⁵⁵³ In drafting the suggested legislation, it will be necessary to take note of the current and likely future challenges to achieving the right to food. In this instance such a great challenge is climate change and events such as floods, droughts and environmental degradation. In Kenya's case the Right to Food Guidelines would be instructive in any efforts to come up with a new framework legislation dealing with food. The framework legislation would serve the purpose of providing a single, all-encompassing and co-ordinated means for implementing national policy and strategy relating to the right to food, especially in the face of climate change.⁵⁵⁴ The framework legislation should also clearly provide for the different roles to be played by the different ministries that might be involved in promoting the right to food.⁵⁵⁵ It is suggested, given the un-coordinated nature of implementing the right to food as

⁵⁵¹ This need for legislative reform has been recognised by the Commission on the Implementation of the Constitution of Kenya in its 3rd Quarterly Report at 19. See also DR Holness, *The Constitutional Right to Food in South Africa* 167.

⁵⁵² Article 21 (2) Constitution of Kenya 2010.

⁵⁵³ CESCR General Comment 12 para 29.

⁵⁵⁴ The importance of Framework legislation in guaranteeing access to rights has been highlighted in the South African context and the same equally applies to Kenya. See S Khoza *Realising the Right to Food in South Africa: Not by Policy Alone - A Need for Framework Legislation* (2004) 20 *South African Journal on Human Rights* 664 at 670.

⁵⁵⁵ Coomans and Yapko 2004 *African Human Rights Law Journal* 20

revealed in chapter 4, that a specific department within the ministry of Agriculture be created to deal all matters dealing with this right.

Since the Kenyan food situation has been characterised by an inability by the state to effectively deal with the challenges it faces, it will be necessary to conduct an extensive study to find out these constraints with the aim of coming up with effective means of addressing them. FAO has proposed that the elaboration of these strategies should begin with a careful assessment of existing national legislation⁵⁵⁶ systematic identification of existing constraints and availability of existing resources. States should formulate the measures necessary to remedy any weakness, and propose an agenda for change and the means for its implementation and evaluation. In Kenya's instance, the right to food framework as discussed in chapter 4 was found to be inadequate, un-coordinated and falling short of the human rights approach. In formulating this framework legislation, Kenyans from all walks of life should be allowed an opportunity to meaningfully participate especially those affected most by droughts, floods, hunger and starvation. Moreover, the measures adopted should address the root causes of the non-realisation of the right to food such as poverty, over dependence on maize as a staple food, poor access to agricultural inputs among others. It should also empower Kenyans to access food rather than depend on government and donor benevolence for their food in times of hardships.

It would be prudent for Kenya to consider adopting a national human rights based strategy for the progressive realization of the right to food in the context of national food security as part of an overarching national development strategy, including poverty reduction strategies, where they exist.⁵⁵⁷ The Right to Food Guidelines promote a human rights-focused assessment and monitoring which is particularly relevant for those not enjoying the right to food fully and would go a long way in maintaining a human rights culture in all efforts meant to guarantee this right in the midst of the effects of climate change and other challenges in Kenya. It's not only

⁵⁵⁶ Right to Food Guidelines 3.2 read together with Guideline 8.7 and 11.5 and the discussion on the import of the right to food guidelines in Chapter 3. The CESCR has also called upon states to put in place a national strategy to cater for the right to food. See CESCR General Comment 12 para 21.

⁵⁵⁷ Right to Food Guidelines 3.1.

enough to engage in legislative reform. The resultant framework legislation should be such that it allows for wider enjoyment of the right to adequate food. Most importantly as observed by Khoza while commenting on South Africa and applicable to the Kenyan situation, it should have the ability to give content to the right.⁵⁵⁸

Since legislation is not the only means through which the right to food can be guaranteed. The policies and strategies pursued in terms of any legislation or for the benefit of the right to food should be such that it addresses all aspects of food security and be able to deal with challenges to accessing the right to food.⁵⁵⁹ Most importantly, the resultant strategies, programmes and measures should be able to provide easy access to food for the most vulnerable and disadvantaged Kenyans. With climate change threatening the enjoyment of the right to food for all, it is submitted that all these measures should include an element of disaster risk and management mechanisms to address situations⁵⁶⁰ that are likely to affect the right to adequate food. Such situations include floods, droughts and environmental degradation among others. Additionally, the new framework legislation and supporting policy documents should allow for the state and other duty bearers to be held accountable for their actions towards fulfilling the right to food. Government ministries and departments in charge of food should have specific obligations to allow for accountability should they fail to deliver.

Comprehensive legislative reform is likely to take some time.⁵⁶¹ This will be for the reason that the right to food can only be provided for in a progressive manner. However, the reform should be engaged in as soon as possible as climate change is already happening and is likely to get worse as it is such an unpredictable phenomenon. More so the efforts to come up with a binding legal instrument to deal with climate change are moving along at a glacial pace. Accordingly, the expectation

⁵⁵⁸ See S Khoza, 'Realising the right to food in South Africa: Not by policy alone . A need for Framework Legislation+(2004) 20 *South African Journal on Human Rights* 670.

⁵⁵⁹ Such aspects include food availability, access to food and the use of food. See also Brand, *The Right to Food* 160. CESCR General Comment 12 paras 21 and 28. Coomans & Yapko 2004 *African Human Rights Law Journal* 20.

⁵⁶⁰ Right to Food Guideline 3.3.

⁵⁶¹ The drafting of framework legislation goes through four stages that involve evaluation, drafting, implementation and monitoring. See Khoza 2004 *South African Journal on Human Rights* 672. DR Holness, *The Constitutional Right to Food in South Africa* 195 -196.

would be that the state will move with the necessary expedience to effect legislative reform and other necessary measures as it is their duty. This, it is contended, will go a long way in mitigating some of the effects of climate change on the population. Accessibility to food is an important aspect of the right to food. It is thus important that food remains affordable to all at all time. To this end the Kenyan government has introduced the Price Control Act⁵⁶² to ensure that the price of essential commodities does not spiral out of control. Such legislation is important if access to food is to be maintained at all times. Political will and meaningful budgetary allocation should accompany measures to provide for food for the most vulnerable Kenyans. This being the case, guaranteeing the right to food through framework legislation might result in the promotion of other rights likely to be affected by climate change including the rights to health, water, a healthy environment and life.

6.2.3 Litigation

The first recommendation for the vindication of the right to adequate food would be to seek legal redress from the courts. The judicial reinforcement of socio-economic rights especially the right to food cannot be gainsaid. The role of litigation is important as it affords an opportunity for governments' policies and programmes meant to implement the human rights enshrined in the Constitution, the supreme law of the land, to be tested by the courts. As shown in chapter 4, the Bill of Rights has made the rights contained therein entitlements each citizen can claim against the State and other parties. Whereas improved access to courts has been catered for in the Constitution⁵⁶³, what remains to be seen is whether the courts will make such rulings that will hold the State accountable for human rights violations. It is one thing for the court to rule against the State but the remedies provided by the courts should be such that it would result in more citizens enjoying their right to food even in the face of hardships brought about by the effects of Climate change. As avidly observed by Mbazira, a court victory is not enough, instead it should be followed by meaningful remedies that are designed in such a way as to improve the living conditions of those whose rights are threatened and or denied.⁵⁶⁴ The adjudication of

⁵⁶² Price Control Act 26 of 2011.

⁵⁶³ Article 22 Constitution of Kenya 2010.

⁵⁶⁴ C Mbazira *Litigating Socio-Economic Rights In South Africa A choice between corrective and distributive justice* (2009) 3 . 4.

the right to food by the courts would require an independent and impartial judiciary. Such an independent and impartial judiciary ought to have enough legal power to impose an order (the order could include a requirement to do something, not to do something, to pay something, etc.) upon the duty-bearer if he or she is deemed not to have met his or her duties.⁵⁶⁵

As earlier alluded to in Chapter 4, there is a dearth of progressive human rights jurisprudence in Kenya. However, so far the courts have shown their willingness to engage in a matters dealing with socio-economic rights on the basis of the Constitution and relevant progressive international human rights law interpretation.⁵⁶⁶ As such in terms of the Constitution an aggrieved party could bring a matter before the high court seeking to have their right to food fulfilled by the state. The recommendation here is to help aggrieved Kenyans access the courts to challenge the State's efforts in realising the right to food and other rights contained in the Constitution. For instance, the hungry population could institute a claim in court arguing that Kenya's policies dealing with the right to food are not sufficient and effective enough to address the food situation during droughts and floods. They could do so in terms of article 22 which provides for public interest litigation. The wording of this provision seeks to make access to justice affordable and less technical by envisioning a simplistic process for instituting a claim before the courts.⁵⁶⁷ This increased and fairly easy access to courts could go a long way in guaranteeing the right to food. So far the courts have shown renewed interest in upholding the rule of law and protecting human rights as was evidenced in the case of *Susan Waithera*. Such an approach, if continuously applied will lead to more people approaching the courts. It would however, require that access to courts be made affordable as many people cannot afford to pay legal fees which remain high. Additionally, in order to question some of the government's decisions that affect the right to food, it is recommended that the right to fair administrative action be made use of. This right is provided for in article 47 of the Constitution. Thus, the

⁵⁶⁵ International Commission of Jurists (ICJ), *Courts and the Legal Enforcement of Economic, Social and Cultural Rights* (2008) 8.

⁵⁶⁶ See *Susan Waithera Kariuki & 4 others v Town Clerk, Nairobi City Council & 2 others*. Both by the Committee on Economic, Social and Cultural Rights through its General Comments and comparative human rights jurisprudence from South Africa and other jurisdictions.

⁵⁶⁷ See article 22 (3) and (4) making provisions for easy access to courts on matters dealing with human rights.

administrative decisions taken that might affect the right to food can be questioned and where necessary written reasons be given for such decisions. The use of this provision would greatly assist in promoting accountability within the government. It is argued also if properly made use of it could lead to the proper execution of duties by all those involved in government in making sure that the right to food is fully realised.

Another situation where litigation could be necessary is in determining Kenya's commitment to deal with climate change. For instance, an aggrieved member of society can have a claim before court in terms of Kenya being a signatory to these international instruments. Kenya's industrial output in terms of GHG's emissions is not as high to warrant action by individuals against private actors as was the case such in Nigeria where gas flaring has been found to be a major concern or the coal mining cases⁵⁶⁸ in Australia.⁵⁶⁹ Thus, litigation directly based on third parties's⁵⁷⁰ activities that contribute to climate change would not suit its situation. For one, climate change litigation is a complex affair as, climate change is not a problem that can be addressed at only one level of governance. Behavior that causes greenhouse gas emissions takes place and is regulated at the local, state, national, regional, and international levels.⁵⁷¹ Nevertheless, there is a danger that Kenya's drive towards development in terms of Vision 2030 might lead to industrial practices that have a significant carbon imprint. Furthermore, government's efforts to adapt to and mitigate climate change could have human rights implications, for instance the cultivation of food crops for bio fuels. It is these measures that can be challenged in court as having negative impacts on the enjoyment of human rights. The importance of such litigation is that, it could be a useful tool in highlighting the effects of climate change and measures to address it while at the same time compelling government

⁵⁶⁸ *Australian Conservation Foundation v Minister for Planning* (2004) VCAT 2029 (October 29, 2004) and *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc. v. Minister for the Environment and Heritage & Ors* [2006] FCA 736 (June 15, 2006) all available at <http://www.austlii.edu.au/>.

⁵⁶⁹ Australia is the world's largest exporter of coal and the world's fourth-largest producer of coal after China, the United States, and India. See World Coal Institute, *The Coal Resource: A Comprehensive Overview of Coal* (2005), 14. 15 http://www.worldcoal.org/assets_cm/files/PDF/thecoalresource.pdf (accessed 26 September 2011).

⁵⁷⁰ The affirmative acts that contribute most dramatically to climate change are committed by private actors, as Shell's involvement in the Nigerian gas flaring illustrates. See Burns and Osofky *Adjudicating Climate Change* 174.

⁵⁷² OW Pedersen 2010 *Journal of Human Rights and the Environment* 237.

action.⁵⁷² Accordingly, it is recommended that in order to deal with climate change effectively human rights should be incorporated in such a way as to deal with the effects of climate change on human rights, and in the Kenyan context the right to food.⁵⁷³

6.2.4 Promoting Rights which Support the Right to Food

The discussion in chapter 2 and 3 revealed that human rights are interdependent and interrelated. This is trite in international law and in the Kenyan context socio-economic rights are put together given their interrelated nature. It is thus difficult for individuals to enjoy the right to food when other interrelated rights such as health, education and social security are not being enjoyed. The right to adequate food in light of climate change can be promoted through the promotion of others rights. This is because the effects of climate change per se do not directly affect human rights. Instead the effects of climate change affect the environment which is intrinsically linked to the enjoyment of human rights in general. Additionally, the responses to climate change are also likely to have human rights implications for food and other related rights.⁵⁷⁴ The promotion of the right to food on its own as a right would not be in keeping with the philosophy that all rights are interdependent and interrelated. Instead it is suggested that perhaps the best way to promote the right to adequate food would be to promote other rights such as those of health, a healthy environment, education and social security. Whereas all previously mentioned rights are important. The right to a healthy environment speaks directly to the right to food and could equally address the issue of climate change within Kenya. The effects of climate change come through the environment in the form of increased droughts and floods. Some of these events such as floods can be dealt with through sustainable environmental management.

The right to social security is equally important in efforts to realise the right to food in the face of climate change. Social security is helpful to members of society who can no longer enjoy their rights due to circumstances beyond their control such as those

⁵⁷² OW Pedersen 2010 *Journal of Human Rights and the Environment* 237.

⁵⁷³ See Burns and Osofky *Adjudicating Climate Change* 174.

⁵⁷⁴ See discussion in Chapter 2.

caused by climate change.⁵⁷⁵ The effects of climate change are such that they would make it difficult to access to food and health care for those that are affected. Access to food is dependent on income security⁵⁷⁶ and in times of hardships social security of some form can be helpful as it plays an important role in poverty reduction and alleviation, preventing social exclusion and promoting social inclusion.⁵⁷⁷ For members of the community entirely dependent on farming for their food, having some form of social grant or help from government would make it easy for them to access food and other basic necessities even without an income during times of droughts and floods. In the Kenyan context the state is yet to roll out a social security system to help the poor and vulnerable members of the society whereas social insurance does not cater for majority of the Kenyans. With climate change likely to lead to an increase in the number of poor and vulnerable Kenyans, there is a growing need to push for a safety net for such people. It is therefore, recommended that the necessary measures should be undertaken by the relevant stakeholders to enable the right to be a reality instead of a provision in the Constitution. Such measures would include drafting the necessary legislative measures using the elaborated guidelines in General Comment 19 as envisioned by the Kenyan Constitution. It could include some sort of social assistance given to retirees and orphans to assist them meet their nutritional needs.

Already in the Kenyan context the right to basic education is fairly provided for to many Kenyans. Government measures such as the free primary education accorded to all school going children is commendable. Such a measure will in the long term benefit those in school and the country as a whole as education can open paths out of poverty for millions. Be that as it may, it is submitted that whole lot more needs to be done to increase access to education. For instance the free education programme should be extended to cover Secondary Schools and the weaknesses in the current free education system addressed. Furthermore, given the effect drought is having on school attendance, the introduction of School Feeding Programmes is highly recommended. It is very difficult for students to concentrate in school if they

⁵⁷⁵ See CESCR General Comment No. 19 para 1.

⁵⁷⁶ M Vidar *Towards Voluntary Guidelines on the Right to Adequate Food*+(2004) 5 *ESR Review* 11 at 13.

⁵⁷⁷ CESCR General Comment 19 para 3.

have nothing to eat, furthermore, history has shown that for most pupils it is better to drop out of school and go in search of food rather than attend school on an empty stomach. Access to quality education would provide people with the necessary information on what to eat and how to cultivate crops in a sustainable manner. Information of climate change and its effects of rights and human well-being can also be given at schools together with the necessary means of dealing with them.

The right to health is also another right which if promoted could benefit the right to food. Among the rights to be affected adversely by climate change is the right to health as changing environmental conditions are likely to lead to vulnerability to health risks.⁵⁷⁸ Adequate and acceptable food is important for good health. The realisation of one's right to health has the advantage of leading to the enjoyment of other rights.⁵⁷⁹ Among these rights is the right to food and education.⁵⁸⁰ The relationship between health and human rights is also one that calls for immediate action as it affects food. It has been acknowledged that diseases, which will become prevalent with the effects of climate change, affect people living in conditions, who conversely are the people who will feel the worst effects of climate change.⁵⁸¹ Thus in terms of its Constitutional and human rights obligations the government should embark on promoting the right to health by making access to health for everyone within its territory for them to enjoy the highest attainable level of health. Adequate and safe supply of food an element of the right to health⁵⁸² and by promoting this right the state would also be promoting the right to food and in a way softening the blow some of the effects climate change is likely to have on its population.

6.2.5 Education and Information of the Public

The advent of social, economic and cultural rights in Kenya is a new phenomenon. As indicated in chapters 1 and 4 the new Constitution and Bill of Rights have only

⁵⁷⁸ See UN Report on Climate Change para 38

⁵⁷⁹ Committee on Economic, Social and Cultural Rights, General comment 14: The right to the highest attainable standard of health, E/C.12/2000/4, 12 August 2000 para 3.

⁵⁸⁰ CESCR General Comment 14 para 3.

⁵⁸¹ The Office of the High Commissioner for Human Rights Human Rights, Poverty Reduction and Sustainable Development: Health, Food and Water A Background Paper World Summit on Sustainable Development Johannesburg, 26 August . 4 September, 2002 7 <http://www.ohchr.org/Documents/Publications/HRPovertyReductionen.pdf> (accessed 24 October 2011).

⁵⁸² CESCR General Comment 14 para 11.

been in place for over a year.⁵⁸³ This very fact means that there is a whole lot of education that needs to be done to sensitize the population about their rights and responsibilities. The need for this is underlined by the fact that there is a need to inculcate a new culture of respect for the Constitution where all are equal before the law. It is thus essential that widespread education on individual human rights and obligations be undertaken. Such education ought to start from schools right up to government departments, arms of government and the whole country. It is equally important that different actors possess an awareness of what the implications of human rights are within different sectors. The recommendation here is that the Constitution and particularly the Bill of Rights contained therein be made part of the curriculum at all levels of study and not only at Law school and all those studying law. This is a function of the Kenya National Commission on Human Rights as provided for by article 59 (2) of the Constitution and subsidiary legislation promulgated in terms of the Constitution.

By sensitising the public of their rights protected by the Constitution there will be a wide appreciation of these rights. It is only if people are aware of their rights and the obligations of government to them, that they can be able to approach the courts claiming their rights have been infringed. Furthermore, the State and its functionaries also need to be sensitized on their legal obligations emanating from the Constitution, national legislation and international human rights treaties dealing with the right to food. What this simply means is that, the State should be aware of all the legal obligations in so far as human rights are concerned. Most importantly would be their obligations in so far as the right to food is concerned. Thus in promoting rights the Kenyan National Commission on Human Rights⁵⁸⁴ could be tasked with the role of educating Kenyans on human rights as a whole. Over and above and above being sensitized on their human rights obligations, it is submitted the Kenya National Human Rights Commission can take it upon itself to underscore the need to deal with climate change as a human rights concern. It would thus be necessary for the

⁵⁸³ The New Kenyan Constitution was promulgated on 26th August 2010.

⁵⁸⁴ The KNCHR is tasked with promoting and protecting human rights in Kenya

KNCHR to take part in any review of the curricula to ensure that human rights are appropriately included to sensitize every member of the population.⁵⁸⁵

Education on human rights is one part; the other is education the population on issues of climate change. Most importantly would be to educate them on how to deal with the effects of climate change, namely adaptation and mitigation. As a result of climate change the environment will never be the same and as such adaption will be necessary. Such adaption must involve the management of risks such as floods, droughts and environmental degradation. It should also involve what has been described as %adopting known good practices to strengthen the resilience of vulnerable livelihood systems, and finding new institutional and technological solutions.⁵⁸⁶ As such the government and all relevant stakeholders should avail all the information of what people may do in order to adapt to climate change. Thus, everyone should have access to information on how to adapt to and mitigate climate change through all the available information channels available to them. Early warning systems should be put to good use to avoid unnecessary casualties in times of floods and droughts. Furthermore, education on alternative sources of fuel and food sources would be important. Such education should focus on using sustainable means of food production coupled with consumption of alternative food with equally high nutritional value.⁵⁸⁷

6.2.6 Land Reform

The ownership of land has always been a contentious issue given the importance attached to it the world over. In discussing the policy measures affecting the right to food in Chapter 4, the issue of land reform was mentioned. The government has been planning to engage in land reform so as to allow for better land use ownership, and adjudication. It was also argued that land is critical for realisation of the right to food. In Kenya land ownership has been a contentious issue and has in the past

⁵⁸⁵ This is an idea propounded by Esom while commenting on the education role of NHRI in KC Esom %The role of National Human Rights Institutions in promoting international law in domestic legal systems: Case study of the Uganda Human Rights Commission+ in M Killander (ed) *International Law and Domestic Human Rights Litigation in Africa* (2010) 208.

⁵⁸⁶ FAO, *Climate Change and Food Security Framework* (2008) 32.

⁵⁸⁷ Increased demand for grain fed livestock and over consumption of food in some areas is also a cause of increased GHG gas emissions across the world.

been seen as the root cause of some of the violence experience in the country.⁵⁸⁸ With climate change, increasing food prices and internal displacement as a result of violence, focus on land ownership has increased. While great competition for use of land for food production and the cultivation of bio-fuel producing crops is yet to reach Kenya, there is a danger that it might. The cultivation of bio-fuels is done on productive land at the expense of food production which is no longer seen as a lucrative venture. This is likely to fuel the transfer land ownership and change in land use for profit gains. This phenomenon has made it difficult for countries to acquire food as it has led to an increase in prices since 2008. Furthermore, most of the productive land is concentrated in the hands of a few individuals thus leaving the rest of the population with little productive land on which to grow their food.

The process of land reform in Kenya is long overdue. Despite several attempts to reform the land policy nothing much has been done.⁵⁸⁹ It is therefore important that the relevant stakeholders engage in land reform as called upon by the supreme law of the land, the Constitution. The importance of such a reform is recognized in the Constitution.⁵⁹⁰ The central importance of land is also highlighted in the Constitution through the issuance of principles of land policy. The principles are important as they speak to (a) equitable access to land; (b) security of land rights; (c) sustainable and productive management of land resources; (d) transparent and cost effective administration of land; (e) sound conservation and protection of ecologically sensitive areas;⁵⁹¹ The above-mentioned principles should guide the much needed land reform so that issues of climate change and adequate food security are catered for. By improving the rights of land occupiers over the land they are occupying it will become easier to motivate sustainable land use and greater food production. Given that land is a finite resource, it becomes necessary to use of for the benefit of the present generation and the future generation. Accordingly, the process of land reform in Kenya should be expedited to allow for sustainable land utilization that will

⁵⁸⁸ Land associated skirmishes have reared their ugly head during elections in Kenya with deadly consequences.

⁵⁸⁹ Despite the tabling of Sessional Paper No. 3 of 2009 on National Land Policy, no concrete reforms have taken place.

⁵⁹⁰ Article 68 calls on parliament to revise and consolidate all existing land laws to accord with the Constitution.

⁵⁹¹ Article 60 (a) to (e) Constitution of Kenya 2010.

maximize food production while at the same time addressing issues of food security and alleviating the effects of climate change. Ideally the process of land reform should allow for the sustainable production of enough food to feed the Kenyan population.

6.2.7 Sustainable Adaptation

Kenya and much of the world will have to adapt to climate change as a result of the increased incidences of floods, droughts, mudslides, rising sea levels and desertification.⁵⁹² As noted in chapter 2, all these incidences will make it difficult to live life as it was known in the past⁵⁹³ necessitating a change in the way of life of many. Life will be more difficult for the most vulnerable members of the community such as women, indigenous groups and the poor. In fact, the effects of climate change are likely to make living with risk the order of the day.⁵⁹⁴ Chapter 3 also noted some of the negative consequences bio-fuel farming and adaptation measures might have on the enjoyment of the right to food. Furthermore, chapter 4 also highlighted how the vulnerable members of society will need to adapt to these changing conditions. The above findings point towards the need for prudent adaptations measures to be implemented. To this end, it is recommended that the government engage in what has been termed as 'sustainable adaptation' This is because very little is known about the longer term impacts of and implications of adaptation itself.⁵⁹⁵ Before suggesting the key issues adaptation measures should identify, it is best to understand what adaptation means in this context. Sustainable adaptation means 'the process or adjustments through which people reduce the adverse effects of climate on their health and well-being, and take advantage of the opportunities that their climatic environment provides.'⁵⁹⁶ Sustainable adaptation will necessitate changing the means of production and diversifying to other sources of food. With the likelihood of variable weather it will be necessary for Kenyans to find

⁵⁹² Adaptation is implicit in the UNFCCC and Kyoto Protocol.

⁵⁹³ See J Barnett 'Four reasons for Concern about Adaptation to Climate Change' (2009) 41 *Environment and Planning A* 2800 . 2801.

⁵⁹⁴ P Marjanovic & K Nimpuno 'Living with Risk: Toward Effective Disaster Management Training in Africa' in A Kreimer, M Arnold & A Carlin (eds) *Building safer cities: The Future of Disaster Risk* (2003) 179.

⁵⁹⁵ S Eriksen and K Brown, 'Sustainable Adaptation to Climate Change' (2011) 3 *Climate and Development* 3.

⁵⁹⁶ S Eriksen *et al* 'When not every Response to Climate Change is a Good One: Identifying Principles for Sustainable Adaptation' (2011) 3 *Climate and Development* 7 at 8-9.

ways to deal with unpredictable and destructive weather events. By adapting to the effects of climate change the vulnerability of the Kenyans to these adverse effects will be greatly reduced. Additionally, if properly conceived and implemented adaptation programmes can go a long way in dealing with other stressors not related to climate change.⁵⁹⁷ Most importantly, any policies conceived by the government should not result in curtailing the enjoyment of human rights of Kenyans and others outside its territory.

It will be important to note that the vulnerability of Kenyans to the effects of climate change will not be the same depending on their geographical region and socio-economic capacity. For instance the drought stricken areas in the eastern and north eastern parts of the country will require different adaptation and mitigation strategies compared to those in the western part of the country who experience floods. Therefore, any adaptations measures should create long term resilience in the face of climate change for all likely to be affected.⁵⁹⁸ The government should lead the way in encouraging its citizens to adapt to climate change. This can only be possible if information is readily available to all in a language they can easily understand. The quality of information passed across should be sufficient and be put to good use. It should ideally result in members faced by the effects of climate change developing long lasting resilience. The information ought to be targeted to local communities affected by climate change who are coincidentally the most vulnerable. This is because good information about uncertainties and risks can make the difference between resilience and collapse for an affected livelihood system or ecosystem, as in the case of climate change.⁵⁹⁹ To this end greater use should be made of the meteorological department together with other relevant stakeholders who might provide information on climate change and its impacts on local communities. All this should be backed by the necessary financial injection from the government and other stakeholders to support efforts to deal with climate change.

⁵⁹⁷ Cameron 2010 *Georgia Journal of International and Comparative Law* 690.

⁵⁹⁸ Copenhagen Accord para 3; advocates for adaptation to climate change to reduce vulnerability and enhance resilience among developing nations.

⁵⁹⁹ FAO, *Climate change and food security: a framework document* (2008) 34.

To foster resilience, it is recommended that the state sensitize Kenyans on the need for behavioural change on a number of aspects. Such changes would involve areas such as food and energy consumption patterns, health care, food and agricultural production practices, sources and use of energy, and livelihood strategies. These are the areas which are affected and are likely to be affected by climate change, with the result that the realisation of the right to food will be negatively impacted. This sensitization should ideally enable members of the community to protect existing livelihood systems; diversify their sources of food and income; change their livelihood strategies or migrate if there is no other option.⁶⁰⁰ The final result should be that Kenyans should develop an adaptive capacity that will enable them, as individuals or in community, to build resilience in the face of climate change. This can only be achieved if and when information on how to adapt and mitigate to climate change should be readily available to the public. Moreover, any adaptation and mitigation measures adopted should be properly conceived so as not to affect the enjoyment of rights by Kenyans. Conception of these measures should include a human rights framework and involve the participation of local communities with the necessary information provided to them. The implementation of the conceived measures should lead to the expected outcome of adaptation and mitigation of climate change. There has to be a dedicated effort to engage in sustainable development as climate change itself is a threat to development for Kenya and most of sub-Saharan Africa.⁶⁰¹

6.3 Final Remarks

This thesis has argued for the need to deal with climate change as a human rights issue. This is because of the effects climate change, of its own and in efforts to deal with it, might have on the realisation of human rights. Whereas climate change is a global concern, the thesis argued for dealing with its effects on a domestic scale. This rings true when one looks at the effects of climate change on the realisation of the right to food in Kenya. From international best practice, the thesis showed that the right to food can be interpreted in such a way as to include the threat posed by climate change. Furthermore, it showed that states will always have obligations to

⁶⁰⁰ FAO, *Climate Change and Food Security: A Framework Document* (2008) 41.

⁶⁰¹ See Human Development Report 2007/2008 *Fighting Climate Change: Human solidarity in a divided world*.

fulfil, promote, and protect the right at all times. To this end the legislative and policy framework dealing with food in Kenya was found to be inadequate and in need for reforms to allow for wider enjoyment of the right to food. Such reforms would allow for Kenyan to fulfil its human rights and constitutional obligations. Frequent droughts and floods with far reaching implications on the right to food curtail government and individuals efforts to achieve food security. While the international community tries to come up with a new binding agreement to deal with climate change, measures to deal with it will have to be accelerated at state level. This is because the effects of climate change and responses to it will not wait for anyone. The recurring droughts and floods are an indication of things to come. Where these events are out of control of many, with the necessary commitment and preparation the right to food can always be guaranteed in the midst of all the uncertainty.

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