

**SAFEGUARDING RIGHTS TO CLEAN WATER AND FOOD SECURITY
FOR MINE-HOST COMMUNITIES: ANALYSIS OF TANZANIA'S
COMPLIANCE WITH INTERNATIONAL STANDARDS**

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**A THESIS SUBMITTED IN FULFILMENT OF THE REQUIREMENTS FOR
THE DEGREE OF DOCTOR OF PHILOSOPHY IN LAW (PhD)
DEPARTMENT OF PUBLIC LAW
THE OPEN UNIVERSITY OF TANZANIA**

2023

CERTIFICATION

The undersigned certify that they have read and hereby recommend for acceptance by the Open University of Tanzania a thesis entitled; **“Safeguarding Rights to Clean Water and Food Security for Mine-Host Communities: Analysis of Tanzania’s compliance with international standards”** in fulfilment of the requirement for the award of Degree of Doctor of Philosophy in Law (PhD).

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Signature

.....

Date

DEDICATION

To my beloved parents, late Mr. Sebastian Joseph Sinato Ombella and Mrs Catherine Lazaro Mfalme Msaki. They brought me up, sent me to school and taught me the right way of life, believing in God and holding education for my liberation. Really they mean and count a lot in my life and always will. May their souls rest in eternal peace. Amen. This work is also dedicated to every one who believes that, ‘adequate food and water is for one’s life, so is minimum privacy for one’s dignity’.

ACKNOWLEDGEMENTS

This study would not have been achieved through my own personal efforts. A number of persons contributed a great deal to have this work achieved and I would love to abundantly thank them. First and foremost, I am so much thankful and humbled to the Almighty God for his free gift of life, abundant grace and protection during the entire period of my study. To him be the glory for ever. Secondly, I would love to extend my gratitude to my major supervisor Prof. Dr. Alex Makulilo of the Faculty of Law, Open University of Tanzania. I benefited a lot from his vast academic talent and experience in research. I am also thankful to Dr. Rindstone Ezeikiel Bilabamu, the Dean Faculty of Law, Open University of Tanzania who accepted to co-supervise my study with Prof. Dr. Makulilo. Their friendly but critical academic guidance is highly appreciated.

Thirdly, I am profoundly appreciative of the initial academic guide I received from Prof. Elmarie Vander Schyff and Prof. Stephen Del Harpe of the North West University. Prof. Elamrie really shaped my academic thinking and writing. Fourthly, I am so much thankful to friends who supported me in different levels of my study. In the early stages of my study I benefited from, Prof. O. Fuo, Prof. E Bain, Dr. W Mugadza, Dr. JeanClude A, Dr. Ali Possi, Dr. J. Jesse, Ms. R. Angwe and Ms M Steenkamp through comments and discussions on my study. Ccolleagues through shaping my moral, spiritual economic and social support which was vital in arriving at this stage.

Such relatives and friends include; the Sebastian Sinato Ombellas' family, Hon. Dr. Judge Ubena J., Prof. Warioba, M., Prof. G. Nyamsogoro, Dr. Isaga N., Dr. Makauki

A, Dr. Sesabo J, Mr. L. Lukiko, and Mr. Massawe M., Dr. S. Bakta, Dr. Mushi, Dr. J. Cosmas, D. Mwashuuya and Mr E. Kautipe. I owe you dear friends a lot and I pray that the Almighty God reward you abundantly.

Fifthly, appreciations are extended to all my relatives for their support in this study. I also am indebted to; Dr. Kessy and Mr. A. Katigano from the Ministry of Agriculture Food Security and Cooperatives for their cooperation during data collection stage. Last but not least I am profoundly honoured and gratified with the study leave and sponsorship I was granted by Mzumbe University in pursuing this study. I will remain that I was lucky to work for Mzumbe University a place to learn and grow endlessly.

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Agreement between the United Arab Republic and the Republic of Sudan for the full utilization of the Nile Waters, 1959

Agreement on the establishment of the Zambezi Watercourse Commission (The ZAMCOM Agreement) 2004

Convention to combat desertification in those countries experiencing serious drought and /or desertification particularly Africa 1994

Convention concerning indigenous and tribal populations 1957

Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 1998

Convention on Biological Diversity 1992

Convention on the elimination of all forms of discrimination against women 1979

Convention on the law of the Non-navigational uses of international water courses 1997

Convention on the protection and use of trans-boundary watercourses and international lakes 1992

Convention on the Rights of the Child 1989

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ABSTRACT

Absence of robust legal and institutional frameworks relevant to address mining impacts on Mine-Host Communities (MHCs) rights to clean water and adequate food is the central problem under this research. Tanzania is a member State to both the UN and AU, and is therefore bound by their frameworks. Both the UN and AU legal and institutional frameworks recognize principles relevant to curb mining impacts on human rights under research. This study investigates the extent of Tanzania's compliance with the two frameworks. To establish the extent to which Tanzania complies with the international and regional frameworks, a documentary review of primary sources such as; international and domestic instruments, was carried out. Also, review of secondary sources such as; books, journal articles, reports and internet sources was carried out. It is found that, Tanzania legal and institutional frameworks have domesticated international principles aimed at safeguarding MHCs rights to clean water and adequate food. The manner of domestication of such principles do not confer full safeguard to MHCs against mining impacts though. Among causative factors are; non-justiciability of the two rights, inadequate participation of MHCs in decision making, overlapping laws on environmental conservation, wide administrative discretionary powers, and less deterrent penalties among others. With respect to institutional framework, factors such as; partiality, overlapping mandate in allocation of resources rights, poor infrastructure, limited budget and inadequate human resources. Reforms of legal and institutional frameworks is recommended to fully comply with the international standards.

Keywords: *Mine-host communities, Right to Water, Right to adequate food, Tanzania.*

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LIST OF ABBREVIATIONS & ACRONYMS

AG	Attorney General
AMD	Acid Mine Drainage
ASDP	Agricultural Sector Development Programme
ASEAN	Association of Southeast Asian Nations
AU	African Union
CAT	Court of Appeal of Tanzania
CCJP	Catholic Commission for Justice and Peace
COMESA	Common Market for Eastern and Southern Africa
DRC	Democratic Republic of the Congo
EAC	East Africa Community
EACJ	East African Court of Justice
ECOWAS	Economic Community of West African States
EIA	Environmental Impact Assessment
EMA	Environmental Management Act
ESC	Economic, Social and Cultural
EU	European Union
FAO	Food and Agriculture Organisation
GDP	Gross Domestic Product
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICGLR	International Conference on the Great Lake Region
ICJ	International Court of Justice
IFIs	International Financial Institutions
IPCC	Intergovernmental Panel on Climate Change

LHRC	Legal and Human Right Centre
LVZ	Lake Victoria Zone
MHC	Mine-host Communities
MID	Mine Induced Displacement
MMSD	Mining, Minerals and Sustainable Development
MNCs	Multi-national Companies
NEMC	National Environmental Management Council
NEPAD	New Economic Partnership for Africa's Development
NGO	Non-Governmental Organisation
NRGI	Natural Resource Governance Institute
OAU	Organisation of African Unity
OECD	Organisation for Economic Cooperation and Development
OHCHR	Office of the High Commission for Human Rights
PURT	Parliament of the United Republic of Tanzania
SADC	Southern Africa Development Community
SERAC	Social and Economic Rights Action Centre
SSA	Sub-Saharan Africa
TASAF	Tanzania Social Action Fund
TIESR	Toronto Initiative for Economic and Social Rights
TLR	Tanzania Law Reports
TSHS	Tanzanian Shillings
UK	United Kingdom
UN	United Nations
UNCTAD	United Nations Commission on Trade and Development

UNDP	United Nations Development Programme
UNECA	United Nations Economic Commission for Africa
UNGA	United Nations General Assembly
UNICEF	United Nations Children Education Fund
UNSC	United Nations Security Council
UNSEC	United Nations Social and Economic Council
URT	United Republic of Tanzania
USD	United State Dollar
WB	World Bank
WHO	World Health Organisation
WIR	World Investment Report
WSFS	World Summit on Food Security

CHAPTER ONE

INTRODUCTION AND BACKGROUND TO THE PROBLEM

1.1 Introduction

Globally, development is dependent on both human and natural resources that are endowed within a respective country and or region.¹ Due to the value that people have it is necessary to guarantee their safe involvement in the process of harnessing natural resources. Internationally, human rights principles relevant to safeguarding peoples' rights are recognised and protected.² Similarly, such human rights need to be emphasised in the process of harnessing natural resource for development. This is because natural resources such as minerals when properly extracted they positively influence socio-economic development of the state and its peoples.³

However, when they are not properly regulated, they tend to bear gross impacts on peoples' lives as they may violate a number of their basic rights. It is argued that among human rights that are prone to anthropogenic activities such as mining are; right to property, right to clean water, right to food, right to clean environment to name but a few.⁴ Among potential impacts of mining on such rights are inclusive; land alienation and resettlement, land pollution, deforestation that may exacerbate climate change, water pollution, chronic water borne diseases to name but a few.⁵

¹ African Union and Commission, *Agenda 2063: The Africa We Want*. (2015). item g (iii).

² European Convention on Human Rights 1950.; International Covenant on Economic, Social and Cultural Rights 1966.;The American Convention on Human Rights 1969; The African Charter on Human and peoples' Rights 1986.

³ UN Commission on Sustainable Development, 'Report on the Eighteenth Session (15th May 2009 and 3-14 May 2010)' (2010) Economic and Social Council E/2010/29, para 10.

⁴ Lidewij Ploeg and Frank Vanclay, 'A Human Rights Based Approach to Project Induced Displacement and Resettlement' (2017) 35 Impact Assessment and Project Appraisal.

⁵Terminsk Bogumuli, 'Mining-Induced Displacement and Resettlement: Social Problem and Human Rights Issue' (2012) <<http://nbn-resolving.de/urn:nbn:de:0168-ssoar-327774>>. ; Johnson Mshana, 'Mercury and Lead Contamination in Three Fish Species and Sediments from Lake Rukwa and Catchment Areas in Tanzania' (2015) 5 Journal of Health and Pollution.; Women in Water, 'The Impacts of Extractives on Quality and Quantity of Drinking Water' (Women in Water (Pty) Ltd

In particular, this fact seems to worsen the pursuit of human rights in resources extraction owing to the fact that, among such rights few are reportedly to be entrenched in the domestic legal frameworks of some countries such as Tanzania.⁶ Worse still, even those entrenched in such laws are not enforceable.⁷ Lack of enforceability of some of the socio-economic rights renders them less of a right and more of an interest at a national level. Consequently, lack of enforceability of some socio-economic rights and failure of states to balance between the need for economic development (such as mining) and access to clean water adequate food create conflict and tension between the governments and other stakeholders.⁸ Owing to their vital role in human life and dignity on the one hand, and the potential gross impacts such as pollution, deforestation and land alienation mining activities may bear to communities in their vicinity (Mine-host communities); this study deals with two specific rights which are; access to clean water and adequate food.⁹

Since minerals are under the control, and often in the ownership of the State, who exercises absolute sovereignty over them, the exploitation of these resources are

2018) <file:///C:/Users/user/Downloads/TheImpactofExtractivesFinal.pdf>; Fredrick Juma, 'Effects of Mining on Food Security to Farming Communities Surrounding Nyamongo Gold Mine in Tarime District Tanzania' (Sokoine University of Agriculture 2015).; IRIN, 'Tanzanian Farmers Displaced by Mining like Refugees', (2013) <<http://www.irinnews.org/report/98150>>; C Marwa and I Warioba, 'Challenges Posed on the New Mining Act and Its Regulation in Tanzania' (2015) 8 Journal of Politics and Law.; Nataj Mohamed and others, 'Impacts of North Mara Gold Mine on the Element Content in Fish from the River Mara, Tanzania' (2016) 309 Journal of Radial Nuclear Chemistry.; C Kihampa and A Wenaty, 'Impact of Mining and Farming Activities on Water and Sediment Quality of the Mara River Basin, Tanzania' [2013] Research Journal of Chemical Science.;Asgeir Almas, Charles Kweyunga and Mkabwa Manoko, 'Investigation of Trace Metal Concentration in Soil and Waters in the Vicinity of "Geita Gold Mines" and 'North Mara Gold Mines" in North West Tanzania' (Norwegian University of Life Sciences 2009).

⁶ Ibid; Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (Hart Pub 2009). 176.

⁷ Ibid. 14, 175-176; TIERS (n 6).

⁸ NRG (2nd Ed) Natural Resource Charter 4; Resource Governance Index <http://www.resourcegovernance.org/countries> accessed on 25 July 2018; UNECA 2004, <http://repository.uneca.org/handle/10855/5560> accessed 25 July 2018.

⁹ Convention on the Law of the Non-Navigational Uses of International Water Courses 1997. Art. 10 (2); UNESCO, 'Water for People, Water for Life: A Joint Report by the Twenty-Three UN Agencies Concerned with Freshwater' (UNESCO 2003) <<https://unesdoc.unesco.org/ark:/48223/pf0000129726>>. p. 5.;CB Soyapi, 'Water Security and Right to Water in Southern Africa: An over View' [2017],Vol. 20 PER. 3; Resolution A/RES/64/292 The Human Right to Water and Sanitation 2010. para 1.; See para 1.8 below for details of impacts of mining.; A detailed description of the term mine-host community will be provided under chapter two of this study. ;See para 2.2.2 and 2.2.3 below for detailed description of clean water and adequate food.

subjected to national laws of the State in whose territory it is found.¹⁰ Therefore, States need to adopt, enact and institute legal and other measures that could curb mining impacts on water and land with the view to safeguard MHCs rights to clean water and adequate food.¹¹

1.2 Background to the Problem

According to Food and Agriculture Organisation (FAO), there is prevalence of food insecurity around the globe.¹² FAO reports, further that about 815 million in the world and about one third of the population in the Eastern Africa suffer from malnutrition owing to food insecurity.¹³ Africa is endowed with more than 50% of global arable land.¹⁴ However, Africa only produces 10% of her ability owing to challenges such as poverty and unsupportive infrastructure. Notably; while less food production leads directly to food insecurity; poor infrastructure contributes into food insecurity owing to challenges to distribute even the little produce. Secondly, according to World Health Organisation (WHO) about 884 million people have no access to clean water.¹⁵ Also, WHO and United Nations Children Fund (UNICEF), show that 19 % of schools around the globe in the year 2016 have no access to clean water.¹⁶ Notably, Sub-Saharan Africa (SSA) is reported to be more impacted with the record of about 50% lack of clean water service in schools.¹⁷

¹⁰ The UNGA Resolution 2158 (XXI) – (1962) Article 1.

¹¹NRGI (2nd Ed) Natural Resource Charter 4; Resource Governance Index <http://www.resourcegovernance.org/countries>; UNECA 2004, <http://repository.uneca.org/handle/10855/5560>

¹² FAO 2016 <http://www.fao.org/state-of-food-security-nutrition/en/> (accessed 20 July 2018).

¹³ Ibid.

¹⁴ <https://au.int/en/au/priorities/food-security> (accessed 20 July 2018).

¹⁵ WHO Human right to water and sanitation-Media brief; 8 facts and figures on human right to water.

¹⁶ WHO and UNICEF, 'Drinking Water, Sanitation and Hygiene in Schools: Global Baseline Report' (UN 2018). p. 6.

¹⁷ Ibid.; Chacha Murungu, 'The Place of International Law in Human Rights Litigation in Tanzania' in Killander (ed), *International and domestic human rights litigation in Africa* (Pretoria University Law Press 2010). p. 68; Legal and Human Right Center and Legal Service Centre Zanzibar, 'Tanzania Human Rights Report' (Legal and Human Rights Centre 2016). para 4.3.

In particular, to Tanzania, food security is an issue. For example, it is reported that since 2008 there is an increase of food insecurity causing hunger evidenced by 34% of all Tanzanians being undernourished.¹⁸ Reportedly, in the year 2016/2017 about 43 districts experienced acute food shortage evidenced by some families living on one meal a day, others with no guarantee of any meal at all, while others depending on wild fruits and insects.¹⁹ According to FAO 23.5% OF Tanzanians are undernourished for an average of three years from 2020-2022.²⁰ Food production in Tanzania is carried out in small-scale farming and is rain fed for about 98%.²¹ Due to little government agricultural subsidy and climate variations evidenced by recurrent droughts and floods in three to five years interval, food production has been dwindling.²²

In addition land conflicts among farmers, investors (on commercial farming or mining) and pastoralists also contributed to the impacts of food shortage.²³ In particular, there is a high prevalence of land conflicts in Tanzania caused by; little respect of the customary right of occupancy in acquiring land for development projects, little adherence to the law in dealing with village lands, absence of land use plan and little or no involvement of local communities in the allocation and or re-allocation of land use.²⁴

¹⁸ Ministry of Constitution and Legal Affairs, 'National Human Rights Action Plan 2013-2017' (Ministry of Constitution and Legal Affairs, 2013). para 2.2.3.

¹⁹ Legal and Human Right Center and Zanzibar (n 17). para 4.4.1.

²⁰ FAO, 'Prevalence of Undernourished (Percent)(3years Average)' (FAO, 2022) <<https://www.fao.org/interactive/state-of-food-security-nutrition/2-1-1/en/>>.

²¹ Ministry of Constitution and Legal Affairs (n 18). para 2.2.3.

²² *ibid.*

²³ Legal and Human Right Center and Zanzibar (n 17).

²⁴ *ibid.* para 4.4.1; Ministry of Constitution and Legal Affairs (n 18). para 2.2.1.2.

With respect to access to clean water, it was targeted that rural water supply to increase from 53% to 65% coupled with 100% supply of clean water to all schools.²⁵ It is estimated that, about 70% of school do not have access to clean water and hence impairs the learning process to pupils and students.²⁶ However, access to water in rural areas is still a challenge. Firstly, majority have to walk a distance to collect water.²⁷ Mining activities are also shown to contribute towards declining water quality and quantity due to discharge of effluents in underground waters.²⁸

Secondly, due to environmental degradation caused by human activities which contributes towards droughts both the quantity and quality of the water is poor.²⁹ In particular to Tanzania, it is reportedly that about 20% of the total assessments made on discharge of industrial waters (including mining) are full of effluents that contaminate waters.³⁰ It is no wonder that mining activities are reportedly to pose a challenge through realisation of the Water Sector Development Programmes in Tanzania.³¹ This situation is mainly caused by; absent of strong legal framework, weak enforcement of laws, poor coordination of the relevant governmental agencies and little or non-involvement of locals in planning and implementing development projects.³² Access to clean water is relevant to socio-economic development and

²⁵ Ministry of Water and Irrigation, 'Water Sector Report' (Ministry of Water and Irrigation 2009). para 3.2.

²⁶ *ibid.*

²⁷ Ministry of Constitution and Legal Affairs (n 18). para 2.2.4.2.

²⁸ UNESCO, 'World Water Development Report: Ground Water Making the Invisible Visible: Facts and Figures' (UNESCO 2022),p.5.;UNESCO, 'World Water Development Report: Ground Water Making the Invisible Visible' (UNESCO, 2022). pp.5-6.

²⁹ Ministry of Constitution and Legal Affairs (n 18).; Jamhuri ya Muungano wa Tanzania, 'Kamati Ya Kudumu Ya Bunge Ya Ardhi, Maliasili Na Utalii: Taarifa Ya Utekelezaji Wa Shughuli Za Kamati Kwa Kipindi Cha Januari2016-Januari 2017' (Bunge la Tanzania 2017). para 3.1 (v).

³⁰ Ministry of Water and Irrigation (n 25). para 3.1.

³¹ Ministry of Water, 'Water Sector Development Programme Phase Three (WSDP III) 2022/23-2025/26' (Ministry of Water 2022). p.x.

³² Ministry of Constitution and Legal Affairs (n 18). para 2.2.4.2 and 2.2.7.3

eradication of poverty.³³ Limited access to clean water relates to increased water born diseases that acts as trap of MHCs into the poverty vicious cycle.³⁴

Generally, land and water apart from being human rights are regarded as prime to human livelihood. Diminishing water and land quality and quantity therefore grossly affect MHCs means of their livelihood in Tanzania.

1.3 Statement of the Research Problem

The problem investigated in this study concerns absence of balance between socio-economic development activities, such as mining and its potential and actual impacts that grossly affect MHCs rights to clean water and adequate food in Tanzania. Such a problem may be explained in threefold. Firstly, it stems from non-explicit incorporation of such rights in the constitution and relevant laws.³⁵ Secondly, where such rights are provided, their enforcement become cumbersome due to structural and other procedural limitations.³⁶ Example of procedural limitations are provided under the Basic Rights and Duties Enforcement Act (BRDEA) 1994 which limit the powers of the court to declare void laws infringing basic rights. Instead the Act requires the court to recommend the law to be changed by the Parliament.³⁷

Notably, unless the Parliament amend such laws, they remain valid even though they infringe peoples' rights.³⁸ In particular to constitutional guarantee of such rights,

³³ Ministry of Finance and Economic Affairs, 'National Strategy for Growth and Reduction of Poverty (NSCRP) II' (Ministry of Finance and Economic Affairs, 2010), para 2.3.3

³⁴ *ibid.* para 2.3.3 and 2.3.5.

³⁵ Toronto Initiative for Economic and Social Rights-Tanzania para 28.

³⁶ Murungu (n 17). p.68 ; Ernest Uzia, 'How the Provision of the Basic Rights and Duties Enforcement Act Do Not Advance Human Rights Protection in Tanzania' (2014) <<https://www.academia.edu/6536920>> accessed 29 May 2021. Pp. 7-8

³⁷ the Basic Rights and Duties Enforcement Act 1994. s 13 (1-2)

³⁸ *ibid.* s 13 (2).

they are provided under the Directive Principles of State Policy which is by its nature sets the vision and mission of the state rather than human rights. Consequently, rights falling under this part of constitution are not enforceable. In addition, such rights may be enforced through other rights such as; the right to life and or rights to clean and health environment.³⁹ However, it is worth noting that, even the right to life is not absolutely guaranteed under the constitution owing to existence of death penalty. With respect to right to clean and health environment is provided under environmental law.⁴⁰

However, such a provision has never been tested in courts to establish a reliable precedent on recognition and protection of human rights say for example. Prior to environmental rights being legislated, the High Court of Tanzania had once ruled out in favour of people's rights to clean and health environment. The court arrived at such a position by prohibiting the Dar es Salaam City Council to pollute environment through construction of sewage dumping sites closer to people's settlement in Tabata and Kunduchi respectively.⁴¹ Notably, these case laws seem to be limited by the 1994 enactment of the BRDEA with respect to their enforcement.

Thirdly, improper regulation of mining activities from exploration stage to international trading is named as a source of fuelling human rights violation in areas where they are miend owing to absence of good governance in such a sector.⁴²

³⁹ Environmental Management Act 2004. s 5.; United Republic of Tanzania Constitution 1977. Art. 14.

⁴⁰ Environmental Management Act. s 4- 5.

⁴¹ *Joseph D Kessy and Others v The City Council of Dar es Salaam, Civil Case No 299 of 1988* (High Court of Tanzania).; *Festo Balegele and 794 Others v Dar es Salaam City Council Miscellaneous Civil Cause No 90 of 1991* (High Court of Tanzania).

⁴² See para 1.8 below.

Consequently, the legal gap cascade down to the mining legal and institutional frameworks in Tanzania.⁴³ Notably, the international and African (AU) regional legal and institutional frameworks provide for relevant principles that may be relied by Tanzanians to safeguarding MHCs access to clean water and adequate food.⁴⁴ Tanzania therefore, is required to adopt legislative and administrative measures to incorporate such principle in her domestic laws.

1.4 Objective(s) of the Study

The general objective of this research is to investigate the extent to which the current Tanzanian legal and institutional frameworks comply with international (UN and AU) principles relevant to safeguard MHCs' rights to clean water and food. To arrive at this main objective, the following specific objectives are set:

1. To explore the the extent to which the international legal and institutional frameworks safeguard MHCs'rights to clean water and food.
2. To explore the extent to which Tanzania's legal and institutional frameworks safeguard MHCs right to clean water and food.
3. To explore the extent of compliance of the Tanzanian legal and institutional frameworks with the international and regional frameworks to safeguard MHCs' MHCs rights to clean water and adequate food.

⁴³ The Mining Act 2018.; the Village Land Act 2002.; Water Resources Management Act 2009.; Natural Wealth and Resources (Permanent Sovereignty) Act 2017; The Environmental management Act 2004.;The Forest Act 2002.; The Beekeeping Act 2002.;Land Acquisition Act 1967.

⁴⁴Convention Concerning Indigenous and Tribal Populations 1957.; Convention on Biological Diversity 1992.; Indigenous and Tribal Peoples Convention 1986.; Framework Convention on Climate Change 1992.; Convention to Combat Desertification in those Countries Experiencing Serious Drought and /or Desertification Particularly Africa 1994.; Convention on the Law of the Non-Navigational Uses of International Water Courses.; Paris Agreement 2015.; African Convention on the Conservation of Nature and Natural Resources 1968.; African Charter on Human and Peoples' Rights 1986.;Convention on the Protection and Use of Trans-Boundary Watercourses and International Lakes. 1992.;Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 1998.

1.5 Research Question(s)

This research is guided by four research questions as hereunder provided.

1. To what extent the international legal and institutional frameworks provide for principles relevant to safeguard MHCs' rights to clean water and adequate food?
2. To what extent the Tanzania legal and institutional frameworks comply with the international legal and institutional frameworks relevant to safeguard MHCs' right to clean water and adequate food?
3. What are the ideal legal principles that Tanzania (and other resource-rich African states) may learn from international frameworks to safeguard MHCs' right clean water and adequate food.

1.6 Significance of the Study

Absence of robust legal and institutional frameworks to strike a balance between mineral resources development on one hand and securing MHCs human rights is noted as a challenge in this study. In particular, this study focuses on safeguarding of MHCs rights to clean water and adequate food. Mining is shown to pose threats on MHCs access to quality clean water and ability to produce their adequate food free from harmful substances. Consequently, the study helps in proposing legal and institutional measures to be adopted to strike a balance with a view to abate violation of MHCs human rights where mining are taking place. The study is pertinent in Tanzania now owing to notable concerns on how MHCs are challenged by improper regulation of mineral extraction, processing and trading.

Since the study focuses on rough diamond, it adds the need of the study now as a means to comply to international standards on trade in rough diamond. Regulation in

trade in rough diamond is intended to abate human rights violation in areas where diamond is mined. Consequently, states will generate revenue from the regulated trade which may be used in food and water infrastructure. In particular, the study is relevant to a number of stakeholders such as; state owned and non-state owned organisations and or institutions dealing with promotion and protection of human rights. Other stakeholders are inclusive; MNCs involved in large-scale mining, Mining Commission, institutions established to regulate internationally shared resources such as rivers, lakes, aquifer and forests. The research is also relevant to other natural resources-rich developing countries with similar legal challenges like Tanzania. Finally, the research is relevant in adding knowledge on legal relation existing between mining and human rights to clean water and adequate food in Tanzania.

1.7 Research Methodology

This is purely a doctrinal research study. It is guided by the legal positivism theory. Legal positivism theory regards law as it is in the statute books.⁴⁵ Consequently, it may be used to identify the law, before one gets a chance to critic the law itself.⁴⁶ Once the laws are identified, this study compares and contrasts three legal regimes⁴⁷ between the international, African region; and Tanzania on the guarantee of MHCs' rights to clean water and food security. It is basically a deductive study. Consequently, vertical comparison between the international and regional, instruments and domestic Tanzanian laws is carried out with a view to assess the

⁴⁵ Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory* (Oxford University Press 2012). p. 43.; Cryer Robert, *Research Methodologies in EU and International Law* (Hart Publishing 2011). 37.

⁴⁶ Robert Cryer *et al* (n 29) 38.

⁴⁷ Peter Stokes and Tony Wall, *Research Methods* (Palgrave business briefing 2014).93.

extent of compliance thereto. Manisuli Ssenyonjo seems to provide a justification on the use of vertical comparison as applied in this study when he says:

...the principle of state responsibility to guarantee human rights on the basis that the state individual relationship involves unequal power dynamics between the parties.⁴⁸

This study, therefore, identifies the extent to which domestic laws in Tanzania comply with the international, and regional legal frameworks. It then analyses comparatively the lessons learnt from both frameworks to draw conclusion and thereby recommendation(s). To arrive at the comparison, this study carries-out an analytical documentary review of various documents in order to:

- (i) Establish the conceptual base of the MHCs' rights to clean water and food both at international and regional level.

The following documents are reviewed and analysed at this stage: various literature inclusive journal articles; books; policies; commentaries and various relevant reports.

- (ii) Conduct a review to the extent to which binding and non-binding international and regional instruments provide for the MHCs' rights to clean water and food security.

The following documents are reviewed and analysed: binding and non-binding UN and African regional instruments; comments from international and regional commissions/committees; international and sub-regional case laws from various Courts, Tribunals and or Commissions.

⁴⁸ Ssenyonjo (n 6).

- (iii) Conduct a vertical comparison between the Tanzanian mining legal regime and the international and regional, instruments. The purpose and justification of this comparison is same as (ii) above.

The following documents are reviewed and analysed: binding and non-binding international and regional instruments; domestic legislation; regulations; case laws and frameworks relevant to the MHCs' rights to clean water and food security.

- (iv) Conduct an analysis of the similarities and or differences existing between the Tanzania legal framework, the international and regional frameworks on MHCs' rights to clean water and food security.

Here the differences and or similarities identified under item (ii) and (iii) above are analysed to form the basis of the recommendations towards better compliance with the binding and non-binding international and regional instruments influencing the area of the study.

In addition, Tanzania is one among common law legal system member states. It therefore stands a chance to learn from other common law countries on how best to balance the interest of the competing stakeholders in realisation of MHCs' rights to clean water and food security. On the one hand, the procedural principles such as principles of procedural fairness, locus standi and the principle of precedent ensuing from the stare decisis are relevant to this study.⁴⁹ Moreover, under common law, in case of conflict between the statute and the international convention, statute will be

⁴⁹Shaun Fluker, 'The right to public participation in resources and environmental decision making in Alberta' (2015) ALR 573-575. ; Elmarie Schyff, 'Unpacking Public Trust Doctrine: A Journey into Foreign Territory' [2010] EPER/PELJ. 134

preferred.⁵⁰ This gives domestic laws primacy over international law instruments.⁵¹ These principles help in analysing the international and regional principles as interpreted in various cases and their application in Tanzania.⁵²

With respect to data analysis technique the study at hand is essentially qualitative research in nature. It is qualitative owing to the fact that type and nature of data collected and analysed are non-numerical.⁵³ Instead, the researcher conducted a content analysis of documents reviewed, both primary and secondary as a means to deduce themes and issues relevant to research questions.⁵⁴ The researcher also relied on statutory interpretation techniques namely, literal, purposive and golden rules in analysing contents of identified laws.⁵⁵ Such analysis helped in deriving themes which are either descriptively presented and or critically analysed in attempt to answer respective research questions noted above. In particular, the research is deductive since the researcher examines the international and regional frameworks with the view to ascertain the extent to which their principles are reflected in Tanzania's legal framework.

In addition, the researcher conducted a horizontal comparison of the best practices from other countries on the key issue under research. It is shown by Geoffrey Wilson that among aims of comparative law has been to make a practical contribution to local legal system that may ultimately lead to harmonization of laws into a supra

⁵⁰ Dinah Shelton, 'Introduction' in Dinah Shelton (ed), *International law and domestic legal system: Incorporation, transformation and persuasion* (Oxford University Press 2011).

⁵¹ *Ibid.*

⁵² Schyff, 'Unpacking Public Trust Doctrine: A Journey into Foreign Territory' (n 49). p. 134; Charles Ihrlich, 'Aboriginal Land Rights: The Effects of Common Law Decision in Canada and Australia on International Law' [2001] NEICLA. 1, 3.

⁵³ Loraine Blaxter, Christine Hughes and Malcolm Tight, *How to Research* (Open University Press 2006). p. 64.

⁵⁴ Glen Bowen, 'Document Analysis as a Qualitative Research Method' (2009) 9 *Qualitative Research Journal*. p 30-31.

⁵⁵ Williams Granville, *Learning the Law* (15th edn, Sweet & Maxwell 2013). pp. 97-103.

national level such as European Union.⁵⁶ Consequently, the idea of harmonisation of Tanzanian laws with the international and regional standards finds its relevancy here.

Wilson further points out that, for effective comparison to take place both socio-cultural and economic context of the problem under investigation have to be taken into account.⁵⁷ Vivian Curran is of the view that case laws help in identifying the social and cultural values behind the foreign statutory provisions interpreted by the court, which is vital in avoiding legal transplant.⁵⁸ On the other hand, substantive principles such as the ownership of land subject to minerals, and neighbourhood principle, are potential substantive rights on the subject of this study. These principles are geared towards guiding the determination of disputes on rights and interest in landed properties, where minerals are part.⁵⁹

Generally, the choice of this methodology allows the study to assess the extent to which the Tanzanian legal and institutional frameworks comply with the international and regional instruments.⁶⁰ As such Tanzania being a dualist state, international laws do not apply directly unless legal measures to domesticate them are carried out. Further, this methodology facilitates identification of the potential different and or similar principles binding or influencing other countries best

⁵⁶ Geoffrey Wilson, 'Comparative Legal Scholarship' in Michael McConville (ed), *Research Methods for Law* (Edinburgh University Press 2007).88

⁵⁷ Ibid' p. 93.

⁵⁸ Vivian Curran, 'Dealing in Difference: Comparative Law's Potential for Broadening Legal Perspectives' (1998) 46 AJCL. p. 9.

⁵⁹ Elmarie Schyff, *Property in Minerals and Petroleum* (JUTA 2016). pp. 40,67,75.

⁶⁰ Robert Cryer *et al* (n 29) 38; Geoffrey Samwel, *Introduction to Comparative Law Theory and Method* (Hart Publishing 2014). pp. 100-101.

practices on the area under research.⁶¹ Indeed the lessons that are distilled from the international and regional framework (inclusive that of best practices of individual States) is used to propose for an ideal Tanzanian legal framework, owing to the legal status of foreign law as being more persuasive than binding.⁶²

1.8 Scope of the Study

This study focuses on large-scale mining of minerals on land in rural areas of Mainland Tanzania.⁶³ Minerals are generally classified into three classes namely construction, industrial and metallic such as gold and diamond.⁶⁴ There seems no global single definition of the term minerals owing to its complex nature. Geologically, minerals are defined as *naturally occurring substance with definite character*.⁶⁵ However, basing on the terms of contract minerals may be defined beyond the geological perspective. Yet still, courts may further interpret the contract and give the term mineral its meaning.⁶⁶

In particular, the research deals with mining of rough diamond for three major reasons in Main land Tanzania. Firstly, rough diamond mining and trading is linked

⁶¹Ibid 22-23-28; Mark Hoeke and Mark Warrington, 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law' [1998] International & Comparative Law Quarterly. p. 497.

⁶²Curran V G (n 41) p. 659.

⁶³The term "Large-scale mining" in this study means mining done by Multinational Companies (MNCs) as opposed to small-scale mining. ; See para 5.6.1 and 5.6.2 below for details on the choice of rural areas in Tanzania.

⁶⁴ United Nations Conference on Trade and Development, *World Investment Report 2007: Transnational Corporations, Extractive Industries and Development (Includes CD-ROM)* (UN 2007) <https://www.un-ilibrary.org/international-trade-and-finance/world-investment-report-2007_f67689bc-en> accessed 29 August 2018. p. 85 classifies minerals into three categories as well, however, the industrial category seem to be referred as energy minerals which is composed of oil and gas; Eva Liedholm Johnson, 'Mineral Rights: Legal System Governing Exploration and Exploitation' (Doctoral thesis, 2010). p. 2.

⁶⁵Elmarie Schyff, 'The Constitutionality of Mineral and Petroleum Resource Development Act 28 of 2002' (North West 2006). p. 301.

⁶⁶ibid. p. 304.

to human rights violation in areas where they are mined.⁶⁷ Secondly, there is an international initiative to regulate trade in rough diamond to abate its link to human rights violations. Thirdly, Tanzania mines and trades in diamonds.⁶⁸ Tanzania is duty bound to promote peace, security and human rights globally, even though no such insecurity within her borders, hence the need to comply with global and sub-regional initiatives becomes imperative.⁶⁹ As such, this study does not include Zanzibar owing to the fact regulation of hard minerals is not one among the Union matters.⁷⁰ Further, this study does not deal with the small-scale mining activities, as it would widen the scope and hence pose a challenge given the time and resources available in conducting this research.

Internationally, the scope of the study focuses on two perspectives. The first perspective is the UN instruments and initiatives focusing on human rights and good governance which are relevant to mineral resources extraction and trading.⁷¹ The choice of UN is based on the fact that, Tanzania as it is for other countries is bound and influenced by the decisions of the UN in its efforts to promote human rights.⁷² Also, although UN set standards through its instruments, they do not directly apply to respective countries.

⁶⁷ UN Security Council, 'Natural Resource Wealth Fails to Translate into "Equivalent" Benefits for People, Fuelling Conflict, Instability, Deputy Secretary-General Tells Security Council' (UN, 2013) <www.un.org/News/Press/docs/2013/sc11037.doc.htm> accessed 1 September 2018.

⁶⁸ Interlaken Declaration on Kimberly Process Certification Scheme for Rough Diamond 2002.; Kimberly Process Certification Scheme 2002.

⁶⁹ UN Charter 1945.

⁷⁰ The *URT Constitution* (1977) Art 4 read together with the First Schedule; Mining Act 123 R.E 2018, s 2.

⁷¹ UN Charter.; United Nations Convention Against Corruption 2004.; Convention to Combat Desertification in those Countries Experiencing Serious Droughts and /or Desertification, Particularly in Africa 1994. ; UNEP, 'Resolution Adopted by the United Nations Environment Assembly on 15 March 2019' (2019).

⁷² UN Charter. Art. 1 (3) and 55 (c).

However, due to a number of UN instruments and initiatives relating to human rights to water and adequate food, this study focuses only to those regulating trans-boundary water, and mineral resources. The choice of this focus is based on the concern identified in the literature review where mining impacts on human rights. In particular, it shows mining activities seem to override other stakeholders in the mining processes.⁷³ Reportedly, about half of global population lives around trans-boundary water resources basin and are dependent on as sources of their drinking water.⁷⁴

The second perspective of the scope is the African region. Equally as it is in the UN sphere, Africa has a number of instruments that relates to MHCs access to water and adequate food, however, this study, mainly focuses on African instruments relevant to promotion and protection of human rights and natura resources governance. The focus is based on the fact that, AU member states are called to to strike a balance between development activities and environmental preservation.⁷⁵ Such a balance is shown to be vital if at all MHCs are to gain their access to clean water and adequate food.

Moreover, Africa is home to a number of gray finite and renewable natural resources such as minerals, forests, wild life, ground and surface fresh waters. As noted in the introduction, such resources are vital for human development but also they are the base of their livelihood. Owing to nature and historical impacts of colonisation, such

⁷³ See para 1.8 below.

⁷⁴ UNEP, 'The Greening of Water Law: Managing Fresh Water Resources for People and Environment' (2010). p. 36-37.

⁷⁵ African Convention on the Conservation of Nature and Natural Resources. preamble.

resources are shared between states a fact which may exacerbate the imbalance situation if not well regulated.⁷⁶ It is argued that, Africa is less industrialised with high prevalence of underprivileged situation facts combination of which threatens an increasing deforestation water contamination and food insecurity owing to socio-economic activities impacts on environment.⁷⁷

Secondly, mining activities are intensive in Africa. For example, by 2014 large mining projects in SADC sub-region were estimated to be a hundred, indicating intensive large scale mining activities.⁷⁸ Thirdly, it is shown in the introduction that, Africa is faced with the challenge of recurrent famine that threatens peoples' health and life. Fourthly, AU mining framework calls for harmonisation of laws that may be used to borrow experience from international and other regional advanced countries like South Africa.⁷⁹

In addition, the choice of Tanzania is based on the fact that, there a number of mining activities taking place.⁸⁰ As may be noted below, mining activities adversely impact access to clean water and food security.⁸¹ This study, therefore examines the extent to which the Tanzanian mining legal and institutional frameworks responsible for safeguarding MHCs rights to water and food, comply with the international and regional frameworks. The immediate part below reviews relevant literature.

⁷⁶ AU, ECA, and ADB, 'African Water Vision for 2025: Equitable and Sustainable Use of Water for Socio-Economic Development'. para 6.;UN Watercourse Convention: Users guide facts sheet series No.13.

⁷⁷ Michael Faure and Du Plessis Willemien, 'Introduction' in Michael Faure and Du Plessis Willemien (eds), *The balancing of interest in environmental law in Africa* (Pretoria University Law Press 2011). p. xxi.

⁷⁸ Rod Allence and Robert Mattes, 'Mineral Governance Barometer: Southern Africa' (Open Society Initiative for Southern Africa and Southern African Resource Watch, 2016). p. 4.

⁷⁹ Statute of the African Mineral Development Centre 2016. ;Protocol on Mining 1997. Art. 2(2); SADC, 'Implementation Plan for the Harmonisation of Mining Policies, Standards and Legislative Regulatory Frameworks in Southern Africa, ECA/SA/Tpub/2008/1' (2008). 1.

⁸⁰ See the Mineral Occurrence in Tanzania (2017) <http://www.tanzaniainvest.com/minerals>

⁸¹ See para 1.8 below.

1.9 Literature Review

This part reviews the relevant literatures to the problem at hand. In undertaking this task, the part is organized in three main clusters of literature aimed at identifying the gap. These clusters are literatures on; mining specific impacts on MHCs access to clean water, mining land rights variations coupled with little compensation and its potential impacts on MHCs access to adequate food. The last cluster discusses the place of international laws and principles that pose challenges on; state sovereignty of resources, status of international law principles at the domestic setting, and good governance as a tool to guarantee MHCs access to clean water and adequate food.

To begin with water related literature, globally the Intergovernmental Panel on Climate Change (IPCC) report, presents scientific estimate concerning climate change which bears gross impacts on water and food security around the globe and Africa in particular.⁸² These estimates are based on scientific evidences observed from various continents that indicate increasing temperature. Increasing temperature threatens melting of glacier; warming of the rivers and lakes and negative impacts on the both terrestrial and aquatic biological organisms. IPCC further points out that, since 20th century, such an increase seem to be contributed by anthropogenic activities (mining inclusive) that results into emission of greenhouse gases. Consequently, Africa is estimated to be under acute shortage of water by 2020. Although IPCC report is not related to mining directly, activities of such nature triggers global warming and hence cause water stress and food insecurity in most

⁸² Susan Solomon, Intergovernmental Panel on Climate Change and Intergovernmental Panel on Climate Change (eds), *Climate Change 2007: The Physical Science Basis: Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* Cambridge University Press 2007.

African countries.

According to Safe Drinking Water Foundation (SDWF), global mining activities contribute towards negative impacts on clean water.⁸³ Such impacts are however dependent on the nature of the terrain, composition of the minerals mined, technology used in mining, experience of mining companies on environmental issues and the ability to monitor and enforce environmental regulations.⁸⁴ With regard to open-pit mining for example mining companies do excavate numerous tonnes of rocks bearing minerals, which in turn are deposited on the earth surface. It is estimated that in order to get one tonne of copper for example, 99 tonnes of rocks will have to be excavated. Mining impacts on water sources may be explained either in terms of water quality or quantity. With regard to water quality, four instances may be pointed out as follows; firstly, when sulphide elements in the excavated rocks are exposed to air and water turning it into Sulphuric Acid. It is reported that, such a chemical process may take place for a considerable number of years, with its effects on the land and water sources.⁸⁵

Secondly, water sources are shown to be impacted through contamination of heavy metals such as iron, lead, zinc and silver from the mineral rocks. Thirdly, water sources are impacted by leaking of the chemicals used in processing of minerals. Examples of such chemicals used by large-scale mining are cyanide and sulphuric

⁸³ Safe Drinking Water Foundation, 'Mining and Water Pollution' (2017) <<https://www.safewater.org/fact-sheets-1/2017/1/23/miningandwaterpollution#>> accessed 21 May 2021.

⁸⁴ *ibid.*

⁸⁵ *ibid.*

acid, which pose a serious threat to human and animal health.⁸⁶ Fourthly, mining activities exposes the land to harsh weather due to clearing of vegetation and deep excavation of the ground. Consequently, sediments from the rocks or mineral waste become easily transported by water which later fills in the water sources like lakes.⁸⁷ Although the literature is silent on its scope (i.e whether it deals with large or small-scale mining) it is apparent that such impacts may happen both with small and large-scale mining activities. It is therefore relevant to provide a general view of mining impacts on clean water, which is relevant in this study.

At the African sub-region level, Ashton, Peter *et al.*, provides an insight on the apparent and potential impact of mineral processing activities on water quality.⁸⁸ Their study was carried out scientifically in three river basins in Southern Africa sub-region namely; Zambezi, Limpopo and Oliphants. The research noted the potential of water conflicts evidenced in situations such as: where water is scarce; varying levels of economic development between neighbouring countries; and competition between upstream and downstream countries in cases of shared water courses.⁸⁹ While the competing interest might seem to be between States, Ashton, *et al.*, further shows that competition of water resources is also present among the sectors. In mining for example, water is reportedly used for cooling the mining plants; used in operations such as underground drilling; processing of minerals and

⁸⁶ *ibid.*

⁸⁷ *ibid.*

⁸⁸ Peter Ashton and others, 'An overview of the impact of mining and mineral processing operations on water resources and water quality in the Zambezi, Limpopo, and Olifants catchments in Southern Africa.

⁸⁹ *Ibid.* para 1.4.4.

storage of the mineral waste in dams.⁹⁰ Such high demand of water in mining competes against other potential sectors that use water as well.

Ashton further shows that, the impact of mining on water is dependent on mining methods and the stages reached in mining so far. With regard to the mining methods; on the one hand, underground mining is reportedly to changing the quality of water through water contamination. It also impacts negatively the underground water system, produces waste that changes considerably the land use when they are deposited on the surface. On the other hand of open pit and alluvial mining, Ashton, *et al.*, is of the view that it affects largely the soil and aquatic ecosystem due to sedimentation.⁹¹

With regard to the stage at which mining process is, Ashton shows that at the early stage of mine exploration and construction, mining causes gross impact on environment. Large-scale of land is subjected to changes such as clearing of vegetation and excavation. Consequently, such activities contribute to soil erosion and sedimentation which affects water quality and volume as well.⁹² Notably, during the closure stage of mines, Ashton, *et al.*, shows that most mines are not properly rehabilitated. Such mines contribute to water pollution but also render the land idle.⁹³ In order to mitigate the potential impacts of mining on water, Ashton, *et al.*, suggest mutual cooperation and desire to attain sustainable use of water.⁹⁴ Such a suggestion is founded on the fact that, despite requirement for environmental impact assessment

⁹⁰ Ibid. para 2.4.5.

⁹¹ Ibid. para 2.2.

⁹² Ibid. para 2.3.4.4.

⁹³ Ibid. para 2.3.7.

⁹⁴ Ibid. para 1.4.5.

in countries surveyed, lack of enforcement of law, weak institutional framework and inadequate provision in the legislation seem to be prevalent. Notably, Ashton, *et al.*, seem silent on other potential sectors that might be competing with mining, which are relevant to this study. Ashton Peter, reiterates the aspect of competition on the utilization of water resources among States sharing water courses.⁹⁵ Water competition is mainly caused by the fact that every State has sovereignty over her natural resources.⁹⁶ He further points out that rivers and other water bodies however, do not adhere to the borders that separate States.⁹⁷

In Tanzania literature indicates that mining activities impacts the quality of water through pollution by the contamination of both surface and underground waters. Ombella John through documentary review of the impacts of large-scale development projects cautions about their potential harm to water.⁹⁸ He calls for the need of legal and institutional framework that will strike a balance between stakeholders interests on issues of water.⁹⁹ His focus however seems less informed by international and or sub-regional frameworks. In particular to mining, Ikungura J and Akagi H show that mining activities along Lake Victoria Basin contribute to discharge of heavy metals into the lake waters polluting not just waters but also the aquatic organisms.¹⁰⁰

Additionally, studies by Asgeir Almas *et al.*, and Manfred Bitala *et al* which were conducted among the communities adjacent to large-scale mining in the Lake Zone

⁹⁵ Peter Ashton, 'Southern African Water Conflicts: Are They Inevitable or Preventable?' p. 5.

⁹⁶ *ibid.*

⁹⁷ *ibid.*

⁹⁸ John Ombella, 'Challenges of Access to Clean Water and Healthy Environment: An Inter-Link between Huge Investment Projects and the Surrounding Local Community in Tanzania' (2012) 5 Revista de Negocios Internacionales. p. 104.

⁹⁹ *ibid.* p. 112.

¹⁰⁰ JR Ikungura and H Akagi, 'Monitoring of Fish and Human Exposure to Mercury Due to Gold Mining in the Lake Victoria Goldfield Tanzania' [1996] Science of Total Environment.

found that, both the surface waters and underground waters found in boreholes are highly contaminated with heavy metals beyond the recommendable levels and that were unfit for human consumption.¹⁰¹ Similar findings are also shown by Kihampa Charles and Wenaty Alex, who investigated the quality of sediments and waters in river Mara are contaminated with heavy metals beyond national and international recommended standards of drinking water.¹⁰² According to Musiba Musiba, about 84% of all heavy metal depositions in water sources is caused by large-scale mining activities in Tanzania.¹⁰³ Since heavy metals if consumed by human being causes gross health impacts, their regulation is called for.¹⁰⁴ Apart from polluting water sources by heavy metals, discharge of waste waters into sources of waters such as wells is reported to have happened in Shinyanga after the breach of Petra Diamond Limited Tilling Storage Facility.¹⁰⁵

In particular, to right to water and climate change in Tanzania it is reportedly that, evidences of its impacts on water quantity and quality are apparent. Recurrent droughts, shrinking of lakes and change in river flow frequency from perennial into seasonal rivers are reported to happen in Tanzania.¹⁰⁶ With respect to water quality, industrial wastes from mining activities for example impairs the water quality adding stress on the little quantity that is available.¹⁰⁷ Apparently, this part has shown that

¹⁰¹ Almas, Kweyunga and Manoko (n 5). p. 22.; Manfred Bitala, Charles Kweyunga and Manoko Mkabwa, 'Levels of Heavy Metals and Cyanide in Soil, Sediment and Water from the Vicinity of North Mara Gold Mine in Tarime District, Tanzania.' pp.12-13.

¹⁰² Kihampa and Wenaty (n 5). p. 22.

¹⁰³ Musiba Musiba, 'The Potential of Water Sources Contamination Around Large-Scale Gold Mine' (A Dissertation Submitted in Partial Fulfilment of the Requirements for the Degree of Master's in Hydrology and Water Resources Engineering, Nelson Mandela African Institution of Science and Technology 2022).p.30.

¹⁰⁴ Piotr Rzymyski and others, 'Impacts of Heavy Metals on the Female Reproductive System' (2015) 22 *Annals of Agriculture and Environmental Medicine*.

¹⁰⁵ Petra Diamonds, 'Update Regarding Tailings Storage Facility (TSF) Wall Breach at Williamson in Tanzania' (Petra Diamonds, 2022) <<https://ir.q4europe.com/solutions/petradiamonds/3144>>.

¹⁰⁶ VPO, 'State of the Environment Report 3' (VPO 2019). para 12.5.

¹⁰⁷ *ibid.* para 14.5.

there is a competing interest between the mining stakeholders on water not only around globe and Africa but also in Tanzania. Consequently, mining seems to contribute to the increased inaccessibility of clean and safe water, which is already a global problem; especially in Africa.

Next is on climate change and its impact on MHCs access to adequate food. The IPCC report., presents scientific estimates concerning climate change.¹⁰⁸ These estimates are based on scientific evidences observed from various continents that indicate increasing temperature. Increasing temperature threatens melting of glacier; warming of the rivers and lakes and negative impacts on the both terrestrial and aquatic biological organisms.

IPCC further points out that, since 20th century, such an increase seems to be contributed by anthropogenic activities (mining inclusive) that results into emission of green-house gases. Consequently, Africa is estimated to be under acute shortage of water by 2020. Also, access to food is estimated to be challenged especially in countries or communities' dependent on rain for their crop production. It is estimated that the production may be far less than half of their normal harvest. In order Africa to be able to maintain a balance in her production and access to water, it is estimated by IPCC that 5-10% investment of the respective state GDP will be needed. Consequently, global warming threatens the climate changes around the globe but Africa will experience the threat owing to the fact that majority are underprivileged hence limiting their access to adequate food

¹⁰⁸ Solomon, Intergovernmental Panel on Climate Change and Intergovernmental Panel on Climate Change (n 82).

The problem of climate change and its impact on access to adequate food are also exacerbated by deforestation. Rautner Mario, *et al.*, shows that forests are responsible for absorption of carbon, which is known for its contribution on global warming and climate change.¹⁰⁹ Climate change has actually stimulated the response that requires adoption of regulatory mechanisms to mitigate its impacts. For example, it is estimated that 43% of the loss incurred in stranded assets in Brazil is emanating from agricultural sector.¹¹⁰ Rautner further shows that the increasing rate of global warming is caused by anthropogenic activities such as large-scale mining activities that end up clearing traditional forests emphasis added. He pointed out the two impacts of stranded assets such as physical and regulatory. With regard to physical impacts, floods and increased forest fires due to high temperatures are predicted to happen.¹¹¹

Notably, with regard to regulatory impacts of the assets being stranded, Rautner points out that, they cuts across a number of stakeholders in the supply chain ranging from producer, trader of agricultural or forest products, processors, manufactures and lastly the retailers.¹¹² Consequently, given the need to ensure reduction of emission and avoiding the assets from being stranded the use of voluntary codes seem to be preferred than hard laws.

In particular, crops such as palm oil which are commonly produced in forest cleared areas seem to be the targets of pressure groups on the need to adopt a more climate

¹⁰⁹ Mario Rautner, Shane Tomlinson and Alison Hoare, 'Managing the Risk of Stranded Assets in Agriculture and Forestry' 18.

¹¹⁰ *Ibid.* p. 7.

¹¹¹ *Ibid.* p. 6.

¹¹² *Ibid.* p. 5.

friendly agriculture in the production and supply chain.¹¹³ Rautner gives an example of the New York declaration on forest which received acceptance among countries, companies, indigenous peoples and civil societies.¹¹⁴ Among the objectives are to ensure zero deforestation and adaptation of scientific approaches to mitigate the threat of climate change.¹¹⁵ Although Rautners' work is not connected to human rights and or mineral aspects, it identified the value of forests in climate regulation (which is relevant to access to food and water), and that it adds onto the use of voluntary codes as a means to curb the climate change which may also be applicable to mining.

According to the Food and Agriculture Organisation (FAO) in 2016, Sub-Saharan Africa (SSA) more specifically East Africa is reported to be food insecure with one third of its population undernourished due to droughts and floods.¹¹⁶ Such calamities are reportedly contributing into the increasing rate of malnutrition in most countries around the world. It is further reported that food security seems challenged during when the community is in conflict. Notably, the nature of conflicts seems to be based on resources such as: civil conflicts that greatly affect the pattern of pastoralist communities, contribute towards displacing people both internally and in neighbouring countries as refugees; arable land and adverse weather such as *elnino*, and severe drought to name but a few. South Sudan and Somalia seem to be the leading countries in such a situation.

¹¹³ Ibid. p. 10.

¹¹⁴ Ibid. p. 10.

¹¹⁵ Ibid. p. 10.

¹¹⁶ FAO 2016 <http://www.fao.org/state-of-food-security-nutrition/en/> accessed 20 July 2018.

In particular FAO shows that, although food insecurity might be the result of the civil war, climate and weather desasters, food insecurity may also become the cause of conflicts that may ultimately destroy the environment and existing infrastructure relevant for food production. Most natural resources-rich African countries like; DRC Congo, South Sudan; Nigeria and Angola exemplifies presence of conflicts which ultimately makes access to adequate food an issue.

Ruppel Oliver, presents the nexus between climate changes and human rights in African perspectives.¹¹⁷ He points out that despite Africa contributes insignificantly into the green-house gases emission, yet it is the most to be affected by the impacts of climate change.¹¹⁸ Impacts such as tsunami; floods and other natural disaster seem common evidences of climate change in Africa. He further notes that such impacts seem to add into mounting pressure on aspects such as access to water, agricultural infrastructure and less produce. Evidences of such stress are noted in the increasing malnutrition in rural areas poor access to water and increasing water born diseases like dengue and fever.¹¹⁹

Moreover, Rupel, presents the relation between endless civil conflicts and climate change.¹²⁰ Africa is known for endless conflicts that are common in regions such as DRC Congo and Sudan. Such conflicts apart from exerting physical human insecurity, still it exerts food and water insecurity due to environmental destruction and competition on scarce resources as noted by FAO above. Competition for scarce

¹¹⁷ Oliver Ruppel, 'Climate Change, Natural Disasters and Human Security: International Law and Diplomacy Responses from African Perspectives' in Legal Service Centre Zanzibar (ed), *Zanzibar Yearbook of law* (Zanzibar Legal Service Centre 2012).

¹¹⁸ Ibid. p. 3.

¹¹⁹ Ibid. p. 6.

¹²⁰ Ibid. pp. 7-8.

resources is commonly seen during when people are displaced or relocated to other areas as refugees or internally displaced people. Notably, climate change may also trigger such a displacement and competition for scarce resources such as water and or food. Such a potential impact of climate change and access to food or water which are human rights, provide a link between the two.¹²¹

Notably, Ruppel presents the human right approach to climate change mitigation and adaptation. He states that such a connection between the human rights and climate change may well be seen under; policy drafting; development of climate change jurisprudence from human right perspectives; being human right sensitive at the time of setting mechanisms for adoption and mitigation of climate change.¹²² Such an approach seems to take on board the dual duty of the state to protect human rights in human right perspectives but also address the root cause of climate change from climate change perspectives.¹²³ Notably, despite the fact that Ruppel does not address mining activities, his work is relevant in indicating the link between human right and climate change. Such a link is relevant in making decision whether to mine or not since mining may contribute to climate change and results into displacement of large group of people if not properly managed.

In particular, according to Sian Bradley, mining activities may not be the primary cause of deforestation and hence contributes towards global warming.¹²⁴ However, mining long accumulated effects poses threats to forests which are shown to be vital

¹²¹ Ibid. p. 11.

¹²² Ibid. p. 11.

¹²³ Ibid. p. 12.

¹²⁴ Sian Bradley, 'Mining's Impacts on Forests: Aligning Policy and Finance for Climate and Biodiversity Goals' (Chatham House, 2020). p. 25.

for curbing carbon emissions.¹²⁵ Bradley, further concludes that with the increased demand of minerals such as gold, copper and bauxite most of which are commonly found in protected forests such as; Congo, Western Africa and Amazon, unless well regulated mine-induced deforestation remains a potential threat to be solved.¹²⁶ Bradley's study is relevant in locating the potential impacts of mining towards the modern global challenge of climate change which is shown above to have gross impact on access to water and adequate food in African countries.

Dan Sonnenberg, *et al.*, have identified the problem of involuntary resettlement caused by mining.¹²⁷ Through a case study of the Southern African region, reveals that involuntary resettlement results into a number of risks to MHCs inclusive food insecurity. It is estimated that in the Southern African region more than 42,000 people have been displaced due to mining activities. Such a displacement detaches people from their fertile land, forests, rivers and sacred cultural sites. Similar observations were noted by Bogumil who identified the extent of Mine-induced Displacement (MID) around the globe with reference to case studies in a number of regions and countries.¹²⁸ Africa is identified among regions with high prevalence of MID in rural areas.¹²⁹ Among factors attracting mining companies into African rural areas apart from the discovery of minerals are inclusive, unsecured land tenure that makes land relatively cheap, little awareness of the rural communities of their land rights, African communities being not litigious, weak civic organisations to hold accountable mining companies and absence of strong institutions to guarantee

¹²⁵ *ibid.*

¹²⁶ *ibid.*

¹²⁷ Dan Sonnenbeg and Munster Frauke, 'MMSD Southern Africa: Mining and Society Involuntary Resettlement' (IIED 2001).

¹²⁸ Bogumuli (n 5). para 3.2.

¹²⁹ *ibid.* para 3.2.

governance in resources extraction.¹³⁰ Notably, unlike, Sonnenberg *et al.*, Bogumil Terminsk identifies the role of the multinationals such as World Bank in remedying the violation of human rights in areas where it finances mining projects.

The Catholic Commission for Justice and Peace (CCJP) also identified similar weakness among the selected some ICGLR member states namely, Zambia, Malawi, Mozambique save for South Africa.¹³¹ In their report they noted that MID seem common and that its main cause is weak legal and institutional framework in such countries. The report noted a number of evidences indicating such a weak governance such as; weak land tenure system; poor Environmental Impact Assessment (EIA) requirement; compulsory land acquisition with little compensation and non-involvement of communities in granting mineral rights and or sharing benefit from the minerals.¹³²

CCJP., further shows that, international best practices and voluntary guideline from multinational institution such as WB and IFC are used to supplement the weak legal framework in a number of African countries. Although not enforceable, they require mining companies to adopt their principles pertaining to local community engagement; consultation of the affected communities to name but a few.¹³³ Consequently, the report is relevant to the study at hand for two major reasons; firstly, since displacement affects a number of human rights, access to adequate food and clean water inclusive. Secondly, the report shows that voluntary codes, act as a

¹³⁰ *ibid.* para 3.4.

¹³¹ CCJP 2014 Land displacement, involuntary resettlement and compensation practice in the mining sector, para 2.2 and 3.1.1.

¹³² *Ibid.* para 2.3.

¹³³ *Ibid.* para 2.3.

compliment to the domestic legal framework that does not reflect international human rights standards, notably, Tanzania was not one among the countries under investigation, as the current study suggests.

Moreover, a number natural resources-rich African countries, are reportedly to have failed to strike a balance between anthropogenic activities and environmental conservation. Among such countries are inclusive; Zimbabwe, Mozambique, DR Congo, Sudan, Uganda and Tanzania to list but a few.¹³⁴ Among factors behind such imbalance are inclusive; limited human resources, little technology and meagre budget to enforce the standards industries may set and implement their own standards, absence of political will, adoption of investor friendly laws and regulation, poor coordination.¹³⁵

It is recently, shown that, mining activities also bear gross impacts on the ecosystem when heavy metals are discharged on land and or water.¹³⁶ These factors are relevant to inform this research the extent to which adopted laws in selected African countries are reflective of the international framework regulating climate variation among others. Notably, however, these factors are reflective of the general environment hence it lacks focus on issues such as mining, rights to water and food which is the

¹³⁴Michael Faure, 'The Balancing of Interests: Some Preliminary (Economic) Remarks' in Michael Faure and Du Plessis Willemien (eds), *The balancing of interest in environmental law in Africa* (Pretoria University Law Press 2011). p. 23; S Norfolk and M Cosijn, 'Development and Balancing of Interests in Mozambique' in Michael Faure and Du Plessis Willemien (eds), *The balancing of interest in environmental law in Africa* (Pretoria University Law Press 2011). pp. 337; Tumai Muroombo, 'Balancing of Interest through the Framework Environmental Legislation in Zimbabwe' in Michael Faure and Du Plessis Willemien (eds), *The balancing of interest in environmental law in Africa* (Pretoria University Law Press 2011). p. 589; Robert Kibugi, 'Development and Balancing of Interest in Kenya' in Michael Faure and Du Plessis Willemien (eds), *The balancing of interest in environmental law in Africa* (Pretoria University Law Press 2011). p. 195. ;Danniel Pallangyo, 'Tanzania's Framework, Environmental Law and Balancing of Interests' in Michael Faure and Du Plessis Willemien (eds), *The balancing of interest in environmental law in Africa* (Pretoria University Law Press 2011). p. 517.

¹³⁵ Faure (n 134). p. 23; Norfolk and Cosijn (n 134). p. 337; Muroombo (n 134). p. 589; Kibugi (n 134). p. 195.

¹³⁶ A Mwimba-Kankolonogo and others, 'Impacts of Trace Metals Pollution of Water, Food Crops and Ambient Air on Population Health in Zambia and DR Congo' [2022] *Journal of Environmental and Public Health*. p.11.

focus in this study.

In particular, mining activities in Tanzania are reportedly to impact MHCs ability to food themselves through resettlements. According to IRIN Geita Gold Mines in Geita district was involved in evicting MHCs from their fertile land and resettled them in a camp. Being resettled, MHCs are disconnected from their land and areas where they could carry out their daily activities for their sustenance.¹³⁷ Instead of being engaged in small-scale agriculture that would have produced their own food, they are forced to become labourers in order to get money to buy food. It is also shown that, MHCs in Geita received little or no compensation on their land. For example lump sum compensation paid for half an acre was TSHS 400,000 equivalent to 240 USD.¹³⁸

Fredrick Juma, shows that there are incidences of food insecurity among MHCs in rural Tanzania.¹³⁹ Among factors for such food insecurity are reportedly to be; few are involved in food production while many are attracted into mining sector; increased price for food crops that witnessed famers selling all of their produce to the mining companies, leaving them with insufficient food stock.¹⁴⁰ Jumas' work builds on the previous literature that shows that MHCSs are resettled and have little access to land for production of their own food. It is therefore relevant to show both direct and indirect impacts of mining activities on food security.

¹³⁷ IRIN (n 5).

¹³⁸ *ibid.*

¹³⁹ Fredrick Juma, 'Effects of Mining on Food Security to Farming Communities Surrounding Nyamongo Gold Mine in Tarime District Tanzania' Sokoine University of Agriculture, A dissertation submitted in partial fulfilment of the requirements for the Degree of Master of Science in Agricultural Education and Extension of Sokoine University of Agriculture. Morogoro, Tanzania, 2015. p. 60.

¹⁴⁰ *ibid.* p. 60

Charles Marwa and Isabela Warioba show that Tanzania promotes more foreign investment in mining sector than protection of her peoples' property rights.¹⁴¹ In their study they identified the problem of unsecured land tenure system in rural areas where Tanzanians are evicted from their farms with little or no compensation for mining instead.¹⁴² This resonates to the finding by Juma that few are involved in farming owing to large chunk of the land being taken for mining activities. Despite of the fact that this study is not directly linked with the right to food, it informs this study that, mining activities tend to affect mostly unsecured property rights which are central to food production to majority of rural MHCs in Tanzania.

Moreover, Manfred Bitala argues that mining discharge of heavy metals such as; lead and mercury into environment contaminates local farms relied by MHCs for food production. Land degradation through contaminating soils produce contaminated food crops since the heavy metals and poisons such as cyanide retains its self in the food chain affecting its ultimate consumer. He further concludes that, heavy metals and poisons concentration on soil alongside mining sites in Geita in Tanzania is beyond recommendable standards hence food crops produced on them are not fit for human consumption.¹⁴³

Regions bordering Lake Victoria are also reportedly to be extremely impacted by land degradation due to unregulated anthropogenic activities such as mining and

¹⁴¹ Marwa and Warioba (n 5). p. 189.

¹⁴² *ibid.*

¹⁴³ Manfred Bitala, 'Evaluation of Heavy Metals Pollution in Soil and Plants Accrued from Gold Mining Activities in Geita, Tanzania' (University of Dar es Salaam 2008). p. 61.

agriculture. Land degradation is manifested through a number of evidencing situations such as, increased deforestation, bush fire, drought, loss of biodiversity and loss of soil fertility.¹⁴⁴ Indeed, all these evidences signal gross impact to food security in affected regions. Among regions reportedly to suffer such degraded lands are inclusive; Mara, Shinyanga and Mwanza.¹⁴⁵ Behind these situations are weak or absence of legal and institutional frameworks to address climate change issues and inadequate fund to monitor environmental safeguards and inadequate qualified personnel.¹⁴⁶

Similar findings are also reiterated under the State of the environment report which identified land degradation, increasing deforestation and loss of biodiversity due to anthropogenic activities.¹⁴⁷ It is estimated that 1% of forests is lost annually and that almost half of the arable land in Tanzania is under threat of degradation.¹⁴⁸ It is further estimated that, the cost of reversing the impacts of land degradation and restoration of lost biodiversity may cost 1% of the GDP.¹⁴⁹ In particular, the cost is projected to raise to 2% of the GDP by 2030 in case no action will be taken to halt the increasing threats to land degradation and biodiversity loss.¹⁵⁰ The value of conserved land, forests and biodiversity towards food security may not be overemphasised.

¹⁴⁴ National Audit Office, 'Study on the Status of Environment with a Focus on and Degradation, Forest Degradation and Deforestation' (Controller and Auditor General of Tanzania 2018). para 3.4 -3.6.

¹⁴⁵ *ibid.* para 4.2 and 5.2.

¹⁴⁶ *ibid.* para 4.7.

¹⁴⁷ VPO, 'State of the Environment Report 3' (n 106). para 14.2-4.

¹⁴⁸ *ibid.* para 14.3.

¹⁴⁹ *ibid.* para 14.8.

¹⁵⁰ *ibid.* para 14.8.

This part has discussed the climate change, mining and variation property rights impacts on MHCs access to clean water and adequate food. It is shown here that unregulated mining activities impacts grossly the MHCs rights to water and food in Africa and Tanzania in particular. It shows that, there is a nexus between mining induced land dispossession and or pollution signifies a serious threat to food security among the MHCs. The next immediate cluster analyses the status of international law and procedural issues in domestication of international principles (both human rights and resources governance) in guaranteeing MHCs' access to clean water and adequate food.

To begin with literatures on the status of international, Hall Stephen., argues that international law as opposed to domestic laws suffers the lack of; hierarchy, single legislative organ, single international judicial organ, a fact which makes it challenging to research.¹⁵¹ Notably, such deficiencies do not disqualify it. Hall further classifies international law into two main groups, the positive law and those which are not. According to Hall, the positive law represents the binding laws based on agreed treaties and customary international law. He noted that despite the fact that States are allowed to enter reservation under international law based on treaties, no such a reservation is allowed under human rights treaties as they are regarded fundamental and universally applicable.

Moreover, Hall points out that declarations are by their very nature not part of the positive laws. In order to bear the binding effect a declaration has to be supported by

¹⁵¹ Stephe Hall, 'Researching International Law' in Michael McConville (ed), *Research methods for law* (Edinburgh University Press 2007).

the State practice. Notably, the State practice in question has to be uniformly carried in a number of States claiming it to be a right, although not all State practices becomes a custom. Furthermore, Hall points out the decisions of the UN organs arguing that they are non-positive laws. To him, UN and or other multinational organisations such as; AU, EU, and World Bank, to name but a few, decisions are not binding to all States in the world.

Gunugten Willem, presents the concept of the mainstreaming human rights in all the UN agencies even the specialized ones.¹⁵² IMF treaty for example limits on the aspect of political intervention of its member State affairs. Such a prohibition acts as a limitation to consider human rights in IMF operation but rather its core business. Notably, in recent years it is seen that most of the International Financial Institutions (IFIs) do work to ensure their activities are compatible with human rights to avoid being held responsible in case of violation.

Gunugten, further shows that IFIs are obliged to refrain from violating human rights and protect human rights within the areas of their operations. As a matter of fact, the IFIs are required to respect the peremptory norms of international law on its own dealing or in partnership with development partners. A number of statements by the treaty bodies such as ICECSR and the OHCH general comments both signify the fact that IFIs as it is for other international organizations are bound by the human rights standards. This literature seems relevant in identifying two key factors namely: that international organizations and MNCs are required to respect human rights, and that

¹⁵² Willem Genugten, 'The World Bank Group, the IMF and Human Rights: And Attribution of Unlawful Conduct' in Wulter Vandenhole (ed), *Challenging territoriality in human rights law: Building blocks for plural and diverse duty-bearer regime* (Routledge 2017).

MHCs may rely on the soft laws to safeguard their access to clean water and adequate food once infringed.

George Pavlakos, shows that, MNCs are equally accountable in case of violation of human rights. He propounds the concept of *proto-legal* relation instead of legal relation owing to the fact that MNCs adopt a very complex structure.¹⁵³ The proto-legal relation identifies all the patterns of relation between companies from those involved in the production, processing and production of end-use products. Identification of such complex structure is relevant to MHCs and governance in mineral sector in two major ways. In the first hand, MHCs would need to be able to claim for remedies in case of violation of human rights by mining companies. In the second place regulation of trade in minerals by the government institutions such as; revenue collection, certification of the mineral products as a means to curb the illicit financial flows becomes apparent.

With respect to domestication of international laws, it is argued by Magnus Killander and Horace Adjolohoun most African countries are dualist. In order to guarantee domestic application of international principles there is a need to enact a domestic statute or allows a direct application of such principles as part of their laws. Despite all these procedural steps, application of international principles seem limited.¹⁵⁴ Among the limiting factors are; limited access to international laws, inadequate reporting of the cases, little or no exposure of judicial officer to international human

¹⁵³ George Pavlakos, 'Transnational Legal Responsibility: Some Preliminaries' in Wulter Vandenhole (ed), *Challenging territoriality in human rights law: Building blocks for plural and diverse duty-bearer regime* (Routledge 2017).

¹⁵⁴ Magnus Killander and Horace Adjolohoun, 'International Law and Domestic Human Rights Litigation in Africa: An Introduction' in Magnus Killander (ed), *International and domestic human rights litigation in Africa* (Pretoria University Press 2010). p. 18.

rights laws and limited access to justice owing to cumbersome procedures and litigation costs.¹⁵⁵

Furthermore, they argue that, although all African States have incorporated the Bill of Rights in their constitutions, not all contain all internationally recognised and protected rights such as right to water and adequate food [emphasis added]. In order to guarantee effective protection of international human rights, they recommend among other things; domestic courts to reflect how foreign courts, international judicial and quasi-judicial organs have interpreted international human rights issues in their decisions.¹⁵⁶ The views in this literature is relevant to the study at hand owing to the problem stated above, that despite ratification of the Bill of Rights in Tanzania, still the right to clean water and adequate food are not guaranteed and not enforceable.

Osogo Ambani is also of the similar view, when analysing the application of international human rights law in Kenya. He argues that, in order to guarantee effective promotion and protection of international human rights as enshrined in the Kenyan Constitution, the Kenyan Judiciary has to silence the dualism principle.¹⁵⁷ Silencing the dualism principle, means using the international human rights framework as a tool to interpret the domestic rights as enshrined in the constitution.¹⁵⁸ Notably, the use of international human rights as an interpretive tool, guarantees peoples of their rights as protected under international law both in dualist

¹⁵⁵ *ibid.*

¹⁵⁶ *ibid.* p. 21.

¹⁵⁷ Osogo Ambani, 'Navigating the Dualist Doctrine: The Case for Progressive Jurisprudence on the Application of International Human Rights in Kenya' in Magnus Killander (ed), *International and domestic human rights litigation in Africa* (Pretoria University Press 2010). p. 35.

¹⁵⁸ *ibid.*

and or monist States like Zambia and Benin.¹⁵⁹

Notably, however, it is shown that despite the use of international law as an interpretative tool, domestic laws may pose a limitation on the mandate of the judiciary to fully protect international human rights. In Benin for example, judiciary may only reach a finding of violation of human rights but not further to pronounce compensation for such a violation.¹⁶⁰ Tanzania being a dualist State, the position in this literature may not be overemphasised as a means of guaranteeing MHCs access to clean water and adequate food.

Emanuel Quansha supports the use of international human rights as an interpretative tool in domestic courts as a means to promote and protect human rights domestically.¹⁶¹ He states that judiciary is obliged so to do for a number of reasons. Such reasons are; the desire of States to adopt rules of civilised nations in which international human rights are embodied, international obligation arising from the Vienna Convention on the Law of Treaties, that States may not rely on domestic laws as a ground of violation of internationally agreed principles, as a perfection of States commitment under respective international human rights instruments they have signed and ratified which calls for full compliance of its provisions and global forces that, decisions from domestic courts have to reflect the international human

¹⁵⁹ Machelo Hasungule, 'Domestication of Human Rights in Zambia' in Magnus Killander (ed), *International and domestic human rights litigation in Africa* (Pretoria University Press 2010). p. 81; Armand Tauoh and Horace Adjolohoun, 'International Law and Human Rights Litigation in Cote d'Ivoire and Benin' in Magnus Killander (ed), *International and domestic human rights litigation in Africa* (Pretoria University Press 2010). p.120.

¹⁶⁰ Tauoh and Adjolohoun (n 159). p. 117.

¹⁶¹ Emmanuel Quansha, 'An Examination of the Use of International Law as an Interpretative Tool in Human Rights Litigation in Ghana and Botswana' in Magnus Killander (ed), *International and domestic human rights litigation in Africa* (Pretoria University Press 2010). p. 52.

rights principles and standards to name but a few.¹⁶² These justifications are relevant to the study at hand since Tanzania is also a member of the global community, has ratified the Bill of Rights and other international human rights instruments which requires it to be bound as such.

Despite above justification of the use of international human rights as an interpretive tool, experience in Uganda and Tanzania seems to be rarely used. According to Busigye Kabumba, judiciary in Uganda seems reluctant to engage with international law when passing decision at the domestic level.¹⁶³ A similar position is also noted by Chacha Murungu with regard to Tanzania.¹⁶⁴ Among contributory factors towards this anomaly are inclusive; little exposure of the members of the bench and the bar on international law frameworks; non domestication of international human rights, existence of claw-back clauses, non-justiciability of mostly socio-economic rights and passing of laws that undermine courts' decision on human rights aspects.¹⁶⁵

Notably, limitations on application of international principles has a domestic impact in Tanzania. Hamza Hilal argues that, despite of ratification of the bill of rights in the Constitution in Tanzania, protection of human rights have been a challenge owing to cumbersome procedures such as; limiting human rights litigation only to the High Court jurisdiction, inadequate number of High Court Zones, restriction of the court's power to declare laws as void irrespective of its infringement of human

¹⁶² *ibid.* pp. 51-52

¹⁶³ Busigye Kabumba and Magnus Killander, 'The Application of International Law in the Ugandan Judicial System: A Critical Inquiry', *International and domestic human rights litigation in Africa* (Pretoria University Press 2010). p.106.

¹⁶⁴ Murungu (n 17). p. 68.

¹⁶⁵ Kabumba and Killander (n 163). p. 106; Murungu (n 17). p. 68.

rights.¹⁶⁶ In totality, these factors do no good to underprivileged MHCs which rely on court for their justice when mining activities ruin their waters and diminish their agricultural land both in terms of quality and quantity.

On the second hand of international law and good natural resources governance, United Nations Economic Commission for Africa (UNECA),¹⁶⁷ has reported that weak governance in African States has resulted into more than fifty billions USD being illicitly taken from Africa on annual basis. According to UNECA weak governance structures and institutions permits tax evasion; corruption and abusive use of administrative powers as it is one among the common ways finance from Africa is illicitly taken.¹⁶⁸ In Tanzania, in the case of *African Barrick Gold PLC vs Commissioner General* it was held that the General Commissioner was justified to invoke section 66 (4) of the Income Tax Act which provide conditions for a resident person for the purpose of taxation.¹⁶⁹ In this case, the African Barrick Gold PLC declared profit and proceeded issuing dividends to its overseas shareholders. Despite the fact that the declared profit was wholly gained from one of its subsidiary company in Tanzania, their record declared loss.¹⁷⁰

UNECA further, points out that corruption for example happens mostly in contractual arrangements and concessions.¹⁷¹ At this stage of resources development,

¹⁶⁶ Hamza Hilal, 'Examination on the Efficacy of Legal and Institutional Framework in Enforcing Human Rights in Tanzania' (Dodoma 2017) <https://www.academia.edu/33906383/Examination_on_the_Efficacy_of_Legal_and_Institutional_Framework_in_Enforcing_Human_Rights_in_Tanzania_docx> accessed 29 May 2021. p. 51.

¹⁶⁷ AU/UNECA Report on the high level panel on illicit financial flow from Africa para 2.2.1.

¹⁶⁸ Ibid para 1.4.

¹⁶⁹ Ibid. p. 21.

¹⁷⁰ Tax Appeal (n 104) .17-18; AU/UNECA Report (n) para 2.2.1.

¹⁷¹ AU/UNECA (n102) para 2.2.1.

the real value of the resources is underestimated by the entrusted officials. While the underestimation of the resource value denies the State her revenue, it signals corruption on the part of the respective officials involved. It is estimated that the amount lost via the illicit financial flow exceeds by far the amount Africa receives as official development assistance from developed countries.¹⁷²

UNECA is committed to ensure that both national and regional efforts are adopted to strengthen governance and curb illicit financial flow from Africa.¹⁷³ UNECA calls for good governance and transparency in resource extraction, curbing corruption and freezing and returning the assets procured as a result of the use of such illicit transactions. States are therefore called to adopt both legal and voluntary initiatives that supports transparency and accountability in extractive sector.¹⁷⁴

In addition, according to Rhuks Ako and Nilopar Uddin most African countries lacks good governance necessary to harness the abundant natural resources into development.¹⁷⁵ While they define good governance basing on the democratic principles prevailing due process of law; accountable government and transparency; they show such principles are vital if any State is to attain development in extraction of resources. Through the analysis of the constitutional provisions and relevant to the principles in selected African countries, they identified that, '*mismanagement of the resource revenue*' is behind the underdevelopment of many natural resources-rich

¹⁷² AU/UNECA (n 102) para 1.1.1.

¹⁷³ Ibid para 1.4.

¹⁷⁴ Ibid para 3.1.

¹⁷⁵ Rhuks Alko and Nalopar Uddin, 'Good Governance and Resource Management in Africa' in Francis Botchway (ed), *Natural resources investment and Africa' Development* (Edward Elgar 2011). p. 21.

African.¹⁷⁶ Notably, such a weakness is reportedly a common trend in many resources-rich African countries evidenced by; abuse of political powers, compromised judicial and legislative institutions and questionable democracy.¹⁷⁷

In particular, an abused democratic system may hardly be supportive of transparency and accountability. Absence of transparency and accountability act as breeding grounds for government officials' self-enrichment and other illegal means of utilization of public fund at the expense of the poor majority in African countries.¹⁷⁸

Worth noting here is the fact that proper management of the revenue collected from the resource extraction have immeasurable impact on the two aspects under this study.

In particular, Lundstol Olav, further shows the revenue loss incurred by African countries through the illicit financial flow for the period ranging from 1998 to 2013.¹⁷⁹ His study has identified the fall in the share of government revenue from 30-10%.¹⁸⁰ Notably, such a drop of revenue contributes into gap in the respective countries budget deficit. Budget deficit, in turn affects the States' ability to provide for social services to her people.¹⁸¹

Furthermore, Bill Araujo, shows that African countries are dependent on export of raw minerals for their development.¹⁸² He also notes that not so many commodities

¹⁷⁶ibid. p. 39.

¹⁷⁷ ibid. p. 40.

¹⁷⁸ibid. p. 41.

¹⁷⁹ Olav Lundstol, 'Mines and Tax in Africa Fair Benefiting Share or Exploitation in the Work of Liberalization' in Fjeldstad Odd-Helge and others (eds), *Lifting the veil of secrecy: Perspectives on international taxation and capital flight from Africa* (Chr Michelsen Institute 2017). p. 108.

¹⁸⁰ Ibid p. 108.

¹⁸¹ Ibid p. 110.

¹⁸² Bill Melo Araujo *Commodity Agreements and Markets* in Francis Botchway *Natural resources investment and Africa' Development* 2011 Cheltenham Edward Elgar. p. 328.

would be traded by a single African country, indicating the dependency on the commodities in considerable number of such countries. It is also noted that almost all compete at offering similar commodities to the same market, commonly minerals and energy.¹⁸³ Such a dependency makes African countries' economy prone to prices of the offered commodities at the world market, which they don't regulate.

Notably, Araujo argues that irrespective of the international measures aimed at regulating volatility of the commodity prices, African countries still are unable to derive economic benefit from such resources.¹⁸⁴ Among factors behind this failure are; mismanagement of the income generated from commodities boom, absence necessary human resources to convert the resources into tangible economic development, lack of capital to invest in extraction of the resources and poor technology in harvesting the resources. Consequently, African countries are left with no alternative but entering into jointventure with foreigners in harvesting the resources and ultimately sharing the profit gained.¹⁸⁵

In particular, diminished profit or revenue by the government seems to be further implicated with the weak fiscal legal framework in many African countries which do not guarantee accountability and transparency.¹⁸⁶ It is also shown to diminish owing to the prolonged decline in commodity price at the world market.¹⁸⁷ The combination of all these factors exacerbate the African countries inability to fund resource

¹⁸³ Bill Araujo, 'Commodity Agreements and Markets' in Francis Botchway (ed), *Natural resources investment and Africa's Development* (Edward Elgar 2011), p. 329.

¹⁸⁴ *ibid.* p. 329.

¹⁸⁵ *ibid.* p. 329.

¹⁸⁶ *ibid.* p. 329.

¹⁸⁷ *ibid.* p. 358.

extraction projects; train its own human resource and guarantee its position in the sector through research and development activities.¹⁸⁸ It also pose a threat to potential investors due to its historical development level exhibited through poor infrastructure that adds to the cost of doing business.¹⁸⁹

Fernando Bastos acknowledges that resources are subjected under the State sovereignty within which they are found.¹⁹⁰ He adds that, at international level, the principle of permanent sovereignty over natural resources has widened to include other considerations like environment. Consequently, States which originally assumed almost absolute sovereignty witness their limitations based on the need to preserve and or conserve environment.¹⁹¹

He further states that owing to lack of awareness and widespread of the modern development in international law; political leaders have always assumed State absolutism under the principle of permanent sovereignty over natural resources.¹⁹² Consequently, absence of recognition of international law principles at the domestic level, grant domestic laws primacy over international law.¹⁹³ A similar view seems to be shared by Evaristus Oshionebo who shows that most natural-resources-rich African states and governments hold all the natural resources in trust for their people.¹⁹⁴ Such a legal position grants the governments wider scope to enact laws

¹⁸⁸ibid. p. 358.

¹⁸⁹ ibid. p. 359.

¹⁹⁰ Fernando Bastos, 'A Southern African Approach to the Permanent Sovereignty over Natural Resources and Common Resources Management System' in Marc Bugernberg (ed), *Permanent sovereignty over natural resources* (Springer International 2015).

¹⁹¹ibid. p. 66.

¹⁹² ibid. p. 76.

¹⁹³ ibid. p. 67.

¹⁹⁴ Oshionebo Evaristus, 'Fiscal Regime for Natural Resource Extraction : Implication for Africa's Development' in Francis Botchway (ed), *Natural resources investment and Africa' Development* (Edward Elgar 2011). p. 200

and regulation on access, extract, process, trading in natural resources. Apart from such laws being weak, and friendly to MNCs, they also limit potentials of MHCs to derive benefit from the use of natural resources in their vicinity.¹⁹⁵

Inability of the state and the MHCs to derive benefits from the natural resources is related to improper regulation of access, extraction, processing and trading of such resources at the national and global levels. According to Christina Dietrich, improper regulation of mining and trade in rough diamond in Central African Republic (CAR) does not only deny the state its revenue but also fuel civil unrest and human rights violation in areas where they are mined.¹⁹⁶ Dietrich suggest that, the only means to guarantee states and MHCs benefits from minerals, is a denial of access to global markets diamonds mined in human rights violation circumstances.¹⁹⁷

Dietrich further shows that the concern of improper regulation of mining and trading in rough diamond is not peculiar to CAR but also in DR Congo. She shows that, firstly, improper regulation in diamond mining and trading fuel proliferation of rebels in both countries. Secondly, rough diamond mined in DR Congo (Kivu in particular) which is under rebels is smuggled to Bangui the Capital City of CAR where it gains access to global markets.¹⁹⁸ Dietrich is of the view that, good governance that upholds transparency in the mineral sector is a way forward to limiting fuelling human rights violation in the diamond value chain.¹⁹⁹ Similar view

¹⁹⁵ *ibid.* p. 235.

¹⁹⁶ Christian Dietrich, 'Hard Currency: The Criminalized Diamond Economy of the Democratic Republic of Congo and Its Neighbours' (Partnership Africa Canada, 2002). p. 47.

¹⁹⁷ *ibid.* p. 48.

¹⁹⁸ *ibid.*

¹⁹⁹ Christian Dietrich, 'Diamonds in the Central African Republic' (Partnership Africa Canada, 2003). p. 48.

is also shared by Nicolas Cook who calls for responsible mining through adoption of strong legal and institutional frameworks.²⁰⁰ Despite of the fact that Cook deals with different minerals namely; Tantalum, Tin and Tungsten (3Ts) instead of rough diamond, his view on the need for responsible mining and its value chain may not be ignored.

Honke Jana adds on responsible mining industry, in particular to MNCs' role to foster peace and tranquillity in areas where they are operating. He shows that, MNCs are required to respect human rights instead of being caught up into the violence in areas where they operate.²⁰¹ Daniella Jong is of the view that, transparency in the mining industry is vital both to the state and MNCs as it informs the decisions to be made by these stakeholders.²⁰² As the mining stakeholders are informed, they thus can hold the MNCs and the state into account when mining impacts their livelihood say for example.²⁰³ However, despite the notable value international mineral resources governance initiatives, it is argued that they seem to have adopted narrow approach focusing on minerals while turning a blind eye into environment degradation and its impacts to MNCs.²⁰⁴

Generally, most MNCs in developing States have failed to fully benefit from the mining activities within their vicinities.²⁰⁵ This echoes the resource curse theory

²⁰⁰ Nicolas Cook, 'Conflict Minerals in Central Africa: U.S. and International Response' (Congressional Research Services, 2012). pp. 21-22.

²⁰¹ Honke Jana, 'Business for Peace? The Ambiguous Role of "ethical" Mining Companies.' (2014) 2 Peacebuilding. p.16.

²⁰² Daniella Jong, "'A Rough Trade'?: Towards a More Sustainable Minerals Supply Chain' [2019] Brill Open Law. pp. 37-38.

²⁰³ *ibid.* p. 38.

²⁰⁴ Shawn Blore and Ian Smillie, 'Taming the Resource Curse: Implementing the ICGLR Certification Mechanism for Conflict-Prone Minerals' (Partnership African Canada, 2011). p.19; Miho Taka, 'A Critical Analysis of Human Rights Due Diligence Process in Mineral Supply Chains: Conflict Minerals in the DRC' (South African Institute of International Affairs, 2014). pp. 18-19; S Young, Y Zhe and G Dias, 'Prospects for Sustainability Certification of Metals' [2014] Metallurgical Research and Technology. p. 5.

²⁰⁵ Lyuba Zarsky, 'Sustaining Development: Extractive Industries and Local Communities' (2013) <<https://www.worldpoliticsreview.com/articles/13145/>> accessed 29 August 2018.

which refers to the failure by many resource-rich developing countries to turn the natural resources into the tangible socio-economic benefits to their own citizens. Instead such countries which suffer from resources curse theory experience high levels of poverty, social or political unrest and a low level of democracy.²⁰⁶

It is shown that, mining activities pollutes waters and soil beyond recommendable standards both at international and local levels. Such pollution poses a threat to human, especially women's health and wellbeing. For example, according to United Nations Development Programme (UNDP) women and girls are responsible for fetching water in most African societies.²⁰⁷ Water stress therefore mean women and girls are increasingly over burdened with the task of fetching water than say schooling and or involvement in socio-economic activities to empower them.²⁰⁸ Despite of existence of international and regional instruments setting principles and or standards that may be relied to safeguard MHCs access to clean water and adequate food the reviewed literature has identified the imbalance as a challenge that need to be addressed. It is shown that MHCs impacts are founded on weak legal and institutional frameworks.

²⁰⁶ NRGI, 'The Resource Curse: The Political and Economic Challenges of Natural Resource Wealth' (NRGI, 2015) <The Resource Curse The Political and Economic Challenges of Natural Resource Wealth>; The details of the theory of resource curse will be discussed under chapter two of the main thesis.

²⁰⁷ United Nations Development Programme, 'Human Development Report: Beyond Scarcity: Power, Poverty, and the Global Water Crisis' (UNDP 2006). p. 46.

²⁰⁸ *ibid.* p. 46.

CHAPTER TWO

CONCEPTUAL AND THEORETICAL FRAMEWORKS

2.1 Introduction

The previous chapter provides the foundation of all other chapters inclusive the current one. It does so by deriving the problem under research from the reviewed literatures, setting objectives to be attained, research questions, and methodology to answer them. This chapter, is descriptive in nature. It thus describes theoretical foundation of the problem under research and unpacks the constitutive elements of relevant terms and concepts. In particular, nine terms and one concept are relevant to this study as described below. Also, two theories, namely, legal positivism and resources curse are identified as relevant in this study.

2.2 Conceptual Frameworks

This part describes the terms and concept(s) applied in this study. With respect to terms, among relevant terms described below are inclusive; Mine-host communities (MHCs); clean water, harmonization, justiciability, good governance, transparency, public participation, biodiversity and climate change. With respect to concept, this study has identified food security as relevant to safeguarding MHCs access to adequate food.

2.2.1 Mine-Host Communities (MHCs)

The term Mine-host Communities (MHCs) is complex to define owing to multiple contexts it may be subjected to. In this study, the term Mine-host Communities refers to a group of people composed of mainly residents who have common interests arising from their socio-economic and cultural ties to the area where mining is taking

place or within the vicinity of mining activities, and endure the negative impacts caused by mining activities.

Notably, the term MHCs has been defined and characterised differently by various scholars. In particular, it appears not in the same wording as MHCs, rather various terms such as local communities, interested and affected communities, local groups to name but a few.²⁰⁹ For example, Aguilar Gaby, uses the term local communities to refer to MHCs as a geographically identified communities and or organizations with common identifiable human rights interests while, Elmarie Schyff, uses the term interested and affected persons, instead.²¹⁰ In the group of affected persons, Schyff seems to include variety of interested persons when mineral rights are to be granted over a given land.

Among the identified potential interested group are: those holding mineral rights of various types say for example; oil, gas, and hard minerals on the same area; land owners; community in the vicinity of the mining and communities which are directly affected by the mineral operations.²¹¹ In this definition, groups are seem to have diverse interests; holders of mineral rights for example seem to have more commercial interests than would be communities within the vicinity of the mining operations, who may be interested on preservation of their land for agricultural

²⁰⁹ MMSD, 'Breaking New Ground: Mining, Minerals and Sustainable Development' <<http://pubs.iied.org/pdfs/9084IIED.pdf>>. 200.; Lorenzo Cotula, 'Legal Empowerment for Local Resource Control: Securing Local Resource Rights within Foreign Investment Projects in Africa' (2007) <<http://pubs.iied.org/pdfs/12542IIED.pdf>>. 54; Schyff, *Property in Minerals and Petroleum* (n 59). p.582.

²¹⁰ Gaby Aguilar O, 'Local Relevancy of Human Rights: A Methodological Approach' (2008) <https://www.uhasselt.be/Documents/UHasselt/onderwijs/internationaal/noord-zuid_2015/Aguilar_the_local_relevance_of_Human_rights_-_a_methodological_approach.pdf>. 11.; Schyff, *Property in Minerals and Petroleum* (n 59). p. 582.

²¹¹ *ibid.* pp.582-583.

activities and clean water.

Another definition referring to MHCs for example is provided by the Mining, Minerals and Sustainable Development (MMSD) which indicates three potential way of categorizing MHCs.²¹² Firstly, they categorize the community based on profession. This category involves those who are recruited by the mining company. Notably, since mining companies require special type of skills, at times it might be necessary that such group of people is procured from far community to where mining operation is taking place.²¹³ This type of group of the community seems to have a commercial and contractual based interest that may not necessarily be similar to the rest of other groups in defining MHCs as applied in this study.

Secondly, MMSD points out the community which resides in the locality where mining activities are taking place. This community is said to endure the negative impacts of mining such as; water pollution, land pollution, loss of land for farming and grazing, air pollution, to name but a few.²¹⁴ Notably, MMSD further categorizes this community into two. These two categories are based on those who were habitual residents of the locality and those who seems to have migrated to the locality because of presence of mining.²¹⁵ This study disregards the differentiation of the two categories as long as all resides on the same area and endures the same negative impacts from mining operations.

²¹² MMSD Breaking New Ground, Mining Minerals and Sustainable Development <http://pubs.iied.org/pdfs/9084IIED.pdf>, p. 200.

²¹³ MMSD (n 209). p. 200; In other instruments, the term MHCs is defined to include even suppliers, employees; and shareholders of the mining companies to name but a few, see Towards Sustainable Mining –Understanding the TSM assessment protocol, 4.

²¹⁴ *ibid.* p. 200.

²¹⁵ *ibid.*

The third category identified by MMSD, is that of indigenous communities. According to MMSD, indigenous communities are habitual residents of the locality where mining takes place, but have an additional element of historical and cultural link with the land they live on.²¹⁶ The MMSD definition of MHCs, provides the basics of the term MHCs in the last two categories of residential communities and indigenous communities. In the same line as noted in the immediate paragraph, this study disregards the differentiation between the indigenous and other residents who are subjected on the same negative impacts of mining operations such as water pollution. This study therefore defines the term MHCs as, communities with both historical permanency and cultural link with the natural resources surrounding them and or habitual residence in the vicinity of large-scale mining activities.

2.2.2 Clean Water

The term clean water is an ordinary English term composed of two words, clean and water. On the first hand, the term clean seems to have multiple meaning under the Oxford Advanced Learner's Dictionary.²¹⁷ Such meanings are inclusive; '*not dirty*' and '*free from harmful and unpleasant substances*', to name but a few.²¹⁸ For the purposes of this study, preference is towards the definition of the term clean as free from harmful and unpleasant substances. The choice is influenced by two main reasons. Firstly, the nature of the study where mining activities are seen as a direct cause of discharge heavy metals into water sources such as rivers and lakes. Secondly, that cumulative impacts of mining activities may trigger climate change

²¹⁶ *ibid.* p. 200.

²¹⁷ Oxford Advanced Learner's Dictionary International Student's Edition, 2015, p. 264.

²¹⁸ *Ibid.* p. 264.

whose impacts on water infrastructure is eminent.

On the other hand, the term water is defined under the Oxford Advanced Learners Dictionary to mean,

...a liquid without colour; smell or taste that falls as rain, is in lakes, rivers and seas and is used for drinking, washing etc.²¹⁹

Consequently, the use of two terms, clean water refers to harmless, colourless, tasteless and odourless liquid used for drinking and other domestic uses such as food preparation and washing. According to Dinka Megersa, clean water contains only the elements which made up water, with no purities.²²⁰ Dinka distinguishes clean water from safe water by showing that, unlike clean water which is pure, safe water may not necessarily be pure as it may contain other elements such as salts which may not be harmful to human health.²²¹ Internationally, the term drinking-water is preferred whereby it is used to mean,

... water which is used or intended to be available for use, by humans for drinking, cooking, food preparation, personal hygiene or similar purposes...²²²

Consequently, the use of the term clean water in this study refers to internationally agreed definition of drinking-water which put emphasis on the quality of the waters as being pure. This approach is opted owing two noted potential and real impacts of

²¹⁹ Ibid .p. 1698.

²²⁰ Megersa Dinka, 'Safe Drinking Water: Concepts, Benefits, Principles and Standards' in Glavan M (ed), *Water challenges of an urbanizing world* (IntechOpen 2018).

²²¹ *ibid.*

²²² Protocol on Water and Health to the 1992 Convention on the Protection and Use of Trans-boundary Watercourses and International Lakes 1999. Art. 2 (2).

mining on the water quality.²²³

2.2.3 The Concept of Food Security

The concept of food security seems to be complex. There is no one definition that describes the concept all the time. As a matter of fact, there seems to be an evolving trend over a period of time in which the meaning of the concept food security may be traced. FAO seems to have traced such an evolution from early 1970s', 1980s' to 2000s'.²²⁴ In 1970s' for example the UN defined food security to mean;

...availability at all times of adequate world supplies of basic food-stuffs, particularly so as to avoid acute food shortages in the event of wide spread crop failure, natural or other disasters, to sustain a steady expansion of food consumption in countries with low per capital intake and to offset fluctuation in production and prices.²²⁵

According to Wen Peng and Elliot Berry, the definition of food security in 1970s' was much influenced by the acute food shortage that triggered price concerns and poor food distribution around the globe.²²⁶ Consequently, food security measures seem to have been targeting issues to do with food productivity, distribution and pricing.

In 1980s' and early 1990s' the definition of the term food security seems to take a new approach where it was noted that, poverty grossly impact food security. The

²²³ See para 1.8 above.

²²⁴ FAO, Food security: concepts and measurement, <http://www.fao.org/3/y4671e/y4671e06.htm#fn27> (accessed 15th January 2020).; Peng W, Berry, E.M, *The concept of food security*, in Ferrant, P., Berry E.M, Anderson J,R (Eds), Encyclopedia of food security and sustainability, vol.2, Elsevier, 2019, p. 2.

²²⁵ UN World Report on the World Food Conference, Rome 15-16 November 1974, p. 14.

²²⁶ Peng W, Berry, E.M, *The concept of food security*, in Ferrant, P., Berry E.M, Anderson J,R (Eds), Encyclopedia of food security and sustainability, vol.2, Elsevier, 2019, p. 2.

definition of food security by the World Bank for example stresses on accessibility of the food stuff, as here under provided;

...access by all people at all times to enough food for an active, healthy life.²²⁷

Similarly, UNDP emphasized that accessibility to enough food is vital elements in defining the term food security. Specifically UNDP noted that accessibility has to be both financial and physical owing to not only the problem of food being poorly distributed around the globe but also, weak purchasing power due to poverty.²²⁸ Consequently, food may be available but inaccessible to those who are economically underprivileged. In addition, inability for communities to produce food for themselves is also seen as a limiting factor to accessing food and hence a determinant in defining the term food security.

According to World Summit on Food Security (WSFS) 2009 the term food security is defined to mean as follows;

...a situation where when all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life...²²⁹

This definition seems to extend the scope of the term food security as new other determinants are considered for example; food has to be safe and nutritious. According to Peng and Berry, it is because of the requirement that food has to be

²²⁷World Bank, 'World Bank Policy Study, Poverty and Hunger, Issues and Options for Food Security in Developing Countries', (World Bank, 1986). p.1.

²²⁸United Nations Development Programme, Human Development Report 1994, Oxford, Oxford University Press, p. 27.

²²⁹The World Summit on Food Security Draft Declaration 2009, p. 1.

nutritious in the definition of food security, whereby, food security becomes the sub-category of food security and nutrition.²³⁰

This study adopts the definition by the WSFS which defines food security including not only determinants such as physical, social and economic accessibility but also safety. In particular, it entails the ability of MHCs to engage production of their sufficient and uncontaminated food.²³¹ As noted in chapter one above in this study, mining activities has a tendency of displacing people from their farm land disabling them to engage in production of their own food. Also, mining pollutes environment such as; soil and waters which is home to a number of aquatic organisms which are sources of food to global communities [Tanzania inclusive].²³²

2.2.4 Justiciability

The term justiciability used in this study refers to the possibility of rights to clean water and adequate food be recognized and enforced in judicial or quasi-judicial organs for the determination of whether they have been violated or are about to be violated, and a decision to remedy the same issued. According to Christian Courtis justiciability means,²³³

...the possibility for alleged victims of violations of ESC rights to file a complaint before an impartial body, and request adequate remedies or redress if violation is deemed to have occurred.

²³⁰ Peng W, Berry, E.M, *The concept of food security*, in Ferrant, P., Berry E.M, Anderson J,R (Eds), *Encyclopedia of food security and sustainability*, vol.2, Elsevier, 2019, p. 2.

²³¹ John Ombella, 'Upholding Human Rights in AU Member States' Extractive Sector: Review of Aspects of Food Security to Communities Neighbouring Mines in Selected Countries' (2022) 2 *International Journal of Law, Justice and Jurisprudence*. p. 20.

²³² See para 1.8 above

²³³ Christian Courtis *The right to food as a justiciable right: Challenges and strategies* in A. von Bogdandy and R. Wolfrum (eds) , *Max Plunk year book of United Nations Law*, vol, 11 2007, pp. 317-337. p. 318.

Generally, justiciability of the socio-economic rights guarantees every one (MHCs inclusive) a right to enforce their human rights (such as right to water and adequate food) and claim for remedies in situation where the rights are violated or are likely to be violated.²³⁴ In particular, safeguarding the MHCs' access to clean water and adequate food entails possibility of the MHCs invoking the relevant legal rights in judicial and or quasi-judicial organs where such rights are violated or about to be violated.

There are two types of justiciability that are direct and indirect justiciability of social economic rights. On the one hand the direct justiciability refers to a situation where the social economic rights are expressly provided for in the statutes hence their enforceability may be directly questioned in courts of law.²³⁵ Examples could be picked from the Kenyan Constitution 2010 and South African Constitution 1996 which guarantee the right to clean water and adequate food. Consequently, individuals may invoke such constitutional provisions where they see that their right to water and or food is being violated and or likely to be violated.

On the second hand there is indirect justiciability which represents the process of enforcing social economic rights that are not expressly provided in the statute but

²³⁴Greenwell Matchaya, O'brien Kaab and Charles Nhemachena, *Justiciability of the Right to Water in the SADC Region: A Critical Appraisal*, Laws, Vol. 7, No.18, p. 13.

²³⁵Ilias Trispiotis, *Socio-economic rights: Legally enforceable or just aspirational?* Opticon, vol. 8, 2010, p. 4.; Amare Tesfaye Justiciability of Socio-economic rights in the Federal Democratic Republic Of Ethiopia; A Thesis Submitted to the School of Graduate Studies of Addis Ababa University in Partial Fulfilment of the Requirements for the Masters of Law (LL.M) in Human Rights Law Stream 2010, p.76.; ACHPR, 'Principles and Guidelines on the Implementations of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights'. ;ACHPR, 'Guidelines on the Right to Water in Africa, Adopted during 26th Extra-Ordinary Session of the African Commission on Human and Peoples' Rights Held from 16th-30th July 2019 in Banjul, The Gambia' (2019). para 2.2.

rather through other rights which are expressly provided for in the statute.²³⁶ An example could be derived from the African charter which seems to be silent on the right to adequate food. However, the ACHPR Guideline seems to direct that the right to adequate food may be justiciable through the right to life owing to the fact that without food the guaranteed right to life is meaningless.²³⁷ Generally, indirect justiciability is mostly practiced in countries whose constitutions did not incorporate or did incorporate social economic rights, but limit their enforcement.²³⁸

2.2.5 Harmonisation of Legal Frameworks

Robert Milbourne, has raised the concern on different laws and policies governing mining activities around the globe and African countries in particular.²³⁹ Such a concern is raised owing to the fact that the procedures through which mining activities commence, operate, and cease are relatively similar.²⁴⁰ Such similarity dictates similar rules of governance irrespective of the location of minerals. It is also shown that desire for harmonisation of mining legal regime apart from being historic, is not only at the global, but also at the regional levels too.²⁴¹ Consequently, there is a need for harmonization of the different national laws and policies on minerals. Harmonisation is used here to mean;

²³⁶ Ilias Trispiotis, *Socio-economic rights: Legally enforceable or just aspirational?* Opticon, vol. 8, 2010, p. 4.; Amare Tesfaye Justiciability of Socio-economic rights in the Federal Democratic Republic Of Ethiopia; A Thesis Submitted to the School of Graduate Studies of Addis Ababa University in Partial Fulfilment of the Requirements for the Masters of Law (LL.M) in Human Rights Law Stream 2010, p.76.

²³⁷ The ACHPR Principles and guidelines on the implementation of economic, social and cultural rights in the African charter on human and peoples' rights, para 83.

²³⁸ Amare Tesfaye Justiciability of Socio-economic rights in the Federal Democratic Republic Of Ethiopia; A Thesis Submitted to the School of Graduate Studies of Addis Ababa University in Partial Fulfilment of the Requirements for the Masters of Law (LL.M) in Human Rights Law Stream 2010.

²³⁹ Robert Milbourne, 'Mining and Natural Resources Law Development: The Need for Harmonization in Light of the G20' <<http://www.klgates.com/files/FileControl/073006e1-ad75-4698-b85b-73fd771767bd/7483b893-e478-44a4-8fed-f49aa917d8cf/Presentation/File/LegalAlert-RobertMilbourneG20BRRaudio.pdf>>. accessed 18th September 2018.

²⁴⁰ *ibid.*

²⁴¹ UNECA International Study Group, 'Africa's Mining Regimes: Framework Report' (UNECA 2009). para E.

...merging of national system for managing and administering mining sector in a manner that reduces differences in operating environment...²⁴²

Generally, there are two forms in which harmonisation may manifest, that are standard and minimum harmonization. Under the standard harmonization, states are given a room to adopt their sui generis rules and policies. However, under the minimum harmonisation, States are given mandatory thresholds to meet in their domestic laws so as to ensure socio-economic well-being of her people. An example of the mandatory thresholds could be the core minimum requirements under the ACHPR principles and guidelines.²⁴³ Consequently, harmonization may be viewed argued in two main stages. On the one hand, there are standardization of procedures which entails, training of personnel, geological information; health and safety requirements to name but a few.²⁴⁴

On the other hand, there are requirements for alignment of national policies, rules, and laws in an agreed common goal or direction. Alignment of policy and rules entails among other the procedures from licensing, awarding of mineral rights, assigning of responsibilities to entities, protection of communities, fiscal aspects, mineral development strategy which is concerned with, land tenure and other subsectors such as water and agriculture owing to their conflicting interest on

²⁴² UNECA/SADC Implementation plan for harmonization of mining policies, standards and legislative and regulatory frameworks in Southern Africa 2008, para 7.

²⁴³ The ACHPR Principles and guidelines on the implementation of economic, social and cultural rights in the African charter on human and peoples' rights, para 17.

²⁴⁴ See UNECA/SADC Harmonisation of mining policies, standards, legislative and regulatory framework in Southern Africa 2004, ECA/SA/TPub/Mining/2004/03, para 3.1.1.

water.²⁴⁵ It is argued that harmonization of extractive laws in Africa in general will enhance the State efficiency in managing the resources plus the revenue there from and in turn provision of socio-economic services to their populations.²⁴⁶

2.2.6 Good Governance

Good governance is a term composed of two words; good and governance. According to the Concise Oxford English Dictionary the meaning to these words are described as: '*Good is an adjective, meaning pleasant, to be desired or approved.*' Governance is an action referring to the manner of governing or control. Governance is also explained to mean the process of implementing: laws; regulations; measures and policies by the established institutions in a democratic State.²⁴⁷ The inter-link between the established institutions must tell how the decision reached in implementing the laws; regulations may be challenged by those potentially to be affected.²⁴⁸ Tom Parreut, is of the view that; governance is not only how the government and quasi-governmental organs work, but also their relation to non-governmental stakeholders.²⁴⁹ Consequently, the main concern here seems to be the extent to which the public may hold into account the existing governance system in their community.

With respect to good governance in the mineral sector, the World Investment Report (WIR) 2007, seems to put forward the thesis that mining is an activity that can

²⁴⁵ Ibid. para 3.1.2.

²⁴⁶ Ibid. para 3.2.

²⁴⁷ Loreta Ferris and L Koetz, 'Regulation of Acid Mine Drainage in South Africa: Law and Governance Perspectives' Potchefstroom Electronic Law Journal, 2014, vol 17 Issue 5, p. 75.

²⁴⁸ Furaha Lugoe, 'Governance in Mining Area in Tanzania with Special Reference to Land' (Economic and Social Research Foundation, 2012) <esrf.or.tz/docs/GOVERNANCEINMININGAREASINTANZANIA.pdf>. 2.

²⁴⁹ T Parreut, 'What Kind of Governance for What Kind of Equity? Towards Theorization of Justice in Water Governance' Water International, 2014 Vol. 39 Issue 2 pp. 236.

contribute to economic growth when properly regulated. The need for proper regulation of mining sector is based on the following identified challenges: volatility of the price of minerals, social and environmental impacts; and that minerals are finite in nature. All these factors shows the need for polices to ensure their sustainable harvest and benefit to community is necessary.²⁵⁰

According to WIR, good governance refers to the management system in the mineral sector which guarantee; stakeholders' participation, transparency, accountability, due process of the law and considerate of interests of the underprivileged. Notably, women and youths are vulnerable where environment is destroyed by large-scale mining activities. Though not directly connected to access to water and adequate food, good governance allows MHCs to hold their government and other stakeholder in mining into account.

Notably, governance may be discussed in various levels such as: international; regional; regional, national and local levels.²⁵¹ Lack of good governance in most resources-rich African States seem to contribute to the inability to convert the natural resources into tangible benefits to ordinary citizens.²⁵² Such inability to benefit from the plenty of natural resource has been labelled as resource curse.²⁵³ The relation that exist between good governance or lack of it and resource curse is founded on its key tenets. It is due to governance tenets that Collier and Venables seem to be of the

²⁵⁰ Ibid 82.

²⁵¹ Lugoe (n 248). p. 3.

²⁵² Paul Collier and Antony Venables, 'Natural Resource and State of Fragility' (Robert Schuman Center for Advanced Studies, 2010) <cadmus.eui.eu/handle/1814/13860>. p. 2.

²⁵³ See para 2.3.1 below for details.

view that, governance is more needed in resources-rich countries than otherwise.²⁵⁴

Various authors discuss the concept of governance based on a number of key tenets. While some restrict the list to transparency and accountability, others seem to consider other tenets such as: public participation; efficiency; consensus oriented and rule of law.²⁵⁵ Tiwari for example explains such tenets in a reverse order when he argues that in a community where there lacks good governance the following are expected to be experienced: absence of accountability; non-observance of rule of law; lack of transparency; scarcity of information; questionable effectiveness and absence of participation in decision making.²⁵⁶ Notably, the most relevant tenets to the study at hand are; transparency and public participation indecision making as hereunder expounded;

2.2.7 Transparency

According to English dictionary the term transparency is an adjective with multiple meaning, such as; the quality of a thing that makes it easy to see through and or quality of a situation which makes it easily understood.²⁵⁷ The dictionary further gives an example that, transparency simply mean absence of secrecy either in the process and or the situation.²⁵⁸ Although the definition is capable of multiple meaning, this study adopts the later meaning which signifies absence of secrecy. The choice of such a definition resonates to the aabove noted secrecy existing in mineral

²⁵⁴ Collier and Venables (n 252). p. 1.; World Bank and International Financial Corporation, 'Mining and Development; Global Mining –Mining Reform and the World Bank-Policy Reform for Development' (2003) <<http://siteresources.worldbank.org/INTOGMC/Resources/miningreformandtheworldbank.pdf>>. p.14.

²⁵⁵ Feris and Koetz (n 247). p. 75. ; Lugoe (n 248). para 2.2.

²⁵⁶ RS Tiwari, 'Good Governance: Populist Democracy to Quality Democracy' Indian Journal of Public Administration, 2002, Vol. 48, p. 584.

²⁵⁷ Margaret Deuter, Jennifer Bradbery and Joanna Tumbul, 'Oxford: Advanced Learner's Dictionary'. p. 1609.

²⁵⁸ Collins English Dictionary' (2022) <<https://www.collinsdictionary.com/dictionary/english/transparency>> accessed 3 June 2022.

resources extraction investment in many resources-rich developing countries.²⁵⁹ With respect to extractive sector, which involves both mining oil and gas, transparency relates to openness of the process through which; mining rights are allocated (license and contracts), revenues are paid and shared; environmental plans and developmental impacts of minerals and or oil and gas sector to respective countries.²⁶⁰

It is argued that, transparency in the extractive sector begun in late 1990s' where civil societies and pressure groups were pressing for disclosure of oil extracting MNCs in Angola to publish what the pay to the government.²⁶¹ Such a call was a reaction of a feeling that their resources were caught up between looting MNCs and corrupt government which swindles the resources gained from the extractive sector. Notably however, transparency initiative gained pace in the year 2002 when the UK Prime Minister Tony Blair presented it as a tool to guarantee good governance in the extractive sector.²⁶²

According to Natural Resources Governance Institute (NRGI), transparency refers to ability to access and share relevant and accurate up to date information that may be relied by the stakeholders in order to monitor and or build trust among them.²⁶³ Given the complex nature of the extractive sector, information will not be regarded as to have been accessed if it is not in the plain language for an ordinary member of

²⁵⁹ See para 1.8 above.

²⁶⁰ Philippe Billon, Paivi Lujala and Siri Rustad, 'A Theory of Change for the Extractive Industries Transparency Initiative: Designing Resource Governance Pathways to Improve Developmental Outcomes', *4U Issue* (CMI: CHR Michelsen Institute 2020). p. 43.

²⁶¹ *ibid.* p. 9.

²⁶² Natural Resource Governance Institute, 'Transparency Mechanism and Moments: Tools to Foster Openness and Accountability' (2015) <https://resourcegovernance.org/sites/default/files/documents/nrgi_primer_transparency-mechanisms.pdf>.p. 2.

²⁶³ *ibid.* p. 2.

public to understand. Consequently, such information has to be released based on nature of projects and themes covered. Where MNCs have multiple sites in the country for example, information should clearly indicate every type of sites instead of clogging all in one report.²⁶⁴

NRGI further show that, transparency is a means to achieve accountability which is a concern in the extractive sector in many resources-rich developing countries.²⁶⁵ According to Philippe Billon *et al*, one way to bring change in extractive sector is through transparency that discloses the corrupt governmental and or MNCs officials. These officials and their companies are named and shamed through public debate and other media outlets. Finally, such officials and MNCs are to be held accountable through prosecution.²⁶⁶

Generally, there are a number of global transparency initiatives which are sector specific and or generals. NRGI lists these initiative which includes; Publish What You Pay (PWYP), Extractive Industries Transparency Initiative (EITI), Open Government Partnership (OGP), Natural Resources Charter (NRC), and Accounting Standards (AS).²⁶⁷ This study however, has identified the EIT framework owing to the fact that, it has regained global acceptance as may be noted under the; UN resolution and the ICGLR frameworks.²⁶⁸ Also, it has gained acceptance among natural resources-rich developing countries and other stakeholders such as MNCs

²⁶⁴ *ibid.* p. 2.

²⁶⁵ *ibid.* p. 3.

²⁶⁶ Billon, Lujala and Rustad (n 260). pp.18-20.

²⁶⁷ Natural Resource Governance Institute (n 262). p.3.

²⁶⁸ UNEP, 'Resolution Adopted by the United Nations Environment Assembly on 15 March 2019' (n 71). ; Lusaka Declaration of the ICGLR special summit to fight illegal exploitation of natural resources in the Great Lakes Region. 2010.

involved in the mining sector.²⁶⁹

2.2.8 Public Participation in Decision Making

As noted from chapter one, the focus of this study is on the weak legal and institutional frameworks for safeguarding MHCs rights to clean water and adequate food. It thus essential to review among others their involvement in awarding of mineral rights to investors (MNCs) most of whom are from the developed countries. It is argued that developed countries seem to have depleted their resources a fact which contribute to a massive increase in foreign investment in developing countries.²⁷⁰ Although laws are incentivizing this form of business, they are weak such that, they create conflict among stakeholders in mineral resources who are the government, the mining investors and the MHCs, inclusive others. Public participation in decision making seems a powerful tool to resolve such conflicts among the stakeholders.

There is no consensus among researchers and practitioners on large-scale development projects like mining on what the term public participation mean. Attempt to define the term seems either to give it a restrictive or broad meaning which indicate that there is no single definition to fit all circumstances of its application.²⁷¹ On one hand, George Pring and Susan Noe, for example define the term public participation to mean ways applied in sharing views among individuals

²⁶⁹ Billon, Lujala and Rustad (n 260). pp.12-13.; See also para 3.2.1.8 and 4.2.1.8 below.

²⁷⁰ Issa Shivji and others, *Constitutional and Legal System of Tanzania: A Civic Source Book* Mkuki na Nyota 2004Dar Es Salaam, p. 281.

²⁷¹ George (Rock) Pring and Susan Noe, 'The Emerging International Law of Public Participation Affecting Global Mining, Energy and Resource Development' in Donald Zillman, Lucas Alastair and Pring George (Rock) (eds), *Human rights in natural resource development: Public participation in sustainable development of mining and energy resources* Oxford University Press 2002 Oxford. pp. 15-16.

or group people.²⁷² Donald Zillman, on the other hand provide a traditional explanation of public participation where decision seems to have been done indirectly by the government through the elected representatives.²⁷³ Notably, the definition of the public participation in decision making seems to be perceived to be narrow when it takes the form of political representation as it limits potential stakeholders into the political spectrum.²⁷⁴

However, in a democratic State, the executive for long seems to have enjoyed the monopoly of decision making, monitoring and enforcement.²⁷⁵ Examples would be negotiation by a potential investor and issuance of necessary permits and operation licenses. Notably such a monopoly may be a product of the law or regulation that empowers a form of bi-party decisions between the government and potential investors.²⁷⁶ Collier, once noted that most of the investment deals are products of by-party decisions between the government officials and the investors excluding potential communities who are to endure the hardships of the investment projects.²⁷⁷ Based on the records of gross impacts to communities in host-states, governments started to be looked at as part of the problem than a solution.²⁷⁸ Given the weakness in the legal framework, public participation emerges out of pressure from citizens, affected groups and non-governmental organizations calling for the shift in

²⁷² *ibid.* p. 15.

²⁷³ Donald Zillman, 'Introduction to Public Participation in the Twenty –First Century' in Donald Zillman, Lucas Alastair and Pring George (Rock) (eds), *Human rights in natural resource development: Public participation in sustainable development of mining and energy resources*, Oxford University Press 2002, Oxford, p. 1.

²⁷⁴ Barry Batton, 'Underlying Concepts and Theoretical Issues in Public Participation in Resource Development' in Donald Zillman, Alastair Lucas and Pring George (Rock) (eds), *Human rights in natural resource development: Public participation in sustainable development of mining and energy resources*, Oxford University Press 2002, Oxford, p.78.

²⁷⁵ Zillman (n 144), p.1.

²⁷⁶ *ibid.* p.1.

²⁷⁷ Paul Collier, 'Law and Codes for the Resource Curse' (2014) 11 Yale Human Rights and Development Journal. p. 7.

²⁷⁸ Zillman (n 273). p. 2.

governance strategy to tri-party. A tri-party decision making approach represents the balance of interest between the government, investors and public.²⁷⁹ Public participation appears in various forms and nomenclature in the regulation of natural resources. According to Pring, common terms that are used are inclusive:

.....citizens' involvement; stakeholders' engagement; indigenous peoples' rights; local community consultation; and NGO intervention.....²⁸⁰

Such a nomenclature seems to be based on the nature of the potential affected group which range from the general public to specific protected groups like indigenous peoples, youths and women.²⁸¹

Notably, manifestation of public participation may take various ways. Among the common ones are the top-down and bottom-up approaches.²⁸² While the top-down indicates a government led participation, the bottom-up represents initiatives by the people at the grass root.²⁸³ The other distinguishing element of bottom-up form of public participation is that, it is less complex on the modality of its occurrence. It may transpire through: government lobbying; protest; testifying; and public disorder to name but a few.²⁸⁴ Various factors influence the choice of mode in which public

²⁷⁹ Colin Filer, 'Development Forum in Papua New Guinea: Upside and down Side' *Journal of Energy and Natural Resource Law*, 2008, vol. 26, p. 120.

²⁸⁰ Pring George (Rock), Donald Zillman and Lucas Alastair, 'Law of Public Participation in Global Energy and Resources Development: A New IBA Book' *Journal of Energy & Natural Resource Law*. 2002, vol. 20, 79; Zillman (n 273). p. 2.

²⁸¹ Zillman (n 273). p. 2; Lucas Alastair, 'Canadian Participatory Rights in Mining and Energy Resource Development: The Bridges to Empowerment?' in Donald Zillman, Lucas Alastair and Pring George (Rock) (eds), *Human rights in natural resource development: Public participation in sustainable development of mining and energy resources* Oxford University Press 2002, Oxford, p. 307.

²⁸² Batton (n 274). p. 80.

²⁸³ *ibid.*

²⁸⁴ Zillman (n 273). p. 1; Batton (n 145), p. 80.

participation may take place. Such factors are inclusive but not limited to: financial strength of the individual or group; ability to organize; nature and extent of issues that is to affect the public; expected results; and nature of participants involved.²⁸⁵

Furthermore, apart from the above forms public participation, Pring and Noe have identified other two possible approaches of public participation which are common. First, the public participation commonly required under the Environmental Impact Assessment (hereafter EIA).²⁸⁶ EIA is a common prerequisite to carrying out large scale development projects such as mining. It is aimed at identifying potential risks the project may bear on environment and propose mitigating measures.²⁸⁷ In carrying out this assessment public is involved. EIA is a common requirement in many countries Tanzania inclusive.²⁸⁸

Second, the modern public participation in decision making which goes beyond the EIA commonly referred to as a non-EIA based public participation.²⁸⁹ Unlike EIA the modern public participation seems to be largely found in non-environmental related frameworks.²⁹⁰ They are diverse in nature, found in: international; regional; national, both hard and soft law documents [emphasis is mine].²⁹¹ Moreover, they regulate a range of aspects from general such as; natural resources, to specific aspects like: mining; waste and heavy metal management.²⁹² This study, focuses on the non-EIA based public participation for the reasons that it covers a flexible and

²⁸⁵ Batton (n 145), p. 80.

²⁸⁶ Pring and Noe (n 142), p. 38.

²⁸⁷ *ibid.* p. 38.

²⁸⁸ For detailed discussion of EIA see Chapter five of this study.

²⁸⁹ Pring and Noe (n 271). p. 38.

²⁹⁰ *ibid.* p. 39.

²⁹¹ *ibid.*

²⁹² *ibid.*

wide spectrum than the EIA public participation led. Public participation is therefore used in this study to mean a process through which MHCs are effectively involved in decision making, planning, implementation, monitoring and evaluation of issues affecting their daily access to clean water and adequate food.

2.2.9 Climate Change

According to English dictionary the term climate change refers to variation in the earth weather patterns.²⁹³ Weather patterns are inclusive temperature, rain and wind. According to the African Union Climate Change Strategy, the variation of global weather patterns has to be observed for a long period like ten years for it to be considered as a change.²⁹⁴ However, the daily weather situations such as high and low temperature or wind may not be ignored since it is constitute in the 10 years period. Notably, such definitions, seem to be silent on the potential factors triggering climate change. Under the United Nations Framework Convention on Climate Change 1992 climate change is shown to be triggered by both natural and human activities such as; mining, increased industrialisation and its accompanying emission [emphasis added].²⁹⁵

In order to halt increasing climate change, global community is called to adopt measures that will limit global temperature increase to the level of 1.5 degree centigrade above pre-industrial levels.²⁹⁶ It is shown that global climatic variation is evidenced through; increase of temperature, wind and rainfall patterns. Severe

²⁹³ Deuter, Bradbery and Turnbull (n 257).

²⁹⁴ AU, 'African Strategy on Climate Change' (2014). p. 66.

²⁹⁵ Framework Convention on Climate Change. Art. 1(2)

²⁹⁶ Paris Agreement. Art. 2 (1)(a).

rainfall, droughts, desertification and storms are examples of impacts of climate change.²⁹⁷ Ultimately, climate change seems to be a potential factor which contributes towards; infrastructure destruction, variation in hydrological patterns, degradation of land and ecosystem which are relevant to both the rights to clean water and adequate food.²⁹⁸ This study however, adopts the climate change from the contributory role of large-scale anthropogenic activities such as mining.

2.2.10 Biodiversity

The term biodiversity is defined to mean differences existing within and between living organisms such as; plants and animals in respect to their sources and natural habitat for example on land or marine.²⁹⁹ Under the English Dictionary, biodiversity is explained to refer to existence of broad variation among plants and animal species living in a given environment.³⁰⁰ International Council for Minerals and Metals (ICMM) however, extends the definition of the term biodiversity to include different levels of such organisms with respect to genes and species in a given ecosystem.³⁰¹

ICMM further extends the definition of biodiversity adding to their interaction though various process such as; photosynthesis and pollinations.³⁰² Such an extension signals the value of biodiversity to human life and general environment. Indeed, human well-being may hardly be discerned from a conserved biodiversity since it depends on it. Conserving biodiversity is vital in this study owing to the report showing that about 10% of the global mining sites are located in areas with

²⁹⁷ AU, 'African Strategy on Climate Change' (n 294), p 66; AU, ECA, and ADB (n 76). para 1.

²⁹⁸ UNECA International Study Group (n 241). pp. 78-79

²⁹⁹ Convention on Biological Diversity. Art. 1

³⁰⁰ Deuter, Bradbery and Turnbull (n 257). p.136.

³⁰¹ ICMM, 'Good Practice Guidance for Mining and Biodiversity' (ICMM, 2006), para 1.2.

³⁰² *ibid.* para 1.2.2.

global conservation value.³⁰³

It may be argued that, in order to safeguard MHCs access to clean water and adequate food, a number of terms and concepts described above are relevant. Notably, some of terms are derived from legal view point which indicate that they founded on established laws. The immediate part below describes the legal and economic theoretical frameworks which may be relied as a base for arguments in the unfolding chapters.

2.3 Theoretical Frameworks

In this two key theories are described in relation to the study at hand. While the first, resource curse theory is not a legal but economic based theory, it is vital in setting the foundation of this study. The second is the legal positivism theory, which helps in discerning between the law as it is from other norms which may be not binding. It also helps in providing legal argumentation on balancing interest between competing stakeholders on natural resource extraction for example.

2.3.1 Resource Curse Theory

Notably, resource curse is not a legal, but an economic theory. It being an economic theory helps to explain the link between plenty of mineral resources and improved livelihood conditions of ordinary citizen. It does so well through analysing concepts that are directly or indirectly linked with nature of the legal framework (strong or weak), and other concepts like governance. It also shows the other side of plenty resources and lack of governance which translates such resources as a curse owing to

³⁰³ UN, 'Trends in Sustainable Development: Chemicals, Mining, Transport and Waste Management' (UN 2010). p. 14.

their extraction and trading nexus to human rights violations. Consequently, despite resource curse being a non-legal theory, it has an immeasurable contribution in analysing the link between presence of natural resources, its harvest and the potentials of safeguarding MHCs' access to clean water and food security.

Michael Ross, presents the economists conception that States with plenty of resources are likely to be more developed than others owing to revenue and attraction of investment.³⁰⁴ He further contends that, the inverse is however true to a number of resources-rich developing countries. In explaining this paradox, Ross argues that economically, mineral resources have a tendency of fluctuating price.³⁰⁵ Consequently, if not well managed, it may impact the economy of the country by affecting its international trade due to fluctuating currency. Notably, when there is mineral boom, mineral sector draws human capital from other less paying sectors like agriculture for example.

In supporting a better management of the mineral resources, Collier, *et all* show that, comparatively, developed countries invest 5-7% of their GDP a rate 4% higher than developing countries.³⁰⁶ He further shows that most developing countries do prefer to invest in sovereign foreign bonds than in infrastructures which will have more trickle down effects to large populations. Both works by the two authors are relevant to the study at hand owing to the pressing demand of water and agricultural infrastructure in Africa, and Tanzania in particular.

³⁰⁴ Michael Ross, 'The Political Economy of the Resource Curse' (1999) 51 *World Politics* 297. p. 301.

³⁰⁵ *ibid.*

³⁰⁶ Paul Collier and others, 'Managing Resource Revenues in Developing Economies' (2010) 57 *IMF Staff Papers* 84.

Lisa Sachs, carried out a case study of the Timor-Leste, as an example of a developing country intending to achieve her development owing to her natural resource richness.³⁰⁷ She observed that, despite presence of MNCs extracting oil in Timor-Leste, still a considerable number of population in Timor-Leste suffer from; malnutrition, poor state of infrastructure in water, education, transport and energy. According to Sachs, the challenge behind such poor infrastructure is based on lack of capital both in terms of human, technological and financial.³⁰⁸ Sachs further observes that such a challenge is experienced by Timor-Leste despite government receiving revenue from the oil extraction.

Based on this observation, Sachs identified a number of limitations on the desired resource-based development strategy adopted by Timor-Leste. Such limitations are inclusive: unfair contractual terms; longevity of the contractual arrangements; confidentiality of extraction contracts; poor linkage of extractive sector and other sectors; infringement of peoples' rights to property in allocating mining rights; negative impacts on environment; political decision rather than legal based decision; conflicting interests of the multiple stakeholders in resource extraction; weak legal and institutional frameworks responsible for regulation of extraction of resources to name but a few.³⁰⁹

In order to overcome such limitations and ensure that resources-rich country is able to convert them into socio-economic development, Sachs suggests a number of

³⁰⁷ Lisa Sachs, 'On Solid Grounds: Toward Effective Resource Based Development' [2013] World Politics Review <<https://www.worldpoliticsreview.com/articles/13140/on-solid-ground-toward-effective-resource-based-development>>. 1.

³⁰⁸ *ibid.* p. 2.

³⁰⁹ *ibid.* pp. 3-5.

potential solutions. Among such solutions are inclusive; participatory approach of all the stakeholders in development; adoption of transparent legal and institutional framework in resource extraction; ensure effective planning in resource extraction process; adoption of a development approach that integrate local levels of the government; guarantee environmental management to avoid potential impacts on climate change that may impact access to adequate food and clean water.³¹⁰ The relevancy of Sachs' observations and solutions is based on the fact that, most African countries and Tanzania in particular have not been able to convert their endowed natural resources into socio-economic development.

According to NRGI, extractive sector in most developing countries African inclusive have been tainted with a number of challenges that turns them into a curse than a blessing to its population.³¹¹ The general factor contributing this phenomenon is poor governance transpiring through; little or no participation of locals in decision making, price fluctuation, the fact that they are non-renewable when exhausted, and little participation of locals in extraction due to high need of technology and capital.³¹² Moreover, due to secrecy in government contracts with multinational companies, locals do not get enough information (say for example, methods of mining, amount of tax paid to the government to name but a few) to be able to hold their government into account.³¹³

³¹⁰ *ibid.* p. 9.

³¹¹ Natural Resources Governance Institute, 'The Resource Curse: The Political, Economic Challenges of Natural Resource Wealth' (2015) <https://resourcegovernance.org/sites/default/files/nrgi_Resource-Curse.pdf>.

³¹² *ibid.* p.1

³¹³ *ibid.* p.1.

NRGI further shows that, there is a link between government secrecy in contracts and revenue and absence of democracy. Such a link becomes clearer where, governments relies more on the revenue from mining than tax collection from citizens. In turn Citizens ceases to hold their government into account, and if at all they do, the government becomes less concerned owing to enough revenue from extraction.

Notably, absence of democracy, may also fuel political hostility and even breed rebels who may control some pockets of the country where extraction is more prominent. Increased political hostility and widespread of rebels' hold and controlled areas for the purposes of mineral extraction leads to human rights violation due to wide spread of civil unrest.³¹⁴ It is also noted that poorly regulated extraction of natural resources under undemocratic circumstances of this nature, undermines women's beneficial participation in the sector. As such they are depicted not only to be victims of gender based violence but also victims of communicable and chronic non-communicable diseases caused by mining ruination of environment.³¹⁵

Generally, the resource curse theory seems to be founded on two key aspects, firstly, weak legal and institutional frameworks in most natural resources-rich African countries. Secondly, there is non-observance of principles of good governance that is evidenced by little participation of stakeholders when government makes decision on the extraction of natural resources. In particular, the second base of the theory is dependent on the first that laws and institutions necessary to guarantee beneficial

³¹⁴ *ibid.*p.2.

³¹⁵ *ibid.*p.4.

harnessing of the natural resources are either weak and or non- enforced due to absence of strong institutions. The next theory that finds relevancy to the study at hand is the legal positivism. Legal positivism is a legal theory as opposed to the resource curse theory as hereunder described;

2.3.2 Legal Positivism Theory

Legal positivism is a legal theory which is founded on the principle that, the source of law as all formally made rules of command by the recognized organs in a State.³¹⁶

It is commonly referred to as a theory holding a view of law as it is stated in the law books rather than as it ought to be. Consequently, what is not stated in the law book is regarded not law but mere morals. Legal positivism ascribes to the distinction between law and morals. Such a distinction requires that the process of application of law should not be influenced by, neither, morals of those who follow the law nor of those who administer it.³¹⁷ Notably the distinction between morals and law seems a fictional one. The truth still holds that there is, to a largest extent overlap between law and morals and law, borrows a lot from morals. As a result, in positivist view morals forms part of the law once a formal procedure has been adopted to have them properly incorporated.³¹⁸

There are criticisms against legal positivism to the effect that, it is restrictive and operates under ignorance of existence of legal pluralism as it only regards formal rules as sources of laws.³¹⁹ Despite such criticism, legal positivism seems relevant in

³¹⁶ Tom Campbell, *Perspective Legal Positivism: Law, Rights and Democracy* (UCL Press 2004).p. 21;Robert (n 45). 37.

³¹⁷ Campbell (n 316). p. 25.

³¹⁸ *ibid.* p. 26.

³¹⁹ Robert (n 45). p. 38.

this study as it helps to address the research question under the study. For example it helps in the foundation of analysis of legal norms as opposed from those which are not.³²⁰ Given the nature of the study at hand where both soft and hard; international, regional and national legal frameworks are being scrutinized, legal positivism provides an initial insight of legal analysis of these frameworks.

Additionally, Robert Cryer, argues that, legal positivism helps to identify the law before one critic what the law covers and what it did not.³²¹ It helps to identify the law such as: the relevant Acts of parliament; regional and international laws relevant to safeguarding the MHCs' access to clean water and food security. Consequently, legal positivism becomes relevant in this study. It also builds a platform where other (theories) approaches such as critical approaches may build their arguments and provide a more insight in this study, as here under shown;

2.3.3.1 Critical Approaches

This is not a fully-fledged legal theory but rather a movement intended to depart from the traditionally known theories. The departure is intended to dig deep more knowledge on how things work.³²² Criticism in relation to law according to Kaarlo Touri, is based on the law as an object or the means of criticising, which also results into criticism “of” and “by” the law.³²³ On the one hand he contends that criticism “by” the law seems to be concerned of a single transaction upon which law is used as a measure to impose sanctions such as during issuing a judgment by the court on a

³²⁰ *ibid.*

³²¹ *ibid.*

³²² *ibid.* p. 60.

³²³ K Touri, *Critical Legal Positivism* (Ashagte Publishing Limited 2002). p. 307.

specific matter of its determination.³²⁴

On the other hand, criticism “of” the law happens when the law is taken as an object.³²⁵ In this case, the measurement for criticism in this form is the law itself.³²⁶

Examples are such as when legal practitioners are involved in adjudication and assessment of self-limitation of the law.³²⁷ Notably, this study adopts the criticism “of” the law for two major reasons: firstly, it is using law as an object of measurement in its analysis and secondly, criticism of the law will help to unmask the observed perspectives in the legal norms as the research is not interested with empirical data that would have detailed the practical application of the rules.³²⁸

Critical approaches help in questioning what would have been seen as obvious or assumed to be neutral.³²⁹ As noted above under positivism for example, why should someone accept that law is that only which is made by formally established organs? How do other factors such as; morality, customs, economics, social behaviour help in determining legal norms apart from formal procedures? Notably, these other norms may be relevant in determining a better way to safeguard MHCs’ access to clean water and food security due to the fact that community norms and customs differ from community to community. Here under are the critical approaches relevant to the study at hand:

a) Law and economics

This is a school of thought originating from United States of America (USA) in early

³²⁴ *ibid.*

³²⁵ *ibid.*

³²⁶ *ibid.*

³²⁷ *ibid.*

³²⁸ *ibid.* p. 308.

³²⁹ Robert (n 45). p. 60.

1960's, which also seems to have influenced other countries, like United Kingdom (UK).³³⁰ According to Richard Posner, the relation between law and economics has two limbs which are law and economics and economic analysis of law.³³¹ The later means the '*using of the economist approach and concepts to analyse the working of the legal system.*'³³² Law and economics, which is the focus of this study, refers to "*influence of legal system on the working of the economic system.*"³³³ Law and economics is also referred to as '*...the economics of non-market legal regulations.*'³³⁴ Law and economics tries to give an answer to the question whether the current law reflects the correct economic thinking and or principles.³³⁵ It is aimed at reforming the law with the view to make it more efficient tool in addressing the modern socio-economic challenges in the community.³³⁶

In order to arrive at the goal above, (reform of the law) an evaluation and assessment of efficiency of the law in addressing a given social goal is inevitable. Robert Cooter and Thomas Ulen argues that economics has the necessary methods used for prediction and evaluation of efficiency.³³⁷ Such methods will not only help in formulation of efficient policies, but also, in prediction of the potential effects of a proposed policy approach on other related factors such as; resources distribution, and income.³³⁸ Consequently, law and economics is seen as a move to ensure efficiency

³³⁰ibid. p. 84; David Trubek, 'The Rule of Law in Development Assistance: Past, Present and Future' in David Trubek and Alvaro Santos (eds), *New law and economic development* (Cambridge University Press 2006). p. 2.

³³¹ R Posner, 'Uses and Abuses of Economics in Law' [1979] *The University of Chicago Law Review* 281, pp 281-282

³³²R Coase, 'Law and Economics at Chicago' [1993] *Journal of Law and Economics* 239.

³³³ ibid..

³³⁴Posner (n 331). pp. 282 and 285.

³³⁵Robert (n 45). p. 84.

³³⁶ ibid.

³³⁷ Robert Cooter and Thomas Ulen, *Law and Economics (International Edition) (4th Ed)* (Pearson Addison Wesley 2004). p. 4.

³³⁸ R Posner, 'Values and Consequences: An Introduction to Economic Analysis of Law' <<http://www.law.uchicago.edu/Lawecon/index.html>>. p. 2

in addressing challenges of the modern era.³³⁹ Ronald Coase is among renowned founders of the law and economics theory as he propounds the theory here under;

i) Coases' perspective of law and economics

Taking the economic analysis of the law, Coase, likened the two business firms to the real world. If these firms are to compete, either of them has to make a choice at the end of time as they will tend to reach a position where none of them may have a better position without affecting the other.³⁴⁰

He proposes the idea of transaction cost while illustrating it with the cattle raiser and a farmer as exemplary business firms. He contends that if the cattle damage the farmers' crops a number of probable solutions are available. Example of solutions are such as restraining the cattle and or building of the fence. Consequently, these solutions will necessitate one to incur cost. How much will be spent? ; By who?; and is the solution efficient? In proposing answer to the above possible questions, Coase sets the principle that, if the value of the crops damaged are lesser than the value of the total cost of cultivating the land, it will be profitable for the cattle raiser to negotiate with the farmer to have the land uncultivated. This is because it is more efficient than to construct a fence to restrict the cattle in the first place, but also solves the problem between the firms without the intervention of other player say the government.

Coase proceed setting the line of choice between the two firms as being the transaction cost. He defines the term transaction cost to mean the relevant charges

³³⁹Cooter and Ulen (n 337). p. 8.

³⁴⁰R Coase, 'The Problem of Social Cost' [1960] *Journal of Law and Economics* 1.p. 414.; G Cohen, 'Posnerian Jurisprudence and Economic Analysis of Law: The View from the Bench' [1985] *University of Pennsylvania Law Review* 1118. p.1120.

one will incur in his business such as advertisement, negotiation, professional charges in drafting contracts to name but a few.³⁴¹ Transaction costs have an implication on assigning or re-arranging property rights.

Arrangements of rights will be undertaken when increase in value of production consequent upon re-arrangement is greater than the cost which will be involved in bringing about ...³⁴²

He further contends that, at times the cost for rearrangement may be so unbearable between the firms such that legal framework need to provide direction. This is common in instances where majority of peoples' interest might be in jeopardy.³⁴³ Government intervention is thus expected to improve economic efficacy by regulating transactions that would have impacted peoples' interests.³⁴⁴

Additionally, Coase contends that at times the government interference seems to set a tolerable margin where property rights might be infringed for the sake of development.³⁴⁵ The judicial arm of the State usually makes use of phrases such as "reasonable, common or ordinary use" in setting the tolerable margin upon encroachment of property rights.³⁴⁶ Notably, taking the reallocation of property rights between a MHCs and mining companies, Coase seems to be of the view that, MHCs may be relocated to give a room for mineral rights holders to mine. However, in socio-economic terms, an early evaluation has to be carried to ensure that the mine brings more benefit to the community and not otherwise. More benefits have to be

³⁴¹Coase (n 340).p. 423.

³⁴² *ibid.*

³⁴³ *ibid.* p. 424.

³⁴⁴ *ibid.*

³⁴⁵ *ibid.* p. 426.

³⁴⁶ *ibid.* p. 427.

viewed in terms of improving the MHCs' access to clean water and food security during the presence of mining and not otherwise.

However, Coase seems to have been criticised on this theory on the basis of lack of clear criterion of the choice between the optimal competing interests of the firms and in cases of unknown costs. Examples could be on issues such as human life and climate change which can hardly be quantified in monetary value, but likely to be caused by mining.³⁴⁷ Despite these criticisms, Coase theory provides a guide in assessing the re-arrangements of property rights which seems to be the key point revolving around MHCs. Efficient solutions need to be arrived at before re-arranging the property rights, to arrive at an efficient solution, one need to carry out assessment.

Also, although he pointed the assessment in monetary terms "transaction cost", yet the requirement for assessment may be likened to the environmental impact assessment, social and human right assessments which are necessary before mining is to be carried out.³⁴⁸ These assessment in mineral sector, are aimed at avoiding harm to majority of people while benefiting few (MNCs and government officials through corruption and embezzlement of public funds).³⁴⁹

As noted from above, Coase theory seems silent on issues that cannot be quantified in economic terms but bears impacts on MHCs' access to clean water and food security. This study has identified the theory of law and development postulated by

³⁴⁷ Cohen (n 340). p. 1125.

³⁴⁸ Allence and Mattes (n 78). pp. 24-25.

³⁴⁹ See the resource curse theory on para 2.8.2 above for more details on this.

Robert Seidman which among other aspects addresses unquantifiable aspects like human behaviour and law. This theory is here under explained;

ii) Seidman perspective of law and development

In his support for efficiency of the law as tool to foster socio-economic development, Seidman argues that there is relation between law and socio-economic change.³⁵⁰ To him law refers to set of rules which are highly probable of inducing a desired activity focused towards development.³⁵¹ In addition, development in accordance to Seidman means an improved standard of living such as accessible, safe, clean and affordable water, adequate food for all and health environment to name but a few [emphasis added].³⁵²

Seidman further postulates that every rule is framed with the aim to induce a specific behavior to the policy maker or any other subjects of the rule.³⁵³ Notably, for any law to be effective in steering development there is a need for the law to establish a form of sanction; institutions to enforce the law and that necessary to impose the sanction. In showing the instrumentalism of the law in solving the socio-economic issues in the community, Seidman points out the problem of excessive discretionary powers under various laws. Discretionary powers provide the administrative officers wide powers to make decision, powers which they misuse resulting into arbitrary behaviour.³⁵⁴ Excessive discretionary powers under laws regulating natural resources

³⁵⁰ Robert Seidman, 'Law and Development: A General Model' [1972] *Law and Society Review* 311.; Ann Seidman and Robert Seidman, 'Law Making, Development and Rule of Law' <<http://media.leidenuniv.nl/legacy/Seidmanforth.pdf>>.

³⁵¹ Seidman (n 350), p. 312.

³⁵² *ibid.* p. 314.

³⁵³ *ibid.* p. 317.

³⁵⁴ Seidman and Seidman (n 350), p. 11.

are the foundation of secrecy described above where only state and MNCs are involved in negotiations ignoring MHCs and other stakeholders.

In suggesting a legal solution to the problem of misuse of power; he argues that, it is not to cling into principles of rule of law but rather setting legal criteria on how such powers are to be used by the public officials.³⁵⁵ The legal criterion may be the need for justification based on scientific research findings and experience.³⁵⁶ Such justification may be obtained from various forms of assessment such as; human rights, environmental, and social impacts assessment, in case of mining activities. He further, contends that for the law to derive legitimacy it has to be the product of the values of the people.³⁵⁷ Indeed, the law being a product of the peoples' values avoids possible transplant which may not produce the intended social change in a different socio-cultural set-up.

Despite above relevancy of the law as an instrument for achieving development it is not immune from critics. David Trubeckseems to criticize the instrumentalism of the law which brings about legal reform as: source of legal transplant; the reforms are not implemented or are implemented to benefit few mostly the elites.³⁵⁸ In addition, as it is for other legal theories, law and development seems silent on aspects of gender. The explanation here under addresses the gender aspect of the law and how it guarantees equality of human being which is the corner stone of human rights.

³⁵⁵ *ibid.* p. 28.

³⁵⁶ *ibid.*

³⁵⁷ Seidman (n 350), p. 317.

³⁵⁸ M Trubek and Y Mastuura, 'The Rule of Law in Development Assistance: Past, Present and Future', *The role of the law in Development: Pas present and future*, CALE Books, 2005. p. 4.

b) Critical Feminism

It is contended that most conventional legal theories seems to be gender blind.³⁵⁹ Feminism theoretical approach therefore, is aimed at unpacking the law with a view to unlock social aspect of gender in its dimension.³⁶⁰ Feminist challenges the gender neutrality of the law.³⁶¹ Feminism originated from the struggles for liberation of women from the subordination since 18th century.³⁶² The initial movement seems to have been interested on civil rights unlike the current trend which witness the call for equality in all sphere of life.³⁶³ Apart from liberal feminism which is more relevant to this study, other feminist approaches are radical and post- modern.³⁶⁴

i) Liberal Feminism

This is one of the multiple arms of feminist critical approach to law. As noted from above, liberal feminism is concerned with equality of men and women with regards to rights, duties and privileges that are offered under the law.³⁶⁵ Equality of human beings irrespective of their gender is tool to liberate women from the political, social and economic oppression by men.

Liberal feminism dates back to 1848 with the signing of the Seneca Declaration stating among other issues equality between men and women.³⁶⁶ The main focus of

³⁵⁹ Wacks (n 45). p. 309.

³⁶⁰ Robert (n 45). p. 63.

³⁶¹ *ibid.* p. 64.

³⁶² Wacks (n 45). p. 310.

³⁶³ *ibid.*

³⁶⁴ *ibid.* p. 3112.

³⁶⁵ William Turnier, Pamela Conover and David Lowery, 'Redistributive Justice and Cultural Feminism' (1996) 45 *The American University Law Review*. p. 1293.

³⁶⁶ *ibid.* p. 1294.

liberal feminism is towards addressing social imbalance between men and women in a given group of the community.³⁶⁷ Notably, a number of reforms were undertaken as a result of the rise of this movement, inclusive are: equal pay; equal access to employment; education opportunities; and other entitlement such as housing to name but a few.³⁶⁸ Law reforms seem to be inevitable in addressing concerns of the liberal feminism as a means of mainstreaming gender into the legal framework of a particular country.

It is noted above that, fetching water is a gender related task where women and girls are involved in many African communities.³⁶⁹ Consequently, economic development activities that are gender blind widens the gender disparity between men and women in case of gross impacts on MHCs' access to clean water and food security. Liberal feminism theory therefore, is relevant in addressing such socio-economic disparities between men and women embedded in socio-cultural and practical aspects of resource ownership and equal voice in most African societies and Tanzania in particular. Notably, the liberal feminism has not been free of critic from other forms of feminist approaches. It is argued that liberal feminism is intended to make women like men. Meaning that women are given right to be like men.³⁷⁰

2.4 Conclusion

This chapter provides for the description of conceptual and theoretical framework on the research problem. As for the conceptual framework about nine terms and one

³⁶⁷Robert (n 45). p. 64.

³⁶⁸Turnier, Conover and Lowery (n 365). p.1295.

³⁶⁹See para 1.8 above.

³⁷⁰Wacks (n 45). p. 310.

concept which are relevant to the problem at hand are described. Such terms are; MHCs, clean water, justiciability, harmonization of legal frameworks, good governance, transparency, public participation, climate change, biodiversity and food security as a concept. Unpacking elements of such terms and a concept applied in this study is relevant as they are contextually described to fit the unfolding discussion in this research.

The unfolding discussion in chapter three to five, reveals that, in order to guarantee MHCs rights to adequate food and clean water such rights have to be justiciable against the state and MNCs when their activities infringe such rights. Globally, states are called to harmonize their laws regulating the manner in which mining rights are regulated to safeguard among other MHCs access to water and adequate food. Among areas for harmonization are inclusive; good governance, public participation, transparency, curbing mining impacts on biodiversity and climate change.

Moreover, this chapter also describes theoretical framework. In this chapter, both legal and non legal theories relevant to the study at hand are identified and described. Such theories are; legal positivism, while resource curse is non-legal theory. This chapter shows the theory despite of the fact that law is as it is provided in statute books, but it has economic considerations behind it. In order to permit an activity under the law therefore, its socio-economic considerations are relevant. Among such considerations are issues related to environment, socio-economic aspects such as gender balance and limiting the administrative discretionary powers. The resource curse theory presents the existence of poverty amidst plenty in most natural resources rich countries. It reveals that poor governance, weak legal and

institutional framework and absence of public participation in decision making among other factors contribute towards such poverty.

The immediate chapter below, unlike this chapter, adopts a critical explanatory approach. It presents international legal and institutional frameworks relevant to safeguard MHCs rights to clean water and adequate food. It partially, provide answer to research question one. It is partial because its focus is on UN level, while the AU frameworks are discussed in chapter four below.

CHAPTER THREE

INTERNATIONAL LEGAL AND INSTITUTIONAL FRAMEWORKS ON

MHCs' RIGHTS TO CLEAN WATER AND FOOD SECURITY

3.1 Introduction

In the previous chapter two, various terms, concepts and theories are described. Such terms and concepts are vital in the due course of presenting data and critical discussion of key principles under research. Unlike the previous chapter which is descriptive, this chapter adopts a critical explanatory approach. In particular, it partly, provides for answers to research question number one above.³⁷¹ Through Human Rights Based Approach, (HRBA) this chapter argues that there are international legal principles and institutions which are relevant to guide states in their efforts to secure MHCs rights to clean water and adequate food. According to the UN, states are required to adopt the rights based approach in planning, implementing, monitoring and evaluating their desired socio-economic development such as large-scale mining.³⁷²

3.2 International Legal Framework on MHCs Rights to Clean Water and Adequate Food

As noted from chapter one in this study the focus of this study is on international frameworks relevant to safeguarding MHCs rights to clean water and adequate food. It also highlights on frameworks relevant to governance of mineral and trans-

³⁷¹ See para 1.4 (2) above.

³⁷² UN, 'Human Rights Based Approach: AA Statement of Common Understanding among UN Agencies' <<https://hrbportal.org/the-human-rights-based-approach-to-development-cooperation-towards-a-common-understanding-among-un-agencies>>.

boundary water resources which are relevant to realisation of the two rights.³⁷³ This part therefore, is dedicated for the discussion of key international principles relevant to safeguard MHCs rights to clean water and adequate food. Discussion of legal measures and or principles are vital owing to the general international obligations imposed among states to guarantee progressive realisation of human rights (inclusive right to food and water) through adoption of relevant legal and administrative measures towards that end.³⁷⁴ Therefore, among key principles to be discussed are; permanent sovereignty over natural resources, common but differentiated responsibility, avoidance of significant harm, reasonable utilisation of natural resources, notification, stakeholders' participation, consultation and negotiation and international cooperation. These principles are provided for under the UN binding and non-binding frameworks and may be relied by MHCs to safeguard their rights to clean water and adequate food.³⁷⁵

The term international law principles refers to the agreed canons by States and evidenced under the treaties and or conventions as binding upon them.³⁷⁶ It also means and includes the decision of the international courts, customs and general principles of the civilized States. International law principles are relevant to determination of rights and duties of States against other States, but also rights and

³⁷³ See para 1.7 above.

³⁷⁴ The Office of the High Commissioner for Human Rights, 'CESR General Comment No. 12 : The Right to Adequate Food (Art. 11) , Adopted at the Twentieth Session of the Committee of Economic, Social and Cultural Rights' (1999). para 14.; FAO, 'Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security' (FAO, 2003). p. 19.; The International Covenant on Economic, Social and Cultural Rights 1966, Art 2 (1).; OHCHR, 'General Comment No. 15: The Right to Water (Art.11 and 12 of the Covenant) Adopted at the Twenty-Ninth Session of the Committee on Economic, Social and Cultural Rights, on 20 January 2003 (Contained in Document E/C.12/2002/11)' (2003). para 17.

³⁷⁵ Convention on Biological Diversity. Signed and ratified by Tanzania on 1992 and 1996 respectively; Convention on the Law of the Non-Navigational Uses of International Water Courses.; Convention to Combat Desertification in those Countries Experiencing Serious Drought and /or Desertification Particularly Africa. Signed and ratified by Tanzania on 14/10/1994 and 19/06/1997 respectively.; Framework Convention on Climate Change. Signed and ratified by Tanzania on 12/06/1992 and 17/04/1996 respectively; UNSC Resolutions; Paris Agreement.

³⁷⁶ The Statute of the International Court of Justice, Art. 38(1) (a-d).

duties of the individuals and multinational corporations. Consequently, they can be relied by a State in arriving at an amicable solution in case of controversy at international level. Similarly, an individual may rely on them to hold his own State accountable, where such a State derogates from them.

However, it is argued that the ICJ statute seems to have adopted a narrow approach in listing sources of international law principles.³⁷⁷ Such an approach seems to limit the potential forum and sources of international law in the modern world. For example, there is a growing influence of unilateral action of states towards international law principles and decisions of both public and private international and or regional organisations like the UN and AU.³⁷⁸ Consequently, the term international law principles applicable in this study does not take the narrow scope of the ICJ. It is rather composed of principles from; the ICJ, UN instruments and decisions of its organs, AU human rights and natural resources regulating instruments, decisions from the African Court on Human and Peoples Rights, African Commission on Human and Peoples Rights (ACHPR), domestic laws, state best practices and comments by the established human rights and natural resources governance institutions.

The definition of international principles and its sources is influenced by the fact that, international principles do not necessarily rely on the origin but also, the

³⁷⁷ Weiss F and Scherzer B '(Existence of) Common or universal principles for resources management (?)' in Bungenberg M and Hobe S, *Permanent Sovereignty over Natural Resources*, (Springer International Publishing, Switzerland 2015), pp 29-60. p. 31.

³⁷⁸ Ibid; Asamoah, O. Y, *The legal significance of declarations of the General Assembly of the United Nations*, (Martinus Nijhoff, The Hague, 1966). p. 48.

process through which it has to take for it to be binding, for example ratification.³⁷⁹

In particular to this part, the focus is aimed at streamlining the discussion around the UN and WB lead initiatives and assess Tanzania's compliance with the same in chapter five this study.

3.2.1 Safeguarding MHCs Right to Adequate Food

The right to adequate food is inferred under Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR 1966). Right to food was at the first time expressed under Article 25 of the Universal Declaration of Human Rights (UDHR 1948). Both two international instruments do not define right to food. In addition, the provision on right to food in both instruments seems to be explaining other rights such as clothing and housing to name but a few. Therefore, resort is to be made to UN Economic and Social Council (UNESCO) General Comments for proper interpretation of this right. Notably, general comments are not legally binding but a representation of the specialized body monitoring the treaty.³⁸⁰ Examples of such specialized bodies are the, Office of the High Commission for Human Right (OHCHR) and the United Nations Economic and Social Council (UNESCO). General Comments are an initial stage to envision the spirit of the rights under international instrument.³⁸¹

According to the UNESCO the right to adequate food entails its availability in the required quantity and quality to meet the nutritional requirements. It has also to be

³⁷⁹ Canadian Water Research Society, 'International Waters and Governance: Reference and Training Manual' (2013), p. 17.

³⁸⁰ Ssenyonjo (n 6). p.166.

³⁸¹ Ibid.; See also para 2.2.9 and 2.2.10 above.

free from harmful substances and must be compatible to the culture of the particular group.³⁸² To ensure food security, UNESCO further requires that food accessibility be sustainable and in a manner that will not compromise other human rights.³⁸³

According to UNESCO food will be said to be adequate if its availability is sustainable.³⁸⁴ Food sustainability links to food security both of which requiring food to be available and accessible both for present and future generation. Notably, food security is determined by other factors inclusive are such as: climate, peoples' culture, ecology of the geographical area, to name but a few.³⁸⁵ Consequently, in order to ensure adequate food, there is a need to preserve, climate, ecology and peoples culture.

According to UNESCO the right to adequate food is founded on its availability, its safety in terms of quality and quantity, and its sustainability.³⁸⁶ However, this part focuses on the ability of the MHCs to engage into sustainable production of their own safe and nutritious food.³⁸⁷ Owing to such a focus, the unfolding discussion is thus limited to UN conventions and initiatives regulating; minerals governance, biodiversity and promotion of human rights.³⁸⁸

³⁸²The Office of the High Commissioner for Human Rights (n 374). para 8.

³⁸³ *ibid.*

³⁸⁴ *ibid.* para 7.

³⁸⁵ *ibid.*

³⁸⁶ *ibid.* para 8.

³⁸⁷ See para 2.2.3 above.

³⁸⁸ Convention Concerning Indigenous and Tribal Populations. This convention is enforce 1959, two years before Tanzania gained her independence and has not been ratified.; Indigenous and Tribal Peoples Convention. 1989. Although this convention is enforced since 1992, Tanzania has not ratified it.; Convention on Biological Diversity. Signed and ratified by Tanzania on 1992 and 1996 respectively; However, other convention such as; Convention to Combat Desertification in those Countries Experiencing Serious Drought and /or Desertification Particularly Africa. Signed and ratified by Tanzania on 14/10/1994 and 19/06/1997 respectively.; other convention such as; Framework Convention on Climate Change. Signed and ratified by Tanzania on 12/06/1992 and 17/04/1996 respectively; UNSC Resolutions; Paris Agreement. may also influence the discussion but not at the core.

3.2.1.1 Permanent Sovereignty over Natural Resources (PSNR)

The PSNR is an international law principle which confers exclusive ownership and control of all the natural resources found within the borders of a particular country.³⁸⁹ The term natural resources may be defined in various ways. Firstly, in general term refers to all aspects of environment (excluding man-made) which are of value for human life.³⁹⁰ Secondly, natural resources are defined as renewable environmental aspects such as; water, forests and non-renewable such as minerals.³⁹¹ Thirdly, they further define natural resources based on their geographical occurrences where three categories may be noted such as; resources within the borders of a particular country, trans-boundary resources shared by two or more countries and collective resources such as the high sea and the outer space.³⁹²

In particular, reference to renewable, finite and trans-boundary resources in the definition is preferred in this thesis owing to the key rights examined in this thesis. Worth noting here is the fact that principles governing such defined resources vary accordingly.³⁹³ Natural resources are also defined to mean wealth which is naturally endowed to a particular country.³⁹⁴ This definition seems too general as it combines all the potential categories of the natural resources into one, which is 'wealth'. In this party of the study the term natural resources, takes the Elena Blanco and Jona Razzaque's approach, with some modification so as to focus on non-renewable

³⁸⁹ General Assembly Resolution Permanent Sovereignty over natural resources 1962.Art.1; International Covenant on Economic, Social and Cultural Rights 1966. Art. 1.1; *Saramaka People v Suriname (Interpretation of the Judgment on Preliminary Objection, Merit, Reparation and Cost)*. para 32 and 37; *Democratic Republic of the Congo vs Uganda* [2005] International Court of Justice 2005/5. para 245.

³⁹⁰ Elena Blanco and Jona Razzaque, *Globalisation and Natural Resources Law: Challenges , Key Issues and Perspectives* (Edward Elgar 2011). p. 65.

³⁹¹ *ibid.* p. 65.

³⁹² *ibid.* p. 87.

³⁹³ *ibid.* p. 87.

³⁹⁴ Economic Commission for Africa, 'African Governance Report V: Natural Resource Governance and Domestic Revenue Mobilization for Structural Transformation' (2018). para 1.2.1.

mineral resource namely rough diamond. The term rough diamond is used to refer to uncut diamond which is commonly mined in rebels strongholds hence related to human rights violation, causing civil unrest targeting overthrow of legitimate governments.³⁹⁵ However, since the study, focuses on mining on land, and that it has impacts on land cover, forest or biodiversity resources will also be highlighted.³⁹⁶

Historically, a number of American, African and Australian communities had experienced colonisation by western countries.³⁹⁷ Foreign occupation in such regions took place in a form of colonies that subjugated peoples, rights to property, culture and their wellbeing under the disguise of such land being vacant.³⁹⁸ Thanks to the ICJ which ruled that territories occupied by tribes with their political socio-cultural institutions may not be regarded as no mans' land, hence retain their sovereignty.³⁹⁹

To liberate them from colonial powers, there was a need to recognise their rights to exist independently through their established political and socio-economic and cultural institutions.⁴⁰⁰ Ability of the state to exist independently and adopt its own policy laws and regulation for their socio-economic, cultural and political sphere is referred to as self-determination. It may be noted that, self-determination traces back to 1945 in the establishment of UN Charter with objectives to maintain global peace and human rights observance.⁴⁰¹ However, in mid 1960s' the self-determination was

³⁹⁵ Kimberly Process Certification Scheme. section 1. ; Economic Commission for Africa, 'Special Report on the : "The ICGLR Regional Initiative against the Illegal Exploitation of Natural Resources (RINR) and Other Certification Mechanisms in the Great Lakes Region: Lessons Learned and Best Practices"' (UNECA 2013).para 4.1.2.

³⁹⁶ See para 1.7 above.

³⁹⁷ Orellana M, 'Indigenous Peoples, Mining and International Law' <https://peacepalacelibrary.nl/ebooks/files/002_orellana_eng.pdf> accessed 26 September 2018.

³⁹⁸ Ibid.

³⁹⁹ *Western Sahara Advisory Opinion*. p.101; B Okere, 'The Western Sahara Case' (2008) 28 *International and Comparative Law Quarterly*. pp. 296-312.

⁴⁰⁰ International Covenant on Economic, Social and Cultural Rights. Art. 1(3).

⁴⁰¹ UN Charter. Art. 73 (b).

recognised as an integral principle not only to enable peoples to freely dispose their natural wealth but also design their political and socio-economic policies for their development.⁴⁰² In recognition of colonial occupied territories, UN member states were called to guarantee independent leading towards self-determination of the peoples in such territories.⁴⁰³

Upon attainment of independence, states were therefore free to regulate access to resources and their exploitation for the well-being of their peoples.⁴⁰⁴ To achieve this, three aspects may be pointed out. Firstly, states should enact laws that will compel MNCs to respect human rights in areas where their activities are taking place.⁴⁰⁵ Secondly, states should enforce such laws to all MNCs violating human rights.⁴⁰⁶ Thirdly, enacted laws should always guarantee states' policy space in case it would wish to enact specific laws to address any human right violation.⁴⁰⁷

Other measures are inclusive; safeguarding land tenure system in rural areas, and guaranteeing women and indigenous peoples' access to land and other resources like water and regulation of climate change [emphasis added].⁴⁰⁸ Generally, such powers exercised by states is referred to as external self-determination.⁴⁰⁹ Contrary however,

⁴⁰² International Covenant on Economic, Social and Cultural Rights. Art. 1 -2.

⁴⁰³ *ibid.* Art.1 (3).

⁴⁰⁴ General Assembly Resolution Permanent Sovereignty over natural resources. para 1.

⁴⁰⁵ UN, 'Guiding Principles on Business and Human Rights' (The Office of the High Commissioner, 2011). para 3.

⁴⁰⁶ *ibid.* para 7.

⁴⁰⁷ *ibid.* para 9.; Ssenyonjo (n 6). p. 24.; UNSC, 'The CESCR General Comment 3. "The Nature of States Parties Obligation (Art.2, Para1): 14/12/90"' (1990). para 3.

⁴⁰⁸ Johannah Bernstein and others, 'Strengthening the Foundational Elements of the Post 2020 Global Biodiversity Framework: A Guide for Negotiators' (IIED) <<http://pubs.iied.org/2023iied>>. p. 6.; ACHPR, 'State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter Relating to Extractive Industries, Human Rights and the Environment' (2017). para 41-42.

⁴⁰⁹ Office of the High Commissioner for Human Rights, 'General Comment No. 12: The Right to Self Determination of Peoples' (1984). para 5-7.; The Charter of Economic Rights and Duties of States 3215th Plenary Meeting 1974. Chapter II Art.2(1).

it is shown that, most natural resources-rich developing states have adopted stabilization clauses in their legal frameworks.⁴¹⁰ Among impacts of such clauses are; inability to enact and enforce laws to safeguard human rights or environmental preservation which are relevant to MHCs right to food.⁴¹¹

In addition, after independence, most states stepped into the shoes of their colonial masters where resources were being exploited with little consultation and benefits to their people.⁴¹² MNCs extraction of natural resources was tainted with human rights and environmental destruction in many parts of the world.⁴¹³ Newly independent States assumed exclusive ownership and control of resources as trustees of their people.⁴¹⁴ Such a mover triggered the desire to attain internal self-determination to safeguard indigenous peoples' land from invasion by the governments and or MNCs through land relocation and resettlement in indigenous territories.⁴¹⁵ Correlation of food insecurity and land tenure security is a global concern.

In particular, to indigenous peoples right to internal self-determination, several global and regional initiatives were put in place since the year 1957 and 1989.⁴¹⁶

⁴¹⁰ Frank Sotonye, 'Stabilization Clauses and Human Rights: The Role of Transparency Initiatives .' in Isabel Feichtner, Ricarda Roesch and Markus Krajewski (eds), *Human Rights in the Extractive Industry: Transparency, participation, Resistance* (Springer Nature 2019). p. 137.

⁴¹¹ *ibid.* p.137.

⁴¹² TT Onifade, 'People-Based Permanent Sovereignty over Natural Resources: Toward Functional Distributive Justice?' [2015] *Human Rights Review*.pp.364-365; Ricardo Pereira and Orla Gough, 'Permanent Sovereignty over Natural Resources in the 21st Century: Natural Resources Governance and the Right to Self Determination of Indigenous Peoples under International Law' (2013) 14 *Melbourne Journal of International Law*. p. 495.; See para 2.2.1 above for the definition of the term indigenous peoples.

⁴¹³ Bonnie Campbell, 'Revisiting the Reform Process of the African Mining Regime' (2010) XXX *Canadian Journal of Development Studies*. pp. 214-215.

⁴¹⁴ Elmarie Schyff, 'Stewardship Doctrine of Public Trust: Has the Eagle of Public Trust Landed on South African Soil?' (2013) 130 *South Africa Law Journal*. p. 372; Schyff, *Property in Minerals and Petroleum* (n 59). pp. 178-179. See also para 1.8 above.

⁴¹⁵ UNGA, 'Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People' (UN General Assembly Resolution 2007) A/62/286. para 47.

⁴¹⁶ See para 3.2.1.7 below for the definition of the term indigenous peoples.; Convention Concerning Indigenous and Tribal Populations.; Indigenous and Tribal Peoples Convention.

Under the UN 1957 initiative in internal self-determination of indigenous peoples through granting them rights to establish their own political and customary governance institutions to propel their own socio-economic, political and cultural developments is provided.⁴¹⁷ However, this initiative has been criticised as less protective to the indigenous peoples owing to inclusion of a provision that allows their assimilation and relocation from their land.⁴¹⁸ Consequently, in the year 1989 another initiative was put in place to mend noted challenges.⁴¹⁹

In Canada for example the Supreme Court once held that, groups of people enjoy both the right to internal and external self-determination.⁴²⁰ Such a move puts forward the need to recognise indigenous people internal self-determination as the cornerstone of the peoples-based permanent sovereignty over natural resources.⁴²¹ As such, many states recognise the principle of self-determination that brought up their existence and international recognition. However, the emphasis is on territorial integrity and prohibit secession, save for Ethiopia which recognises the right to external self-determination.⁴²²

Despite adoption of these initiatives, global report shows that indigenous peoples' wellbeing is under threats due to expansion of large-scale development projects such as mining.⁴²³ It is shown that states are reluctant to domesticate the internal self-

⁴¹⁷ Convention Concerning Indigenous and Tribal Populations. Art. 7 (1-3).

⁴¹⁸ ILO, *Understanding the Indigenous and Tribal Peoples Convention 1989 (No. 169): Hand Book for ILO Tripartite Constituents* (ILO 2013). pp. 4 and 73.

⁴¹⁹ Indigenous and Tribal Peoples Convention. Art.1 (2), 8 and 16 (1-3).

⁴²⁰ *Reference re Secession of Quebec* [1998] Supreme Court of Canada S.C.R. 217, 2. para 222.

⁴²¹ Onifade (n 412). p. 364.

⁴²² Declaration on Principles of International Law Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations 1970. para 1.; Constitution of the Federal Democratic Republic of Ethiopia. preamble and Art. 39 (1).

⁴²³ UNGA (n 415). para 46-47.

determination and even where institutions are provided, yet the practice is that they are most often not used.⁴²⁴ Also, it is cautioned that, reliance on customarily established institutions such as those of indigenous peoples' may jeopardise women rights.⁴²⁵ Consequently, recognising their self-determination, governments should also address weaknesses in the customary systems to empower women say for example in land ownership.⁴²⁶

In particular to women, international community calls for equality of men and women in ownership and access to resources relevant for food production.⁴²⁷ It further requires that respective countries to guarantee in practice the realisation of the equality.⁴²⁸ Special provisions should be devised to ensure gender equality in access to and land ownership.⁴²⁹ Land ownership is relevant to poverty eradication owing to it being one of the major means of production.⁴³⁰ Consequently, in order to eradicate mine induced poverty among MHCs, national laws have to secure peoples' land tenure.

It is argued that, women access to land resonates to food security, and socio-economic empowerment.⁴³¹ Globally, land ownership seems to be more dominated

⁴²⁴ Christina Allard, 'The Rationale for the Duty to Consult Indigenous Peoples: Comparative Reflection Form Nordic and Canadian Legal Contexts' (2018) 9 *Arctic Review on Law and Politics*. p. 39-40; Sam Szoke-Burke and LKaitlin Cordes, 'Mechanism for Consultation and Free-Prior and Informed Consent in the Negotiation of Investment Contracts' (2020) 41 *Northwest Journal of International and Business Law*. p.86.

⁴²⁵ Aparna Polaravapu, 'Reconciling Indigenous and Women's Right to Land in Sub-Saharan Africa' (2013) 93 *Ga. Journal of International and Comparative Law*. pp.130-131.

⁴²⁶ *ibid.* pp.130-131.

⁴²⁷ Convention on the Elimination of all forms of Discrimination Against Women 1979. Art. 2 (b-c).

⁴²⁸ *ibid.* Art. 2 (a).

⁴²⁹ William Rosa (ed), 'Transforming Our World: The 2030 Agenda for Sustainable Development', *A New Era in Global Health* (Springer Publishing Company 2017) <<http://connect.springerpub.com/lookup/doi/10.1891/9780826190123.ap02>> accessed 29 August 2018. Goal 5 para 5(a).

⁴³⁰ *ibid.* Goal 1 para 1.4.

⁴³¹ UN Human Rights Office of the High Commissioner, 'Realising Women's Rights to Land and Other Productive Resources.' (2013) <<https://www.ohchr.org/documents/publications/realizingwomensrightstoland.pdf>>. p. 2.

by men than women. For example according to UN only 1% of women do own land globally.⁴³² Among limiting factors are inclusive; weak legal framework, discriminatory cultures and practices, inadequate enforcement of laws and little awareness of land rights among women.⁴³³ The concern of global gender gap between men and women on aspects of skills, employment opportunities and or positions in the policy making levels, is also noted above as a limiting factor to women empowerment.⁴³⁴

Notably, the PSNR principle which entrust the natural resources to government, creates a trust beneficiary relationship.⁴³⁵ Hence, states are duty bound to act fiducially by preserving peoples' interest in the use of such resources. In cementing this position Schyff is of the view that when resources extraction infringes peoples' interests such as access to clean water, the doctrine of public trust allows any permit related there too to be cancelled. The rationale for cancelling such permits is based on the fact that the state which is the custodian of such resources have the duty to secure peoples' interest and nothing more nothing less.⁴³⁶ Arguably, such a duty though seldom realised fully is inclusive protecting MHCs right to food.

3.2.1.2 Common but Differentiated Responsibilities (CDR)

Climate change is responsible for; increased droughts, wide spread of desertification and loss of biodiversity all of which are relevant to food security.⁴³⁷ To address this

⁴³² *ibid.* p. 3.

⁴³³ PBL Netherlands Environmental Assessment Agency, 'How Sectors Can Contribute to Sustainable Use and Conservation of Biological Diversity' (PBL Netherlands Environmental Assessment Agency 2014) 01448. p. 91; UN Human Rights Office of the High Commissioner (n 431). p. 2.

⁴³⁴ See para 3.2.1.7 above.

⁴³⁵ Schyff, *Property in Minerals and Petroleum* (n 59). pp. 179-186.

⁴³⁶ Elmarie Schyff, 'Who "Owns" the Country's Mineral Resources? The Possible Incorporation of the Public Trust Doctrine through the Mineral and Petroleum Resources Development Act' (2008) 4 J.S.Afr.L. p. 766.

⁴³⁷ See para 1.8 above.; Convention on Biological Diversity. Preamble.

concern states, MNCs and other stakeholders are duty bound to guarantee conservation of biodiversity subject to their capabilities.⁴³⁸ Since most of developing countries generally lack necessary technology, skills and capital the need for preferential arrangements relevant to avail both technology and capital from developed countries is pertinent.⁴³⁹ Consequently, the CDR principle is relevant at identifying the global common concern and allocate different obligation among states and or other stakeholders in conserving the biodiversity against climate variation.

In particular, addressing the global problem of climate change resulting from increasing GHG, the industrialised countries were obliged to commit themselves to reducing GHG emissions since 2008.⁴⁴⁰ Equally, industrialised countries were required to fund developing countries projects relevant to adopt and or mitigate the impacts of climate change which is mainly triggered by their industrial pollution.⁴⁴¹ Since developing countries are not contributory agents to GHG, no targets were set for them to achieve. However, the obligation to reduce GHG emissions may be explained in various approaches. For instance, through carbon market where GHG become a commodity sellable between industrialised countries and those which are not.⁴⁴² Also, GHG may be reduced through adoption of clean technologies such as adoption of solar energy instead of coal, charcoal or fuel energy.⁴⁴³

⁴³⁸ *ibid.* Art. 6.

⁴³⁹ UNGA Resolution, 'Addis Ababa Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda) A/RES/69/313' (2015). para

⁴⁴⁰ Kyoto Protocol to the UN Framework Convention on Climate Change 1997. Art. 3 and 7 (entered in force in 16 February 2005 https://unfccc.int/kyoto_protocol)

⁴⁴¹ *ibid.* Annex I.

⁴⁴² *ibid.* Art. 17.

⁴⁴³ *ibid.* Art. 12.

In addition, states are required to report their determined efforts towards contribution aimed at reducing GHG through carbon sequestration measures such as; technology, afforestation and other potential measures.⁴⁴⁴ The value of the national determined contribution is mainly supportive to projection of the extent to which GHG will be reduced and hence attain the global target of capping the temperature increase not above 1.5 by 2030 and net zero carbon emissions by 2050 through adopted policies laws and or technologies.⁴⁴⁵

Despite such legal obligation and adopted measures it is reportedly that, still the adopted NDCs results into lowering temperature at 2.3 which is higher than the previous target.⁴⁴⁶ It is argued that, despite adoption of the Paris Agreement since 2015, there is a global projection of temperature increase of about 3°C come 2100.⁴⁴⁷ The temperature rise is mainly a result of existence of GHG gap from what was projected and what countries have committed under their national determined contributions.⁴⁴⁸ Consequently, it signifies that despite of the adopted NDCs more need to be done to arrive at the target of 1.5 °C.

Notably, climate related impacts add a burden to developing countries meagre budget to provide for peoples' socio-economic development. In order to support such countries to mitigate such impacts, the CDR provides for commitment to financial support in a bid to invest in adoptive technologies.⁴⁴⁹ Such support may

⁴⁴⁴ Paris Agreement. Art. 4 (2-3).

⁴⁴⁵ Climate Analytics and World Resources Institute, 'Closing the Gap: The Impact of G20 Climate Commitments on Limiting Global Temperature Rise to 1.5°C.' (2021) <www.climateanalytics.org>. pp.17-18.

⁴⁴⁶ *ibid.* pp. 15-16 and 23.

⁴⁴⁷ Vivianne Clement and others, 'Groundswell Part 2: Acting on Internal Climate Migration' (WB 2021). p. 8.

⁴⁴⁸ Climate Analytics and World Resources Institute (n 445). p. 23.

⁴⁴⁹ Convention on Biological Diversity. Art. 16, 20-21.; Paris Agreement. Art. 2 (1)(c), 5(1) and 9.; Convention on Biological Diversity Open ended Working Group, 'The Post-2020 Global Biodiversity Framework: Third Meeting Online, 23 August

transpire through concessional loans, bilateral agreements and or technological transfer.⁴⁵⁰

Globally, it is envisioned that, by the year 2030 the global community must be free from hunger.⁴⁵¹ To achieve this, the need to safeguard seeds, plants and animals biological diversity is inevitable.⁴⁵² In addition, loss of biodiversity was noted to link to land degradation, increasing desertification and climate change.⁴⁵³ Consequently, SDG 15 is relevant to safeguarding MHCs right to food as it calls to curb loss of biodiversity and increasing desertification cause by anthropogenic activities.⁴⁵⁴

In particular to mining, it is noted by the UN that, legal and institutional frameworks guaranteeing private public partnership will guarantee sustainable mining in particular countries.⁴⁵⁵ Consequently, natural resources-rich developing countries are called to enact laws that provide incentives to attract investors on science and technology and guarantee sustainable harnessing of mineral resources.⁴⁵⁶

However, with respect to developed countries commitment to financing climate related strategies and plans, it is shown that, developed countries offer far more little

– 3 September 2021’ (UNEP, 2021) <<https://www.cbd.int/doc/c/abb5/591f/2e46096d3f0330b08ce87a45/wg2020-03-03-en.pdf>> accessed 27 September 2021. para G Target 19 see also para 6 of the Appendix.; Johannesburg Declaration on Sustainable Development 2002. para 67 (a) and 70 (e).

⁴⁵⁰ Convention on Biological Diversity. Art. 20-21.; UN, ‘General Resolution No. 66/288, The Future We Want’ (2012). para 253 and 269.; UNEP, ‘Resolution Adopted by the United Nations Environment Assembly on 15 March 2019’ (n 71). Para5 (d-f).

⁴⁵¹ UN, ‘Transforming Our World : The Agenda 2030 for Sustainable Development A/RES/70/1’ (2012). para 24 and Goal 2 (1).

⁴⁵² *ibid.* Goal 2 (5).

⁴⁵³ UNEP, ‘Thematic Programmes of Work—Progress Reports on Implementation: Biological Diversity of Inland Waters; Marine And Coastal Biological Diversity; Biological Diversity of Dry And Sub Humid Lands; And Agricultural Biological Diversity’ (UNEP 2002). p.12.

⁴⁵⁴ UN, ‘Transforming Our World : The Agenda 2030 for Sustainable Development A/RES/70/1’ (n 451). Goal 15.

⁴⁵⁵ Johannesburg Declaration on Sustainable Development. para 106 (c-d) ; UNEP, ‘Resolution Adopted by the United Nations Environment Assembly on 15 March 2019’ (n 71). para 5(d).

⁴⁵⁶ Stockholm Declaration 1972. principle 18.

compared to what is needed.⁴⁵⁷ For instance it is reportedly that since 201-2018 developing countries have just received only 14 % of the amount expected to have been released by developed countries.⁴⁵⁸ Concerns over insufficient climate adaptation and mitigation funding were also noted in the recent COP 26.⁴⁵⁹ Arguably, strong legal and institutional frameworks for coordination, attraction of science and technology relevant to food production is instrumental in assisting developing countries curb climate change challenges.⁴⁶⁰

3.2.1.3 Avoidance of Harm

It is noted above that mining involves clearing of trees and degrading land through pollution.⁴⁶¹ Such a fact signify the potential and or actual threats of mining towards loss of biodiversity which is above noted as vital in sustaining human life.⁴⁶² Globally, states are called to adopt precautionary principle to avoid irreversible impacts that may arise from anthropogenic activities.⁴⁶³

In particular to large-scale development projects such as mining, there is an obligation to carry out an assessment of potential impacts of the project not just on environment but also socio-economic and climatic aspects.⁴⁶⁴ With respect to the international obligation of MNCs to respects human rights in their extractive

⁴⁵⁷ Anna Schuls, Saonam Wangdi and Gabrielle Swaby, 'LDC Priorities from COP25 to COP26: Unfinished Business and Pandemic Disruption' (IIED, 2021) <<http://pubs.iied.org/20081IIED>>.para 1.3 (4); Climate Analytics and World Resources Institute (n 445). p. 20.

⁴⁵⁸ Climate Analytics and World Resources Institute (n 445). p. 20.

⁴⁵⁹ UN, 'Glasgow Climate Pact' (UN, 2021). para 10.

⁴⁶⁰ UN, 'Nationally Determined Contributions under the Paris Agreement: Synthesis Report by the Secretariat, FCCC/PA/CMA/2021/8' (2021). paras 104-105.; Clement and others (n 447). pp.10-11.

⁴⁶¹ See para 1.8 above.

⁴⁶² See para 2.2.10 above.

⁴⁶³ Convention on Biological Diversity. Art. 3.; Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification Particularly Africa. Art. 5 (c).

⁴⁶⁴ IFC, 'Performance Standard on Environmental and Social Sustainability' (IFC, 2012). Performance standard 1; IFC, 'Guidance Notes: Performance Standards on Environmental and Social Sustainability' (WB, 2021). para 32-35.

activities resonates to the duty to causing no harm in their endeavours.⁴⁶⁵ Secured environment is the source and prime support of human life since it is not only the source of water and energy but also preserves genetic materials of both animal and plants from pollutants.⁴⁶⁶

With respect to value of plants the role of forests in curbing greenhouse gases, reducing natural disasters such as; floods, land-slides, typhoons and storms both of which threatens not only food security but also human life may not be overemphasised.⁴⁶⁷ Also, with respect to biodiversity, it is argued that genetic resources develop through gene inheritance of the plant or animal or organisms from generation to generation.⁴⁶⁸ Variation in the genes represents a biological diversity in species and contributes to the general pool of ecosystem.⁴⁶⁹ Owing to the value of conserved biodiversity in food production, mining stakeholders are called to ensure its conservation.⁴⁷⁰

In addition, biodiversity variation is also argued to be the determinant factor in production as it contributes significantly to how plants or animals may be resistive to pests or harsh climate to name but a few.⁴⁷¹ Consequently, it can be argued that, the weaker the genetic material for agricultural seeds, the greater the chance of being

⁴⁶⁵ Radu Mares, 'Disruption and Institutional Development: Corporate Standards and Practices on Responsible Mining' in Isabel Feichtner, Markus Krajewski and Ricarda Roesch (eds), *Human rights in the extractive industries: Transparency, Participation, Resistance* (Springer Nature 2019), p 411.

⁴⁶⁶ UN Conference on Environment and Development, 'Agenda 21' (1992) 21. para 7.27.

⁴⁶⁷ PB Durst, 'Trees and Forest Contribute to Recovery from the World's Most Powerful Typhoon in the Philippines' 66 *Unasylva: An International Journal of Forestry and Forest Industry*, pp. 12-16; M Wahlstrom, 'The Critical Role of Trees and Forests in Disaster Risk Reduction' (2015) 66 *Unasylva: An International Journal of Forestry and Forest Industry*, p. 5.

⁴⁶⁸ *Ibid.*

⁴⁶⁹ C Guneratne, *Genetic Resources and International Law* (Edward Elgar 2012), p. 5.

⁴⁷⁰ IFC, 'Performance Standard on Environmental and Social Sustainability' (n 464), para 10-11.; UN, 'General Resolution No. 66/288, The Future We Want' (n 450), para 109-111

⁴⁷¹ Guneratne (n 469), p. 8.

affected by the climatic variation. In particular, polluted or ruined ecosystems result into weak genetic materials, which does not only exacerbate food scarcity but also raise concerns on food safety.

In particular, in the United States for example, clearing of land for mining resulted in drought which is reportedly to have endangered the wild bees.⁴⁷² Bees are biologically known for their pollination role in agricultural food crops. Consequently, less bees, results in little pollination; less pollination, results in less harvest which culminates into less food production per hectare. In the same logical analysis, contaminated plants flowers, will contaminate wild bees that extract their nectar. Contamination of wild bees does not only reduce their regenerative effects, which in turn lowers the rate of pollination, but also impacts the quality of the honey they will make out of the extracts from the flowers.

Mining land pollution are also noted in South Africa and Nigeria. According to Luyolo Mkentane the once fertile land for agriculture in Mpumalanga is now subjected to coal mining.⁴⁷³ It is argued that, open pit mining replaces the top fertile soil with gravels which are not agriculture supportive.⁴⁷⁴ Reduction of arable land due to mining results into shortage of food production.⁴⁷⁵ In addition, the case of

⁴⁷²James Cane, 'Meeting Wild Bees' Needs on Western US Rangelands'' (2011) 33 Society for Range Management.; Tom's Murray, Michael Kullmann and Simon Potts, 'Conservation Ecology of Bees: Population, Species and Communities' (2009) 40 *Apidiologie* <www.apidiologie.org>.

⁴⁷³Luyolo Mkentane, 'Mining Threatens Food Security' (2016) <<https://www.iol.co.za/business-report/economy/mining-threatens-food-security-2001271>>. , (accessed 12 December 2019).

⁴⁷⁴ Benchmark Foundation, South African coal mining, Corporate grievance mechanisms, community engagement concerns and Mining impacts, 2014, para 6.8.3; Victor Munnik, 'How Coal Mining in Mpumalanga Threatens Food Security' (November 2016) <<https://www.grainsa.co.za/how-coal-mining-in-mpumalanga-threatens-food-security>>., (accessed 10 December 2019)

⁴⁷⁵ Whitney McFerron and Frank Jomo, 'Cost of Maize Soars' (23 March 2016) <<https://www.iol.co.za/business-report/economy/cost-of-maize-soars-2000738>>., (accessed on 9 December 2019)

SERAC vs Nigeria⁴⁷⁶ mining companies polluted farms in the Niger delta, which was not only source of water but food for Ogoni people is also an indicator of such imbalance.

3.2.1.4 Equitable and Reasonable Utilisation (ERU)

Generally, the principle of equitable and reasonable use of natural resources relates to sustainable use.⁴⁷⁷ Extraction of minerals such as diamonds has a bearing on environmental aspects such as; biodiversity loss, drought and climate variation.⁴⁷⁸ Accordingly, every socio-economic sector (mining inclusive) needs to take into account the need to preserve global biological diversity.⁴⁷⁹

According to WB, large-scale development projects when taken cumulatively may trigger impacts on biological diversity and climate variation.⁴⁸⁰ Hence there is a state and or MNCs duty to regulate their activities not to contribute into loss of biological diversity.⁴⁸¹ Reportedly, the global trend of biological diversity loss is mainly due to variation on land cover.⁴⁸² With respect to climate change, the unsustainable patterns of human interactions nature seems to have boomeranged with potential irreversible devastating impacts such as cyclones and droughts.⁴⁸³

⁴⁷⁶ Social and Economic Rights Action Centre (SERAC) and Another v Nigeria (2001) AHRLR 60 (ACHPR 2001), para 67; Christopher Mbzira, 'Reading the Right to Food into the African Charter on Human and Peoples' Rights: African Regional Developments' (2004) 5 ESR Review. 6; SD Kamga and O Ojoku, 'Reflection on How to Address the Violation of Human Rights by Extractive Industries in Africa: A Comparative Analysis of the Nigeria and South Africa' [2014] PER 612. p. 462.

⁴⁷⁷ Convention on Biological Diversity. Art. 10 (a-b).

⁴⁷⁸ See para 1.8 above.

⁴⁷⁹ Johannesburg Declaration on Sustainable Development. p.92 (para 16); PBL Netherlands Environmental Assessment Agency (n 433). p. 29.

⁴⁸⁰ IFC, 'Performance Standard on Environmental and Social Sustainability' (n 464). GN 31.

⁴⁸¹ *ibid.* Standard 6

⁴⁸² PBL Netherlands Environmental Assessment Agency (n 433). p.43.; Johannesburg Declaration on Sustainable Development. para 44.

⁴⁸³ UN Conference on Environment and Development (n 466) 21. para 4.3 and 7.27 ; Johannesburg Declaration on Sustainable Development. para 11-13.

It is noted that, unless special measures are to be adopted, the loss of biodiversity will be worsened leading to food insecurity among other gross impacts.⁴⁸⁴ Mining is indicated above as contributory factor in land degradation.⁴⁸⁵ Land degradation means loss of land ability to support biological or economical productivity due to among other factors deforestation.⁴⁸⁶ It is argued that regaining the lost biological diversity takes predominantly long time of more than hundred years.⁴⁸⁷

In order to re-assure the global community and in particular MHCs, of food security, and protection against natural calamities the need to sustainably utilise natural resources is imperative.⁴⁸⁸ Also, the need to adopt resilient food production systems and maintaining traditional seeds and breeding is vital in preserving ecosystem and biodiversity which are both relevant to food production.⁴⁸⁹ Mining activities therefore should not grossly impact shared resources such as; forests and water bodies.⁴⁹⁰ States are called to jointly guarantee preservation of the ecosystem through adoption of joint development and conservation plan measures.⁴⁹¹

Moreover, states have set sustainable production and adoption of climate variation mitigation as a target to be achieved by 2030 in order to curb the food insecurity and eradicate hunger around the globe.⁴⁹² It is envisioned that, by 2050 global human

⁴⁸⁴ Convention on Biological Diversity Open ended Working Group (n 449). para 1.

⁴⁸⁵ See para 1.8.

⁴⁸⁶ Convention to Combat Desertification in those Countries Experiencing Serious Drought and /or Desertification Particularly Africa. Art. 1 (f).

⁴⁸⁷ PBL Netherlands Environmental Assessment Agency (n 433). p. 44.

⁴⁸⁸ UN Conference on Environment and Development (n 466) 21. para 4.8 (a-c), 4.10 (a-e) and 4.11; Johannesburg Declaration on Sustainable Development. para 19; Rosa (n 429). Goal 2 para 2.4.

⁴⁸⁹ Rosa (n 429). Goal 2 para 2.4 -2.5.

⁴⁹⁰ Johannesburg Declaration on Sustainable Development. para 67 (a); IFC, 'Performance Standard on Environmental and Social Sustainability' (n 464).Standard 6.

⁴⁹¹ Stockholm Declaration. para 2 and 13; Rio Declaration on Environment and Development 1992. para 3.

⁴⁹² Transforming our world: The 2030 Agenda for Sustainable Development A/RES/70/1 2015. Goal 2 para 2.4.

efforts should have restored all depleted biodiversity so as to guarantee a harmonious life with nature.⁴⁹³ In addition, relevant infrastructure to promote food production, processing, transportation, storage and marketing are vital in order to curb the global food crisis.⁴⁹⁴ Consequently, the principle of sustainable use of natural resource is instrumental in striking a balance between human socio-economic activities and environmental and ecological and biodiversity preservations.⁴⁹⁵

3.2.1.5 Notification

The notification principle obliges states to communicate to other states all planned measures that may adversely impact biodiversity.⁴⁹⁶ The notification apart from providing project technical and specific data, will have to be accompanied by the EIA. In a bid to curb impacts of climate variation, states are required to communicate information concerning legal measures adopted to lower the global warming. Notably, the notification principle seems controversial as it is not among principles under the Stockholm declaration which is the foundation of international environmental regulation. It is argued that absence of such an express provision under the Stockholm Declaration was a result of disagreement among the drafters.⁴⁹⁷

In developing countries perspectives transpiring under the UN Charter on Economic Rights and Duties of States (1974), states are granted rights to freely choose its own

⁴⁹³ Convention on Biological Diversity Open ended Working Group (n 449). para E (9), para G (12) targets 1-2.

⁴⁹⁴ Rosa (n 429). Goal 2 para 2a and 2c.

⁴⁹⁵ Eric Aikins, 'The Relationship between Sustainable Development and Resources Use from Geographic Perspectives' (2014) 38 Natural resources Forum. p. 265.

⁴⁹⁶ Convention on Biological Diversity. Art. 14 (1)(c-d).

⁴⁹⁷ Gunther Handl, 'Declaration of the United Nation Conference on the Human Environment (Stockholm Declaration 1972), and the Rio Declaration on Environment and Development 1992' (United Nations Audiovisual Library of International Law, 2012) <www.un.org/law/avl>. p. 6 para (f).

socio-economic, political and cultural policies, strategies and or plans that will aid it in realising development of her own peoples.⁴⁹⁸ The Charter seems silent on the state's duty to notify other states on her policies and or socio-economic plans. However, after the Stockholm Declaration 1972, numerous non-binding international instruments provide for the notification rule with its special adoption to indigenous peoples.⁴⁹⁹

As such, notification and its accompanying EIA offers a wide room of information sharing between states sharing resources and sets a ground for wider public participation.⁵⁰⁰ As may be noted below, indigenous communities enjoy a unique protection at international level, hence the notification rule is amplified into Free-Prior and Informed Consent (FPIC).⁵⁰¹ Generally, notification rule is also adopted in a number of binding international instruments, with the exception of the FPIC rule which is not yet integrated in the binding instruments yet. According to Handl Gunther, the rule on notification and EIA are currently, considered as part and parcel of international customary principles.⁵⁰²

3.2.1.6 Consultation and Negotiation

As noted from the above discussion, consultation and negotiation is capable of being explained in twofold. Firstly, they are used as tools to engage global parties to the convention in conversation on sustainable use of natural resources. It is argued that,

⁴⁹⁸ The Charter of Economic Rights and Duties of States 3215th Plenary Meeting. Art. 7.

⁴⁹⁹ Rio Declaration on Environment and Development. para 18; Indigenous and Tribal Peoples Convention. Art. 16 (2); Declaration on Rights of Indigenous Peoples 2007. Art. 10.

⁵⁰⁰ UN Conference on Environment and Development (n 466) 21. para 8.4 (f) and 8.5 (b).

⁵⁰¹ See para 3.2.1.6 below.

⁵⁰² Handl (n 497). p.6.

consultation and negotiation may be a tool to widen the scope of convention and or initiative through inviting non-state parties to the convention to ratify and comply with its obligations.⁵⁰³ In particular, adoption of harmonious regulation of natural resources guarantee sustainable development.⁵⁰⁴

Notably, among the indigenous peoples, consultation and negotiation seem to be a principle which is relied to preserve their interest against the development plan from the main government.⁵⁰⁵ In particular, the principle of consultation resonates to the principle of FPIC which is non-binding though.⁵⁰⁶ FPIC is a principle which requires any development plan by the main-stream government on the natural resources located in indigenous peoples' territory, not to take place without their free, prior-informed consent.⁵⁰⁷

According to Sam Szoke-Burke and Keitlin Cordes, consent is free if; firstly, it is given by the relevant organ of their community and not induced by coercion by the government and or private MNCs.⁵⁰⁸ Secondly, it is the consent given after a well-informed consultation of the relevant organs of their community. Corrupt and illicit means of procuring the consent of the indigenous peoples would not amount into freely procured consent. Thirdly, the consent has to be given before the government has approved or permitted the project.

⁵⁰³ Canadian Water Research Society (n 379). p. 55.

⁵⁰⁴ Convention on Biological Diversity. Art. 4 (1).

⁵⁰⁵ Indigenous and Tribal Peoples Convention. Art. 6 (1-2) ; Cathol M Doyle, 'The Evolving Duty to Consult and Obtain Free-Prior and Informed Consent of the Indigenous Peoples for Extractive Projects in the United States and Canada' in Isabel Feichtner, Markus Krejewski and Ricarda Roesch (eds), *Human rights in the extractive industries: Transparency, Participation, Resistance* (Springer Nature 2019). p. 207.

⁵⁰⁶ Tanzania has not ratified the 1957 and 1986 conventions on indigenous peoples.

⁵⁰⁷ Indigenous and Tribal Peoples Convention. Art. 16 (1-2) ; Declaration on Rights of Indigenous Peoples. Art. 10; Organisation of American States, 'American Declaration on the Rights of Indigenous Peoples' (Adopted in the Third Plenary Session, Held on June 15 2016)'.
⁵⁰⁸ Szoke-Burke and Cordes (n 424).

Lastly, consultations and FPIC is not a onetime event but a project life time practice for its survival.⁵⁰⁹ In Kenya for example, the consent procured from indigenous communities elders but not from the relevant tribal institutions was declared as no consent at all.⁵¹⁰ The information has to identify the potential; social, economic, spiritual and cultural impacts of the planned and mitigation measures to be adopted and benefit that will accrual therefore.⁵¹¹ The Endorois community in Kenya for example managed to preserve Lake Bogoria from large-scale development project owing to its sacred nature in their traditions and customs.⁵¹²

In order to guarantee effective communication of these information, data and other complex mining related information have to be reduced into less complex and well understood in their local languages. FPIC principle is deduced from the self-determination principle which grants indigenous peoples a right to; establish, plan and strategize their own socio-economic and political policies and priorities independent of mainstream government.⁵¹³ According to FAO, consultation and negotiation is relied by indigenous communities to negotiate for either restitution to their land after the project is over or getting an alternative land of equal value in quality and quantity to sustain their livelihood.⁵¹⁴

It is argued that, most development plan activities ignore this requirement hence disputes between the indigenous peoples and natural resources developers are

⁵⁰⁹ *ibid.* pp. 40-43.

⁵¹⁰ *Center for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya* [2009].

⁵¹¹ Indigenous and Tribal Peoples Convention. Art. 7 (3).

⁵¹² *Center for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya* (n 510).

⁵¹³ Indigenous and Tribal Peoples Convention. Art. 7(1) ; Declaration on Rights of Indigenous Peoples. Art. 3.

⁵¹⁴ FAO, 'Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security' (FAO, 2012). para 2.5.6.

often.⁵¹⁵ States such as Canada and USA and natural resources developers are cynical to adopt FPIC owing to fear of their plans being vetoed by indigenous peoples.⁵¹⁶ It is also reportedly that even in American region where FIPC is a binding legal principle, state owned extractive companies do not observe such a principle.⁵¹⁷ Among impacts of absence of or inadequate FPIC are inclusive; conflicts and absence of trust between development stakeholders.⁵¹⁸

In Suriname for example, the Saramaka communities managed to object extractive companies whose permit by the main stream government to mine in their locality would have impaired their livelihood.⁵¹⁹ It is shown that, even in states where the FPIC is provided under the law such as; Brazil and Bolivia, still lack of political will and readiness of MNCs do negotiate contracts with indigenous peoples institutions.⁵²⁰

Secondly, consultation and negotiation is used as a platform for settling disputes between parties to the convention because such measures may potentially create tensions among states on potential threats to biodiversity. Consultation and negotiation offers a room to discuss the planned measures from the notifying state hence may be relied to promote sustainable land-use and addressing climate change

⁵¹⁵ ILO (n 418). p. 23.; Szoke-Burke and Cordes (n 424). pp. 85-86.

⁵¹⁶ Doyle (n 505). p. 211.

⁵¹⁷ Ignacio Casas, 'The Corporate Responsibility to Respect Consultation Rights in the Americas: How the Inter-American System Can Better Promote Free, Prior, and Informed Consent .' in Isabel Feichtner, Markus Krajewski and Ricarda Roesch (eds), *Human Rights in the extractive industry: Transparency, participation resistance* (Springer Nature 2019). pp. 2077-278.

⁵¹⁸ Allard (n 424). p. 40.

⁵¹⁹ *Saramaka People v Suriname (Interpretation of the Judgment on Preliminary Objection, Merit, Reparation and Cost)* (n 389). para 29.

⁵²⁰ Almut Schilling-Vacaflor, 'Norm Contestation and (Non-)Compliance: The Right to Prior Consultation and FPIC in the Extractive Industries' in Isabel Feichtner, Ricarda Roesch and Markus Krajewski (eds), *Human Rights in the extractive industry: Transparency, participation resistance* (Springer Nature 2019). pp. 333-334; Columbia Centre on Sustainable Investment, 'Free, Prior and Informed Consent: Addressing Political Realities to Improve Impact' (Columbia Center on Sustainable Investment, 2020). para iv and vi.

impacts.⁵²¹ They are also a tool to amicably settle potential disputes between states with regard to sustainable utilisation of trans-boundary resources say for example forest.⁵²² Given the increased threat of climate change, consultation and negotiation becomes a reliable tool to bring on board the interests and practical experiences of local communities in addressing its impacts.⁵²³ Consultation is also noted as a method of addressing early concerns on large-scale investment activities between states and nationals of another states through the established institutions such as International Centre for Settlement of Investment Disputes under the WB auspices.⁵²⁴

3.2.1.7 Stake-holders' Participation

In order to avoid doubts, the term stakeholders' participation is a synonym of the term public participation.⁵²⁵ According to FAO, examples of stakeholders are inclusive; local, national, regional and international NGOs which are relevant in carrying out monitoring and evaluation, academic and research institutions, organisations of either farmers, forest users, indigenous communities and women.⁵²⁶ With respect to mineral sector, the principle of stakeholders participation through its pillars, is a tool to provide both technical and legal advice to MHCs in their bid to safeguard their right to food.⁵²⁷ Among its pillars are; access to information,

⁵²¹ Convention on Biological Diversity. Art. 27(1) ;UN Conference on Environment and Development (n 466) 21. Para 12.55 (b); Rio Declaration on Environment and Development. para 19.

⁵²² Rio Declaration on Environment and Development. para 26.

⁵²³ Framework Convention on Climate Change. Art. 14 (1).

⁵²⁴ Convention on the Settlement of Investment Disputes between States and Nationals of other States 1966.; See also para 3.3.2.2 below for details.

⁵²⁵ See para 2.2.8 above.

⁵²⁶ FAO, 'Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security' (n 514). para 26.3-26.5.

⁵²⁷ UN, 'General Resolution No. 66/288, The Future We Want' (n 450). para 70;UNGA Resolution (n 439). para 10 ; FAO, 'Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security' (n 514). para 9.10.; See also para 3.2.2.7 below.

environmental awareness, involvement in decision making and access to justice.⁵²⁸

Also, stakeholders are expected to participate in decision making when mining activities are to take place and or as a means to evaluate and monitor the mining impact on their livelihood.⁵²⁹ Consequently, stakeholders participation may be seen as a tool to guarantee accountability on areas such as; revenue, mining impacts on environment and human rights.⁵³⁰ In addition, participation in decision making does not just end with the passing of the decision but also benefiting from the decision itself especially with indigenous peoples.⁵³¹

The duty of the states and natural resources developers such as MNCs to guarantee MHCs mutual benefits has a link to preservation of indigenous communities' livelihood.⁵³² It is argued that, existence of mineral resources rural areas forms the basis of communities' legitimate expectation of their development.⁵³³ However, two major critics may be noted here. Firstly, most resources-rich developing states suffer from inadequate legal and institutional framework to convert the natural resources into socio-economic development of their people.⁵³⁴ Secondly, in practical terms, globally, governments own about two third of all the forests, which gave them power

⁵²⁸ Stockholm Declaration. para 19-20; Indigenous and Tribal Peoples Convention. Art. 7 and 15; Rio Declaration on Environment and Development. para 20; Johannesburg Declaration on Sustainable Development. para 26; Rosa (n 429). para 17.16 and 79; See also para 3.2.1.7.

⁵²⁹ Kimberly Process Certification Scheme. Section VI, para 10 ;EITI, 'The EITI Standards: The Global Standard for the Good Governance of Oil, Gas and Mineral Resources' (2019). para 1.3-1.4 Convention on Biological Diversity. Art. 14 (a).; Convention to Combat Desertification in those Countries Experiencing Serious Drought and /or Desertification Particularly Africa. Art. 3 (a).

⁵³⁰ EITI (n 529). para 1.3.; UNEP, 'Resolution Adopted by the United Nations Environment Assembly on 15 March 2019' (n 71), para 5 (a).

⁵³¹ Indigenous and Tribal Peoples Convention. Art. 15(1-2). ; Convention on Biological Diversity. Art. 15 (7).

⁵³² Indigenous and Tribal Peoples Convention. Art. 2(1) and 7; Declaration on Rights of Indigenous Peoples. Art. 18-19; Rio Declaration on Environment and Development. para 22; Johannesburg Declaration on Sustainable Development. para 25.

⁵³³ SADC, 'Implementation Plan for the Harmonisation of Mining Policies, Standards and Legislative Regulatory Frameworks in Southern Africa, ECA/SA/Tpub/2008/1' (n 79), para 85.

⁵³⁴ UN Commission on Sustainable Development, 'Report on the Nineteenth Session (14th May 2010 and 2-13 May 2011)' (2011) Economic and Social Council E/2011/9. 47.

to use and or allocate it to mining MNCs with minimal participation of other stakeholders such as indigenous peoples.⁵³⁵ The role of forests towards guaranteeing sustainable food production may not be overemphasised here.⁵³⁶

Notably, there seems to lack global consensus of the definition of the term indigenous peoples. This is so despite of the recognition of existence of indigenous peoples and array initiatives to protect them. Owing to such a gap, the term indigenous peoples is rather described in terms of elements that constitute such a group. In order to describe them rightly five perspectives are preferred in this part namely; socio-economic and cultural, political, historical, geographical and manner of their identification.

From socio-economic and cultural perspective indigenous peoples are explained to be vulnerable compared the dominant group in the society.⁵³⁷ They are most often exploited by the dominant group through land dispossession, relocations and cultural prejudices such as assimilation.⁵³⁸ They exhibit a unique culture and socio-economic livelihood dependent to the natural resources they live on, for example forests.⁵³⁹ As such one may discern them from the environment they are found without affecting both their culture and means of livelihood.

Historically, indigenous peoples trace their existence on their land prior to colonisation irrespective of the newly established country frontiers. They continued

⁵³⁵ Itz'a Comey and others, 'Gender-Based Violence and Environment Linkages: The Violence of Inequality' (Jamie Wen ed, International Union for Conservation of Nature, 2020) <<https://doi.org/10.2305/IUCN.CH.2020.03.en>>. p. 38.

⁵³⁶ *ibid.* p. 38.

⁵³⁷ UN Development Group, 'Guidelines on Indigenous Peoples Issues'. para 8-9.

⁵³⁸ *ibid.* para 8-9.

⁵³⁹ UN, 'Guidelines on Stakeholders Engagement in REDD+ Readiness with a Focus on the Participation of Indigenous Peoples and Other Forest Dependent Communities'. para 4.

with their life, culture and economic activities distinct from the colonial and even post-independence era.⁵⁴⁰ In Canada and Australia the term Aborigine is commonly used to refer this situation.⁵⁴¹ They also have a known practice of transmitting their cultural practices and territories to their future generations since long time.

Politically, indigenous peoples are explained to be self-governing through their established political and cultural institutions independent from the dominant group.⁵⁴² Owing to this element, they are not therefore part of the socio-economic and political decision making institutions of the dominant group.⁵⁴³ Such an element seems to be a leeway for the mainstream government to exploit them.

Geographically, indigenous peoples are most often located in rural and remote areas. They live a discrete life from the dominant group dependent on the available geographical resources such as forests, mountains, rivers or lakes. With respect to the mode of their identification, indigenous peoples do identify themselves from the rest of the groups.⁵⁴⁴ Their culture such as; language, religion ways of life and socio-economic activities distinguishes them from the rest of other groups. It is therefore, not the duty of the country they are in to identify them, but themselves.

With regard to women as part of the stakeholders, there is a call to guarantee their participation in decision making organs at international levels.⁵⁴⁵ In the first place,

⁵⁴⁰ Indigenous and Tribal Peoples Convention. Art. 1 ; World Bank, 'Operation Manual –OP. 4.10 Indigenous Peoples' (2013). para 2-4.; UN Development Group (n 537). para 8-9.

⁵⁴¹ Canadian Constitutional Act 1982. Art. 35.; Canadian Charter of Rights and Freedoms. s. 25.

⁵⁴² Declaration on Rights of Indigenous Peoples. para 3.

⁵⁴³ World Bank (n 540). para 2-4.

⁵⁴⁴ Declaration on Rights of Indigenous Peoples. para 33 (1).

⁵⁴⁵ Beijing Declaration and Platform for Action 1995. para 13-15; Rio Declaration on Environment and Development. para 20; Johannesburg Declaration on Sustainable Development. para 20. ;FAO, 'Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security' (n 514). para 26.5.

women are depicted as bread earners in developing countries as they are responsible for small-scale subsistence farming, fruits gathering and food preparation.⁵⁴⁶ In Sudan for example, women access to forests offered a chance to feed their livestock, collect forest fruits for their subsistence and small-scale business. Upon occupation of the forests by the rebels they experienced economic hardship and extreme food shortage.⁵⁴⁷ In the second place, it is shown that, women associations are relevant to promoting women rights and interests through advocating law reform to that effect.⁵⁴⁸ Unless there are special provisions requiring inclusion of women in mining sector, the practice indicates that they are marginally involved in cooking and cleaning activities in the mining which are low paying jobs.⁵⁴⁹

Moreover, in a bid to regulate MNCs operations and remedy their potential violation of human rights, states are required to guarantee MNCs access to justice.⁵⁵⁰ One among means to guarantee access to justice is establishment of quasi and or judicial organs to handle potential disputes between MNCs and MNCs.⁵⁵¹ It is noted under the WB framework that, such organs may either be enshrined in three different approaches namely, the host state, home state and MNCs framework.⁵⁵² However, where MNCs are not satisfied by the decision of the MNC remedy framework they should have access to established state administrative and or judicial remedial

⁵⁴⁶ Comey and others (n 535). pp. 33-35.

⁵⁴⁷ A Thulstrup and W Henry, 'Effects of the Current Crisis and War in Sudan on Access to Forest Foods in Greater Akobo' (2015) 66 *Unasylva: An International Journal of Forestry and Forest Industry*. p. 61.

⁵⁴⁸ Beijing Declaration and Platform for Action. para 26.; See also para 2.3.3.1 (b) (i) for details on women influence on legal reform.

⁵⁴⁹ Women's International League for Peace and Freedom, 'Creating an International Gender and Peace Agenda: Impact of Canadian Mines in Latin America-Extraterritorial Obligations of Canada Shadow Report to CEDAW' (Women's International League for Peace and Freedom 2016). para 4.2.

⁵⁵⁰ UN, 'Guiding Principles on Business and Human Rights' (n 405). para 25.; UN, 'General Resolution No. 66/288, The Future We Want' (n 450). Para 288; Transforming our world: The 2030 Agenda for Sustainable Development A/RES/70/1. para 35.

⁵⁵¹ UN, 'Guiding Principles on Business and Human Rights' (n 405). para 25.

⁵⁵² IFC, 'Performance Standard on Environmental and Social Sustainability' (n 464). para 35

frameworks.⁵⁵³

It is shown that, Canada has established the Canadian Ombudsman for Responsible Enterprise (CORE).⁵⁵⁴ Among objectives of this organ are; to guarantee transparency on state linkages to MNCs in extractive sector abroad and to offer remedy in case of injustices in extractive sector.⁵⁵⁵ Such organs are vital in holding MNCs and the state accountable wherever their rights are breached.

3.2.1.8 International Cooperation

International cooperation in mineral sector may be discussed in various ways. This part focus on international trade of rough diamond and transparency as a means to abate human rights violation and guaranteeing good governance in the sector.⁵⁵⁶ With respect to international regulation of trade in rough diamonds and realisation of MNCs human rights, the UN Charter 1945 (the charter) is categorical on the need of its member states to cooperate.⁵⁵⁷ Notably, the charter does not specifically protect the right to water and or food but provides for a guarantee of safeguarding human rights globally.⁵⁵⁸ The decision of the UNSC, binds all its member states and agencies.⁵⁵⁹ With respect to mining and human rights promotion, the UNSC has issued a number of decisions aiming at abating human rights violation through international trade in minerals mined in violation of human rights. For example the UNSC decisions on regulation of trade in rough diamond that fuel civil unrest in

⁵⁵³ IFC, 'Guidance Notes: Performance Standards on Environmental and Social Sustainability' (n 464).GN 44.

⁵⁵⁴ Charis Kamphuis, 'Building the Case for a Home-State Grievance Mechanism: Law Reform Strategies in the Canadian Resource Justice Movement' in Isabel Feichtner, Ricarda Roesch and Markus Krajewski (eds), *Human Rights in the Extractive Industry: Transparency, participation, Resistance* (Springer Nature 2019). pp.504-506

⁵⁵⁵ *ibid.* pp.504-506

⁵⁵⁶ See para 2.2.7 above.; Rosa (n 429) 202. para 16.6.

⁵⁵⁷ UN Charter. Art. 1 (3).

⁵⁵⁸ *ibid.* Art. 1(1-3).

⁵⁵⁹ *ibid.* Art. 2(5).

some countries such as; Sierra Leone, Angola, Liberia and DRC Congo.⁵⁶⁰

Notably, the efforts to delink trade in rough diamonds from fuelling human rights in areas where they are mined was initiated through a non-binding initiatives.⁵⁶¹ At the UN level, for example, states are called to adopt uniform mineral certification process that could be relied to limit illegal trade of rough diamond which fuels civil unrest and human rights violation in a number of developing countries where they are mined.⁵⁶² It is also shown that, unregulated trade in rough diamonds is used to finance global terrorist activities.⁵⁶³ For example, under the KPC certification process, it is prohibited to import and or export rough diamond to countries which are not member states.⁵⁶⁴

KPCs also calls for adoption of legal framework which is deterrent enough to prevent mining companies and individuals from circumventing the legal provision and or forging certification processes.⁵⁶⁵ This call resonates to the above discussed call by the UN upon countries to adopt stringent and deterrent penalties against illicit exploitation of natural resources minerals inclusive. Limiting market access to uncertified minerals such as diamonds, on one hand weakens the rebels' activities leading to human rights violations. In addition, regulation of rough diamond trade

⁵⁶⁰ Resolution 1521 (2003) adopted by the security council at its 4890 meeting in 22 December 2003 2003.; Resolution 1579 (2004) adopted by the security council at its 5105 meeting in 21 December 2004 2004.

⁵⁶¹ Interlaken Declaration on Kimberly Process Certification Scheme for Rough Diamond.

⁵⁶² The role of diamonds in fueling conflict: breaking the link between the illicit transaction of rough diamonds and armed conflict as a contribution to prevention and settlement of conflicts 2001 (A/RES/55/56). para 3, 5 and 6; The role of diamonds in fueling conflict: breaking the link between the illicit transaction of rough diamonds and armed conflict as a contribution to prevention and settlement of conflicts 2003 (A/RES/57/302). para 3.; The role of diamonds in fueling conflict: breaking the link between the illicit transaction of rough diamonds and armed conflict as a contribution to prevention and settlement of conflicts 2007 (A/RE/62/L16). para 1,2 and 12.

⁵⁶³ Philippe Billon, *Fatal Transactions: Conflict Diamonds and (Anti) Terrorist Consumer* (Blackwell Publishing 2006). p. 787.

⁵⁶⁴ Interlaken Declaration on Kimberly Process Certification Scheme for Rough Diamond. para.; Kimberly Process Certification Scheme. Section III para (c).

⁵⁶⁵ Kimberly Process Certification Scheme. Section IV para (d).

improves the ability of mineral resources producing countries to control revenue from trade in minerals and ability to provide for socio-economic services such as; food and clean water to its population. In order to achieve this, cooperation among the participants into the KPC is called for in a number of areas inclusive; compilation and exchange of data related to compliance trend, experience and or best practices and enforcement measures.⁵⁶⁶

It is however, argued that, despite its effectiveness in limiting the role of conflict minerals in civil unrest and human rights violation, it is still a voluntary scheme that cannot be enforced against non-state parties.⁵⁶⁷ In addition, it is argued that the coining definition of conflict diamond to rebels as applied in the KPC seems bias as it ignores human rights violations perpetrated by the government force against legitimate groups desirous of change and democracy.⁵⁶⁸ This was the case in Zimbabwe where government forces were alleged to have contributed to violation of human rights, killing a number of miners in the Marange diamond fields, yet diamonds mined were certified and traded.⁵⁶⁹ This factual situation may be disused in two folds. Firtsly, it is worth noting that, human rights however, plenty they might be seen, are generally taken to be “*indivisible, interdependent and interrelated.*”⁵⁷⁰ According to Pricilla Neve-Silva *et al*, for example, violation of the right to water and sanitation for example seems to impede other rights such as health and

⁵⁶⁶ *ibid.* Section V para (b), (c), (g).

⁵⁶⁷ Zuzana Silna and Zuzana Kittova, ‘International Trade in Conflict Minerals: Solutions for the EU Regulatory Framework’ (2014) 7 *Studia commercialia Bratislavensia*. p. 628.

⁵⁶⁸ Andrew Winetroub, ‘A Diamond Scheme Is Forever Lost: The Kimberly Process’s Deteriorating Tripartite Structure and Its Consequences for the Scheme’s Survival’ (2013) 5 *Indiana Journal of Global Legal Studies*. p. 1432.

⁵⁶⁹ Alan Martin and Bernard Taylor, ‘Reap What You Sow: Greed and Corruption in Zimbabwe’s Marange Diamond Fields’ (Partnership African Canada, 2012) <www.pacweb.org>; Winetroub (n 568). p.1444.

⁵⁷⁰ The WSSD Copenhagen Declaration on Social Development A/CONF.166/9 of 14th March 1995, Commitment 1 para (g).; FAO, ‘Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security’ (n 374). para 1.2.; OHCHR and FAO, ‘The Right to Adequate Food: Facts Sheet No. 34’. p. 5.

education.⁵⁷¹

Secondly, according to Danniell Jong, UN sanctions approach as applied above are only valid when the target is a third party say for example rebels.⁵⁷² She argues that states may adopt the certification schemes such KPCS. She further raise a caution that, sanctions imposed to states tend to have detrimental impacts to population, whose interest the UN ought to protect.⁵⁷³ However, upon alarm raised by the civil societies Zimbabwe was investigated and her diamond was banned from the year 2009-2011.⁵⁷⁴

Moreover, international cooperation is also called for, as a means to curb corrupt practices among the public officials and or MNCs. UN requires cooperation among states in order to be able to trace the chain of corrupt practices hence freeze and or return the illicitly taken resources to respective countries.⁵⁷⁵ Earlier it was noted that, despite the good intention of the UNSC, such a measure seem to focus only on the right to peace and abating human rights violation. However, it seems silence on climate change impacts which ruins MHCs access to clean water and adequate food, the subject of this study.⁵⁷⁶

In order to maximise revenue from mining sector and halt all potentials of illicit financial flows states are called to guarantee transparency in the sector.⁵⁷⁷ To achieve transparency and therefore guarantee good natural resources governance, the World

⁵⁷¹ Pricila Neve-Silva, Giselle Martins and Leo Heller, 'Human Rights Interdependence and Indivisibility: A Glance over the Human Right to Water and Sanitation' (2019) 19 BMC International Health and Human Rights. pp. 4-5.

⁵⁷² Daniella Jong, 'Who Is Targeted by the Council's Sanctions? The UN Security Council and the Principle of Proportionality' (2020) 89 Nordic Journal of International Law. p. 397.

⁵⁷³ *ibid.* p. 397.

⁵⁷⁴ Martin and Taylor (n 569).

⁵⁷⁵ United Nations Convention Against Corruption. preamble vide Art. 3(1) and 51.

⁵⁷⁶ See para 1.8 above

⁵⁷⁷ Johannesburg Declaration on Sustainable Development. para 46 (a).

Bank (WB) provided for social and environmental standards that has to be complied with in all large-scale development plans. Among aspects that have to be disclosed are inclusive; nature and scope of the planned project, potential impacts of the project to local communities and means to mitigate them among other.⁵⁷⁸ In addition, it also allows member states to register to any other certification schemes that will offer extra safeguards and guarantee broad-based socio-economic empowerment to MHCs.⁵⁷⁹

Among available schemes relevant to governance in mineral sector are; EITI and KPSC. The KPCs framework is already discussed above. The WB noted the objectives of the EITI as a scheme that would increase accountability and hence guarantee sustainable harnessing of natural resources. It thus has been working to support states to become compliant to the EITI requirements. Initially, the WB through the Multi-Donor Trust Fund (MDTF) since 2004 has helped a number of states. In 2016 the WB changed the MDTF into Extractive Global Programmatic Support (EGPS) but the objective remains the same.⁵⁸⁰ It is reportedly that a number of countries benefited from the WB fund to become EITI compliant. Among them are Armenia, Zambia, Zimbabwe, Peru, Papua New Guinea, Ecuador, Dominican Republic, to name but a few.⁵⁸¹

In particular the recent UN resolution recognises the value of EITI and recommend state members to adopted the Extractive Industries Transparency Initiative (EITI) in

⁵⁷⁸ IFC, 'Performance Standard on Environmental and Social Sustainability' (n 464). para 29.

⁵⁷⁹ *ibid.* para 3 and 6.

⁵⁸⁰ WB, 'Extractives Global Programmatic Support[EGPS]: Annual Report' (WB 2020). p.10

⁵⁸¹ *ibid.* pp. 72-98.

their domestic frameworks.⁵⁸² Notably, the EITI traces back to the year 2002 from the private arrangement campaigning for transparency in extractive sector calling companies to publish all revenue they pay to governments.⁵⁸³ Among areas which EITI calls for transparency are; laws, licensing, mining contracts, revenue paid, revenue allocation and its impact on socio-economic livelihood. A such these requirements are coined as key principles that guide the EITI.⁵⁸⁴

Indeed, access to information about, mining laws, licencing, mining contracts and revenue is expected to spur both corporate and government accountability as noted above.⁵⁸⁵ It is also a tool to curb potentials of corrupt practices and maximise mineral revenue to governments and MHCs.⁵⁸⁶ It is argued that, most natural resources-rich developing countries have failed to benefit from such resources due to governance issues such as transparency and accountability.⁵⁸⁷ Transparency is explained to be the cornerstone upon which mineral sector contribution to sustainable development may be measured.⁵⁸⁸ Notably, in a bid to show case that EITI is evolving, the recent amended EITI rules requires mining companies and states to disclose information relating not only on revenue but also on; gender, environment and minerals traded.⁵⁸⁹

⁵⁸² UNEP, 'Resolution Adopted by the United Nations Environment Assembly on 15 March 2019' (n 71). para 5 (b).

⁵⁸³ Shari Bryan and Barrie Hofmann, 'Transparency and Accountability in Africa's Extractive Industries: The Role of the Legislature' (National Democratic Institute for International Affairs (NDI) 2007). p. 14.; Heidi Feldt, 'The Extractive Industries Transparency Initiative (EITI) as a Human Rights Instrument: Potentials and Shortcomings' in Isabel Feichtner, Markus Krajewski and Ricarda Roesch (eds), *Human rights in the extractive industries: Transparency, Participation, Resistance* (Springer Nature 2019). p.13. ; Columbia Centre on Sustainable Investment, 'Transparency for Whom? Grounding Land Investment Transparency in the Needs of Local Actors' (Columbia Centre on Sustainable Investment 2020). p.26.

⁵⁸⁴ EITI (n 529), p. 6.

⁵⁸⁵ See para 2.2.6 above.

⁵⁸⁶ United Nations Convention Against Corruption. Art. 15-16.

⁵⁸⁷ Hany Besada, Franklyn Lisk and Phillip Martin, 'Regulating Extraction in Africa: Towards a Framework for Accountability in the Global South' (2015) 2 *Governance Africa*. pp. 9-10.

⁵⁸⁸ *ibid.* p.10.

⁵⁸⁹ EITI (n 529). para 6.3 and 6.4; Feldt (n 583). p. 25

Currently, the EITI member states are numbered at 55.⁵⁹⁰ Consequently, substantial information regarding mining license, revenue and its allocation from the EITI member states are provided.

Despite the wide coverage of the EITI since its inception to date, it is argued that, there is no proof EITI impacts on local community broad-based empowerment and reduction of poverty.⁵⁹¹ It is, for example not clear how such stakeholders deal with the information they get from the EITI framework.⁵⁹² It is also shown that, at times mining companies and governments exerts serious pressure on communities, and or experts when they want to invest in mineral sector even at the detriment of environment and or human rights.⁵⁹³ Despite the revised principles which now involves gender and environmental issues, it is noted that extractive sector is not required to report on climate change impacts such as GHG emissions in their transparency scheme.⁵⁹⁴ Such concerns cast shadow on the EITI member states and its validity in achieving global transparency and limiting the extractive sector impacts on climate change that considerably affects human rights.

Notably, such challenges may be argued in threefold. Firstly, with respect to transparency and the use of deterrent sanctions there seems to be inadequate compliance to international legal framework especially on freezing and confiscation

⁵⁹⁰ EITI, 'Global Facts Sheet' (2020).

⁵⁹¹ Emma Wilson and James Alstain, 'Localising Transparency: Exploring EITI's Contribution to Sustainable Development' (IIED, 2014). p. 48.

⁵⁹² *ibid.* p. 48. ; Columbia Centre on Sustainable Investment (n 583). p. 25.

⁵⁹³ Columbia Centre on Sustainable Investment (n 583). p.25.

⁵⁹⁴ UNEP, 'Sustainability Reporting in the Mining Sector: Current Status and Future Trends' (UNEP 2020). p.94.

of assets potentially acquired through illicit enrichment.⁵⁹⁵ It is argued that weak legal framework which allows tax avoidance by MNCs, signals weakness in the state ability to exercise her rights under the PSNR principle.⁵⁹⁶ It also limits states ability to fulfil her international obligation to realise human rights progressively. With respect to MNCs, tax avoidance signals breach of the duty to respect human rights beyond their borders.⁵⁹⁷

Secondly, with respect to climate change as a result of increased anthropogenic activities is not a national issue but a global concern. In essence, climate change is not restricted in terms of specific country frontiers. Its magnitude increases when unregulated anthropogenic activities are carried in shared water bodies like lakes and or rivers. Consequently, international cooperation among stakeholders may not be ignored.⁵⁹⁸ International framework enshrines the principle of international cooperation in diverse perspectives. International cooperation with respect to climate change takes various perspectives. Among such perspectives relates to; environmental and ecological conservation,⁵⁹⁹ preservation of traditional livelihood of and empowerment of indigenous peoples divided by international frontiers,⁶⁰⁰ as a tool to promote financial and technological assistance⁶⁰¹ and a tool to guarantee

⁵⁹⁵ Geogios Parlidis, 'The Troubling Shortcomings of International Asset Freezes: The Hunt of Gaddafis' Lost Billions' (2021) 29 *African Journal of International and Comparative Law*. p. 651.

⁵⁹⁶ Wasima Khan, 'Improving Tax Strategy Transparency in Extractive Industries Sector for the Achievement of Human Rights' in Isabel Feichtner, Markus Krajewski and Ricarda Roesch (eds), *Human rights in the extractive industries: Transparency, Participation, Resistance* (Springer Nature 2019). p. 162.

⁵⁹⁷ *ibid.* p. 162.

⁵⁹⁸ Convention on Biological Diversity. Art. 5, 13 (b).

⁵⁹⁹ Stockholm Declaration. para 22; Rio Declaration on Environment and Development. para 27; Johannesburg Declaration on Sustainable Development. para 23.; The Charter of Economic Rights and Duties of States 3215th Plenary Meeting. Art. 3.

⁶⁰⁰ Indigenous and Tribal Peoples Convention. Art. 32; Declaration on Rights of Indigenous Peoples. Art. 36 (1-2).

⁶⁰¹ Declaration on Rights of Indigenous Peoples. Art. 39; Kimberly Process Certification Scheme. Section v (a-g); The Charter of Economic Rights and Duties of States 3215th Plenary Meeting. Art. 9.; UN, 'General Resolution No. 66/288, The Future We Want' (n 450). Goal 2 para 2(a); Goal 7 para 7(a).

governance in the international trade in conflict related minerals.⁶⁰²

Thirdly, EITI initiative may not be a stand-alone attempt to enable natural resources-rich states to convert them into socio-economic development. Heidi Feldt argues that, EITI aims at transparency, but transparency is not the end itself.⁶⁰³ Other measures such as; adoption of democratic principles, freedom of speech and assembly are vital in attaining meaningful resources governance.⁶⁰⁴

3.2.2 Safeguarding MHCs Right to Clean Water

The right to water is recognised under a number of international conventions.⁶⁰⁵ According to OHCHR the right to water is founded on the importance in preserving life from dehydration and allows one to enjoy other human rights.⁶⁰⁶ Globally, water is required for personal and for domestic use in all families.⁶⁰⁷

According to UNESCO the right to water by its nature and scope is composed of; freedom from arbitrary disconnection or prevention from accessing the water supply and the protection of water from harmful contamination.⁶⁰⁸ In addition the right to water entitles everyone to adequate water for personal and or home use as a means of preserving human dignity.⁶⁰⁹ Regarding adequacy of water, the WHO recommends a range from fifty (50) to a hundred (100) litres per person per day as essential

⁶⁰² Kimberly Process Certification Scheme. Section v (a-g).

⁶⁰³ Feldt (n 583). p. 25.

⁶⁰⁴ *ibid.* p.25

⁶⁰⁵ International Covenant on Economic, Social and Cultural Rights. Art. 11-12; Convention on the Elimination of all forms of Discrimination Against Women. Art. 14 (2)(h); Convention on the Rights of the Child 1989. Art. 24 (2).

⁶⁰⁶ The Office of the High Commissioner for Human Rights, 'General Comment No. 15: The Right to Water (Art. 11 and 12 of the Covenant) Adopted at the Twenty-Ninth Session of the Committee on Economic Social and Cultural Rights' (2003). para 2; Resolution on Human right to water and sanitation A/RES/64/292 2010. 1 para 1.

⁶⁰⁷ The Office of the High Commissioner for Human Rights (n 606). para 2.

⁶⁰⁸ *ibid.* para 10.

⁶⁰⁹ *ibid.* para 11.

requirement for everyone's life.⁶¹⁰ While the WHO recommends on the volume aspects, it is also required that social cultural aspects of water be adhered to as well.⁶¹¹

With respect to social and cultural aspects refer to consideration of the water service to meet the diverse gender sensitive needs and adhere to culturally standards of a particular community.⁶¹² Notably, the UNESCO provides for three key elements with respect to right to water which are; water must be available, water must be of quality and that water has to be accessible.⁶¹³ For example, it is estimated that, for water to be said to be physically accessible, it should with the range of one kilometre from home or the estimated time for fetching water should not exceed 30 minutes.⁶¹⁴

In particular, this part focuses on safeguarding MHCs right to clean water. In particular it reviews above named international human rights instruments as they are relevant to right to clean water in the first place. In the second place, it also review laws regulating internationally shared water resources which are relied as sources of water globally.⁶¹⁵ However, since anthropogenic activities such as mining may contribute towards ecological and climate change, international climate change frameworks will also be highlighted.⁶¹⁶ Also, basing on the literature review showing the impacts of mining on water quality and quantity, this part focuses on water

⁶¹⁰ UN www.un.org/waterforlifedecade/.../human_right_to_water_and_sanitation_media_

⁶¹¹The Office of the High Commissioner for Human Rights (n 606). para 11.

⁶¹² WHO Human right to water and sanitation: Media brief.

⁶¹³ The Office of the High Commissioner for Human Rights (n 606). para 11.

⁶¹⁴ Eight facts and figures human right to water.

⁶¹⁵ See para 1.7 above.; Convention on the Law of the Non-Navigational Uses of International Water Courses.; General Assembly Resolution 63/124 the Law of Trans-boundary Aquifer A/RES/63/124 2009.

⁶¹⁶Convention on the Law of the Non-Navigational Uses of International Water Courses.;Convention on Biological Diversity. ; Convention to Combat Desertification in those Countries Experiencing Serious Drought and /or Desertification Particularly Africa. Signed and ratified by Tanzania on 14/10/1994 and 19/06/1997 respectively.; Framework Convention on Climate Change. Signed and ratified by Tanzania on 12/06/1992 and 17/04/1996 respectively; UNSC Resolutions; Paris Agreement.

quality.⁶¹⁷ Consequently, the UN trans-boundary water resources framework is critically discussed with support from UN framework on natural resources governance.⁶¹⁸

3.2.2.1 Permanent Sovereignty over Natural Resources (PSNR)

The principle of PSNR is discussed above with the focus on non-renewable mineral resources.⁶¹⁹ In this part however, the focus is on renewable resources namely water. Internationally, the PSNR principle is regarded as the cornerstone upon which rights and duties of states may be determined.⁶²⁰ It is upon this principle where states boundaries which existed during their independence remain unchanged.⁶²¹ Consequently, water resources that transcend beyond frontiers of a state has to be regulated under international law.⁶²²

In particular, the UNWC does not categorically provide for state sovereignty over part of the internationally shared waters in her boundary. However, the ICESCR 1966 provides expressly not only of the PSNR but also both the external and internal self-determination.⁶²³ PSNR is also provided a principle to regulate transboundary aquifers.⁶²⁴ Recognition of state sovereignty over part of transboundary water resources grant states mandate to enact laws relevant to access, use, manage and

⁶¹⁷ See para 1.8 above.

⁶¹⁸Convention on the Law of the Non-Navigational Uses of International Water Courses.; Convention on Biological Diversity. Signed and ratified by Tanzania on 1992 and 1996 respectively; Convention to Combat Desertification in those Countries Experiencing Serious Drought and /or Desertification Particularly Africa. Signed and ratified by Tanzania on 14/10/1994 and 19/06/1997 respectively.; Framework Convention on Climate Change. Signed and ratified by Tanzania on 12/06/1992 and 17/04/1996 respectively; UNSC Resolutions; Paris Agreement.

⁶¹⁹International Covenant on Economic, Social and Cultural Rights. Art. 1.1.

⁶²⁰ Alistair Rieu-Clarke and Bjorn-Oliver Magsig, *UN Watercourse Convention: User's Guide* (IHP-HELP Centre for Water Law 2012), para 8.1.2.

⁶²¹ *ibid.* para 8.1.2.

⁶²² International Covenant on Economic, Social and Cultural Rights. Art. 1.2; General Assembly Resolution Permanent Sovereignty over natural resources. para 2.; Convention on the Law of the Non-Navigational Uses of International Water Courses. Art. 8 (1).; General Assembly Resolution 63/124 the Law of Trans-boundary Aquifer A/RES/63/124. Art. 7(1).

⁶²³ International Covenant on Economic, Social and Cultural Rights. Art. 1 (1-2).

⁶²⁴General Assembly Resolution 63/124 the Law of Trans-boundary Aquifer A/RES/63/124. Art. 3.

conservation of such waters. Such a mandate arises out of the state right to adopt, socio-economic, political and cultural policies, plans, strategies and laws relevant to attain development of her peoples.⁶²⁵

In particular, to the right to clean water, the UNWC seems to provide for such a right in an implied manner. It requires riparian states to guarantee priority to water for human needs when there seem to be other competing factors.⁶²⁶ MHCs are indicated to be prone to water competition when waters are polluted by mining activities in many parts of the world and Africa in particular.⁶²⁷ It is noted above that the right to water is measured in terms of its quality, physical accessibility, affordability and minimum quantity among others.⁶²⁸ The UNWC however, covers aspects such as, drinking water and food preparation, aspects such as sanitation seems not provided for.⁶²⁹ Irrespective of the notable difference, still the UNWC sets a ground upon which riparian states have to enact laws to guarantee peoples' right to clean water.

Despite such a provision on water for human needs, the UNWC has been criticised to have ignored subnational groups like indigenous peoples.⁶³⁰ Arguably, if the UNWC is to be interpreted broadly, the same obligation member states to priorities water relevant to sustain human needs may be inferred to include vulnerable groups such as indigenous communities and women. It is argued that, recognition of sub-

⁶²⁵ The Charter of Economic Rights and Duties of States 3215th Plenary Meeting.

⁶²⁶ Convention on the Law of the Non-Navigational Uses of International Water Courses. Art. ; World Summit on Sustainable Development, 'Plan of Implementation of the World Summit on Sustainable Development' (2002). para 25 (c).

⁶²⁷ See para 1.8 above.

⁶²⁸ See para 3.2.2 above

⁶²⁹ Rieu-Clarke and Magsig (n 620). para10.1.2.

⁶³⁰ Jenifer Archer, 'Transcending Sovereignty: Locating Indigenous Peoples in Transboundary Water Law' (Thesis Submitted in partial fulfilment of the requirement for the degree of Masters of Laws, The University of British Columbia 2012). pp.166-167.

national sovereignty in international regulation of trans-boundary water resources guarantee safeguards to communities who are socio-economically, and culturally dependent on such waters.⁶³¹ A similar view is also raised as a means to sustainably safeguard indigenous communities interest in all resources extraction activities.⁶³²

3.2.2.2 Common but Differentiated Responsibilities (CDR)

Generally, international human rights instruments and UN Water course convention 1997 seem silent on the CDR principle. However, the UN framework on shared aquifer impliedly, recognises the CDR principle where it calls for developing countries to benefit from developed countries on issues such as; capacity building, technological and transfer of skills, equipment relevant to sustainable management of shared waters and preparation of environmental plans.⁶³³ Similar call is also noted as plans that will alleviate developing countries from climate variation impacts.⁶³⁴ Such a call by the UN resonates to the capital, skills and technical gaps in most developing countries which are relevant to mitigate and help locals adopt to varying climate.⁶³⁵ Access to technology to developing countries is vital in recycling waste waters, desalinisation, restoring loss water related ecosystem such as forests to name but a few.⁶³⁶

It is argued that most developing countries have little to do with contribution towards increasing rate of biological diversity loss, but developed ones.⁶³⁷ Unlike developing

⁶³¹ Rieu-Clarke and Magsig (n 620). para 10.2.2.; Britany Lindley, 'Solution Before Pollution: Mining and International : Mining and International Transboundary Rivers in Southeast Alaska' (2017) 6 American Indian Journal. p. 324.

⁶³² World Summit on Sustainable Development (n 626). paras 7 (c) and 46(b).

⁶³³ General Assembly Resolution 63/124 the Law of Trans-boundary Aquifer A/RES/63/124. Art. 16(a-h)

⁶³⁴ World Summit on Sustainable Development (n 626). para 38 (c-f) and 62 (h-k).

⁶³⁵ UNGA Resolution (n 439). para 16 and 114.

⁶³⁶ UN, 'Transforming Our World : The Agenda 2030 for Sustainable Development A/RES/70/1' (n 451). para 6.6 and 6a.

⁶³⁷ Blanco and Razzaque (n 390). p.102.; Rio Declaration on Environment and Development. principle 7.

countries who are less industrialised developed countries have contributed enormously into it though industrial pollution. Notably, it is hard to reconcile at once all states interests in a bid to preserve the global climate and guarantee its sustainability.⁶³⁸ Consequently, other states interests and or economic activities may be more harmful to water related ecosystem than others. In particular the role towards addressing such a concern calls for common obligation, but surely, different responsibilities have to be accorded to involved parties proportionately.⁶³⁹ Developing countries for example are called to adopt legal and policy environment to promote private sector investment, incentivise ecological and climatic related technological transfer as a means to perfect the CDR principle.⁶⁴⁰

CDR seems to be praised as a principle which brings on board both developed and developing countries in addressing the global environmental deterioration.⁶⁴¹ Among prime areas identified calling for international support to African countries are such as; preparation and implementation of strategic plans/ management and utilisation of shared waters, gathering water data processing and monitoring and safeguarding shared waters (both surface and underground) from pollution.⁶⁴² However, it is noted that weak legal framework and governance challenges limit developing countries from realising their potentials towards benefiting from the global CDR commitments.⁶⁴³

⁶³⁸ Blanco and Razzaque (n 390). p.101; Christina Voigt, 'Delineating the Common Interest in International Law' in Wolfugang Benedek and others (eds), *The common interest in international law* (Intersentia 2014). p.18.

⁶³⁹ Blanco and Razzaque (n 390). pp.102-103.

⁶⁴⁰ Johannesburg Declaration on Sustainable Development. para 69.

⁶⁴¹ Blanco and Razzaque (n 390). p.104.

⁶⁴² Johannesburg Declaration on Sustainable Development. para 66 (b-d).

⁶⁴³ UNGA Resolution (n 439). para 41, 45.

3.2.2.3 States' Obligation Not To Cause Significant Harm

The general exclusive rights of states to plan and execute their own socio-economic development, is limited to not causing a significant harm that will, extend to other states.⁶⁴⁴ It is argued that, the no harm rule relates only to human being and no link is provided under the UNWC to environment and or biodiversity.⁶⁴⁵ However, it is shown that parameters of the restricted harm cover its impacts not only to human being but also, environment animals and general ecosystem.⁶⁴⁶

According to WB large-scale development projects have to guarantee that their activities do not contribute towards climate change and that should not pose a threat on access clean water among other sectors.⁶⁴⁷ Such a call by the WB resonates to the solution of the noted water competition in chapter one above.⁶⁴⁸ The ICJ requires states to adopt precautionary principles in both new and past socio-economic development projects as a means to safeguard shared waters.⁶⁴⁹ Consequently, adoption of due diligence that assesses the potential impacts of the planned measures (on water quality) is said to be one of such measures.⁶⁵⁰

Globally, it is envisioned that by the year 2030, states will have to achieve universal access to clean water.⁶⁵¹ To achieve this, deliberate measures to curb pollution, guaranteeing intergrade water resources management and restoration of water related

⁶⁴⁴ Convention on the Law of the Non-Navigational Uses of International Water Courses. Art. 7 (1) and 20; Convention on Biological Diversity. Art. 3 and 4(b). ; General Assembly Resolution 63/124 the Law of Trans-boundary Aquifer A/RES/63/124. Art. 2.

⁶⁴⁵ UNEP, 'The Greening of Water Law: Managing Fresh Water Resources for People and Environment' (n 74). p. 45.

⁶⁴⁶ UNWC, 'User's Guide Fact Sheet Series: No.5 No Significant Harm Rule' (UNWC, 2021) <<http://www.unwatercoursesconvention.org/resources/factsheets/>> accessed 7 February 2021.

⁶⁴⁷ IFC, 'Performance Standard on Environmental and Social Sustainability' (n 464). Performance Standard 3, para 7-9.

⁶⁴⁸ See para 1.8 above.

⁶⁴⁹ *the Case concerning the Gabcokovo-Nagymarose Project (Hungary vs Slovakia)* [1997] ICJ 92. p. 78.

⁶⁵⁰ *Palp Mills on the River Uruguay (Argentina v Uruguay)* [2010] ICJ 20. para 204.

⁶⁵¹ UN, 'Transforming Our World : The Agenda 2030 for Sustainable Development A/RES/70/1' (n 451). Goal 6, para 6.1.

ecosystem. Addressing water related pollution is also noted as means to safeguard MHCs access to clean water. In particular, the need to address potential impacts of abandoned mines may not be overemphasised.⁶⁵² It is for example shown that, about 30% of global mining sites are located in water stress areas.⁶⁵³ Also, it is for example shown that, there are about 6000 abandoned mines in South Africa, which is reportedly water stress country.⁶⁵⁴ Abandoned mines pose serious threats towards polluting underground waters.

According to UNESCO, clean water has both economic and socio-cultural values. While the economic values are easily quantified, the intrinsic socio-cultural ones are not. Among socio-cultural values of water are inclusive; spiritual where water symbolises purity and reconciliation, culturally, water is regarded as; firstly, a God given commodity that has to be shared freely, and secondly, water is a living being worth to be respected as part of the community.⁶⁵⁵ UNESCOs' view underpins the wider protection offered to indigenous peoples' right to their spiritual and cultural values they attach to environment surrounding them, inclusive water resources.⁶⁵⁶

However, it is argued that, there are a number of challenges in safeguarding safety of underground waters. Firstly, unlike harm caused on surface waters which might be visible and easily noticed, it is not the case for underground waters. Secondly, due to

⁶⁵² UNEP, 'Resolution Adopted by the United Nations Environment Assembly on 15 March 2019' (n 71). para 5 (a) (c),(e).

⁶⁵³ UN, 'Trends in Sustainable Development: Chemicals, Mining, Transport and Waste Management' (n 303). p.14.

⁶⁵⁴ Sphiwe Emmanuel Mhlongo and Francis Amponsah-Dacosta, 'A Review of Problems and Solutions of Abandoned Mines in South Africa' (2016) 30 *International Journal of Mining, Reclamation and Environment* 279. p.283.; Economic Commission for Africa, 'Africa Water Vision 2025: Equitable and Sustainable Use of Water for Socioeconomic Development'. p.11; SADC, 'Southern African Development Community Regional Water Policy' (2005). para 2.1.3

⁶⁵⁵ UNESCO, 'World Water Development Report' (United Nations Educational, Scientific and Cultural Organization, 2021). para 7.1, 7.3 and 7.4

⁶⁵⁶ Indigenous and Tribal Peoples Convention. Art. 13(1).

absence of science and technology, it is hard to identify the accurate link between the surface and underground waters. Thirdly, even when there is a notice of polluted underground waters, its restoration is still a challenge among sharing states.⁶⁵⁷ Among the notable challenges in conserving and or treating polluted waters have been technology and financial ability of most developing countries.⁶⁵⁸ Consequently, these challenges pose a threat upon states desire to avoid harm given the fact that, it becomes hard to establish and prove its occurrence leave alone tracing its origin.

Also it is argued that environmental due diligence is sometimes compromised in developing countries which are pressured with the demographic increase and poverty.⁶⁵⁹ In addition, it is contended that this generality of the principle might be the source of potential conflict between riparian states in case one allocates more water to environment, which may not directly impact the quality of water but quantity.⁶⁶⁰ Consequently, balancing the environmental preservation against socio-economic development becomes impaired.

Notably, in assessing states compliance with this rule, reflection is mainly made firstly, on the efforts by the state in preventing the harm from happening or mitigating its impacts. Secondly, the magnitude of the harm caused so far.⁶⁶¹ The term significant harm is assessed basing on its impacts. Consequently, if impacts are negligible, riparian states may not raise any claim against other states on the use of such water resources.⁶⁶²

⁶⁵⁷ Canadian Water Research Society (n 379). p. 45.

⁶⁵⁸ UN, 'General Resolution No. 66/288, The Future We Want' (n 450). Para 123-124.

⁶⁵⁹ Blanco and Razzaque (n 390). p. 101.

⁶⁶⁰ UNEP, 'The Greening of Water Law: Managing Fresh Water Resources for People and Environment' (n 74). p. 46.

⁶⁶¹ UNWC, 'User's Guide Fact Sheet Series: No.5 No Significant Harm Rule' (n 646).

⁶⁶² *ibid.*

3.2.2.4 Equitable and Reasonable Utilisation (ERU)

In order to strike a balance of interest among riparian states, they are called to guarantee equitable and reasonable use of shared waters.⁶⁶³ Notably, the term equitable use does not connote equal use of waters in terms of quantity but rather requires a rational use depending on the particular time and needs of a state. At the same time, equitable use, requires states not to cause negative impacts upon other states dependent on such a resources.⁶⁶⁴ The term reasonable use is also used to mean the use of resources in a manner that does not impair its ability to sustain future human needs, environment and ecosystem.⁶⁶⁵ Conservation of water resources, may hardly be discerned from the efforts to conserve, forests, and ecosystem owing to their interdependency.⁶⁶⁶ Notably, factors that are used to determine whether the use is reasonable or not, do fluctuate with time for example, demographic increase, increase of socio-economic activities such as mining and climate variation.⁶⁶⁷

In a bid to guarantee sustainable utilisation of water resources, the UN has dedicated the period between the year 2018-2028 as an International Decade for Action.⁶⁶⁸ In this decade, the global community is called to focus among other areas fostering integrated and strategic management of water resources to attain the sustainable

⁶⁶³ Convention on the Law of the Non-Navigational Uses of International Water Courses. Art. 5.

⁶⁶⁴ Blanco and Razzaque (n 390). p. 99.

⁶⁶⁵ UNWC, 'User's Guide Fact Sheet Series: No. 4 Equitable and Reasonable Utilisation' (UNWC, 2021) <<http://www.unwatercoursesconvention.org/resources/factsheets/>> accessed 7 February 2021.

⁶⁶⁶ Transforming our world: The 2030 Agenda for Sustainable Development A/RES/70/1. para 33.

⁶⁶⁷ Convention on the Law of the Non-Navigational Uses of International Water Courses. Art. 6 (a-f); General Assembly Resolution 63/124 the Law of Trans-boundary Aquifer A/RES/63/124. Art.5.

⁶⁶⁸ International Decade for action 'water for sustainable development' 2018-2028 (A/RES/71/222) 2017. para 3.

development goals.⁶⁶⁹ It also calls for reasonable use of water owing to its value in preserving peoples' life, environment and ecosystem to name but a few.⁶⁷⁰ Globally, it is envisioned that, by year 2030 every one must have access to clean water for drinking and sanitation.⁶⁷¹

In particular, UN calls for priority to be accorded to water for human needs in cases of such competing factors among riparian states.⁶⁷² The term water for human needs is explained to mean and include; drinking-water, and water relevant for food production.⁶⁷³ Consequently, the right to clean water seem to be impliedly provided for.⁶⁷⁴ Such a view is justified by the varying coverage of the term water for human needs and the broader right to water which include water for drinking, food production, and domestic hygiene.⁶⁷⁵

However, it is above noted that, identification and mitigation of harm done to underground water needs; time and advanced science and technology which is a challenge to many developing countries.⁶⁷⁶ Also, it is shown that there seem to exist experts and financial gap on aspects such as; water management, conservation, use and re-use.⁶⁷⁷

⁶⁶⁹ UN, 'General Resolution No. 66/288, The Future We Want' (n 450). para 119-120; International Decade for action 'water for sustainable development' 2018-2028 (A/RES/71/222). para 4.

⁶⁷⁰ International Decade for action 'water for sustainable development' 2018-2028 (A/RES/71/222). para 5.

⁶⁷¹ Transforming our world: The 2030 Agenda for Sustainable Development A/RES/70/1. Goal 6.

⁶⁷² Convention on the Law of the Non-Navigational Uses of International Water Courses. Art. 10 (2); General Assembly Resolution 63/124 the Law of Trans-boundary Aquifer A/RES/63/124. Art. 5 (2).

⁶⁷³ UNWC, 'User's Guide Fact Sheet Series: No. 4 Equitable and Reasonable Utilisation' (n 665).

⁶⁷⁴ Famazi Shirani, 'Cooperation in the International Water Law and States' Human Rights Obligation to Fulfil Human Rights to Water' (2017) 15 Global Journal of Politics and Law Research. p. 83.

⁶⁷⁵ Rieu-Clarke and Magsig (n 620). para10.1.1.

⁶⁷⁶ See para 3.2.1.3 above

⁶⁷⁷ UNGA Resolution (n 439); UN, 'General Resolution No. 66/288, The Future We Want' (n 450). Para 123.

3.2.2.5 Notification

From the principle of PSNR above, each state is capable of planning and executing its own socio-economic cultural and political policies it desires.⁶⁷⁸ From socio-economic perspectives, such a mandate by the state, especially those sharing water related resources such as; aquifer, rivers, lakes and forests, if not regulated may impact other sharing states. The rule that, riparian states have to notify other states of their planned measures prior their execution finds its validity in this regard.⁶⁷⁹ The term ‘planned measure’ refers to any socio-economic development project that may cause significant impact on the quality and or quantity of shared waters.⁶⁸⁰ Among such projects may for example be; large-scale mining, hydro-power projects, and water reservoir construction to name but a few.

In particular, the essence of notification is to avail other states a room to assess the potential impacts and the planned mitigation measures. In order to be able to carry out this assessment, the notifying state has a duty to give detailed information on the proposed project. Among information to accompany the notification are those related to technical data (specific about the project) and the Environmental Impact Assessment (EIA).⁶⁸¹ As such, EIA is impliedly provided for as a requirement justified by the rule not to cause harm and a duty to notify.⁶⁸² It was once held by, the ICJ that EIA is an integral part of the notification rule and that it has to be carried

⁶⁷⁸ See para 3.2.1.1 above.

⁶⁷⁹ Convention on the Law of the Non-Navigational Uses of International Water Courses. Art. 12

⁶⁸⁰ UNWC, ‘User’s Guide Fact Sheet Series: No. 6 Notification Process for Planned Measures’ (UNWC, 2021) <<http://www.unwatercoursesconvention.org/resources/factsheets/>> accessed 7 February 2021.

⁶⁸¹ Convention on the Law of the Non-Navigational Uses of International Water Courses. Art. 12.; UN Conference on Environment and Development (n 466) 21. para7.41(b); General Assembly Resolution 63/124 the Law of Trans-boundary Aquifer A/RES/63/124. Art.15(2).

⁶⁸² UNWC, ‘User’s Guide Fact Sheet Series: No. 6 Notification Process for Planned Measures’ (n 680).

out before implementation of the project.⁶⁸³ As might be noted from above, the requirement for EIA resonates to the legal positivism theory which takes law as a tool to achieve economic development. Consequently, it requires an assessment to weigh the advantages of the plan to be implemented against the potential harm it may cause.⁶⁸⁴

However, despite its reliance in identifying the potential socio-economic impacts, EIA is reportedly unreliable in safeguarding MHCs access to clean waters. According to Sengdeuane Wayakone, concerns on the weakness of EIA legal framework in Lao are inclusive; lack of expertise, lengthy and bureaucratic procedure and financial problems has caused many of the investment projects be initiated before the EIA is complete or done.⁶⁸⁵ Wayakone, further argues that lack of experts in EIA contributes to sub-standard assessment and insufficiency in monitoring environmental compliance by the large development projects.⁶⁸⁶ Mohamed Bekhechi and Joan-Roger Mercier, are of the view that, where the government is incapable of regulating EIA, tools like legislation may not be enforced nor monitored.⁶⁸⁷

⁶⁸³ *Palp Mills on the River Uruguay (Argentina v Uruguay)* (n 650). para 205-206.

⁶⁸⁴ For details, see para 2.3.2 above.

⁶⁸⁵ Argentina saves as an example in the similar case according to Lila Barrera-Hernandez, 'The Legal Framework for Indigenous Peoples and Other Public's Participation in Latin America' in Donald Zillman, Lucas Alastair and Pring George (Rock) (eds), *Human rights in natural resource development: Public participation in sustainable development of mining and energy resources* (Oxford University Press, Oxford, 2002), p. 596.

⁶⁸⁶ S Wayakone, 'Environmental Impact Assessment in Lao PDR: A Comparative Study on the Gaps between Procedure and Practice with Reference to Japan' 2 (2013) *International Journal of Environmental Science*.288; M Bekhechi and JR Mercier, *The Legal and Regulatory Framework for Environmental Impact Assessment: A Study of Selected Countries in Sub-Saharan Africa*, The World Bank 2002 . p. 13.

⁶⁸⁷ M Bekhechi and JR Mercier, *The Legal and Regulatory Framework for Environmental Impact Assessment: A Study of Selected Countries in Sub-Saharan Africa*, The World Bank 2002. p. 13.

In addition, it is also noted that, there is a tendency of carrying out EIA for one project in isolation of either previous or potential other projects.⁶⁸⁸ Such a practice is coupled with the limited scope of prediction of both immediate and potential harms that might be caused by the projects generally.⁶⁸⁹ Consequently, both sub-standard EIAs; carrying out exclusive EIA for a project; doubtful practical skills on prediction of future potential harms and lack of compliance expose MHCs into the potential risks of accessing clean water from the shared water resources.

Generally, since the notification is intended to assess the potential impacts that may be caused by the proposed project, a period of six months should lapse from the date of its issue.⁶⁹⁰ After the expiry of such a period, notifying state is expected to implement such a project, unless it is requested to extend it to give a room for more assessment and or consultations.⁶⁹¹ Consequently, notification is also a tool to bring riparian states together for the purposes of consultation as here under discussed.

3.2.2.6 Consultation and Negotiation

Consultation and negotiation among the riparian states may be discussed in two folds. Firstly, consultation and negotiation following the notification on planned measures and their impacts on shared watercourse.⁶⁹² Negotiation is referred to as a next stage after consultation among state with the aim to avoid dispute, it does not

⁶⁸⁸ S Norfolk and M Cosijn, 'Towards the Legal Recognition and Governance of Forest Ecosystem Services in Mozambique', *Potchefstroom Electronic Law Journal* 2013, pp.147-148.

⁶⁸⁹ *ibid.*

⁶⁹⁰ Convention on the Law of the Non-Navigational Uses of International Water Courses. Art. 13 (a).

⁶⁹¹ *ibid.* Art. 13(b) and 14 (b).

⁶⁹² *ibid.* Art. 17 (1).; General Assembly Resolution 63/124 the Law of Trans-boundary Aquifer A/RES/63/124. Art. 14.

presuppose formal existence of the dispute itself.⁶⁹³ In order to guarantee that protection of the shared waters from potential harm, during consultation and negotiation such planned measures are not implemented or permitted.⁶⁹⁴

In order to balance interests of stakeholders such as; the government, MNCs and those of the indigenous peoples, the consultation and negotiation are required to be carried in good faith.⁶⁹⁵ However, the term good faith is not defined. Arguably, it may be depicted from the convention which requires consulting and negotiating states to strive to balance the rights and interests arising from the use of such waters.⁶⁹⁶ As such, the term good faith may be reflected in elements such as; genuine dialogue between stakeholders, reciprocal respect among the stakeholders, use of appropriate legal and administrative procedures, use of established indigenous peoples' institutions and a genuine desire to reach a common agreement.⁶⁹⁷

Notably, the principle of consultation does not offer the indigenous people's a right to veto the proposed development plan.⁶⁹⁸ It does not compel reaching an agreement either, as long as consultation and negotiation was carried out in good faith and the proposed plan does not have significant effects on their wellbeing, the government may still implement its plan. In general consultation and negotiation is regarded as a tool to build mutual trust, confidence and cooperation among states, MNCs and or

⁶⁹³ Cameron Hutchison, 'The Duty to Negotiate International Environmental Disputes in Good Faith' (2006) 2 McGill International Journal of Sustainable Development Law and Policy. pp. 135-136.

⁶⁹⁴ Convention on the Law of the Non-Navigational Uses of International Water Courses. Art. 17 (3).

⁶⁹⁵ Indigenous and Tribal Peoples Convention. Art. 6(2); Declaration on Rights of Indigenous Peoples. Art. 19.

⁶⁹⁶ Convention on the Law of the Non-Navigational Uses of International Water Courses. Art. 17 (2).

⁶⁹⁷ ILO Committee of Expert on Application of Convention and Recommendation, 'General Observation of 2010' (ILO, 2011).

⁶⁹⁸ ILO, 'ILO Convention on Indigenous and Tribal Peoples 1989 (No. 169): A Manual' (2003). p.17; ILO (n 418). p. 17.

stakeholders in the planned measure.⁶⁹⁹

Secondly, consultation and negotiation are used as dispute settlement mechanism among the riparian states.⁷⁰⁰ Internationally, consultation and negotiations are also recognised as dispute settlement mechanisms aimed at maintaining friendly relations among states.⁷⁰¹ In its initial decision on dispute between riparian states, the ICJ ordered Hungary and Czechoslovakia to renegotiate the water dam project in river Danube as a means to guarantee its sustainable utilisation.⁷⁰² It is argued that, when state opt to consult and negotiate they manifest their willingness to up hold peace and respect human rights on the area of their negotiation.⁷⁰³ Notably, however, the UNWC offers another mode of dispute settlement through the International Court of Justice as discussed below.⁷⁰⁴

3.2.2.7 Stakeholders Participation

It is noted above that public participation in decision making is used interchangeably to stakeholders' participation.⁷⁰⁵ Among stakeholders in water governance are inclusive; government agencies, citizens, water service providers, water users associations, private interested groups and non-governmental organisations.⁷⁰⁶ Other

⁶⁹⁹ Hutchison (n 693). p.153; Bukhosi Fuyane and Ferena Madai, 'The Hungary-Slovakia Danube River Dispute: Implications for Sustainable Development and Equitable Utilization of Natural Resources in International Law' (2001) 1 International Journal of Global Environmental Issues. p. 340.

⁷⁰⁰ Convention on the Law of the Non-Navigational Uses of International Water Courses. Art. 33(2); General Assembly Resolution 63/124 the Law of Trans-boundary Aquifer A/RES/63/124. Art.15 (3).

⁷⁰¹ UN Charter. Art. 2 (3), 33(1), 55 vide 59.;Declaration on Principles of International Law Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations. para 1(a-b) ;The principle of friendly relation transpires as good neighborhood under para 1.6 above.

⁷⁰² *the Case concerning the Gabcokovo-Nagymarose Project (Hungary vs Slovakia)* (n 649). p. 83.

⁷⁰³ Robert Barnidge, 'The International Law as a Means of Negotiation Settlement' (2013) 36 Fordham International Law Journal. p. 573.

⁷⁰⁴ See para 3.3 below.

⁷⁰⁵ See para 2.2.8 above

⁷⁰⁶ Surabhi Karambelkar and Andrea Gerlak, 'Collaborative Governance and Stakeholders Participation in the Colorado River Basin: An Examination of Patterns of Inclusion and Exclusion' (2020) 60 Natural Resources Journal <<https://digitalrepository.unm.edu/nrj/vol60/iss1/3>>. p. 9.

potential stakeholders are inclusive; women, youths, disabled and indigenous communities.⁷⁰⁷ It is argued at international environmental law that participation in decision is not limited to environmental aspects, but also include water.⁷⁰⁸

With respect to the scope of stakeholders' participation, the UNWC states that,
...participation includes both the right to utilize the watercourse and the duty to cooperate in the protection and development thereof,...⁷⁰⁹

Consequently, any variation and or intended substantial use of shared waters, riparian states are expected to fully participate not only to fulfil her obligation to preserve its interests but protection of internationally shared water course.⁷¹⁰ Although not explicitly provided, the right of the riparian states to participate in decision making resonates to right to benefit the use of such waters for its socio-economic development.

Internationally, states are required to address the gender gap between men and women through adoption of legislative and administrative policies.⁷¹¹ Among the key areas relevant to this discussion are; states efforts to abolish practices and or customs which discriminate women and a guarantee of (rural) women participation in decision making, implement, monitoring and evaluation process of any development that will affect their lives.⁷¹² Consequently, women are supposed to be one among the key stakeholders to influence the decision whether to mine or not to.

⁷⁰⁷ Blanco and Razzaque (n 390). p. 319.

⁷⁰⁸ *ibid.* p. 306.

⁷⁰⁹ Convention on the Law of the Non-Navigational Uses of International Water Courses. Art. 5 (2).

⁷¹⁰ *ibid.* Art. 25 (3).

⁷¹¹ Convention on the Elimination of all forms of Discrimination Against Women. Art. 2.

⁷¹² *ibid.* Art. 2(a-f), 7 (b) and 14 (2) (a).

Notably, it is shown above that mining activities pollute water and grossly impact women's healthy.⁷¹³ Despite of this fact, it is reported that, globally women represent only 10% of the mining work force.⁷¹⁴ It is further reportedly that, there exists a wide gender gap between men and women in the area of economic participation and political empowerment.⁷¹⁵ This signifies little or absence of women participation in decision making and benefit accruing from mineral sector.

In particular, to water resources, little or absence of women participation in decision making results into increased; poverty and gender-based violence. It is shown that, socio-economic activities such as; food preparation, fetching water and firewood are carried out by women and girls.⁷¹⁶ Mining activities impacts on water quality and deforestation forces women into fetching firewood and water a far, which grossly impact women's participation in economic activities that would have earned them economic gains. It is also shown that water stress is proportional to increased gender based violence such as; sexual harassment, domestic violence and rape.⁷¹⁷ Indigenous women for example, are known to be subjected to cultural and traditional discrimination from participation in decision making hence are confronted with double jeopardy.⁷¹⁸

Notably, rights of indigenous peoples to participate in planning, implementation, monitoring and evaluation of the proposed measures have international

⁷¹³ See para 1.8 above.

⁷¹⁴ PwC and Women in Mining (UK), 'Mining for Talent: A Study of Women on Boards in the Mining Industry' (2013) <www.pwc.co.uk>. [accessed on 27 February 2021]; Comey and others (n 535). p. 106.

⁷¹⁵ World Economic Forum, 'The Global Gender Gap Report' (World Economic Forum 2017) <http://www3.weforum.org/docs/WEF_GGGR_2017.pdf> accessed 30 January 2021. p. 8.

⁷¹⁶ Comey and others (n 535). pp. 36,45 and 106.

⁷¹⁷ *ibid.* p. 45.

⁷¹⁸ *ibid.* p. 110-110.

recognition.⁷¹⁹ As such, participation of indigenous peoples also calls for sharing of benefits accruing from the state and or MNCs accessing and using resources located in their territory.⁷²⁰ Benefits sharing rule may be justified in twofold. Firstly, as noted above indigenous peoples enjoy a right of self-determination that grants them rights over surface and underground resources in their locality. Secondly, it is above noted that socio-economic impacts accompanying large-scale extraction of resources induce MNCs into poverty.⁷²¹ Consequently, indigenous peoples have a right, to benefit from resources they rely for their livelihood.

Also, through the principle of avoidance of harm, states and or companies impairing their livelihood should compensate them accordingly.⁷²² It is argued that the right to compensate indigenous peoples entails their right to participate in the benefits accruing from the use of their resources.⁷²³ Pasifique Marakiza⁷²⁴ argues that, the principle of FPIC has been used by indigenous communities as a tool to shield them from gross impacts of large-scale projects like mining mean while guaranteeing them benefit from the projects. He further states that, such a principle may also be used to non-indigenous communities with the view of protecting them from the harms of large-scale projects but also deriving benefits that may be used to empower such

⁷¹⁹ World Bank (n 540); IFC, 'Performance Standard on Environmental and Social Sustainability' (n 464). Standard 7 para 10; International Decade for action 'water for sustainable development' 2018-2028 (A/RES/71/222). Para 7

⁷²⁰ IFC, 'Performance Standard on Environmental and Social Sustainability' (n 464). Standard 7. ; Declaration on Rights of Indigenous Peoples. Art. 28 (1).

⁷²¹ See para 1.8 above.

⁷²² Declaration on Rights of Indigenous Peoples. Art. 28 (1)

⁷²³ Inter-American Commission for Human Rights, 'Indigenous Peoples' Communities of African Decent Extractive Industries, OEA/Ser.L/V/IL Doc. 47/15' (2015), para 2019. Notably, the American region has their Declaration on the rights of indigenous peoples (Adopted at the 3rd plenary session, held on June 15 2016). Under its Article XXIV (4) and (5) provide for the indigenous peoples' rights to be compensated and benefit from natural resources exploited in their areas.

⁷²⁴ Pasifique Manirakiza, 'Assessing the Principle of Free-Prior and Informed Consent (FPIC) in Sub-Saharan Africa in Extractive Industry Sector' in Isabel Feichtner, Markus Krajewski and Ricarda Roesch (eds), *Human rights in the extractive industries: Transparency, Participation, Resistance* (Springer Nature 2019). p. 243.

communities, MHCs inclusive [emphasis added].⁷²⁵

As such, it is noted that, there is a need of investment in water infrastructure in developing countries most of which are dependent on meagre governmental budget.⁷²⁶ Consequently, access to clean water becomes a challenge evidenced through increases water born diseases due to poor infrastructure and little private participation in water infrastructure investment.⁷²⁷ Apparently, benefiting for the extraction of resources in their locality would entail ability to finance water infrastructure which is said to be poor in most developing countries where indigenous communities reside.

3.2.2.8 International Cooperation

International cooperation as a tool to guarantee MHCs right to water may be discussed in three major components namely; KPCS, EITI and harmonised framework to safeguard trans-boundary water resources. To begin with the KPCS initiative, it is heralded above as an initiative that guarantees human rights promotion, curbing civil unrest and guaranteeing states and communities a tangible benefit from the use of mineral resources. Increasing government revenue empowers the government to provided her population socio-economic rights inclusive right to water. Despite its acceptance by global community, KPCS seems to narrowed in its scope such that, environmental impacts linked to rough diamond are not its concern. Since mining is noted above to contribute towards pollution of water sources the

⁷²⁵ *ibid.*

⁷²⁶ UNGA Resolution (n 439). para 14.

⁷²⁷ UN Conference on Environment and Development (n 466) 21. para 7.35; Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. Art. 9.

KPCS seems not a relevant tool to address such a concern.

Next, the EITI framework as it is for the KPCS, it offers a room to governments guarantee tangible benefit from mineral sector through instilling good governance and eradication of corruption. EITI offers to the public relevant information in order to hold the government accountable in its regulation of mineral sector. Prevention of corruption guarantees the government increase in its revenue which may be relied to provide for water infrastructure. It is noted above that, unlike the KPCs, the EITI recently, included environmental and social issues to be reported.⁷²⁸ Such an expansion of transparency in the mining sector, when implemented will offer MHCs an avenue to defend their rights to clean water against pollution from mining sector. Despite such a growing trend of the scope of the EITI initiative, it remains that it is voluntary by nature hence corrupt and undemocratic governments may not legislate on it.

Lastly, international cooperation among riparian states is worth mentioning. It is required that all riparian states to cooperate through establishment of joint authorities and or institutions to guarantee sustainable utilisation of shared waters.⁷²⁹ Globally, there are about 33 established river and lake basins authorities for that purposes.⁷³⁰ Regulating shared water resources through legal and institutional framework guarantees harmonised framework for sustainable use of shared lakes.

⁷²⁸ See para 3.2.1.8 above.

⁷²⁹ Convention on the Law of the Non-Navigational Uses of International Water Courses. Art. 8 (1-2).

⁷³⁰ International Water Law Project, 'Transboundary Water Management Organizations' <https://www.internationalwaterlaw.org/institutions/transboundary_wmos.html> accessed 21 October 2021.

In addition, cooperation seems to be emphasised through sharing technical, scientific knowledge and data related to water usage and quality.⁷³¹ Most developing countries suffer from inadequate skills and or technology relevant to guarantee MHCs right to water. To guarantee access to technology and private capital to finance water sector, laws and policies have to provide for incentives in water sector investment.⁷³² Several international instruments call for bridging the technological and financial gap in water sector as a means to guarantee universal access to clean water.⁷³³ Given the wide increase loss of biodiversity, international cooperation is also vital as a tool to curb potential threats to the shared-water resources.⁷³⁴

Generally, international legal framework offers key principles and or standards that may be relied to safeguard MHCs rights to clean water and adequate food. Binding principles may be enforced through the established international institutional mechanisms relevant to safeguard MHCs rights to food and clean water.⁷³⁵ Equally, the non-binding framework influences the manner in which binding principles develop over time as they amplify what is provided under the binding framework. Although, it is shown that such principles seem to be broad and offers states a room to misuse them, the political will and international desire to cooperate against unsustainable harnessing of mineral resources is a sign to achieve a balance among competing states interests.

⁷³¹ UN Conference on Environment and Development (n 466) 21. para 7.41 (e); General Assembly Resolution 63/124 the Law of Trans-boundary Aquifer A/RES/63/124. Art.16.

⁷³² UNGA Resolution (n 439). para 35-36.

⁷³³ Resolution on Human right to water and sanitation A/RES/64/292. Para 2; International Decade for action 'water for sustainable development' 2018-2028 (A/RES/71/222). para 6 and 9.

⁷³⁴ General Assembly Resolution 63/124 the Law of Trans-boundary Aquifer A/RES/63/124. Art. 16.

⁷³⁵ See para 3.3 below.

3.3 International Institutional Framework

In order to guarantee effective enforcement of the above discussed international principles the need for strong and independent institutions is inevitable. In particular to realisation of human rights, institutions like courts and or tribunals are vital for access to justice and guaranteeing remedy in case human rights are violated.⁷³⁶ However, since this study focuses on minerals, institutions are also relevant to curb among others potentials of corruption in the mineral extraction, processing and trading.⁷³⁷ It is also argued that institutions are relevant in,

‘...coordinating, planning and implementing climate change policy and action at the national and international level and fostering public participation.’⁷³⁸

Strong institutions are also required to be parallel with efforts to control conducts of public officials who are shown in above as representative of governments in signing mining contracts.⁷³⁹ This is so despite general criticism that international principles are actually not good law owing to their limited enforcement, multiple legislative organs and relevant jurisdiction to interpret them.⁷⁴⁰

With respect to mineral sector, there is a call from the UN that, natural resources-rich countries need to be transparent on areas such as; natural resources extraction contracts, revenue paid to the government by MNCs and the extent to which such

⁷³⁶ Convention on the Elimination of all forms of Discrimination Against Women. Art. 2(b).; Convention on the Rights of the Child. Art. 3 (1 and 3)

⁷³⁷ United Nations Convention Against Corruption. Art. 6 (1-2).

⁷³⁸ UN, ‘Nationally Determined Contributions under the Paris Agreement: Synthesis Report by the Secretariat, FCCC/PA/CMA/2021/8’ (n 460), para 101.

⁷³⁹ United Nations Convention Against Corruption. Art.8 ; See also para 1.8 and 2.2.7 above.

⁷⁴⁰ Peter Langford, Ian Bryan and John McGarry, ‘Introduction: Kelsen Legal Science and Positive Law’ in Peter Langford, Ian Bryan and John McGarry (eds), *Kelsenian legal science and nature of law* (Springer International Publishing AG 2017). pp. 8-9.

revenue is shared. Consequently, it is expected that, states will not only enact laws to guarantee transparency, but also establish strong institutions to monitor mining contracts, processing, trading and management of revenue paid by MNCs.⁷⁴¹ This part however, argues that there exist international institutional framework to guarantee governance in harnessing of natural resources and safeguarding MNCs rights to clean water and adequate food. It will however, be evident that their legal set-up poses a challenge in decision making and implementation with respect to membership, immunity from legal action and voting rights among others. Among such institutions are;

3.3.1 UN Security Council (UNSC)

The UNSC is one among several organs under the UN initiative.⁷⁴² It is established with the mandate to implement the UN Charter objectives for and in behalf of its member states. Consequently, the nature of its decision binds all the UN member states. Unlike other organs of the UN, discussed below, the UNSC; firstly, is composed of both temporal and presentment member states. Secondly, the passing of decision though carried out through voting, the permanent members enjoys the right to veto the decision of the Council.⁷⁴³ Consequently, when one of the permanent members cast her veto, the decision of the UNSC will not have binding effect upon its members.

Paradoxically, all the veto casting powers are; firstly, global importers of raw natural resources under their strategic plans such as; rough diamond, gold, metals from third

⁷⁴¹ UN, 'General Resolution No. 66/288, The Future We Want' (n 450). para 288.

⁷⁴² UN Charter. Art. 7 (1).

⁷⁴³ *ibid.* Art. 27 (3).

world countries.⁷⁴⁴ Secondly, they are well developed and industrialised countries whose contribution on global threats of loss of biodiversity is intense through industrial emissions.⁷⁴⁵ Basing on this, it is argued that such an institution engulfs undemocratic practice which hardly confers its decision legitimacy around the globe.⁷⁴⁶

In particular, the UNSC is vital towards promotion and protection of human rights globally. It does so through passing binding resolutions to her members on regulation of trade in rough diamond say for example from areas affected with civil war and violation of human rights. These are generally called conflict minerals. Through the Kimberly, Certification Process, rough diamond trading around the globe is regulated. Rebels, who benefited from the rough diamond trading revenue, could not find market for their minerals as they require certification which is done by the legitimate government.⁷⁴⁷

Limiting rebel's access to mineral resources revenue, does not only diminish their ability to perpetuate civil unrest, but also empowers the government to provide for socio-economic services such as access to clean water. It is however, hinted above that, despite good intention of the UNSC regulation of trade in minerals, aspects such as; loss of biodiversity, climate change and environmental ruinations seem to be forgotten. Notably, among the UNSC with the veto powers are also the global

⁷⁴⁴ UNECA International Study Group (n 241). pp. 24-29.

⁷⁴⁵ Blanco and Razzaque (n 390).175; Only OnePlanet in Climate Change, Sustainable Development, 'North South Climate Justice: Sustainable Development and Climate' (*ONEPLANET Sustainability Review*, 2013) <oneplanet-sustainability.org/2013/01/06/north-south-climate-justice-sustainable-development-and-climate-change/> accessed 18 August 2021.

⁷⁴⁶ Blanco and Razzaque (n 390). p. 209.

⁷⁴⁷ Gilbert Khadiagala, 'Global and Regional Mechanisms for Governing the Resource Curse in Africa' [2014] Resources Insight. pp. 20-21.

economic giant whose economy greatly contribute towards global warming.

3.3.2 International Dispute Settlement Institutions

It is argued that, strong and efficient disputes settlement institutional framework are relevant in guaranteeing sustainable resources governance and management.⁷⁴⁸

Among aspects that may be influenced are inclusive; participants, manner and or procedures through which disputes may be handled and the effect of the entire process inclusive binding effect and opportunity for appeal [emphasis added].⁷⁴⁹ This part confines itself on international disputes settlement framework firstly on biodiversity related and general international investment under the ICSID.

3.3.2.1 The International Court of Justice (ICJ)

The ICJ is an internationally recognised judicial organ responsible for hearing and issuing binding decisions between two or more contesting states on a number of legal issues.⁷⁵⁰ Among issues handled by the ICJ relates to border demarcation and or those related to utilisation of trans-boundary resources such as water, emphasis added.⁷⁵¹ A number of decisions regarding border delimitations between Nigeria, and Cameroon,⁷⁵² Uruguay and Argentina⁷⁵³ and dispute between Uganda and DRC Congo⁷⁵⁴ represent examples where the ICJ has an area of influence.

⁷⁴⁸ SADC, 'Southern African Development Community Regional Water Policy' (n 654). para 2.2.3(ix).

⁷⁴⁹ Matthew Porterfiled, Lise Johnson and Brooke Guven, 'Reforming the International Investment Regime through a Framework Convention on Investment and Sustainable Development' (Columbia Center on Sustainable Investment, 2020). p. 8.

⁷⁵⁰ UN Charter. Art. 94 (4).

⁷⁵¹ Convention on the Law of the Non-Navigational Uses of International Water Courses. Art. 33 (10) (a-b).

⁷⁵² *Land and maritime boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea Intervening) (Merit) Judgment* (ICJ). para 325 I(b) –II(a) ruled in favour of Cameroon with respect to areas of lake chad and Bakassi Peninsula which is rich in oil and minerals.

⁷⁵³ *Palp Mills on the River Uruguay (Argentina v Uruguay)* (n 650).

⁷⁵⁴ *Democratic Republic of the Congo vs Uganda* (n 389).

Although the ICJ is established under the UN Charter, it traces its origin from the then Permanent Court of International Justice (PICJ) established since 1946 under the League of Nations.⁷⁵⁵ According to Castillo-Labrode, ICJ is preferred than arbitral tribunal in settlement of international disputes because of her independence as it draws judges from various global cultural experiences, reliance on precedent, and internationalisation of her decisions.⁷⁵⁶

In order to guarantee effective implementation of its decisions, the judgement has to be implemented by the member states. Consequently, the UNSC is identified as the last organ where member states may take recourse in cases of non-compliance among the state members on its decisions.⁷⁵⁷ Arguably, this approach poses a challenge, since most developed countries such as; USA, Russia and China do not ratify the ICJ statute and therefore not bound by the decision there too.⁷⁵⁸ As noted immediately above, these are the developed countries with veto power in the UNSC and that they are leading in global mineral extraction investment and GHG emissions.

3.3.2.2 International Centre for Settlement of Investment Dispute (ICSID)

The ICSID forms part of the arms of the World Bank Group. In the bid to realise economic liberalisation and structural reforms in developing countries, the WB as a financial institution also established the disputes settlement mechanism namely the ICSID. Developing countries whose laws were reformed among other aspects were

⁷⁵⁵ Rongxing Guo, 'Cross-Border Conflict Prevention and Management', *Cross-Border Resource Management* (Third Edition, Science Direct 2018); UN Charter. Art. 7 (1) vide Art. 92 (1).

⁷⁵⁶ Lilian Castillo-Laborde, 'Case Law on International Water Courses' in J Dellapenna and J Gupta (eds), *The evolution of law and politics of water* (Springer Science and Business Media B 2009). p. 2.

⁷⁵⁷ UN Charter. Art. 94 (2).

⁷⁵⁸ Guo (n 755).

needed to recognise the ICSID as a dispute settlement organ between states and investors (nationals) from other states. As may be noted below the reforms intended to offer guarantee to investors in sectors such as mining that they will access international and independent forum to have their investment protected in case of disputes.⁷⁵⁹ The nature of its decision with respect to arbitration is binding among parties to dispute and may be enforced in all WB member states.⁷⁶⁰ As such there is no appellate organ to resort to in case a party is not satisfied by the ICSID awards.

It is argued that, although international investment could have been used to promote governance in developing countries through establishing strong institutions, they instead behaved otherwise.⁷⁶¹ International investment is evidenced to have avoided domestic institutions in favour of international ones which discriminate locals from accessing them.⁷⁶² This is a paradox given the fact that locals are the one who suffer the impacts of MNCs investments in sectors such as mining.⁷⁶³

It is also argued for example that most of international agreements on resources extraction in developing countries were too friendly to foreign investors.⁷⁶⁴ As a result, states experienced shrinking policy space that would have been instrumental to safeguarding; environment, ecology and or human rights. Owing to this various states opted to reform their laws withdrawing themselves from the ICSID. It is

⁷⁵⁹See para 3.3.6 below.; Convention on the Settlement of Investment Disputes between States and Nationals of other States. Art. (1)

⁷⁶⁰ *ibid.* Art. 53 (i)

⁷⁶¹Lisa Sachs and others, 'Investment Treaties and Models in 2019 (Mis)Aligned with the SDGs?' in Lisa Sachs, Lise Johnson and Jesse Colleman (eds), *Yearbook on International Investment Law & Policy 2019*, para 8.32-8.33

⁷⁶² *ibid.* para 8.33.

⁷⁶³ See para 1.8 above.

⁷⁶⁴Porterfiled, Johnson and Guven (n 749). pp.12-13.

reportedly, that a number of states such as; Bolivia, Venezuela, Ecuador, Australia and South Africa have already withdrawn from the ICSID framework citing shrinking policy space as a concern.⁷⁶⁵

Indeed, the current framework on international investment calls for coining the investment agreements with the Sustainable Development Goals (SDGs). Sachs shows that, mining activities when properly regulated have great potential to contribute towards realisation of SDGs.⁷⁶⁶ She further shows that MNCs mining activities are located mostly in rural areas in many resources-rich developing countries.⁷⁶⁷ Such a fact coupled with the obligations of MNCs respecting human rights may leverage MNCs wellbeing. Mainstreaming the SDGs into international investment is noted as a tool to guarantee states to adopt regulations leading to broad-based socio-economic empowerment and poverty eradication.⁷⁶⁸

3.3.3 Conference of Parties (CoP)

The term Conference of Parties commonly abbreviated as CoP refers to the annual meeting where all head of states which have ratified respective conventions regulating for example; biodiversity, and natural resources governance.⁷⁶⁹ Basing on the principle of sovereign equality of member states, the CoP decisions are passed basing on one member one vote. The decision of CoP binds all its member states on

⁷⁶⁵ Prabharsh Ranjan and others, 'India's Model Bilateral Investment Treaty: Is India Too Risk Averse?' (Brookings Institution India Center, 2018). p. 7.

⁷⁶⁶ Lisa Sachs, 'Sustainable Development Goals: How Can Mining Sector Contribute?' *The Guardian* (20 March 2016).

⁷⁶⁷ *ibid.*

⁷⁶⁸ Sachs and others (n 761). para 8.09 - 8.10.

⁷⁶⁹ Convention on Biological Diversity. Art. 23 (1); Convention to Combat Desertification in those Countries Experiencing Serious Drought and /or Desertification Particularly Africa. Art. 22 (1); United Nations Convention Against Corruption. Art. 63 (1).

the key areas of their decision.⁷⁷⁰ The CoP among other functions carries out the following tasks; admission of a new member state, review the extent to which the convention is being implemented by the respective members states.⁷⁷¹ CoP is also responsible for negotiation of new substantive commitments to be undertaken by state parties to the convention. It is reportedly for example that the COP6 which was held in the year 2002 adopted the global concern of mining activities and their contribution towards loss of biological diversity.⁷⁷²

Moreover, the CoP is further responsible for promoting the core objective of the conventions such as conservation of biodiversity and safeguarding the globe against desertification say for example. In doing this, the CoP promotes states initiatives to implement the objectives of the convention, mobilises resources to finance activities geared towards meeting the states obligations under the conventions.⁷⁷³ Resources mobilisation is relevant to safeguarding access to food and water owing to the noted principle which requires states to curb climate change and or any other harm subject to the available resources.

In particular, to the recent COP15 held envisions the year 2050 as time line to guarantee human activities to be aligned with nature.⁷⁷⁴ In order to arrive towards such a harmony, global community must guarantee attaining full restoration,

⁷⁷⁰ Convention on Biological Diversity. Art. 23 (3); Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification Particularly Africa. Art. 22(2)(e).

⁷⁷¹ Convention on Biological Diversity. Art. 23 (4) (a-c).

⁷⁷² UNEP, 'Thematic Programmes of Work-Progress Reports on Implementation: Biological Diversity of Inland Waters; Marine and Coastal Biological Diversity; Biological Diversity of Dry and Sub-Humid Lands; and Agricultural Biological Diversity: Report of the First Meeting of the Ad-Hoc Technical Expert Group on Dry and Sub-Humid Lands' (UNEP 2002) 2002. pp.14 and 23.

⁷⁷³ Convention on Biological Diversity. Art. 16, 20-21.

⁷⁷⁴ UNEP, 'Update of the Zero Draft of the Post-2020 Global Biodiversity Framework' (UNEP 2020). para 9.

conservation and sustainable use of ecosystem.⁷⁷⁵ Indeed restoration and conservation of loss biodiversity bears a great significance towards safeguarding MHCs access to water and adequate food.

With respect to mineral resources transparency, the EITI members meeting represent the CoP.⁷⁷⁶ Unlike the CoPs in other conventions where the principle of sovereign equality of member states dictates who should attend the meeting, the EITI is rather open to states and other stakeholders such as representative of mining companies and NGOs.⁷⁷⁷ Among functions that may be carried out by the members meeting are inclusive; broadening its wide acceptance through advocacy, review and approving activities carried out by the board and guaranteeing political will and effective coordination of the EITI.⁷⁷⁸ It is held at an interval of every three years.⁷⁷⁹ Decision of the members meeting is based on consensus hence, no members with the veto powers as noted above.⁷⁸⁰

3.3.4 Secretariat

Unlike the CoP which meets only once in every year or extraordinarily where so convened, there is a permanent secretariat established in respective conventions and KPCs.⁷⁸¹ The secretariat is responsible for administrative coordination among the state parties.⁷⁸² It is also relevant in preparation of reports and dissemination of the same to CoP members before the meeting itself.⁷⁸³ Since the secretariat is composed of experts, it is also an organ that advises the CoP on technical issues relevant to

⁷⁷⁵ *ibid.* para 9.

⁷⁷⁶ EITI (n 529). Art.6 of the Articles of Association.

⁷⁷⁷ *ibid.* p.44 and Art. 7 of Articles of Association.

⁷⁷⁸ *ibid.* Art. 6,7 and 8.

⁷⁷⁹ *ibid.* p. 52.

⁷⁸⁰ *ibid.* Art. 6 (5).

⁷⁸¹ Convention on Biological Diversity. Art 24(1).; Kimberly Process Certification Scheme. Section VI para 6.

⁷⁸² Convention on Biological Diversity. Art. 24 (2).

⁷⁸³ Kimberly Process Certification Scheme. Section vi para 7(a-b).

convention subject matters. In addition, it is responsible to guiding newly admitted countries and developing countries on issues of compliance with the conventions obligations and standards. Through negotiations, the Secretariat works as a channel to persuade non-state parties to ratify the conventions. Both the CoP and the secretariat are regarded as vital in achieving common solution to common problem such as resources governance among international communities.⁷⁸⁴

3.3.4 Specialized Committee and Network

Unlike the CoP and the Secretariat which are common organs to implementing the relevant convention for example on; natural resources governance and biological diversity.⁷⁸⁵ The committees are composed of technical experts from various fields, regions and countries.⁷⁸⁶ Their main task is to advice the secretariat on technical aspects on climate change say for example. In order to realise this objective, the specialised committee has to establish network connections with all; global, regional, sub-regional and national institutions relevant to climate change. The major aim is to promote such networks in the bid to curb the wide spread of drought and desertification which threatens food security emphasis is mine.⁷⁸⁷

3.3.5 United Nations General Assembly (UNGA)

The UNGA is an organ established as one among several UN initiatives.⁷⁸⁸ It is composed of all the sovereign member states of the UN.⁷⁸⁹ UNGA reaches its

⁷⁸⁴ Blanco and Razzaque (n 390). p. 183.

⁷⁸⁵ Convention to Combat Desertification in those Countries Experiencing Serious Drought and /or Desertification Particularly Africa. Art. 24 (1). See also, United Nations Convention Against Corruption. Art. 64(1).

⁷⁸⁶ Convention to Combat Desertification in those Countries Experiencing Serious Drought and /or Desertification Particularly Africa. Art. 24 (2-3)

⁷⁸⁷ *ibid.* Art. 25 (1).

⁷⁸⁸ UN Charter. Art. 7 (1).

⁷⁸⁹ *ibid.* Art. 9(1).

decision through voting, where by one member has one vote.⁷⁹⁰ Unlike the UNSC there are no members with the veto voting power. However, the decisions passed by the UNGA such as resolutions and or declarations do not have binding effect. Despite its non-binding effects, UNGA resolutions and or declarations are vital in safeguarding the MHCs access to clean water and adequate food.

With respect to MHCs right to clean water and food UNGA is relevant in passing a number of relevant declarations. Among such declarations are those related to; the right to water, regulation of trans-boundary aquifer, rights of indigenous peoples to name but a few. In addition, owing to its democratic composition and equal voting rights its decisions seem to gain more legitimacy. A wide spread legitimacy and international recognition of its principles makes them part of customary international law. Examples of decisions of UNGA that gained the status of customary international law are inclusive the declaration on states permanent sovereignty over natural resources, the Rio declaration.

3.3.6 World Bank

The World Bank (WB) is one among multilateral financial institutions established since 1945. Among other global financial institutions are International Monetary Fund (IMF) and International Financial Corporation (IFC) both of which regulate the flow of financial capital investment around the globe. As such the WB was established after the World War II (WWII) and was tasked to guarantee economic reconstruction of European countries which were devastated by the impacts of the

⁷⁹⁰ *ibid.* Art. 18 (1).

war. Despite of the generic name WB, it is named as International Bank for Reconstruction and Development (IBRD).⁷⁹¹ Given the fact that the impacts of the WWII are over, it remains as a financial arm of the UN framework. It is mainly focusing on the; policy, legal reforms and financing development related large-scale projects such as mining and other socio-economic related infrastructures.⁷⁹²

It is reportedly that, about five to seven trillion USD will be required to attain Sustainable Development Goals (SDGs) which includes ending hunger and guaranteeing universal access to clean water.⁷⁹³ Consequently, investment in food, and or water related infrastructure compel attracting foreign investment from global stakeholders, WB inclusive.

With respect to mining project for example, the IBRD is responsible in a number of ways. Firstly, the IBRD issues financial related policies to all its member states. On this, the IBRD has been advising majority of the resources-rich developing countries to open up their markets for foreign investment and capital transfer to take place.⁷⁹⁴ In order to achieve this, most developing states mineral sectors were liberalised through enacting laws which were friendly to private investment. Among areas that were reformed are inclusive; allocation mining rights, security of tenure, environmental and social safeguard and fiscal regime.⁷⁹⁵

⁷⁹¹ Articles of Agreement 2012. Article 1.

⁷⁹² *ibid.* Article 1.

⁷⁹³ PAGE, 'International Investment Agreements & Sustainable Development: Safeguarding Policy Space & Mobilizing Investment for a Green Economy' (UNEP, 2018), p.10.

⁷⁹⁴ See para 3.2.1.8 above.

⁷⁹⁵ World Bank and International Financial Corporation (n 254).pp.11-12.

Most resource-rich developing countries, had their laws aligned with the IBRD framework, through for example subjecting investment in mineral sector to the ICSID. The WB also supports developing countries to comply with the international standards such as; transparency initiatives and or global mineral traceability frameworks. The nature of this support involves, revising mineral related laws and or guidelines, capacity building and establishing relevant institutions to manage such initiatives.⁷⁹⁶

Secondly, it finances large-scale projects through affordable loans to developing countries whose budget could not finance. Notably, IBRD offers such loans to her member states who are also members of the ICSID and Multilateral Investment Guarantee Agency (MIGA).⁷⁹⁷ These two save as international investments lubricant owing to assurance extended to MNCs of the capital they will invest and an international, impartial and speedy dispute settlement mechanism. Despite of such a role played by the WB, its establishing articles seems to immune the Bank from any seizure or attachment in any case that may be filed by those who may be affected by WB funded projects.⁷⁹⁸

With respect to the WB's role to promote human rights, it is explicit that the Bank was set to propel socio-economic development and not human rights issues.⁷⁹⁹

However, since development may hardly be discerned from human rights, it had to revisit its framework. For example, most natural resources developing countries

⁷⁹⁶ See para 3.2.2.8 above.

⁷⁹⁷ Convention establishing the Multilateral Investment Guarantee Agency 1966.; Convention on the Settlement of Investment Disputes between States and Nationals of other States.

⁷⁹⁸ See para 1.8 above; IBRD Articles of Agreement 2012. Art. vii (1) (3) (4) and (6).

⁷⁹⁹ Articles of Agreement. Art. 1.

legal frameworks may be far below the international human rights frameworks. Releasing finance from WB to invest in such countries could fuel more human rights violation unless conditionality's such as observance of human rights are applied. A good example on this is financing of the Chad-Cameroon Pipeline (CCP) by the IBRD.

In particular, to human rights, Cameroon did not have a legal instrument to protect the forest people, most of whom were the indigenous.⁸⁰⁰ Geographically, the CCP had to cut across thick forests which were home to the indigenous peoples. Upon raising concerns on the impact of the project on indigenous peoples' life by NGOS the project was halted.⁸⁰¹ Consequently, to avoid investing in countries with lower standard of human rights than guaranteed internationally, the IBRD had to device its frameworks regulating social, environmental and human rights standards to be adhered in all projects to be financed.⁸⁰²

3.4 Conclusion

The discussion above shows that at the UN level, there exist legal and institutional frameworks relevant to be relied by MHCs to safeguard their rights to clean water and adequate food. It is also noted that, despite of the fact that some of international framework to regulate mineral resources such as EITI, and KPCs are founded on non-binding initiatives, strong political will and state practices seem to have influence states domestication of such initiatives. Notably, the international

⁸⁰⁰ Forest People Programme, 'E-News Letter Special: Safeguarding Human in International Finance' (2013). p.12

⁸⁰¹ *ibid.* p.12.

⁸⁰² World Bank (n 540).;IFC, 'Performance Standard on Environmental and Social Sustainability' (n 464).

frameworks provide for broader principles that may be adopted to suit regional and country specific conditions. In the African region for example, which is endowed with transboundary water and forests resources, socio-economic, political, historical factors such as colonisation and long-time civil unrests will seldom adopt such principles as they are.

With respect to institutional frameworks, generally, UN institutions have shown to be relied by some countries to guarantee MHCs rights to clean water and adequate food. Such institutions are relevant to enacting international principles, monitoring their implementation, funding large-scale development projects such as mining and settling disputes firstly between states and secondly between states and nationals of another states. However, it is shown that some of the international institutions are non-democratic owing to the nature of composition and voting rights. Others such as the WB seems to exonerate themselves from potential conflicts when they are operating in UN member states. Notably, non-binding institutions such as UNGA seem to have passed decision which in turn become binding upon states given time and its adoption by many states. The immediate chapter below proceed with critical discussion of international framework with the focus on AU. It therefore, provides answers to research question one above.

CHAPTER FOUR
AFRICAN REGIONAL LEGAL AND INSTITUTIONAL FRAMEWORKS
ON MHCs RIGHTS TO CLEAN WATER AND ADEQUATE FOOD

4.1 Introduction

The preceding chapter critically presented the international legal and institutional frameworks relevant to safeguard MHCs rights to clean water and adequate food. It shows that there are principles and institutions which may be relied by states and or super-national institutions to safeguard MHCs rights to clean water and adequate food. In that regard this chapter, the African Union (AU) legal and institutional frameworks are critically reviewed. In particular, this chapter provides answers to research question 1 above, with the focus to AU frameworks.⁸⁰³ It does so through the critical analysis of the AU legal and institutional frameworks to safeguard MHCs rights to water and food. The focus of the discussion is based on the same principles discussed in the preceding chapter.

In particular, this chapter adopts the Human Rights Based Approach (HRBA) which require states to adopt HRBA in planning, implementing and evaluating their desired socio-economic development projects.⁸⁰⁴ Such a requirement resonates to the above noted UN HRBA statement of common understanding.⁸⁰⁵ In particular, the year 2003 was set as a target whereby all AU member States will have domesticated legal and institutional measures as a means to promote, protect and enforce human rights in

⁸⁰³ See para 1.4 above.

⁸⁰⁴ Kigali Declaration: The 1st African Union (AU) Ministerial Conference on Human Rights in Africa meeting on 8 May 2003 in Kigali, Rwanda 2003. Art 4.

⁸⁰⁵ See para 3.1 above for details.

Africa.⁸⁰⁶ AU as it is for the UN framework also obliges her member states to adopt both legal and administrative measures to guarantee progressive realisation of human rights (inclusive the right to water and food).⁸⁰⁷ As such, measures to be adopted by the States in achieving the realization are expected to be ‘...reasonable and measurable plan, including set achievable benchmarks and timeframes.’⁸⁰⁸

4.2 African Regional Legal and Institutional Frameworks

The choice of African region in this study is well explained above.⁸⁰⁹ However, it is worth to add that African region is preferred in this study owing to the fact that it holds a large segment of the global biodiversity as it is located in tropical zones.⁸¹⁰ Apart from this fact, African region is also endowed with mineral resources which are valuable for human development when properly harnessed.⁸¹¹ Owing to potential and or real impacts of mining on deforestation, land pollution, degradation and dispossession MHCs rights to food and clean water are challenged. To guarantee MHCs rights to water and food security there is a need to strike a balance between the desire to extract minerals and safeguarding such rights. In particular, this part argues that, Africa has relevant legal and institutional frameworks that may be relied to arrive to such a balance.

⁸⁰⁶The CSSDCA – Draft Memorandum of Understanding on Security, Stability, Development and Cooperation in Africa, 2002 para III.; African Charter on Human and Peoples’ Rights. Art 1;The Resolution on the African Commission on Human and Peoples’ Rights AHG/Res.230 (XXX) of the Assembly of Heads of State and Government of the Organization of African Unity, meeting in its Thirtieth Ordinary Session in Tunis, Tunisia, from 13 to 15 June, 1994 1994. para 2.

⁸⁰⁷ ACHPR, ‘Principles and Guidelines on the Implementations of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights’ (n 235). para, 13.; ACHPR, Pretoria Declaration on Economic, Social and Cultural Rights in Africa 2004. para 11 (iv).

⁸⁰⁸ Ibid. para, 14.

⁸⁰⁹ See para 1.7 above.

⁸¹⁰ Guneratne (n 469). p. 5.

⁸¹¹ African Union, ‘Africa Mining Vision’ (African Union, 2009). para i -ii.

4.2.1 Safeguarding MHCs Rights to Adequate Food

The African charter on human and peoples' rights 1986 (African charter) seems silent on the right to food. However, such a fact does not necessarily affect the recognition of such a right in the African context. The right to food may for example, be inferred in other rights which are expressly provided for under the charter such as the right to life.⁸¹² Moreover, taking the cognisance of how relevant the right to food is in sustaining human life, AU through her protocol, the right to food is expressly provided.⁸¹³ In addition, the right to food is also provided for under the African Charter on the Rights and Welfare of the Child.⁸¹⁴

Notably, there are key elements of the right to food such as; its availability, accessibility and or quality.⁸¹⁵ Unlike the right to water which provides for minimum quantity in terms of volume of water per person per day, the right to food seems silent on specific package.⁸¹⁶ The right to food puts emphasis on its; sustainable availability with reasonable price, required nutritional ingredients and meet the cultural standards.⁸¹⁷ To guarantee food sustainability states are called to; guarantee land tenure security, conserve its ecology, biodiversity and reforming the agricultural sector into modern technologies emphasis is mine.⁸¹⁸

Notably, the definition of the term food security provided above.⁸¹⁹ In this section the discussion is confined to provisions of ; the African Charter, ACHPR

⁸¹² ACHPR, 'Principles and Guidelines on the Implementations of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights' (n 235). para 83.

⁸¹³ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa of 11th July 2003 2003.

⁸¹⁴ African Charter on the Rights and Welfare of the Child 1979.

⁸¹⁵ See para 3.2.2 above; ACHPR, 'Principles and Guidelines on the Implementations of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights' (n 235). para 85.

⁸¹⁶ *ibid.* para 85.

⁸¹⁷ *ibid.* para 84 and 86 (f).

⁸¹⁸ *ibid.* para 86 (j) (g).

⁸¹⁹ See para 2.2.3 above.

Declarations on human rights and resources governance. It also refers to AU instruments relevant to regulate nature and natural resources owing to the fact that the right to food is embedded also in resources like land and forests to name but a few. As such the discussion in this part argues that AU regional principles relevant to safeguard MHCs against hunger seem to have distinctively adopted the international principles. Partly, the uniqueness is contributed, not only by the AU geographical, cultural, political and historical, but also global forces and socio-economic inequalities.

4.2.1.1 Permanent Sovereignty over Natural Resources

Historically, prior to colonial invasion in African communities' resources such as land was owned communally through local chiefs and or clans. Communities and or clans access to land was subjected to their varying rituals on the land they occupied. Although local communities relied on land for their settlement and livelihood, land was as such not commercialised.⁸²⁰ However, during colonial era, new approaches of commercialising resources such as land was introduced by colonialist. Local chiefs were lured to allocate or sale land to colonialists and or their companies for production of raw materials needed in Europe and or for speculation.⁸²¹

New principles related to frontier settings, land allocation and security of tenure emerged in most African countries. Local rules and procedures on access to land for example cease to apply. With respect to new frontiers, resources such as; rivers, lakes and forests become shared between states. Transboundary resources

⁸²⁰ Lihle Mabuza, 'State Complicity in Business-Related Human Rights Abuses: Analysing the State's Failure in Protecting Land Rights in Africa' (University of Pretoria 2021). pp. 30-32.

⁸²¹ *ibid.* p. 33.

regulations may hardly be achieved if there are no international rules to that effect. With respect to resources ownership rules, local chiefs cease to function instead, colonial rules related to public trust, land tenure for example become applicable.⁸²²

In particular, AU recognises the principle of state sovereignty over natural resources, which is one among international customary rules.⁸²³ AU further recognises the right to self-determination as a cornerstone of state choice of its socio-economic, cultural and political orientation.⁸²⁴ It therefore recognises both external and internal self-determination through recognition of peoples' rights. On this the ACHPR once stated that,

*"...self-determination may be exercised in any of the following ways independence, self-government, local government, federalism, confederalism, unitarism or any other form of relations that accords with the wishes of the people but fully cognisant of other recognised principles such as sovereignty and territorial integrity."*⁸²⁵

In particular to internal self-determination, it is argued that, the term 'peoples' used under the African charter despite of its potential meanings, refers both the state and indigenous peoples.⁸²⁶ In the case of *Kevin Mgwanga Gunme et al vs Cameroon* the peoples of Southern Cameroon were recognised as a people and hence enjoy all rights inclusive the right to internal self-determination, save for secession as AU seems to attach primacy over sovereignty and territorial integrity.⁸²⁷ As noted above,

⁸²² *ibid.* p. 45.

⁸²³ African Convention on the Conservation of Nature and Natural Resources. Art. II, XXII (1); Constitutive Act of the AU 2000. Art. 4 (a); African Charter on Human and Peoples' Rights. Art. 21.

⁸²⁴ African Charter on Human and Peoples' Rights. Art. 20.

⁸²⁵ *Congrès du peuple katangais / DRC* [1992] ACHPR 75/92. para 4.

⁸²⁶ Richard N Kiwanuka, 'The Meaning of "People" in the African Charter on Human and Peoples' Rights' (1988) 82 *The American Journal of International Law* <<http://www.jstor.org/stable/2202881>>.p.100.; ACHPR, 'State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter Relating to Extractive Industries, Human Rights and the Environment' (n 408). para 6.

⁸²⁷ *Kevin Mgwanga Gunme et al v Cameroon* [2003] African Commission on Human and Peoples' Rights 266, Communication. para 171-175 and 178.

the PSNR states are granted powers to control resources within their borders, inclusive making laws and institutions relevant to assure sustainable harnessing her resources. It is argued that, Africa is rich in numerous minerals and other resources relevant to her peoples socio-economic development.⁸²⁸ However, due to lack of technical know-how, capital, inadequate legal framework to regulate their use, few African countries do benefit from them.⁸²⁹ Instead, MNCs from developed countries are not only investing their capital and skills but also all repairs and consumables in the extractive sectors are imported from abroad.⁸³⁰

In addition, due to weak legal and institutional frameworks evidenced through; unsecured land tenure, limited women access to land and water resources, eviction from land and inadequate strategic planning of land use, absence of backward and forward linkages, Africa retains very little of the benefits from the extraction of her resources.⁸³¹ Thirdly, concerns the guarantee against eviction from land by the government or third parties licensed by governments.⁸³² Eviction of MHCs from their land resonates to unsecured land tenure system.

In particular to secured land tenure, in Botswana for example, land may be compulsorily acquired by the state in order to develop mineral extraction.⁸³³ Land acquisition is also provided for under the Acquisition of Property Act 1966⁸³⁴ and

⁸²⁸ UNECA International Study Group (n 241). p. 62.

⁸²⁹ See para1.8 above.

⁸³⁰ UNECA International Study Group (n 241). p. 62.

⁸³¹ *ibid.* pp. 62-69.

⁸³² ACHPR, Pretoria Declaration on Economic, Social and Cultural Rights in Africa. para 5

⁸³³ The Constitution of Botswana 2006, Art. 8 (1) (a) (iii).

⁸³⁴ The Acquisition of Property Act 1966, s 3(1) (b).

the Tribal Land Act 1968.⁸³⁵ Notably, in case of the tribal land, when the tribal boards are not willing to have their land compulsorily acquired by the state, a commission is set to inquire into the matter.⁸³⁶ Indeed this could be an opportunity for the tribal land boards to defend their land which support their livelihood such as farming and grazing against extractive sector. However, the process of compulsory land acquisition by the state takes cognisance of the constitutional principle that protects individual properties. The Constitution of Botswana guarantees ownership of properties and requires, when such ownership is interfered, there be prompt compensation.⁸³⁷ Such a legal framework is argued to offer wider protection to MHCs rights such as water and or food.⁸³⁸

With regard to women access to land and other means of production it is argued that, at the African regional level, there is a prohibition of gender discrimination in access and ownership of resources.⁸³⁹ African women are also guaranteed of their right to food.⁸⁴⁰ Despite such a guarantee, yet land tenure system seems to pose a challenge on women on accessing and owning land for food production. It is reportedly that, that only one third of the women in Sub-Saharan Africa who own land which is relevant to food production.⁸⁴¹ While in some countries such a right is domesticated and translated into local languages, in other it is not.⁸⁴² In addition, where the charter

⁸³⁵ The Tribal Land Act 1968, s 32.

⁸³⁶ Ibid. s 32 (2) vide s 35.

⁸³⁷ The Constitution of Botswana 2006, Art. 8 (1).

⁸³⁸ Ombella, 'Upholding Human Rights in AU Member States' Extractive Sector: Review of Aspects of Food Security to Communities Neighbouring Mines in Selected Countries' (n 231). p. 25.

⁸³⁹ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003. Art. II(b) and xv (a--b).

⁸⁴⁰ Ibid. Art. XV (a-b).

⁸⁴¹ Isis Gaddis, Rahul Lahoti and Wenjie Li, 'Gender Gap in Property Ownership in Sub-Saharan Africa: Policy Research Working Paper 8573' (World Bank Group, 2018). pp. 1 and 25.

⁸⁴² Meskerem Techane, 'The Impact of African Charter and the Maputo Protocol in Ethiopia' in Victor Ayeni (ed), *The impact of African Charter and the Maputo Protocol in selected African States* (Pretoria University Law Press 2016). p. 72.;

is domesticated, cultural practices overrides its implementation for example in Kenyan communities, for women to own land he has to do so through her husband and or son in case of a widow.⁸⁴³ Limited access to land and food production resources makes women prone to food insecurity.

With respect to indigenous peoples, it is argued that, Africa recognises both the individual and collective rights.⁸⁴⁴ With collective rights, indigenous peoples gain recognition and protection. Although Africa technically denies existence of indigenous peoples in her borders by terming all Africans as indigenous owing to factors such as; their existence prior to colonisation and that all were subjected to colonial subjugations. Yet AU defines indigenous peoples' not in a definitive way but through elements that may constitute them.

Among such elements are; self-identification, unique cultural and livelihood from dominant group, dependency on natural resources they live on for their socio-economic, and cultural survival, being isolated geographically, and in social political life of dominant group, and that they are marginalised through exploitation by the dominant group.⁸⁴⁵ Africa's denial of existence of indigenous peoples is justified on avoidance of tribal conflicts, desire to maintain African Unity and multicultural democracies.⁸⁴⁶ It is further noted that indigenous peoples suffer from land

Polycarp Forkum, 'The Impact of African Charter and the Maputo Protocol in Cameroon' in Victor Ayeni (ed), *The impact of African Charter and the Maputo Protocol in selected African States* (Pretoria University Law Press 2016).p.42; Sizakele Hlatshwayo, 'The Impact of African Charter and the Maputo Protocol in Lesotho' in Victor Ayeni (ed), *The impact of African Charter and the Maputo Protocol in selected African States* (Pretoria University Law Press 2016). p. 136.

⁸⁴³ Forkum (n 842). p. 42; Saoyo Griffith, Paul Ogendi and Victor Ayeni, 'The Impact of African Charter and the Maputo Protocol in Kenya', *The impact of African Charter and the Maputo Protocol in selected African States* (Pretoria University Law Press 2016). p. 131.

⁸⁴⁴ ACHPR, 'Indigenous Peoples in Africa: The Forgotten People? The African Commission's Work on Indigenous People in Africa' (2006). p. 20.

⁸⁴⁵ *ibid.* pp.10-11.

⁸⁴⁶ *ibid.* p. 12.

alienation, violation of their cultural rights and inadequately represented in the mainstream government in planning, implementing and monitoring socio-economic development.⁸⁴⁷ Land alienation and cultural violation undermines their means of food production and hence subject them into hunger and poverty.

4.2.1.2 Common but Differentiated Responsibilities

In particular, to African regional binding legal framework, the CDR principle seems not provided for. Perhaps such a gap may be associated with the above noted fact that, Africa is seen as a victim in the current global climate change concern.⁸⁴⁸ It is also argued that, time, socio-economic development and advancement in science and technology influence to a great extent the growth of principles relevant for environmental regulation of shared resources.⁸⁴⁹ This is even supported by the approach taken by the AU which allows reservation of provisions of environmental convention by state parties.⁸⁵⁰ As noted above, issues of global concern such as climate variation calls for joint efforts, no other states should reserve their commitment as the impacts are global and affect everyone.

Notably, the international frameworks have shown that global community with respect of the developed countries have committed to CDR as a principle to shoulder the burden of their liability towards climate variation. Despite of such a reality AU which is shown to be the most impacted seems behind as there is no binding

⁸⁴⁷ *ibid.*, pp.17-19.

⁸⁴⁸ AU, 'African Strategy on Climate Change' (n 294). part I.

⁸⁴⁹ John Ombella, 'Regulation of Shared-Watercourses Under Common Principles: A Comparison of the Frameworks of Lake Victoria in East-Africa and the Great-Lakes in America' (2019) 1 International Doctoral Research Scholars Journal, JLS Africa. p. 29.

⁸⁵⁰ African Convention on the Conservation of Nature and Natural Resources. Art. XX(1-3) As may be noted below on Non-binding regional legal framework, the African convention on nature and natural resources 2003 does not allow reservations.

framework on how to reap the benefits. It is shown that, absence of legal and or policy framework on climate change at the AU and state levels jeopardise rights of some groups such as indigenous communities.⁸⁵¹ It is argued that the current climate mitigation measures adopted in some African countries seem to discriminate and or prohibit some practices of indigenous communities which they depend upon for their livelihood.⁸⁵²

However, the African non-binding framework provides for the CDR through the imposed collective duty to protect and conserve environments as a means to guarantee food security.⁸⁵³ In particular to climate change relation to food security as a human right, AU seems to lack a comprehensive legal and policy framework. To address climate variation impacts on food security, AU countries are called to adopt legal framework to facilitate transfer of technology and significant increase of domestic sources to mitigate climate variation.⁸⁵⁴

4.2.1.3 No Harm Rule

In particular to no harm rule, African countries are required to regulate their economic activities such as mining from contributing towards drought, deforestation and or ruination of other natural resources.⁸⁵⁵ The no harm rule is better explained under the AU non-binding framework. Firstly, the requirement that all African states to protect land and other natural resources from being degraded or polluted.⁸⁵⁶ It is

⁸⁵¹ Ademola Jegede, 'The Protection of Indigenous Peoples' Lands by Domestic Legislation on Climate Change Response Measures: Exploring Potentials in the Regional Human Rights System of Africa' (2017) 24 *International Journal on Minority and Group Rights*, p. 55.

⁸⁵² *ibid.*, p. 55.

⁸⁵³ African Convention on the Conservation of Nature and Natural Resources 2003. Art. III (2) and XXXIX.

⁸⁵⁴ AU, 'African Strategy on Climate Change' (n 294), part XI.13 action 2 and Goal 1 and part XIII. 3.

⁸⁵⁵ African Convention on the Conservation of Nature and Natural Resources. Art. IV.; The African Charter on Human and peoples' Rights. Art. 21 (2).

⁸⁵⁶ African Convention on the Conservation of Nature and Natural Resources.

noted for example that more than 70% of Africans are dependent on forests for their livelihood.⁸⁵⁷ To achieve this AU member states are called to adopt integrated approach on land resources management that places land planning at the fore of any land use.⁸⁵⁸

Secondly, guarantee reforestation of all droughts impacted areas.⁸⁵⁹ Reforestation and the call for planning of all socio-economic activities resonate to the above discussed international initiative to combat desertification in African countries. It is reportedly that, Africa's agricultural sector is impacted due over dependency on rainfall than irrigation.⁸⁶⁰ Comparatively with other regions, Africa's percentage of land under irrigation is reportedly to be still a single digit of approximately 4 which smaller than South America, South East Asia and Southern Asia, which are double digits ranging from 10-41.⁸⁶¹ Consequently, AU member States have committed themselves to expand agriculture through increasing finances in the agricultural sector where they agree to set not less than 10% of their national budget to fund agricultural activities.⁸⁶² They also committed themselves to expanding the irrigation schemes by building up new irrigation infrastructure to boost agricultural sector in Africa to guarantee food security.⁸⁶³

⁸⁵⁷ AU, 'African Strategy on Climate Change' (n 294). para xi.17.

⁸⁵⁸ African Convention on the Conservation of Nature and Natural Resources. art. VI (1).

⁸⁵⁹ *ibid.* Art. VI (3) (d).

⁸⁶⁰ United Nations Development Programme (n 207). p. 177.

⁸⁶¹ AU and NEPAD, 'Comprehensive Africa Agriculture Development Programme (CAADP)' (2003). 2.

⁸⁶² Sirte declaration on challenges of implementing integrated and sustainable devilmnt on Agriculture and water in Africa of 27th February 2004. para 23; Social Policy for Africa CAMSD/EXP/4(1) para, 2.2.8; The AU Declaration on agriculture and food security in Africa of the Second Ordinary Session of the Assembly, 10 to 12 July, 2003, para 2.; See also the Dakar Declaration of the General Assembly of the African Ministers' Council on Water on the Prioritisation of Water Security and Sanitation in the Post-2015 Development Agenda 2014. para (b-c) which calls for AU member States domestically mobilise funds to invest in water infrastructure as a means to promote sustainable agriculture that will in turn guarantee food security in the continent. See also, SADC initiative under, The Dar es Salaam Declaration on Agriculture and Food Security in the SADC Region 2004. para 6(a).

⁸⁶³ Sirte declaration on challenges of implementing integrated and sustainable devilmnt on Agriculture and water in Africa of 27th February 2004. para 11. This commitment resonates to the previous need for African states to commit 5-10% in investment infrastructure under para 1.8 above.

Thirdly, the obligation to AU member states to establish forest conservation areas.⁸⁶⁴ It is noted above that, forests are key to absorbing greenhouse gases, provide continued protection of biodiversity both of which are relevant to food production.⁸⁶⁵ To guarantee sustainable conservation, EIA as a precautionary rule has to be applied to strike a balance on mineral extraction and biodiversity conservation.⁸⁶⁶ Hence, African countries are required to enact laws that will minimise harm to MHCs when mining activities are to take place. Inclusive are laws relevant to compelling mining companies to carry out EIA and human rights impact assessments before approval of the mining permit.⁸⁶⁷ Assessments such as EIA and or human rights based impacts resonate to the transaction cost pointed above.⁸⁶⁸ It requires before any re-arrangement of property rights an assessment be carried out to inform its economic efficacy.⁸⁶⁹ Consequently, EIA is a common requirement in most African state laws.⁸⁷⁰

Despite the limitation of the scope of the study basing on mining on land, water resources such as rivers and lakes may grossly be impacted when mineral wastes leak to such water bodies. Therefore, one may hardly limit the no harm rule on land alone but extends it to water resources, aiming at safeguarding aquatic organisms

⁸⁶⁴ African Convention on the Conservation of Nature and Natural Resources. Art. VI (2); Resolution on the Right to Food and Food, Insecurity in Africa: The African Commission on Human and Peoples' Rights (the Commission) Meeting at its 60th Ordinary session held from 8th to 22nd May 2017 in Niamey, Niger 2017. para 1 (e).

⁸⁶⁵ AU, 'African Strategy on Climate Change' (n 294). para ix. 2.

⁸⁶⁶ African Convention on the Conservation of Nature and Natural Resources. Art. II.

⁸⁶⁷ Human Rights-Based Approach to Natural Resources Governance The African Commission on Human and Peoples' Rights (African Commission), at its 51st Ordinary Session held from 18 April to 2 May 2012 in Banjul, The Gambia 2012. para 3.; Resolution on the Niamey Declaration on Ensuring the Upholding of the African Charter in the Extractive Industries Sector - The African Commission on Human and Peoples' Rights, meeting at its 60th Ordinary Session held from 8 to 22 May 2017 in Niamey, Republic of Niger 2012. para 1(g); ACHPR, 'State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter Relating to Extractive Industries, Human Rights and the Environment' (n 408). para 58-64.

⁸⁶⁸ See para 2.3.2. above.

⁸⁶⁹ See para 2.3.2 above.

⁸⁷⁰ National Environmental Management Act 1998.; The National Environment Act 1995.; Environmental Management and Coordination Act 2012 (Chapter 387). to name but a few.

such as fishes.⁸⁷¹ Water bodies such as lakes and rivers are home to aquatic organisms which are major sources of food and income to large population in Africa.⁸⁷² It is also shown that fishes are migratory in nature hence a unanimous framework to protect shared water resources is vital.⁸⁷³ The table below provides for snapshot of fish sector on food nutrition and income in some African countries.

Contribution of Fish in the Food and Income Generation Some SADC Member States

Table 3.1: Fisheries Sector and Its Contribution on the Food and Nutrition In SADC Sub-Region

Name of the state	Shared water resources(Rivers/lakes/basins)	% of GDP contribution	% of total animal protein consumption	% of undernourished population	% of small scale participation in fishing	% of women participation
Mozambique ⁸⁷⁴	Zambezi	4	40	25 out of which 16 % are children	85	-
Zambia ⁸⁷⁵	Zambezi, Kafue, Tanganyika	1	20.2	48 while 15% out of total are children	-	-
Malawi ⁸⁷⁶	Lake Nyasa	-	3	21 while 17 % out of total are children	87	9.1 out of 45% of the fish processor
Botswana ⁸⁷⁷	Okavango basin	1	1	24	-	-

Source: Data extracted from the selected AU member states- Fisheries facts sheets

From the Table above, it is evident that fisheries products contributes a lot not only towards sources of food but also nutrition in AU member States. In addition, fishing sector is reportedly the source of income both the State and individuals. Fisheries

⁸⁷¹ African Convention on the Conservation of Nature and Natural Resources. Art. VII (1) (b).

⁸⁷² See table 1 below.

⁸⁷³ Blanco and Razzaque (n 390). p. 137.

⁸⁷⁴ See SADC Fisheries facts sheet vol. 1 No. 1 of January 2016.

⁸⁷⁵ See SADC Fisheries facts sheet vol. 1 No. 2 of April 2016.

⁸⁷⁶ See SADC Fisheries facts sheet vol. 1 No. 3 of July 2016.

⁸⁷⁷ See SADC Fisheries facts sheet vol. 1 No. 4 of October 2016.

products contributes the rate of 1-4% of the selected African countries GDP. It is also reportedly to hire a large number of people as most of the fishes are collected from small-scale fishermen. In Malawi, women are reportedly to form part of the fish processing sector. Consequently, the revenue from the fisheries sector, on the part of the government signify its ability to finance investment in food production infrastructure and hence ensure food security.

4.2.1.4 Equitable and Reasonable Utilisation (ERU)

The African region binding framework does not have an instrument that provides in lucid terms the ERU principle. However, as indicated in the discussion above, this principle transpires through various terms such as sustainable use, conservation and the like. To achieve this, all socio-economic activities such as mining have to be planned basing on a number of scientific factors such as ecology and carrying capacity.⁸⁷⁸ As such, land use activities are required to take into account the need for reforestation not only as a means to avoid soil erosion but also to guarantee its productivity.⁸⁷⁹

It is shown that, reserved air, land, water resources and plants are vital to biodiversity continuity.⁸⁸⁰ Biodiversity is relevant to supporting not only job creation through various sector developments but also is the foundation of human livelihood.⁸⁸¹ Notably, unlike the regional binding framework, the non-binding framework requires states to adopt legislative measures to incentivise environmental

⁸⁷⁸ African Convention on the Conservation of Nature and Natural Resources. Art. IV (a).

⁸⁷⁹ *ibid.* Art. IV. (b).

⁸⁸⁰ Department of Environmental Affairs and others, 'Mining and Biodiversity Guideline: Mainstreaming Biodiversity into the Mining Sector.' (2013). para 1.1.

⁸⁸¹ *ibid.* para 1.2.

protection through the use of various technologies in order to curb food insecurity in African countries.⁸⁸²

In addition, AU states are required to set aside land to be conserved as forests.⁸⁸³ Forests are known for their contribution to rainfall, soil cover, fertility and a habitat of 80% of all terrestrial biodiversity which are relevant to food security.⁸⁸⁴ In South Africa for example mining activities are prohibited from taking place in areas such as; national parks, mountain catchment areas, and world heritage sites to name but a few.⁸⁸⁵

In particular, there is a need to abate mining impacts on land cover as it may trigger droughts. It is reportedly, that SADC sub-region is grossly impacted by storms, cyclones and floods which has a great bearing on diminished food security.⁸⁸⁶ It is estimated that more than 41 million people suffer food shortage in about 13, out of 15 countries of the Sub-region.⁸⁸⁷ Among the most hit countries are; Mozambique, Malawi and Zimbabwe, where food aid is called for as a short term measure to alleviate hunger in the sub-region.⁸⁸⁸

Notably, it is shown that, poor planning caused by weak governance on the area of natural resources utilisation contribute to worsen the impacts⁸⁸⁹ Among factors that indicate inequitable use of land and or forests in Africa are; over grazing, clearing

⁸⁸² African Convention on the Conservation of Nature and Natural Resources. Art. XIII (2) (b).

⁸⁸³ *ibid.* Art. XIV (1) (a).

⁸⁸⁴ AU, 'African Strategy on Climate Change' (n 294). para xi.7 and 17.

⁸⁸⁵ Department of Environmental Affairs and others (n 880). para 3.2.1.

⁸⁸⁶ Andrew Meldrum, 'Drought Parches Southern Africa, Millions Faced with Hunger' *Associated Press* (Johannesburg, 7 November 2019).

⁸⁸⁷ SADC, 'SADC 2019 Synthesis Report on the State of Food and Nutrition Security and Vulnerability in Southern Africa' (SADC 2019) <https://www.sadc.int/sites/default/files/2021-07/SADC_Synthesis_Report_2019_Update_II.pdf>. p. 15.

⁸⁸⁸ *Ibid.* p. 15.

⁸⁸⁹ ACHPR, Pretoria Declaration on Economic, Social and Cultural Rights in Africa. para 3.

land for mining activities and or farming, forest fires over logging and over fishing in wet areas, inadequate number of human resources and weak legal and institutional framework to name but a few.⁸⁹⁰

With respect to mining, in South Africa for example, according to Mkentane the once fertile land for agriculture in Mpumalanga is now subjected to coal mining.⁸⁹¹ It is argued that, open pit mining replaces the top fertile soil with gravels which are not agriculture supportive.⁸⁹² Reduction of arable land due to mining results into shortage of food production.⁸⁹³ In addition, the case of SERAC vs Nigeria⁸⁹⁴ mining companies polluted farms in the Niger delta, which were not only sources of water but food for Ogoni people is also an indicator of such imbalance.

Lastly, the AU framework recognise the need to prioritise human life over the conservation of environment. For example, it is allowed that during competing interest measures set to conserve forests and its resources such as water sources and or wild fruits and animals may be lifted by state parties for a specific period of time.⁸⁹⁵ It is above noted that, African women are dependent on wild fruits not only for their food but also income when they trade them in other parts of Sudan.⁸⁹⁶

⁸⁹⁰ AU, 'African Strategy on Climate Change' (n 294). para xi.7 and 10; African Convention on the Conservation of Nature and Natural Resources. Art. VIII (1) (b).

⁸⁹¹ Mkentane (n 473)., (accessed 12 December 2019).

⁸⁹² Benchmark Foundation, South African coal mining, Corporate grievance mechanisms, community engagement concerns and Mining impacts, 2014, para 6.8.3; Munnik (n 474)., (accessed 10 December 2019)

⁸⁹³ McFerron and Jomo (n 475)., (accessed on 9 December 2019).

⁸⁹⁴ Social and Economic Rights Action Centre (SERAC) and Another v Nigeria (2001) AHRLR 60 (ACHPR 2001), para 67; Mbzira (n 476). 6; Kamga and Ojoku (n 476). p. 462.

⁸⁹⁵ African Convention on the Conservation of Nature and Natural Resources. Art. XXV (1) (b).; African Convention on the Conservation of Nature and Natural Resources. Art. XVII (1) (c), (2) (a).

⁸⁹⁶ See para 3.2.2.7 above.

4.2.1.5 Notification

The African regional framework seems either silent or provides for the principle of notification impliedly. On the first place, it is assumed silence because no clear provision with such a principle. Perhaps the silence is based on what developing states' claimed their rights to plan and execute their development policies exclusive of others.⁸⁹⁷ On the second hand, through other principles such as; sovereign equality, non-interference of internal affairs peaceful coexistence and social justice and balanced socio-economic development, the obligation to notify other states is implied.⁸⁹⁸

In addition, the no harm rule discussed above, requires the reliance on science.⁸⁹⁹ Consequently, once socio-economic development planning suggests any scientific impact beyond the borders of the particular state, the planning state has an implied duty to notify the other states of such impacts. It may also be argued here that, the principle of notification planned measures is recognised under a number of sub-regional frameworks.⁹⁰⁰

With respect to internal self-determination AU states are called to adopt laws which recognise FPIC as a principle to safeguard MHCs from relocation to provide land for mining.⁹⁰¹ Among key aspects to form part of the report of African countries on the nature of their legal framework cover issues of; land tenure security, prior

⁸⁹⁷ The Charter of Economic Rights and Duties of States 3215th Plenary Meeting.; African Charter on Human and Peoples' Rights. Art 22.

⁸⁹⁸ Constitutive Act of the AU. Art. 4.

⁸⁹⁹ African Convention on the Conservation of Nature and Natural Resources. Art. IV (a) and VI (a).

⁹⁰⁰ The Convention on the Sustainable Management of Lake Tanganyika 2003. Art.14; Protocol for Sustainable Development of Lake Victoria Basin 2003. Art. 4 (2)(c); Agreement on the establishment of the Zambezi Watercourse Commission (The ZAMCOM Agreement) 2004. Art. 16.

⁹⁰¹ Resolution on Climate Change and Human Rights and the Need to Study its Impact in Africa - ACHPR/Res.153(XLVI) 2009. para 1.; Resolution on Climate Change and Human Rights in Africa - ACHPR/Res.342(LVIII) 2016. para ii.

consultation and framework to benefit MHCs through their involvement in resources (mineral) extraction.⁹⁰² In particular, the case of Endorosi shows that AU requires indigenous peoples to be notified of the potential impacts of development projects through the FPIC.⁹⁰³

4.2.1.6 Consultation and Negotiation

The principle of consultation and negotiation may be explained in two major ways. Firstly, as mandatory principle in case one intends to access resources located in indigenous locality.⁹⁰⁴ As noted above, consultation and negotiation has to take place through the established indigenous organs and or institutions and traditions. It also has to take place in good faith and prior to the initiation of socio-economic project, say for example mining. These requirements ensue from the fact that, indigenous peoples enjoy the principle of self-determination.⁹⁰⁵

Generally, self-determination may be exercised by groups, local community, local government given the fact there is respect of sovereignty and territorial integrity.⁹⁰⁶ Consequently, resources located in their locality are vital for their livelihood, any access or use has to receive their informed consent. In addition, any use of such resources should not affect their means of livelihood such as pasture and agricultural

⁹⁰² ACHPR, 'State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter Relating to Extractive Industries, Human Rights and the Environment' (n 408), para III (h, j, k) respectively.

⁹⁰³ *Center for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya* (n 510), para 86, 291-293.

⁹⁰⁴ Human Rights-Based Approach to Natural Resources Governance The African Commission on Human and Peoples' Rights (African Commission), at its 51st Ordinary Session held from 18 April to 2 May 2012 in Banjul, The Gambia. para 4.

⁹⁰⁵ African Charter on Human and Peoples' Rights. Art 20(1).

⁹⁰⁶ *Congrès du peuple katangais / DRC* (n 825). para 4. Notably, however, Ethiopia in a unique manner provides for a constitutional right of self-determination that also recognises the right to secede from the sovereignty and territorial integrity see for example, Constitution of the Federal Democratic Republic of Ethiopia. Preamble vide Art. 39 (1).

lands.⁹⁰⁷ An example could be taken from the forest communities in Kenya, in the case of *Ibrahim Sangor vs Minister for State Provincial Administration and Internal Security*,⁹⁰⁸ where a forceful eviction of communities from their settlement, grazing and food production land was challenged based on State violation of the right to food, absence of prior notice, and absence of alternative land for settlement and or accommodation.⁹⁰⁹

Secondly, consultation is also used as a tool to settle disputes between parties to the international conventions. As noted above, this procedure of settlement of disputes dates back to the Declaration of international law friendly relations.⁹¹⁰ On similar note, the AU framework recognises consultation and negotiation as a means to solve conflict between states in this case aimed at conserving and or use of nature and natural resources and as a means to achieve human rights.⁹¹¹ In addition, consultation is seen as a tool firstly, to halt the civil insecurity in a number of mineral-rich African countries. Calls to stop the endless civil unrest is parallel with the requirement to allow passage of humanitarian help including providing food to MHCs captured between fighting (rebel) forces.⁹¹² Despite such a principle, proliferation and intensification of rebels and insurgence of military coup in mineral resources-rich African countries such as; Mali, Chad, Sudan, Guinea and DR Congo

⁹⁰⁷ *Center for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya* (n 510). Para; Resolution on Climate Change and Human Rights and the Need to Study its Impact in Africa - ACHPR/Res.153(XLVI). para 1.

⁹⁰⁸ *Ibrahim Sangor vs Minister of State Provincial Administration and Internal Security*, 2011, eKLR Constitutional Petition No. 2 2011, 11.

⁹⁰⁹ *Ibid.* 5 para (e).

⁹¹⁰ See para 3.2.1.6 above.

⁹¹¹ African Charter on Human and Peoples' Rights. Art. 23; African Convention on the Conservation of Nature and Natural Resources. Art. XVIII.

⁹¹² Resolution on the Right to Food and Food, Insecurity in Africa: The African Commission on Human and Peoples' Rights (the Commission) Meeting at its 60th Ordinary session held from 8th to 22nd May 2017 in Niamey, Niger. Para 1 (b) and 4.

signals its inefficiency.

4.2.1.7 Stakeholders Involvement

Generally, stakeholders are key participants in decision making forum, whom either are affected or will be affected directly or indirectly by the decision that will be reached.⁹¹³ Consequently, it relates to participation in decision making, freedom of opinion and right to information. Notably, potential lists of stakeholders are provided above.⁹¹⁴ At the African regional level stake holders' participation is one among the key principles that requires to be adhered. Firstly, such a principle is reflected in various parameters ranging from the right of peoples to participate in disposing their natural resources, right to participate in decision making and right to information and opinion.⁹¹⁵ Notably, however, the AU framework seems lack precision on issues such as; nature and procedure to receive information which are indicated above as vital in leading towards stakeholders meaningful participation.⁹¹⁶

In particular, stakeholders' participation offers local communities a chance to share their traditional knowledge on issues such as biodiversity which is relevant to sustain their livelihood.⁹¹⁷ Given the fact that at times mining related information may be complex, AU requires that MNCs to provide less complex and information in local language as a means to effect popular participation.⁹¹⁸ It is also a tool to grant MNCs

⁹¹³ Donna Volger, Suzane Macey and Amanda Sigouin, 'Stakeholder Analysis in Environmental and Conservation Planning' (2017) 7 Lesson in Conservation. p. 6.

⁹¹⁴ See para 3.2.1.7 above.

⁹¹⁵ The African Charter on Human and peoples' Rights. Art. 9(1-2),13 and 21(1).

⁹¹⁶ See para 3.2.1.7 above.

⁹¹⁷ Department of Environmental Affairs and others (n 880). para 3.3.

⁹¹⁸ Resolution on the Niamey Declaration on Ensuring the Upholding of the African Charter in the Extractive Industries Sector The African Commission on Human and Peoples' Rights, meeting at its 60th Ordinary Session held from 8 to 22 May 2017 in Niamey, Republic of Niger 2017. para 1 (f).

a social licence to operate in local areas.⁹¹⁹ Clementine Burnley shows that approaches involving local communities contributed to ending resources related conflicts in some parts of DR Congo.⁹²⁰ Involvement in decision making requires presence of laws relevant to guarantee access to information and freedom of speech and gender balance in decision making.⁹²¹

Secondly, the principle of stakeholders' participation is also recognised requiring both the government private companies and MHCs to be involved in decision making.⁹²² Guaranteeing stakeholders' participation in decision making is not only a tool to balance peoples' interests in the planned development but also a tool to foster transparency good governance and broad-based empowerment of locals which is badly needed in African governments.⁹²³

In particular, among the key stakeholders in food security in Africa are women, because it is shown that they constitute more than 40% of the agricultural work force.⁹²⁴ Since African food production is carried in small-scale rural areas and relies on rainfall, climate variation seems to pose a threat to food security.⁹²⁵ It is however, noted despite of the fact that women are guaranteed right to food its realisation becomes an issue due to a number of factors such as; non-domestication of the

⁹¹⁹ Bench Marks Foundation and Bench Mark Center for CSR, 'Floating or Sinking Social License to Operate (SLO) Kumba Iron Ore Ltd' (2015). para 5.2; Department of Environmental Affairs and others (n 880). para 3.3.

⁹²⁰ Clementine Burnley, 'Natural Resources Conflict in the Democratic Republic of the Congo: A Question of Governance?' (2011) 12 Sustainable Development Law & Policy. p.11.

⁹²¹ African Charter on Democracy; Elections and Governance 2007. Art. 2 (10), 3 (6-8); Declaration of principles on freedom of expression and access to information in Africa 2019. principle 10.

⁹²² Declaration on Democracy, Political, Economic and Corporate Governance 2003. para 18(e); UNECA, 'Guideline for Enhancing Good and Economic Corporate Governance in Africa' (UNECA, 2002). para 29 and 41.

⁹²³ African Union Convention on Preventing and Combating Corruption 2003. Art. 2 (5) and 3 (3) ; UNECA (n 922). para 41 - 44. ; Bichaka Fayissa and Christian Nsiah, 'The Impact of Governance on Economic Growth of Africa' (2013) 7 Journal of Development Areas. p.104.

⁹²⁴ AU, 'Framework for Irrigation Development and Agricultural Water Management in Africa' (AU, 2020). para 2.1.7.

⁹²⁵ *ibid.* para 2.1.5-2.16.

protocol in domestic laws in some African countries; cost of implementing the requirement of the protocol, little awareness among policy makers, judicial officials, legal practitioners and civil societies, civil and political instability, cultural practices that limit women from accessing clan lands to name but a few.⁹²⁶ Such a trend is also reflected in the mineral sector as well. Among the reasons behind such a trend are; cultural bias, inadequate capital, lack of skills, masculinity nature of the mining activities to name but a few.⁹²⁷

In order to guarantee women beneficial participation in mineral sector South Africa may be taken as an example. Since the year 2002 to 2018 South African legal framework has been progressively increasing women beneficial chances ranging from their employment to procurement of goods and services in the sector. It is shown for example that in the years 2002-2010 the target was to guarantee women participation at the range of 10% and 40% respectively.⁹²⁸ In the year 2016-2017 the target was to increase women in decision making positions such as board members, executive and senior positions at the range of 15%, 25% and 30% to 25%, 25% and 30% respectively.⁹²⁹

⁹²⁶ Victor Ayeni, 'Introduction and Preliminary Review of Findings' in Victor Ayeni (ed), *The impact of African charter and the Maputo protocol in selected African States* (Pretoria University Press 2016).pp.13-15; Kounkine Some', 'The Impact of the African Charter and the Maputo Protocol in Bukina Fasso' in Victor Ayeni (ed), *The impact of African Charter and the Maputo Protocol in selected African States* (Pretoria University Law Press 2016).28; Forkum (n 842). p. 42. ; Kounkine Some' and Armand Tauoh, 'The Impact of African Charter and the Maputo Protocol in Corte D'Ivoire' in Victor Ayeni (ed), *The impact of African Charter and the Maputo Protocol in selected African States* (Pretoria University Law Press 2016). p. 55.; Techane (n 842). p. 73.

⁹²⁷ Ouida Chichester, Jessca Pluess and Alison Taylor, 'Women's Economic Empowerment in Sub-Saharan Africa: Recommendations for the Mining Sector' (The Business of a Better World, 2017). p. 11.

⁹²⁸ Broad-based socio-economic empowerment Charter for the South African Mining Industry 2002, para 4.2; Amendment of the Broad based socio-economic empowerment charter for South Africa Mining and Minerals Industry 2010. para 2.4.

⁹²⁹ Republic of South Africa, 'Broad-Based Black Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry' (Department of Mineral Resources, 2016).para 2.4; Republic of South Africa, 'Broad-Based Black Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry' (Department of Mineral Resources, 2017). para 2.3.

In particular to women participation in supply of goods and services to mining sector, new requirements were introduced in the year 2017 where mining companies were required to procure 5% of goods and 10% of services from women owned and or controlled companies.⁹³⁰ The thresholds for women beneficial participation are also noted in the year 2018 where women composition in the board members, executive directors and senior positions was required to be 20%, 20% and 25% respectively.⁹³¹ Notably, unlike the previous thresholds, the 2018 requirements states that the percentage provided have to be based on the total population of the province where the mining companies operate.⁹³²

Furthermore, the African region, benefit sharing is enshrined under the same provision which recognises the peoples' right to participate in disposing their resources.⁹³³ Indigenous peoples therefore, are inclusive in the discussion of benefit sharing discussed under Article 21 of the charter. As such governments are neither the sole decision maker nor the only beneficiary of the mineral extraction in the modern mining framework.⁹³⁴ With respect to indigenous peoples, it is required that revenue sharing be paid directly to the established community trusts or community

⁹³⁰ Republic of South Africa, 'Broad-Based Black Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry' (n 929). para 2.2.

⁹³¹ Republic of South Africa, 'Broad-Based Black Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry' (Department of Mineral Resources, 2018).para 2.4.1, 2.4.2 and 2.4.3.

⁹³² Ibid.

⁹³³ The African Charter on Human and peoples' Rights. Art. 21(2).; Same is also provided for under non-binding frameworks such as; Resolution on a Human Rights-Based Approach to Natural Resources Governance: The African Commission on Human and Peoples' Rights (African Commission), at its 51st Ordinary Session held from 18 April to 2 May 2012 in Banjul, The Gambia; 2012. para 2 (c); Resolution on the Niamey Declaration on Ensuring the Upholding of the African Charter in the Extractive Industries Sector The African Commission on Human and Peoples' Rights, meeting at its 60th Ordinary Session held from 8 to 22 May 2017 in Niamey, Republic of Niger. para 1 (a) and 2(b) (d).; African Union (n 811). para I.

⁹³⁴ UNECA, 'Improving Public Participation in the Sustainable Development of Mineral Resources in Africa' (2004). p. 4.

based organisation as their representatives.⁹³⁵

Experience from South Africa shows that MHCs' (indigenous communities') interests are taken care in the law making process where their trusts are involved.⁹³⁶

Also a special percentages of the benefits for MHCs are set at the rate of 5% -8% of the shares in the issued licences.⁹³⁷ With regard to benefits, laws in South Africa, Kenya, Uganda and Sierra Leone show that the MHCs are involved in benefit sharing through equity participation and or joint mining rights, and or percentages of revenue collected.⁹³⁸ Guaranteeing sharing of revenue generated from extraction the benefit sharing is relevant to supporting investment in agricultural infrastructures which are relevant to food production. It is noted above that if Africa intends to end hunger she will need to invest 5-10% of her GDP in infrastructure.⁹³⁹ Notably, Africa strategies and envisions to ending and or eradicating hunger by 2025 and 2063 respectively through adoption of cheap technology aimed at increasing agricultural production.⁹⁴⁰

Despite such a reality most African states still do not have robust legal framework to support such mineral resources revenue sharing.⁹⁴¹ It is also argued that, indigenous peoples are more prone to mining induced environmental ruination than other

⁹³⁵ Resolution on the Niamey Declaration on Ensuring the Upholding of the African Charter in the Extractive Industries Sector The African Commission on Human and Peoples' Rights, meeting at its 60th Ordinary Session held from 8 to 22 May 2017 in Niamey, Republic of Niger. para 1 (d).

⁹³⁶ Traditional Leadership and Governance Framework Act 2003 2003.s. 18(1); Republic of South Africa, 'Broad-Based Black Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry' (n 929). para 2.1.1.3.

⁹³⁷ Republic of South Africa, 'Broad-Based Black Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry' (n 929), para 2.1.13; Republic of South Africa, 'Broad-Based Black Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry' (n 931). para 2.1.3.2.

⁹³⁸ Mineral and Petroleum Resources Development Act 2002.s 17 (4A), 23(2A) ;Mining Act 2016.s 183(5) ;The Mines and Minerals Act 2009.s 138 and 139 ; Mining Act 2003.s 98(2) .

⁹³⁹ See para 1.8 above.

⁹⁴⁰ AU and NEPAD (n 861). para 1.8.3; African Union and Commission (n 1). The Agenda 2063, para 13.; *ibid.* para 72 (e) .

⁹⁴¹ UNECA (n 934). p. 5.

communities due to their dependence on environmental resources.⁹⁴² However, at the African regional level there seems no dedicated comprehensive policy and or guide relate to climate variation adaptation and or mitigation by indigenous peoples.⁹⁴³

4.2.1.8 International Cooperation

International cooperation in mineral sector is shown above as a key principle to guarantee mineral sector contribution to human rights observance and sustainable development. AU legal framework seem to have two approaches with respect to international cooperation. Firstly, guaranteeing MNCs respect human rights throughout their life cycle.⁹⁴⁴ Notably, under the African Mining Vision 2009, KPCS is named as a global resources governance tool that may also be relied by African countries.⁹⁴⁵

Adoption of KPCs is vital owing to natural resources-rich African countries trend of exporting raw minerals to global markets.⁹⁴⁶ Among factors contributing to this situation are; absence of good governance and effective institutions, inadequate information such as geological data to base decision on, inadequate human resources to negotiate and draft laws and mining contracts. Other factors are; inadequate legal framework on aspects of local beneficiation and revenue sharing, mismanagement of revenue, inadequate political will and inadequate investment in key

⁹⁴² Machelo Hasungule and Ademola Jegede, 'The Impact of Climate Change on Indigenous Peoples' Land Tenure and Use: The Case for Regional Policy in Africa.' [2014] *International Journal on Minority and Group Rights*.p.290.

⁹⁴³ *ibid.* p. 290.

⁹⁴⁴ Resolution on the Niamey Declaration on Ensuring the Upholding of the African Charter in the Extractive Industries Sector - The African Commission on Human and Peoples' Rights, meeting at its 60th Ordinary Session held from 8 to 22 May 2017 in Niamey, Republic of Niger. para 2.

⁹⁴⁵ African Union (n 811). para 3.

⁹⁴⁶ *ibid.* para II.

infrastructures.⁹⁴⁷ It is argued these factors portray existence of resource curse in eastern part of DR Congo due to endless conflicts.⁹⁴⁸ AU recognises the principle that human rights are interdependent and indivisible in the sense that, guaranteeing human rights has to be looked at as a holistic rather than single handled right.⁹⁴⁹ Civil conflicts resonates to infringing the right to peace that may impact the right to food owing to inadequate involvement in food production activities for example.

To address such weaknesses, AU member states are called to adopt robust legal and institutional framework to guarantee local value addition as a means to maximise potentials in the resource extraction widening employment opportunities.⁹⁵⁰ It is worth to note here that, the Africa Mining Vision 2009 seems to have yielded positive results when AU enacted the Statute of the African Mineral Development Centre 2016.⁹⁵¹ Local value addition will definitely, reduce export of raw minerals from Africa and hence address the KPCS initiative which seems to be more recognised at the African sub-regional level.⁹⁵²

However, African countries will still be bound to contribute to limiting rough diamond from other states. It is shown that, reliance on international and regional frameworks to curb illicit natural resources extraction contributes to abating human

⁹⁴⁷ *ibid.* pp14-15; Burnley (n 920). p. 11.

⁹⁴⁸ Burnley (n 920). p. 11.

⁹⁴⁹ ACHPR, 'Principles and Guidelines on the Implementations of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights' (n 235). preamble, and para 21.; ACHPR, Pretoria Declaration on Economic, Social and Cultural Rights in Africa. preamble.; Kigali Declaration: The 1st African Union (AU) Ministerial Conference on Human Rights in Africa meeting on 8 May 2003 in Kigali, Rwanda. para, 1.

⁹⁵⁰ African Union (n 811). para i.

⁹⁵¹ Statute of the African Mineral Development Centre. Art. 9 (c).

⁹⁵² Khadiagala (n 747). p. 24.; For details on sub-regional efforts to curb trade in rough diamonds nexus to human rights violation, reference may be made to; Dar es Salaam Declaration on Peace, Security, Democracy and Development in the Great Lakes Region 2004.; Protocol Against the Illegal Exploitation of Natural Resources 2006.; Protocol on Democracy and Good Governance 2006.; ICGLR, 'Pact on Security, Stability and Development in the Great Lakes Region' (2006).

rights violations.⁹⁵³ The KPCs is named as an example with the emphasis to domesticate such initiatives and adoption of strong institutions in African countries.⁹⁵⁴ It is also noted that without partnering with other countries and stakeholders in regulating the entire value chain in the mineral sector, African countries will hardly derive the benefit from the sector.⁹⁵⁵

Secondly, AU requires all her member states to curb MNCs in the mineral sector from exploiting African states and or communities.⁹⁵⁶ To guarantee that mineral extraction does contribute to AU member states' development, both states and MNCs in the extractive sector are called to adopt transparency in their dealings.⁹⁵⁷ Among aspects which are called for are inclusive; beneficial-ownership, profit made by MNCs, revenue paid by the MNCs to the states and all mining contracts and or licenses.⁹⁵⁸ It is shown above that, availability of information is vital tool to hold the governments and MNCs accountable in the minerals sector. Despite of the fact that there exist several global and regional and sub-regional transparency initiatives, AU recommends among others the EITI.⁹⁵⁹ States are therefore, free to choose among the available initiatives.⁹⁶⁰

⁹⁵³ Khadiagala (n 747). p. 20.

⁹⁵⁴ *ibid.* p. 25.

⁹⁵⁵ Besada, Lisk and Martin (n 587). p. 10.

⁹⁵⁶ Resolution on the Niamey Declaration on Ensuring the Upholding of the African Charter in the Extractive Industries Sector - The African Commission on Human and Peoples' Rights, meeting at its 60th Ordinary Session held from 8 to 22 May 2017 in Niamey, Republic of Niger. para 1(c).

⁹⁵⁷ ACHPR, 'State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter Relating to Extractive Industries, Human Rights and the Environment' (n 408). para 46.

⁹⁵⁸ Resolution on the Niamey Declaration on Ensuring the Upholding of the African Charter in the Extractive Industries Sector - The African Commission on Human and Peoples' Rights, meeting at its 60th Ordinary Session held from 8 to 22 May 2017 in Niamey, Republic of Niger. para 1(b) and 2(e); Human Rights-Based Approach to Natural Resources Governance The African Commission on Human and Peoples' Rights (African Commission), at its 51st Ordinary Session held from 18 April to 2 May 2012 in Banjul, The Gambia. para 2.

⁹⁵⁹ African Union (n 811). para 3.

⁹⁶⁰ See para 2.2.7 above.; See also Annexure 1 on AU states members to EITI and KPCS.

Transparency is vital in fostering international cooperation leading to returning to African countries all financial and other resources like minerals illicitly taken from them.⁹⁶¹ Parallel with this obligation, African countries are also called to enhance their domestic anti-corruption institutions through insulating them from political and other interferences as a means to widen governance and accountability in Africa.⁹⁶² Strong institutions are vital in holding the government and mineral stakeholders into account when mining impacts affects peoples' well-being.

However, despite such a call, yet some African countries have not domesticated the same.⁹⁶³ Non domestication of this convention is indicated to undermine regional and global efforts to curb illicit financial flow from the mineral sector, which is indicated to cost African continent more than the aid she receive annually.⁹⁶⁴ Also non-ratification of AU instruments on natural resources governance, contravenes the objective of the African Mineral Development Centre which strives for coherent and robust regional legal framework for sustainable harnessing of minerals.⁹⁶⁵

All in all, this part identified key regional principles relevant to safeguard MHCs right to adequate food. The discussion shows that such principles are relatively similar to those relied at international level, some variations to reflect African region perspectives are noted though. As such, the Africa's adoption of international principles seems to be influenced by her; geographical, historical, cultural, socio-

⁹⁶¹ AU Assembly, 'Report of H.E. Muhammadu Buhari President of the Federal Republic of Nigeria and Leader on the African Anti-Corruption Year. Au Assembly Thirty Second Ordinary Session 10-11 February 2019' (2019). para 31.

⁹⁶² *ibid.* para 33.

⁹⁶³ *ibid.* para 32.

⁹⁶⁴ AU, 'AU Advisory Board on Corruption (AU-Abc) 2018-2022 Strategic Plan: Validation Workshop Document' (2017). p. 20; See also para 1.8 above.

⁹⁶⁵ Statute of the African Mineral Development Centre. Art. 3 (2)(a)(e).

economic and political factors.

4.2.2 Safeguarding MHCs Right to Water

The African charter seems silent on the right to water.⁹⁶⁶ This means that, it may be implied from other human rights such as; right to life which is expressly provided under the charter.⁹⁶⁷ However, the right to water is provided for under other AU instruments.⁹⁶⁸ In particular, AU does not set or provide for minimum volume of water to sustain human life.⁹⁶⁹ Instead it adopted the UN standards which requires a minimum of 20 litres per person per day. As such the 20 litres is a bottom line, otherwise the minimum volume is 50-100 litres per person per day.⁹⁷⁰

In addition, the right to water requires it to be free from hazardous elements, safe and should meet peoples' socio-cultural standards. AU seems to have adopted the UN standards on water accessibility. Firstly, it obliges all states to deliver water services to all irrespective where they live.⁹⁷¹ It capitalises on the need of water services to be available in the vicinity of homes, government institutions and or and other places such as health institutions or markets.⁹⁷² In particular, it adopts the UN standards that, water has to be available within the range of one kilometre or thirty minutes' walk.⁹⁷³

⁹⁶⁶ ACHPR, 'Principles and Guidelines on the Implementations of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights' (n 235). para 87.

⁹⁶⁷ *ibid.*; ACHPR, 'Guidelines on the Right to Water in Africa, Adopted during 26th Extra-Ordinary Session of the African Commission on Human and Peoples' Rights Held from 16th-30th July 2019 in Banjul, The Gambia' (n 235).

⁹⁶⁸ 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 in Africa of 11th July 2003.

⁹⁶⁹ ACHPR, 'Principles and Guidelines on the Implementations of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights' (n 235). para 88,-89 and 92.

⁹⁷⁰ ACHPR, 'Guidelines on the Right to Water in Africa, Adopted during 26th Extra-Ordinary Session of the African Commission on Human and Peoples' Rights Held from 16th-30th July 2019 in Banjul, The Gambia' (n 235). para 12.

⁹⁷¹ *ibid.* para 13.2.

⁹⁷² *ibid.* para 13.2.

⁹⁷³ *ibid.* para 14.1.

Owing to various ways through which mining activities may impact water sources and given parameters within which right to water may be discussed, this part focuses on the quality of water.⁹⁷⁴ It intends to show that AU have relevant principles adopted to fit in Africa's geographical, historical, socio-economical, cultural, political and hydrological circumstances relevant to safeguard MHCs right to water. In order to draw a logical conclusion, the critical discussion here under, analyses similar principles under international framework.

4.2.2.1 Permanent Sovereignty over Natural Resources

The PSNR principle is applicable in the AU binding and non-binding frameworks with respect to the right to water.⁹⁷⁵ It is worth to note here that, as discussed above, both the external and internal self-determination apply to water resources as well.⁹⁷⁶ On a similar note the scope of this principle requires states to enact laws and relevant institutions to guarantee water accessibility to all.⁹⁷⁷ Notably, AU requires states to enact laws relevant to safeguard peoples (children women and girls) access to clean water.⁹⁷⁸ AU region took cognisance of social stratification noted above where women and girls are seen vulnerable in case of water stress situation compared to men.⁹⁷⁹

In addition AU calls for good governance in all administrative positions as a means to curb potential corrupt practices in granting mining rights that may impact

⁹⁷⁴ See para 1.8 above.

⁹⁷⁵ African Convention on the Conservation of Nature and Natural Resources. Art. XXII; The African Charter on Human and Peoples' Rights. Art. 21; ACHPR, 'The ACHPR Resolution on the Right to Water Obligations- ACHPR /Res.300 (EXT.OS/XVII) 20 The African Commission on Human and Peoples' Rights (the Commission), Meeting at Its 17th Extraordinary Session Held from 19 to 28 February 2015 in Banjul, The Gambia'. para 1.; ACHPR, 'Guidelines on the Right to Water in Africa, Adopted during 26th Extra-Ordinary Session of the African Commission on Human and Peoples' Rights Held from 16th-30th July 2019 in Banjul, The Gambia' (n 235). para 1.1.

⁹⁷⁶ See para 4.2.1.1 above.

⁹⁷⁷ African Union Convention on Preventing and Combating Corruption. Art. 5.

⁹⁷⁸ The African Charter on the Rights and Welfare of the Child 1990. Art XIV (2) (c); Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. Art 15 (a).

⁹⁷⁹ See para 1.8 above.

sustainable access to clean water.⁹⁸⁰ As such, governments are not only required to adopt positive measures but also guarantee their administrative implementation and legal enforceability as means to remedy violation of right to clean water wherever they happen.⁹⁸¹ Despite its importance the right to clean water seems to be guaranteed in few African States.⁹⁸²

In particular, to institutions, examples could be taken from Kenya and South Africa where relevant institutions are in place to guarantee the right to clean water. Firstly, in the case of *City of Johannesburg Metropolitan Municipality V Blue Moon Light Properties 39 (PTY) Ltd*,⁹⁸³ (although not related to water services) the South African Constitutional Court uphold the decision of the Supreme Court of appeal in declaring the city's policy as unreasonable and unconstitutional owing to the fact that it discriminates between homeless people as a result of eviction by the City and those evicted from private property.

Secondly, in Kenya the Water Tribunal is established with the mandate to safeguard peoples' rights to water as guaranteed under the Kenyan Constitution 2010.⁹⁸⁴ In case one is not satisfied with the decision of the Water Tribunal he/she has a right to appeal to the Land and Environmental Court which is also a constitutional creature.⁹⁸⁵ Consequently, MHCs have a right to defend their access to clean water

⁹⁸⁰ African Union Convention on Preventing and Combating Corruption. Art.7; African Charter on Values and Principles of Public Service and Administration 2011. Art. 10(2-3).

⁹⁸¹ Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and People's Rights. para 22.

⁹⁸² See the Annexure I on the list of African States with constitutional recognition of rights to clean water and adequate food.

⁹⁸³ *City of Johannesburg Metropolitan Municipality v Blue Moon Light Properties 39 (PTY) Ltd CCT37/11* [2011] Constitutional Court of South Africa ZACC 33. para 95.

⁹⁸⁴ Constitution of Kenya 2010. Art. 43(2)(d); The Water Act 2016. s. 119 (1).

⁹⁸⁵ Water Act 2016. s. 124.; Constitution of Kenya. Art. 162 (2)(b).

through established independent institutions for various remedies.

AU has also issued a guideline that compel AU members not to enact laws which will waive their PSNR. Emphasis is placed on requirement that laws should provide for relevant institutions to provide for remedies in case peoples' rights are infringed. In order to deter potential violation of peoples' right to clean water, laws should adopt deterrent penalties against individuals and or companies which will be convicted to have violated peoples' right to water.⁹⁸⁶ It is stated that, states actions to promote access to clean water may not be limited by contractual arrangements either between the state and private companies and or individuals.⁹⁸⁷

Notably, access to clean water in Africa is reportedly low due to infrastructure gap, inadequate skills and lack of respective incentives to invest in water sector.⁹⁸⁸ Also, the impact of climate variation diminishes the rain fall which is relevant to both forest rejuvenation and source of fresh water.⁹⁸⁹ Concerns of unclean water resonates to the fact that almost half of African population suffer from water born diseases.⁹⁹⁰ To address such challenges AU states are called to adopt laws, policies, strategies that opening up room for private sector investment in water sector.⁹⁹¹ However, it is noted above that most African states do not adopt robust legal framework which would provide for private sector involvement in service delivery and or promotion of

⁹⁸⁶ Resolution on the Niamey Declaration on Ensuring the Upholding of the African Charter in the Extractive Industries Sector The African Commission on Human and Peoples' Rights, meeting at its 60th Ordinary Session held from 8 to 22 May 2017 in Niamey, Republic of Niger. para 1 (g-h).

⁹⁸⁷ The Office of the High Commissioner for Human Rights (n 606) 15. para 33.

⁹⁸⁸ John Ombella, 'Promoting Water Infrastructure Investment to Accelerate Access to Water in Tanzania' (2020) 8 Nazarene University Law Journal. p.183.

⁹⁸⁹ AU, 'African Strategy on Climate Change' (n 294). part xi. 9.

⁹⁹⁰ AU, ECA, and ADB (n 76). p. 13.

⁹⁹¹ The Libreville Multi-stakeholder's declaration on achieving water security and safely managed sanitation for Africa 2018. para iii-v.

transfer of science and technology inclusive in water sector.⁹⁹²

4.2.2.2 Common but Differentiated Responsibilities

As noted above the AU binding legal framework seems silence on the CDR principle, the same position applies to water related instruments.⁹⁹³ Notably however, AU non-binding legal framework seems to contain general elements of CDR principle. Such a reflection transpires through the imposed collective duty to protect and conserve environments as a means to guarantee enjoyment of the right to development.⁹⁹⁴ AU seems to be in her initial stages of establishing link between climate change and food security as one among human rights under the ACHPR initiative.⁹⁹⁵ Prior to such efforts AU had adopted a strategy on climate change which shows that AU states depends on CDR as a means to mitigate the impacts of climate variation on various sectors inclusive water.⁹⁹⁶

However, it is noted among other factors limiting AU states from benefiting from the CDR principle as; reluctance of the developed countries to implement their financial commitments, inadequate legal and policy framework in AU states, weak institutional framework and wide spread underprivileged situations among Africans.⁹⁹⁷ Consequently, for African states to benefit from the CDR principle it has to capitalise on; good governance, mainstream climate issues in their legal and policy frameworks, guarantee international cooperation and public awareness on

⁹⁹² See the discussion on chapter three above.

⁹⁹³ See para 4.2.1.2 above.

⁹⁹⁴ African Convention on the Conservation of Nature and Natural Resources. Art. III (2) and XXXIX.

⁹⁹⁵ Resolution on Climate Change and Human Rights and the Need to Study its Impact in Africa - ACHPR/Res.153(XLVI). para 4; Resolution on Climate Change and Human Rights in Africa - ACHPR/Res.342(LVIII). para iii.

⁹⁹⁶ AU, 'African Strategy on Climate Change' (n 294).

⁹⁹⁷ *ibid.* para I and II. 2.

climate aspects.⁹⁹⁸

4.2.2.3 No Harm Rule

African region requires all her member states to establish laws with provisions that will guarantee water resources from pollution.⁹⁹⁹ Prohibition of water pollution resonates to the prohibition of ruination of African resources enshrined under the African Charter 1986.¹⁰⁰⁰ In Africa, water pollution poses a serious threat to human life due to the increase in water born diseases and deaths estimated to about one million annually.¹⁰⁰¹

Secondly, they are required to control water utilisation say for example through the abstraction of waters by the upstream countries hence causing hardship to downstream communities and countries.¹⁰⁰² Notably, no specific amount is set to limit the level of abstraction of waters, however, some criteria as discussed immediate below.¹⁰⁰³ Thirdly, given the link between land cover and water resources, they are called to rehabilitate areas affected with loss of vegetation through reforestation.¹⁰⁰⁴

In particular, the discussion is relevant since it is indicated above that mining activities contributes variably to water pollution.¹⁰⁰⁵ In the case **Sudan Human**

⁹⁹⁸ *ibid.* para X.

⁹⁹⁹ African Convention on the Conservation of Nature and Natural Resources. Art. V (d); African Convention on the Conservation of Nature and Natural Resources. Art. VI (3) (c) and Art. VII (1)(a-b); Resolution on a Human Rights-Based Approach to Natural Resources Governance: The African Commission on Human and Peoples' Rights (African Commission), at its 51st Ordinary Session held from 18 April to 2 May 2012 in Banjul, The Gambia; para iv; ACHPR, 'The ACHPR Resolution on the Right to Water Obligations- ACHPR /Res.300 (EXT.OS/XVII) 20 The African Commission on Human and Peoples' Rights (the Commission), Meeting at Its 17th Extraordinary Session Held from 19 to 28 February 2015 in Banjul, The Gambia' (n 975). para 1.

¹⁰⁰⁰ African Charter on Human and Peoples' Rights. Art. 21 (2).

¹⁰⁰¹ Brazzaville Declaration 2007. Part II para 15; The eThekwin Declaration and AfricaSan Action Plan 2008. preamble.

¹⁰⁰² African Convention on the Conservation of Nature and Natural Resources. Art VII (1) (c).

¹⁰⁰³ See para 4.2.2.4 below.

¹⁰⁰⁴ African Convention on the Conservation of Nature and Natural Resources. Art. VI (3) (d).

¹⁰⁰⁵ See para 1.8 above.

Rights Organisation and Centre on Housing Rights and Eviction v Sudan 2005¹⁰⁰⁶ it was held that the State violated the right to enjoy the best attainable state of physical and mental health, which entails also the right to access clean water, when they destroyed and poisoned wells. As such this legal position resonates to the above discussed interdependent and indivisibility of human rights.¹⁰⁰⁷

Moreover, in Zambia where the constitution¹⁰⁰⁸ is silence on the right to clean water, residents of Chingola District managed to sue mining company which polluted their source of waters, under environmental and common law principles. In the case of **Konkola Copper Mines PLC vs James Nyasulu and 2000 others**,¹⁰⁰⁹ the appellant Konkola Copper Mines PLCs' tailing pipeline ruptured and discharged toxic contents into the streams used as source of water by the respondents. The toxic contents polluted waters in the streams which poured its waters in river Kafue.

Upon local communities consuming polluted waters, they suffered from various diseases, hence decided to sue the mining company for compensation. Both the court of first instance and the court of appeal found the Konkola Copper Mines PLC (the appellant) liable both under the common law and environmental statute, and was required to compensate the respondents.¹⁰¹⁰ Notably, although MHCs in this instance managed to sue mining company for polluting river waters, it is shown above that tracing of pollution of underground waters is hard leave alone inadequate

¹⁰⁰⁶ Sudan Human Rights Organisation and Centre on Housing Rights and Eviction vs Sudan 279/03-296/05 at para 212.

¹⁰⁰⁷ See para 4.2.1.8 and 3.2.1.8 above

¹⁰⁰⁸ Zambia's Constitution 1991 as amended in 2016 under part II specifically article 8 and 9 which provides for Fundamental Objectives and Directive Principles of State Policy.

¹⁰⁰⁹ Konkola Copper Mines PLC v James Nyasulu and 2000 others, Appl. No.1 2012.

¹⁰¹⁰ Ibid. p.10.

technologies to treat them.¹⁰¹¹

Notably, it is above shown that, prior to mining EIA is required to take place. However, there seems no express provision of such a principle in the legal instrument at the AU regional level. Instead, the AU non-binding framework provides for EIA and Human Rights Impacts Assessment (HRIA).¹⁰¹² It is shown that, carrying out gender impact assessment which is part of HRIA aims at identifying and understanding a number of factors relevant to extractive activities.¹⁰¹³ With respect to, EIA, it seems to be implied through reliance on science and international best practices in installing large-scale development.¹⁰¹⁴ In addition, it is expressly provided as a means to identify not only the potential impacts on environment and ecology but also the mitigating factors.¹⁰¹⁵

Despite of requirement to carry out EIA, it is argued that EIA is not reliable to safeguard MHCs access to clean water in Africa because of a number of factors. Among such factors are; non-enforcement of the law; little involvement of public; inadequate technical skills to test discharges in water sources and governance issues such as conflict of interest when governments own shares in large scale mining while it is the same government that is required to penalise such companies for

¹⁰¹¹ See para 3.2.2.3 above.

¹⁰¹² Resolution on a Human Rights-Based Approach to Natural Resources Governance: The African Commission on Human and Peoples' Rights (African Commission), at its 51st Ordinary Session held from 18 April to 2 May 2012 in Banjul, The Gambia; para 4.

¹⁰¹³ Christina Hill and others, 'A Guide to Gender Impact Assessment for the Extractive Industries' (Melane Scaife ed, Oxfam, Melbourne, 2017) <www.oxfam.org.au>. p. 3.

¹⁰¹⁴ African Union Convention on Preventing and Combating Corruption. Art. XII (1); The Libreville Multi-stakeholder's declaration on achieving water security and safely managed sanitation for Africa. Part II para ix; Durban Political Declaration signed on the occasion of the World Water Day 2017. para 5.

¹⁰¹⁵ African Convention on the Conservation of Nature and Natural Resources. Art. XIV (2) (b); Resolution on a Human Rights-Based Approach to Natural Resources Governance: The African Commission on Human and Peoples' Rights (African Commission), at its 51st Ordinary Session held from 18 April to 2 May 2012 in Banjul, The Gambia; para 4; Resolution on the Niamey Declaration on Ensuring the Upholding of the African Charter in the Extractive Industries Sector The African Commission on Human and Peoples' Rights, meeting at its 60th Ordinary Session held from 8 to 22 May 2017 in Niamey, Republic of Niger. para 1 (d).

pollution.¹⁰¹⁶ As such the human rights impacts assessment seem a new requirement owing to the fact that AU member states codes are silent on this type of assessment.

4.2.2.4 Equitable and Reasonable Utilisation (ERU)

The African region despite her abundant fresh water endowments is faced with water stress situation.¹⁰¹⁷ As noted above, mining activities contributes towards; pollution, deforestation and land cover which pose a threat to access to clean water.¹⁰¹⁸ Consequently, the African region safeguards MHCs right to water by requiring her member states to sustainably utilise water resources.¹⁰¹⁹ In particular, it means and includes enactment of laws relevant to; setting no go zone in forests reserve areas, restoration of lost forests, limiting overgrazing to allow forests regeneration and preserving waters form pollution and aquatic ecology.¹⁰²⁰ As may be noted above, Ghana and Botswana have adopted mining laws which limit mining activities near water bodies and or reserve areas. However, in such countries there seems no go zone prescribed under such laws. Consequently, mining activities may take place even in reserve areas provided permits are sought in the respective organs.

In addition, unlike the binding international framework, the African regional legal framework does not provide for criteria upon which water utilisation is to be assessed. It is also general at allowing adoption of special measures aimed at serving life in case of competing interests as indicated above. Perhaps much reliance is

¹⁰¹⁶ Andres' Montejano, 'In Search of Clean Water: Human Rights and the Mining Industry in Katanga, DRC' (2013). p. 30; Devine Appiah and Balikisu Osman, 'Environmental Impact Assessment: Insight from Mining Communities in Ghana' 16 *Journal of Environmental Assessment Policy and Management*. p. 16.

¹⁰¹⁷ AU, ECA, and ADB (n 76). para 5 and 6 respectively.

¹⁰¹⁸ See para 1.8 above.

¹⁰¹⁹ African Convention on the Conservation of Nature and Natural Resources. Art. v (1).

¹⁰²⁰ *ibid.* Art. v(1) (a-d), vi (1) (a-e), vii (1) (b).

placed on its fundamental principle that requires balancing of interest between conservation and utilisation.¹⁰²¹

In Africa water conflicts are sparingly clear in the Nile River Basin where the upstream countries are at loggerhead with the downstream countries.¹⁰²² This antagonism apart from political hostilities and mistrusts is based on perceived over utilisation of the Nile river waters by the upstream countries such as Ethiopia versus the interests of Sudan and Egypt.¹⁰²³ Increased usage of Nile river waters is evidenced by abstraction into reservoir, expanded agriculture and expansion of settlement in the dessert.¹⁰²⁴ It is argued that the current trend of Nile river water usage is unsustainable.¹⁰²⁵

Recently, Ethiopia abstracted the Nile river waters to construct a grand dam for Hydro-electric Power generation and agricultural support. This move threatens Sudan and Egypt of their shares of the Nile waters.¹⁰²⁶ The threats are based on the position held by Sudan and Egypt that, the water levels of Nile River should be maintained at the volume set under the colonial agreements that are not recognised by upstream countries.¹⁰²⁷ Historically, colonial powers entered into treaties setting specific volume of water to flow in Nile River. Salam Abdulakadir states that the colonial powers in 1929 restricted other riparian countries such as Sudan and

¹⁰²¹ *ibid.* Art. II.

¹⁰²² Richard Pisley and Taylor Henshaw, 'Trans-Boundary Governance of the Nile River Basin: Past, Present and Future' (2013) 5 *Environmental Development*. p. 11-12.

¹⁰²³ Global Environmental Facility and International Water Governance Project, 'In-Depth Case Study of the Nile River Basin'. pp. 3-5.

¹⁰²⁴ Pisley and Henshaw (n 1022). p. 11.

¹⁰²⁵ Global Environmental Facility and International Water Governance Project (n 1023).p.16.; Pisley and Henshaw (n 1022). p. 12.

¹⁰²⁶ Pisley and Henshaw (n 1022). pp.11-12.

¹⁰²⁷ Global Environmental Facility and International Water Governance Project (n 1023). p .10.

Ethiopia from the use of waters in River Nile so that a specific volume should flow to Egypt.¹⁰²⁸ In 1959, such agreements were revised to increase the volume, this time between only, Egypt and Sudan excluding Ethiopia among other Nile River Basin states.¹⁰²⁹ Such agreements created tension among the downstream countries owing to the fact that they too need such waters for their socio-economic development.¹⁰³⁰

As noted above, international and African regional frameworks do not recognise rules on specific volume but has set criteria to be relied in case of competing interests. Consequently, given factors such as; demographic increase, mushrooming of foreign investment in extractive sector African countries, and a fact that the right to water is not justiciable in a number of African countries absence of clear criterion to assess equitable use of water may pose serious impacts on MHCs right to clean water.¹⁰³¹

In addition, access to clean water in Africa is challenged by factors such as; poor infrastructure and poor institutional set up to manage water resources and little government investment in water infrastructure.¹⁰³² Owing to such challenges, AU member states are required to invest at least 0.5 % of their GDP as a means to accelerate access to clean water to all.¹⁰³³ In order to achieve this, African states are also called to adopt legal and policy frameworks that will enhance private

¹⁰²⁸ Salam Abdulrahman, 'Agreements That Favour Egypt's Rights to Nile Waters Are an Anachronism' (The Conversation, 2018) <<https://theconversation.com/agreements-that-favour-egypts-rights-to-nile-waters-are-an-anachronism-103353>>.

¹⁰²⁹ Agreement between the United Arab Republic and the Republic Of Sudan for the full utilization of the Nile waters, 1959.Art. 1 (1-2); Protocol Concerning the Establishment of Permanent Joint Technical Committee 1960.

¹⁰³⁰ Abdulrahman (n 1028).

¹⁰³¹ See Annex I on African countries which provides for the right to water under their constitution.

¹⁰³² Ministerial Declaration 2015. para part I para 6; Dakar Declaration on the Prioritisation of Water Security and Sanitation in the Post-2015 Development Agenda 2014. para b.

¹⁰³³ The eThekwin Declaration and AfricaSan Action Plan. para 6.; The Ngor Declaration on Sanitation and Hygiene Adopted by the African Minister responsible for sanitation and hygiene on 27 May 2015 at AfricanSan4 2015. para 3.

investment in water infrastructure as a means to attain the SDG 6.¹⁰³⁴

Worth noting here is the fact that both binding and non-binding AU legal frameworks provide for priority to drinking water to MHCs in case of competing uses such as water for mining and or hydropower generation.¹⁰³⁵ It is indicated in chapter one above that, there are potentials of competition of water resources that may cause disputes among communities in Africa.¹⁰³⁶ Although right to clean water seems not justiciable in majority of African states, recognition of its priority among competing uses offers a stepping stone to argue for its justiciability.

4.2.2.5 Notification

The review of African regional frameworks shows that they lack express provision on notification principle. Arguably, the principle of prior notification is seen to be against the principle of sovereignty which grants states exclusive rights to choose and carry out its socio-economic development plans.¹⁰³⁷ It is even true that, the UN charter on the economic rights and duties of the state (1974) allows states to freely adopt development projects relevant for socio-economic, cultural and political development of their own people. It is even worsened by the fact that, there seems no customary international law on the duty to notify other states of any planned measure.¹⁰³⁸ It is therefore, not surprising that AU has noted unsustainable utilisation of mineral resources in AU member states.¹⁰³⁹ Consequently, African states such

¹⁰³⁴ Durban Political Declaration signed on the occasion of the World Water Day. para 1.

¹⁰³⁵ African Convention on the Conservation of Nature and Natural Resources. Art. XXV (1) (b).

¹⁰³⁶ See para 1.8 above.

¹⁰³⁷ Global Environmental Facility and International Water Governance Project (n 1023). p. 9.

¹⁰³⁸ Abiy Chelkeba, 'Notification and Consultation of Projects in Trans-Boundary Water Resources: Confidence Building Rather than Legal Obligation in the Context of GERD' (2017) 11 Mizan Law Review. pp. 151-152.

¹⁰³⁹ Resolution on a Human Rights-Based Approach to Natural Resources Governance: The African Commission on Human and Peoples' Rights (African Commission), at its 51st Ordinary Session held from 18 April to 2 May 2012 in Banjul, The Gambia; preamble.

as; Egypt and Ethiopia which have not ratified the UNWC 1997 are shown to have practically ignored the notification rule.

However, as noted above, the principle of no harm and reasonable and equitable utilisation of nature and natural resources are founded on fundamental principle of science and best interest of the peoples.¹⁰⁴⁰ In addition trans-boundary water resources as shall be discussed below are required to consult each other for effective utilisation of shared water resources. Consultation may hardly precede notification of the planned measures, given state sovereignty in planning and executing its own socio-economic and political policies and programmes.¹⁰⁴¹ Consequently, notification, though not expressly provided may be presumed as one of the key principle relevant to safeguard MHCs right to clean water in Africa. Moreover, the reliance on science reinforces the above noted international customary rule that prior to any large scale project planning EIA must be carried and be part of documents that notify riparian states of such planned measures.¹⁰⁴²

4.2.2.6 Consultation and Negotiation

As already discussed above, consultation and negotiation is a next stage of notification of the planned measures between riparian states. It serves as a forum to foster wider acceptance of the convention as well as dispute settlement in a wider perspective of serving best interests of the peoples. Consequently, in the first place, African states sharing water resources are required to consult each other on how best they can harness the shared waters.¹⁰⁴³ It is shown that, firstly, consultation among

¹⁰⁴⁰ African Convention on the Conservation of Nature and Natural Resources. Art. II.

¹⁰⁴¹ Constitutive Act of the AU. Art. 3 (b), 4 (a).

¹⁰⁴² See para 3.2.2.2 above.

¹⁰⁴³ African Convention on the Conservation of Nature and Natural Resources. Art. V(1-2).

riparian states entail establishment of joint commissions and or other coordinating authority among trans-boundary water resource sharing states.¹⁰⁴⁴ Joint commission and or coordinating authority are regarded as tools to foster joint sustainable use of water resources among the sharing states.¹⁰⁴⁵ Secondly, is used as tool to involve the potentially affected communities in decision making and benefits.¹⁰⁴⁶

In addition, consultation and negotiation is presented as a forum for dispute settlement between state parties to the convention.¹⁰⁴⁷ With regard to water resources, riparian states are required to consult and form a joint forum to solve their dispute before the responsible organs under the convention are referred.¹⁰⁴⁸ The Nile River Basin states are exemplary in utilising the consultation and negotiation principle because the Nile Basin involves more than ten states with different interests and historical relations.¹⁰⁴⁹ Notably, through consultation and negotiation Africa has witnessed increasing number of shared surface and underground water joint cooperation and or agreements.¹⁰⁵⁰

4.2.2.7 Stakeholders Involvement

According to UNECA stakeholders participation in mineral sector requires participation in decision making (which requires states to guarantee access to

¹⁰⁴⁴ African Convention on the Conservation of Nature and Natural Resources. Art. vii (3).

¹⁰⁴⁵ African Convention on the Conservation of Nature and Natural Resources. Art V (2).

¹⁰⁴⁶ ACHPR, 'Guidelines on the Right to Water in Africa, Adopted during 26th Extra-Ordinary Session of the African Commission on Human and Peoples' Rights Held from 16th-30th July 2019 in Banjul, The Gambia' (n 235). para 16.3.

¹⁰⁴⁷ African Convention on the Conservation of Nature and Natural Resources. Art. XVIII

¹⁰⁴⁸ *ibid.* Art. V (2).

¹⁰⁴⁹ Global Environmental Facility and International Water Governance Project (n 1023). p. 1.

¹⁰⁵⁰ Protocol for Sustainable Development of Lake Victoria Basin.; Agreement between the governments of the Republic of Botswana, The Kingdom of Lesotho, The Republic of Namibia and The Republic of South Africa on the establishment of the ORANGE-SENQU River Commission 2000.; Revised Protocol on Shared Water Courses 2000.; Agreement on the establishment of the Zambezi Watercourse Commission (The ZAMCOM Agreement).; The Convention on the Sustainable Management of Lake Tanganyika.; The Constitution of the Joint Authority for the Study and Development of the Nubian Sandstone Aquifer Waters 1992.

information and freedom of speech), and benefit sharing.¹⁰⁵¹ Guaranteeing access to information and freedom of speech coupled with the legal framework to protect informants is relevant to improving governance that will minimise illicit exploitation of mineral resources in African countries.¹⁰⁵² In addition it will provide the public freedom to report and hold into account governmental and other officials in the mineral sector which will spur transparency and accountability.¹⁰⁵³

Among African countries, South Africa is hailed for a model law which guarantees not only access to information but also protect the freedom of opinion on environmental affairs.¹⁰⁵⁴ Such a law is relevant owing to information asymmetry among the stakeholders in the extractive sector. Most of times, MNCs may have vast information than even the government and local communities in which they are investing.¹⁰⁵⁵ These information relates but not limited to; the history of the proposed mining company, methods of mining and its impacts, methods of tilling storage and its impacts, geological information, technology to be employed in mining and its impacts.¹⁰⁵⁶ Access to such information is vital to the government for various purposes such as revenue calculation and or precautionary measures on environment which involves protecting water sources.

Notably, stakeholder participation entails the need to form part of the decision that will impacts daily livelihood of a particular community.¹⁰⁵⁷ Since mining may

¹⁰⁵¹ UNECA (n 934), pp. 8-15 and 20.

¹⁰⁵² African Union Convention on Preventing and Combating Corruption. Art. 5 (5-7).

¹⁰⁵³ *ibid.* Art. 12.

¹⁰⁵⁴ UNECA (n 934), p. 16.

¹⁰⁵⁵ Tom Mitro, Cielo Magno and Jeremy Weate, 'Overcoming a Key Barrier to Stakeholders Empowerment in Extractive Industries' (Colombia Center on Sustainable Investment, 2020). pp. 2-3.

¹⁰⁵⁶ *ibid.* pp. 2-3.

¹⁰⁵⁷ African Convention on the Conservation of Nature and Natural Resources. Art. XVI (1) (c); African Charter on Democracy; Elections and Governance. Art. 3 (7-8) ; Resolution on the Niamey Declaration on Ensuring the Upholding of

grossly impact MHCs right to clean water, African countries are called to enact laws that will guarantee their participation in decision making. Among such laws are those related to access to information, establishment of democratic principles, rule of law and administrative or judicial remedies in case their rights are violated.¹⁰⁵⁸ Politically, there is a call for public participation in decision making through political platforms such as electing and or being elected to represent others in public institutions.¹⁰⁵⁹ It is argued that, good political governance through for example; democracy, rule of law, freedom of expression, equality, separation of power is a prerequisite for socio-economic development.¹⁰⁶⁰

However, it is reported that most Sub-Saharan African countries have failed to exhibit democratic principles with their election rigged, incumbent leaders elongating their office tenure, and foreign influence in financing oppositional parties.¹⁰⁶¹ Also, few countries such as; South Africa, Botswana and Namibia exhibit fundamental freedom, but, other countries such as; DR Congo, Zimbabwe and Swaziland journalist are being harassed and or detained when exercising their right to freedom of speech.¹⁰⁶² In environmental perspectives, it is argued that, lack of good governance on environmental area is a major contributor of weak African

the African Charter in the Extractive Industries Sector The African Commission on Human and Peoples' Rights, meeting at its 60th Ordinary Session held from 8 to 22 May 2017 in Niamey, Republic of Niger. para 1 (e).

¹⁰⁵⁸ African Convention on the Conservation of Nature and Natural Resources. Art. XVI (1) (d) and (2); Resolution on the Niamey Declaration on Ensuring the Upholding of the African Charter in the Extractive Industries Sector The African Commission on Human and Peoples' Rights, meeting at its 60th Ordinary Session held from 8 to 22 May 2017 in Niamey, Republic of Niger. para 1 (i).

¹⁰⁵⁹ UNECA (n 922). para 3.3.

¹⁰⁶⁰ *ibid.* para 25; Mbih Tosam and Richard Mbih, 'Climate Change, Health and Sustainable Development in Africa' (2015) 17 *Environ Dev Sustain.* p. 792.

¹⁰⁶¹ Khabele Matlosa, 'Managing Democracy: A Review of SADC Principles and Guidelines Governing Democratic Elections' (2004). pp. 19-20; J Lisakafu, 'The Southern African Development Community and the Challenge of Southern Africa Regional Security' (2017) 24 *Huria Journal of the Open University of Tanzania* 190. p.18.

¹⁰⁶² Chentelle Sousa, 'Combating Corruption in the SADC' (2015) <<http://www.derebus.org.za/combating-corruption-in-the-sadc/>> accessed 1 October 2018.

countries economies.¹⁰⁶³ It is also responsible for brain drain.¹⁰⁶⁴

Moreover, with respect to indigenous peoples, as noted above, there is a need to procure their FPIC to any project before its installation.¹⁰⁶⁵ Notably, AU binding framework seems silent on the FPIC. However, the non-binding framework amplifies indigenous peoples' internal self-determination through the requirement of seeking their FPIC in case of any development project in their territory.¹⁰⁶⁶ As such stakeholders' participation is a tool to guarantee public ownership of the projects and or agreement reached on usage and or governance of water resources.¹⁰⁶⁷

In Kenya, the Endorois community managed to defend Lake Bogoria and its reserve which was not only the source of water but a sacred site for their rituals.¹⁰⁶⁸ In Botswana, the judiciary in the case of *Matsipane Moselelhanyane and Matsipane G, vs The AG*¹⁰⁶⁹ irrespective of non justiciability of the right to water, held that denial of indigenous communities access to water for domestic uses amount to violation of Article 7 of Botswana's Constitution 2006 which prohibits inhuman treatment.

Notably, with regard to the nature and mode of benefit sharing as already noted above may take various forms such as; a share of revenue through rents and levies, non-revenue based advantages like creation of employment, construction of public

¹⁰⁶³ Tosam and Mbih (n 1060). p. 793.

¹⁰⁶⁴ *ibid.* p. 793.

¹⁰⁶⁵ See para 3.2.1.5 above.

¹⁰⁶⁶ African Convention on the Conservation of Nature and Natural Resources. Art. XVII (2); Resolution on a Human Rights-Based Approach to Natural Resources Governance: The African Commission on Human and Peoples' Rights (African Commission), at its 51st Ordinary Session held from 18 April to 2 May 2012 in Banjul, The Gambia; para 4.; Resolution on Climate Change and Human Rights and the Need to Study its Impact in Africa - ACHPR/Res.153(XLVI). para 2.

¹⁰⁶⁷ Pisley and Henshaw (n 1022). p. 11.

¹⁰⁶⁸ *Center for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya* (n 510). para 3-6.

¹⁰⁶⁹ *Matsipane Moselelhanyane and Matsipane G v The AG* Civil Appeal No. CACLB-074-10 para 20 and 22.

services like road, hospital, school and or water infrastructure.¹⁰⁷⁰ While in other countries such as South Africa and Kenya and Uganda (noted above) allocation is done to local communities, in USA (Alaska Province), the benefit sharing is carried out not only at the local level but rather every individual.¹⁰⁷¹ Alaskan approach poses a challenge to African countries which are hailed to have abundant natural resources yet with prevalent underprivileged situation that is presented as a curse above.¹⁰⁷²

However, AU non-binding framework requires sharing of the revenue to include not only MNCs and government but also MHCs.¹⁰⁷³ Given the water resources infrastructure challenge noted above, revenue sharing to MHCs will enable them to install water supply infrastructure. It is also a tool to raise awareness on environmental issues of the modern world such as climate change.¹⁰⁷⁴ As noted above, few African countries domesticate principles on sharing of mineral revenue to MHCs.

In addition, recognition of socio-cultural bias of the African life style on women, there is a call to adopt special legal measures in favour of women and youths. Such measures will empower them to curb mining impacts on water resources.¹⁰⁷⁵ It is reportedly that women in Africa are estimated to constitute about 70% of the underprivileged groups.¹⁰⁷⁶ It is argued that, women involvement in decision

¹⁰⁷⁰ UNECA (n 934), p. 22.

¹⁰⁷¹ *ibid.* p. 25.

¹⁰⁷² See para 2.3.1 above.

¹⁰⁷³ Resolution on a Human Rights-Based Approach to Natural Resources Governance: The African Commission on Human and Peoples' Rights (African Commission), at its 51st Ordinary Session held from 18 April to 2 May 2012 in Banjul, The Gambia; para 2 (c); Resolution on the Niamey Declaration on Ensuring the Upholding of the African Charter in the Extractive Industries Sector The African Commission on Human and Peoples' Rights, meeting at its 60th Ordinary Session held from 8 to 22 May 2017 in Niamey, Republic of Niger. para 1 (a).

¹⁰⁷⁴ African Convention on the Conservation of Nature and Natural Resources. Art. XX (1-2).

¹⁰⁷⁵ Resolution on Climate Change and Human Rights and the Need to Study its Impact in Africa - ACHPR/Res.153(XLVI). para 2; Resolution on Climate Change and Human Rights in Africa - ACHPR/Res.342(LVIII). para 2.

¹⁰⁷⁶ AU, 'African Strategy on Climate Change' (n 294). part xii.1.

making, is a tool to contribute towards their socio-economic empowerment.¹⁰⁷⁷ As such their involvement is required to be on all stages from initial planning, implementing, monitoring and evaluation of the decision so made.¹⁰⁷⁸ In essence women are shown to hold relevant knowledge to curb socio-economic challenges such as climate variation although most often are not involved in decision making.¹⁰⁷⁹

4.2.2.8 International Cooperation

International cooperation at the AU regional level may be discussed in twofold. Firstly, through the adoption of above global natural resources governance initiatives namely KPCS and EITI. Although such initiatives are not categorical on water issues, guaranteeing transparency may not be discerned from holding accountable all mineral sectors stakeholders. In addition, the EITI signals gradual expansion on aspects to be reported, such as gender and environmental plans, both of which resonates to water issues.¹⁰⁸⁰ Also, the KPCs for example, is heralded as a tool that guarantee the legitimate governments to benefit from revenue from mining sector and delinking mining from fuelling human rights violation.¹⁰⁸¹

Secondly, the AU legal framework recognises the role of international cooperation as it compels her member states to work jointly in solving water related concerns.¹⁰⁸²

A number of joint commissions and or organisations on management of shared

¹⁰⁷⁷ Tosam and Mbih (n 1060). p. 796.

¹⁰⁷⁸ African Convention on the Conservation of Nature and Natural Resources. Art. XVII (3).

¹⁰⁷⁹ AU, 'African Strategy on Climate Change' (n 294). part xii.1.

¹⁰⁸⁰ See para 3.2.1.8 above.

¹⁰⁸¹ See para 4.2.1.8 above.

¹⁰⁸² African Convention on the Conservation of Nature and Natural Resources. Art. V (2).

surface water resources in Africa are already established.¹⁰⁸³ In addition, efforts to jointly manage underground waters are also noted mostly in North-western African countries impacted by the Sahara Desert.¹⁰⁸⁴ Apart from the fact that joint cooperation among states may ultimately form institutions to deal with shared waters, international cooperation goes beyond the concern of riparian states.

In particular, international cooperation is named as one of four pillars in addressing climate variation impacts in Africa.¹⁰⁸⁵ Its essence is based on two main factors. Firstly, climate change is mainly caused by developed states and Africa seems to be a victim.¹⁰⁸⁶ Secondly, Africa depends on technologies and financial support from developed countries in addressing climate variation challenges, inclusive in water sector.¹⁰⁸⁷ Consequently, international cooperation with the view of guaranteeing MHCs access to clean water transcends African boundaries. For example on the aspect of guaranteeing good governance and limiting illicit extraction of minerals, African countries are called to cooperate with other global partners such as; developed countries, MNCs, regional and sub-regional organisations.¹⁰⁸⁸

Generally, the African regional framework has almost similar principles to international legal framework. However, AU has adopted such principles a unique approach owing to her, geographical, hydrological, historical, socio-economic,

¹⁰⁸³ International Water Law Project (n 730).

¹⁰⁸⁴ Memorandum of Understanding for Establishment of Consultation Mechanism for the Integrated Management of the Water Resources of the Iullemeden, Taoudeni/Tarnesrouft Aquifer Systems (ITAS) 2014.; The Constitution of the Joint Authority for the Study and Development of the Nubian Sandstone Aquifer Waters.

¹⁰⁸⁵ AU, 'African Strategy on Climate Change' (n 294).

¹⁰⁸⁶ *ibid.* part I.

¹⁰⁸⁷ *ibid.* part x.4; The Abuja Ministerial Declaration on Water-A key to Sustainable Development in Africa 2002. para 8; African Convention on the Conservation of Nature and Natural Resources. Art. XIX (1-2); Sharm El-Sheikh Declaration on Commitments for Accelerating the Achievement of Water and Sanitation Goals in Africa 2008. para t; The eThekwin Declaration and AfricaSan Action Plan. para 10 of the AU pledges and 1 calls for support.

¹⁰⁸⁸ African Union Convention on Preventing and Combating Corruption. Art. 19.

cultural and political position. Despite such approach, principles are still broad enough for AU member states to adopt them subject to their circumstances. Such a scope if not well utilised may be a breeding ground of water related disputes among states. The Nile saga between Ethiopia Sudan and Egypt may save the purpose on this point.

4.3 Institutional Framework

In order to guarantee MHCs rights to clean water and adequate food among other rights, there is a need of strong institutions in the respective countries. AU compel all her member states to establish such institutions to eradicate any form of discrimination and guaranteeing progressive realisation of human rights.¹⁰⁸⁹ In addition since resources governance has a bearing on the realisation of right to clean water and adequate food, AU states are called to adopt robust institutions like; judiciary and parliaments relevant to holding the government into account.¹⁰⁹⁰ As such establishment of strong institutions is relevant in two major ways.

Firstly, it helps in enforcement of international principles such as those relevant to safeguarding MHCs right to water and adequate food. Secondly, they are relevant to curb corruption emanating from natural resources extraction both in government and private sector.¹⁰⁹¹ Institutions will be regarded as strong if they depict the following

¹⁰⁸⁹ African Charter on Human and Peoples' Rights. Art. 1.; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa of 11th July 2003. Art II(1)

¹⁰⁹⁰ African Charter on Human and Peoples' Rights 1986 198. Art. 26; Declaration on Democracy, Political, Economic and Corporate Governance. para 13-14.; African Union Convention on Preventing and Combating Corruption. Art. 5.; Human Rights-Based Approach to Natural Resources Governance The African Commission on Human and Peoples' Rights (African Commission), at its 51st Ordinary Session held from 18 April to 2 May 2012 in Banjul, The Gambia. para 3.; Resolution on the Niamey Declaration on Ensuring the Upholding of the African Charter in the Extractive Industries Sector - The African Commission on Human and Peoples' Rights, meeting at its 60th Ordinary Session held from 8 to 22 May 2017 in Niamey, Republic of Niger. para 1(i).

¹⁰⁹¹ African Union Convention on Preventing and Combating Corruption. Art. 3,4, 5(3) and 7 (1).;ACHPR, 'State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter Relating to Extractive Industries, Human Rights and the Environment' (n 408). para 47.

elements among others; autonomy, legal mandate, operational independency, budgetary independency, procedural independency in appointment and or removal from office and adequate staff and working infrastructure.¹⁰⁹² Institutional autonomy is relevant to guarantee good governance and respect for human rights in socio-economic activities.

This part argues that, African efforts to establish her own institutions to solve her unique problems related to natural resources governance seems to be gradual. The trend seems traceable from the desire to attain political independence to socio-economic independence and attainment of sustainable development. Among such institutions are; the AU Assembly, AU Peace and Security Council (APSC), the African Court on Human and Peoples Rights (ACrHPRs), Mineral Development Centre (MDC), CoP, the Secretariat and the New Partnership for Africa's Development (NEPAD) to name but a few.

4.3.1 AU Assembly

According to the AU Constitutive Act 2002 the Assembly is the supreme organ of the Union.¹⁰⁹³ It is composed of the head of states and or governments from African region.¹⁰⁹⁴ The Assembly is headed by the chairperson whose tenure is only one year.¹⁰⁹⁵ It issues binding decisions on various matters of policy, strategy and or other relevant decisions related to monitoring and implementation AU missions

¹⁰⁹² Charles Fombad, *Compendium of Documents on National Human Rights Institutions in Eastern and Southern Africa* (Pretoria University Law Press 2019), para 5.

¹⁰⁹³ Constitutive Act of the AU. Art. 6 (2).

¹⁰⁹⁴ *ibid.* Art. 6 (1).

¹⁰⁹⁵ *ibid.* Art. 6 (3).

under various instruments.¹⁰⁹⁶ As may be noted below for example it appoints judges and receives reports of the African Court on Human and Peoples Rights.¹⁰⁹⁷

Generally, the decision of the Assembly is reached by consensus and no member state with veto powers as noted under the international framework.¹⁰⁹⁸ It is noted that, most AU member states are unable to comply with the AU standards and principles due to lack of political will, budgetary constraints and leniency with respect to membership rules to AU Assembly.¹⁰⁹⁹ Such a situation threatens the harmonisation of legal framework with the aim of achieving socio-economic integration of all AU member states.¹¹⁰⁰

4.3.2 African Peace and Security Council (APSC)

This is an organ established under the Protocol Relating to Establishment of the Peace and Security Council of the African Union 2002.¹¹⁰¹ The organ is composed of fifteen members elected in two approaches.¹¹⁰² The first category of members are elected for a term of two years while the second are elected three years.¹¹⁰³ Such an approach is aimed towards guaranteeing continuity of members but not permanence. In appointing its members a number of factors are considered inclusive; commitment to promoting key AU principles, participation in peace keeping missions, respect for democracy and rule of law among others.¹¹⁰⁴ As already noted above, in absence of

¹⁰⁹⁶ *ibid.* Art. 9 (1) (a-h).

¹⁰⁹⁷ See para 4.3.6 below.

¹⁰⁹⁸ Constitutive Act of the AU. Art. 7 (1).

¹⁰⁹⁹ Oheneba Boateng, 'Membership Accession in the African Union: The Relationship between Enforcement and Compliance, and the Case for Differential Membership' (2017) 24 South African Journal of International Affairs. p. 35.

¹¹⁰⁰ *ibid.*; See also para 2.2.5 above which calls for harmonization of mining legal framework in Africa.

¹¹⁰¹ Protocol Relating to Establishment of the Peace and Security Council of the African Union 2002. Art. 2 (1).

¹¹⁰² *ibid.* Art. 5 (1).

¹¹⁰³ *ibid.* Art. 5 (1).

¹¹⁰⁴ *ibid.* Art. 5 (2).

good governance African countries will not be able to harness their mineral resources and guarantee MHCs rights to clean water and adequate food.¹¹⁰⁵

The APSC was established with the view to promote peace and security in Africa as its key objective.¹¹⁰⁶ Other functions of the APSC are inclusive promotion of human rights (inclusive rule of law, democratic principles and guarantee of fundamental freedoms), early prevention of conflicts and peace keeping in post-conflict situations.¹¹⁰⁷ To achieve its objective, the APSC is empowered to make decisions on a number of aspects such as; identifying, analysing and abating potential conflicts in Africa, guarantee humanitarian support in conflict situations (access to food, medicines and water for example), sanctioning respective AU member states in case of breach of democratic principles, and approving the deployment of troops for peace mission in African countries.¹¹⁰⁸ As such the APSC is said to be an African home grown solution to African problems.¹¹⁰⁹ Unlike the UNSC noted above the APSC reaches her decision based on equal voting rights of her members.¹¹¹⁰ Based on this principle it is hailed to be more democratic compared to UNSC.¹¹¹¹

Despite its establishment, powers and functions, a number of factors impair the effective operation of the APSC. Among such factors are; external global forces such as the invasion of Libya, high dependence on foreign donors in implementing her

¹¹⁰⁵ See para 1.8 above.

¹¹⁰⁶ Protocol Relating to Establishment of the Peace and Security Council of the African Union. Art. 2 (1).

¹¹⁰⁷ *ibid.* Art. 6.

¹¹⁰⁸ *ibid.* Art. 7.

¹¹⁰⁹ Theo Neethling, 'Working towards an African Peacekeeping Capability: Key Issues, Challenges and Dilemmas in Darfur' (2016) 34 *Scientia Militaria*, South African Journal of Military Studies. p.108; Hussein Solomon, 'African Solutions to Africa's Problems? African Approaches to Peace, Security and Stability' (2015) 43 *Scientia Militaria*, South African Journal of Military Studies. p. 68; Solomon Dersso, 'The Quest for Pax Africana: The Case of the African Union's Peace and Security Regime' (2012) 12 *African Journal on Conflict Resolution*, 11. p. 42.

¹¹¹⁰ Protocol Relating to Establishment of the Peace and Security Council of the African Union. Art. 12.

¹¹¹¹ Solomon (n 1109). p. 62.

missions, inadequate political will to support the APSC mission based on fear of reprisal from the global terrorist groups such as Al Shabab, absence of legal instrument on deployment of troops from AU member states and or regional blocks.¹¹¹²

Notably, AU dependency on foreign donors seems to pose a challenge on the key objective of establishing NEPAD as may be noted below.¹¹¹³ Other weaknesses are, inadequate qualified personnel on early warning and conflict prevention, and conflicting mandate with the regional arrangements on peace to name but a few.¹¹¹⁴ It is upon these limitations the home grown solution doctrine attached to the APSC seems to be questionable, save for its infancy which shades a light of potential gradual development to a matured and fully functioning organ.¹¹¹⁵

4.3.3 Conference of Parties (CoP)

At the African regional level, CoP is also one of the institutions relevant to safe guard MHCs access to clean water and adequate food.¹¹¹⁶ The CoP is a forum to pass decisions, recommendations, and policies relevant sustainable utilisation of natural resources in Africa.¹¹¹⁷ Notably, two key exceptions may be noted with respect to AU CoPs. Firstly, unlike the international institutional framework, the AU CoP in particular to nature and natural resources conservation and utilisation, is silent on who are the members and voting rights. In addition, unlike modern international and or regional instruments, where CoPs are supported by the Secretariat, the African

¹¹¹² African Union's Peace and Security, 'African Peace and Security Architecture' (2010). para 25 and 26; Solomon (n 1109). p. 69.

¹¹¹³ See para 4.3.7 below.

¹¹¹⁴ African Union's Peace and Security (n 1112). para 21 and 22; Dersso (n 1109). p. 42.

¹¹¹⁵ Solomon (n 1109). pp. 68-69.

¹¹¹⁶ African Convention on the Conservation of Nature and Natural Resources. Art. XVI (3); Statute of the African Mineral Development Centre. Art. 9 (a); African Charter on Values and Principles of Public Service and Administration. Art. 23 (2).

¹¹¹⁷ Statute of the African Mineral Development Centre. Art. 11 (a).

approach seems silence on the need of secretariat. Secondly, the CoP on mineral development in Africa is rather a meeting of ministers responsible for minerals in the respective countries, not the head of states.¹¹¹⁸ These two exceptions pose a challenge on the nature of decisions to be reached and its binding impacts on the African countries. Absence of secretariat at the AU level poses a doubt on effective implementation of the convention objectives.

4.3.4 Secretariat

At the African regional level, secretariat is established under the Statute of the African Mineral Development Centre 2016.¹¹¹⁹ As noted above on international institutional framework the secretariat is vital in preparation of the CoP.¹¹²⁰ Notably however, in addition to those functions, at the AU level, the secretariat is rather the operational instrument of the Mineral Development Centre discussed below.¹¹²¹

4.3.5 Mineral Development Centre (MDC)

As noted above, despite similarity on the nature and types of mining, mining process and stages, African countries have adopted diverse legal framework in regulating mineral extraction.¹¹²² While other countries like Botswana and South Africa benefit from such resources, others do not. Consequently, there was a concern in assuring that such resources guarantee sustainable development to African peoples through effective regulation. Establishment of the AMDC aims at achieving this reality.¹¹²³ It is worth noting here that the AMDC was created under the partnership between

¹¹¹⁸ *ibid.* Art 10 (1).

¹¹¹⁹ *ibid.* Art. 9 (c).

¹¹²⁰ *ibid.* Art. 14 (5) (i-j).

¹¹²¹ *ibid.* Art. 14 (1).

¹¹²² See para 2.2.5 above.

¹¹²³ Statute of the African Mineral Development Centre. Art. 2 (1).

Africa, Canada and Australia.¹¹²⁴

To achieve this, the Centre strives to attain coherency of the legal framework regulating mining in AU countries.¹¹²⁵ It is thus required to carry out among other functions such as; promotion of environmental friendly extraction of minerals, encourage private investment in relevant infrastructure related to mining such as water, electricity and roads and promotion of training relevant to mining as a means to enhance competitiveness of the African human resources.¹¹²⁶

Increasing human resources skills in Africa is vital in achieving sustainable access to clean water and adequate food. Since African countries seem to lack relevant technology for adding value to raw minerals, the centre is also tasked to help them to carry out beneficiation at the domestic level.¹¹²⁷ If MDC will be able to develop mineral refinery and add value to African raw minerals, the concern arising from regulation of rough diamond through KPCS noted above will automatically fade out. It is argued that, despite some of African countries have reviewed their mineral codes, they suffer from weak institutional and enforcement mechanisms which are anchored from lack of political will.¹¹²⁸

4.3.6 African Court on Human and Peoples Rights (ACrthPR)

The ACrthPR is established under the Protocol to the African Charter on the establishment of an African Court on Human and Peoples' Rights.¹¹²⁹ As evident

¹¹²⁴ Besada, Lisk and Martin (n 587). p. 10.

¹¹²⁵ Statute of the African Mineral Development Centre. Art. 4 (1).

¹¹²⁶ *ibid.* Art. 4 (3) (a-i)

¹¹²⁷ *ibid.* Art. 3 (2) (d-f).

¹¹²⁸ UNECA International Study Group (n 241).p.94.; Hany Besada and Phillip Martin, 'Mining Codes in Africa: Emergence of a "Fourth" Generation?' [2014] Cambridge Review of International Affairs. p.17.

¹¹²⁹ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' rights. Art. 1.

from its establishing instrument and its name the ACrtHPR had jurisdiction focused on human and peoples' rights. The protocol reads

...interpretation and application of African charter or any other legal instrument relating to human rights ratified by the state parties...¹¹³⁰

According to Frans Viljeon, unlike the European Community that established the European Court of Justice (ECJ) upon its establishment, the AU did not. He notes that AU instead established the African Commission on Human and Peoples' Rights (hereafter ACHPR) that was more to do with promotion of human rights. According to Samuel Makinda and Wafula Okumu, the ACHPR noted below, had a very limited mandates of promotion of human rights and advisory role to the AU on human rights issues.¹¹³¹ Consequently, the ACrtHPR was later established as an independent institution to hear and determine cases on violation of human rights under the African Charter.

In particular to the composition of the ACrtHPR, it is composed of eleven judges elected on their individual capacity and not as representatives of their country.¹¹³² Emphasis on individual capacity aims at guaranteeing impartiality of the judges in decision making. Notably, the judges are initially nominated by their own country, but such names have to be voted for in the secret ballot by the members of the AU Assembly. In particular the Assembly is guided by two requirements in their choice of the judges that are: the geographical representation and gender.¹¹³³ The manner in

¹¹³⁰ *ibid.* Art. 3.

¹¹³¹ Samuel Makinda and Wafula Okumu, *The African Union: Challenges of Globalization, Security, and Governance* (Routledge 2008). p. 47.

¹¹³² Protocol to the African Charter on Human and People's Rights on the Establishment of the African Court on Human and Peoples' rights. Art. 11.

¹¹³³ *ibid.* Art. 14.

which judges of the international courts as it is for the domestic courts are obtained, the nature of their tenure of office contribute towards their impartiality and thereafter the credibility of the court.¹¹³⁴

Moreover, the establishment of the ACrHPR reformed the human rights institutional system in Africa in a number of ways such as; issuance of binding decision; broadened the human rights system in Africa through multiple avenue for promotion and protection; guaranteed well-organized mechanisms for addressing pressing human right violation to name but a few.¹¹³⁵ The jurisdiction of the court was on all human rights instruments in AU.¹¹³⁶ The ACrHPR therefore, is accessible through two main ways; direct and indirect.¹¹³⁷ The direct access includes the fact that the court had the power to entertain cases for the first instance arising from countries which have declared their acceptance to its competence. The indirect access are inclusive cases that have to go via the ACHPR owing to either the State not being a member to the protocol establishing the ACrHPR or such a State have not declared its acceptance to the ACrHPR competence.

With respect to binding effect of the ACrHPR decision, all AU states are bound and have to guarantee execution of judgments in their jurisdiction.¹¹³⁸ Notably however, the ACrHPR is required to report on yearly basis to the Assembly. Among issues to be reported are the AU member states that have failed to comply with its judgment. It is expected that the Assembly shall impose sanctions upon its members as a means

¹¹³⁴ Ally Possi, 'Independence of the Judiciary at International Level: The Case of East African Court of Justice' (2014) 4 Zanzibar Yearbook of Law. p. 117.

¹¹³⁵ Frans Viljeon, *International Human Rights Law in Africa* (2nd edn, Oxford University Press 2012). pp. 414-417.

¹¹³⁶ Protocol to the African Charter on Human and People's Rights on the Establishment of the African Court on Human and Peoples' rights. Art. 3.

¹¹³⁷ *ibid.* Art. 5.

¹¹³⁸ *ibid.* Art. 28.

to compel their compliance. Cole Rowland views this as rather a politicization of the court.¹¹³⁹ To him, the enforcement of the decision of the court depends on the political will. This is justified by the fact that non-compliance by the state is reported to the Assembly which will ultimately decide to sanction the member. Cole is of the view that to bring this to an end its decisions need to be guaranteed execution in the domestic jurisdiction of every AU member States. Consequently there is a need to integrate the protocol with the domestic laws.¹¹⁴⁰

However, a number of factors contribute to the compliance with ACrHPR decisions. On the first hand, for the decision to be implemented it depends much on how politically sensitive the decision issued is, nature of remedies granted and practicability of the decisions.¹¹⁴¹ On the other hand, lack of clarity on the orders issues are reportedly to have resulted into non-compliance. Consequently, there is a call for reforms the ACrHPR such that its decision becomes clear and visible online to all the stakeholders. It is argued that, if the decision will identify what is expected of a the state; what it has not been done?; to what extent the state is implementing the decision? would contribute to stakeholders awareness and hold their government into account hence contributing to compliance.¹¹⁴²

Recently, there is an emerging trend of withdrawal from the protocol establishing the court offering individuals, civic organisations a direct access to file cases to promote

¹¹³⁹ Rawland Cole, 'The African Court on Human and Peoples Rights: Will the Political Stereotypes Form an Obstacle to Enforcement of Its Decision?' (2010) 43 *The Comparative International Law Journal of Southern Africa*. p. 45.

¹¹⁴⁰ *ibid.*

¹¹⁴¹ Rachel Murray and others, 'Monitoring Implementation of the Decision and Judgment of the African Commission and Court on Human and Peoples' Rights' (2017) 1 *African Human Rights Yearbook*. p. 163.

¹¹⁴² *ibid.* p.165.

and defend human rights in their countries.¹¹⁴³ It is argued that, civic organisations are vital in pressuring government not only to protect human rights as provided under through filing cases on potential and or actual violation of the law but also in the process of making the law itself.¹¹⁴⁴ Tanzania in particular, withdrew from the protocol limiting individuals and civic organisations a direct access to the court.¹¹⁴⁵ Tanzania puts forward the argument that the implementation of the protocol was contrary to her deposited declarations.¹¹⁴⁶

Perhaps the withdrawal decision is motivated by increasing number of cases filed to the court from Tanzania. Reportedly for example, 40% of the decisions issued by the court in the year 2019 concerned Tanzania.¹¹⁴⁷ It is argued that, such an approach will not only limit peoples and organisations to seek the court redress but also cast a doubt on the desire of AU to establish robust institution to promote and defend peoples' rights.¹¹⁴⁸ This is even worrying owing to the fact that already there was a precedent by Rwanda, Benin, Ivory Coast to name but a few.¹¹⁴⁹ It is unclear if other African countries will follow this approach.

4.3.7 New Partnership for Africa's Development (NEPAD)

The abbreviation NEPAD stands for the New Partnership for Africa's

¹¹⁴³Centre for Human Rights, Faculty of, Law, University of Pretoria, and African Commission., 'Guide to the African Human Rights System - Celebrating 40 Years since the Adoption of the African Charter on Human and Peoples' Rights 1981 - 2021' (Pretoria University Law Press, 2021). p. 63.; Guardian Reporter, 'AfCHPR Begins 63rd Ordinary Session in Dar' *The Guardian* (Dar es Salaam, 11 September 2021). p. 5.

¹¹⁴⁴Clement Mashamba, *Judicial Protection of Civil and Political Rights in Tanzania* (Second, Law Africa 2016). p.151.

¹¹⁴⁵AU, 'Reference BC/OLC/66/24/2565.19' (2019) <www.au.int>. p. 1.

¹¹⁴⁶United Republic of Tanzania, 'Notice of Withdrawal of the Declaration Made under Article 34(6) of the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights' (2019). p. 1.

¹¹⁴⁷Amnesty International, 'Tanzania: Withdrawal of Individual Rights to African Court Will Deepen Repression' (Amnesty International, 2019) <<https://www.amnesty.org/en/latest/press-release/2019/12/tanzania-withdrawal-of-individual-rights-to-african-court-will-deepen-repression/>> accessed 26 October 2021.

¹¹⁴⁸ibid.

¹¹⁴⁹ibid.; Guardian Reporter (n 1143). p. 5.

Development.¹¹⁵⁰ It is an initiative of African states focused at ensuring rejuvenation of the African continent in economic, social and political spectrum.¹¹⁵¹ Generally, Africa's history may be categorized into three periods namely, the colonial era; the political independent era and the third one is referred to as African revival.¹¹⁵² In particular, during the colonial era, all the major means of the economy were under the western powers, African countries were under foreign domination in economic, social and political aspects.

Notably, the independent era, is said to have commenced with the African liberations struggle to regain their freedom, which is said to have ended up with more or less political freedom. The revival era, represents the efforts by the African countries to regain their economic powers from the Western powers.¹¹⁵³ Examples of framework that evidences this is under the Abuja Treaty (1991) and the UN Charter on economic rights and duties of the state 1974.¹¹⁵⁴ However, such efforts did not bear the expected results to most African states. As it may be noted, even the Western powers did not vote in favour of them, while most developing countries inclusive Africa pioneered the same.¹¹⁵⁵

To ensure that Africa's economic development is attained, more efforts have to be sought to ensure that both the African developing countries; developed countries and

¹¹⁵⁰ UNECA (n 922), p. vi; Declaration on Democracy, Political, Economic and Corporate Governance, preamble.

¹¹⁵¹ Declaration on Democracy, Political, Economic and Corporate Governance, para 3.

¹¹⁵² S Hamad and M Kitigwa, 'What Is New in the New Partnership for Africa's Development (NEPAD)?' [2016] The Journal of Open University of Tanzania, p. 140.

¹¹⁵³ Elsabe Boshoff and Owiso Owiso, 'Pan-Africanism and Development in the Twenty-First Century: A Critical Analysis of the New Partnership for Africa's Development (NEPAD)' in Michael Addeynay and Micahel Nyarko (eds), *Ghana @60 governance and human rights in the twenty-first century Africa* (University of Pretoria Law Press 2017), p. 267.

¹¹⁵⁴ Charter of Economic Rights and Duties of States 1974 (Resolution 3281 (XXIX)).

¹¹⁵⁵ Charles Brower, 'Notice to Members of the International Law Section's Subcommittee on Economic Rights and Duties' (1974) 9 *International Lawyer* <<https://scholar.smu.edu/cgi/viewcontent.cgi?article=4075&context=til>> accessed 10 August 2021, p. 401.

private sector will also be on board. On this basis, NEPAD was initiated. It was observed that African states were highly indebted to the developed countries through the international financial institutions namely World Bank and International Monetary Fund (IMF) through structural adjustment programmes.¹¹⁵⁶ To relieve African states from such heavy external debts, three major efforts are reported to have been carried out namely; the Millennium Partnership for Africa recovery programme (MAP) under the presidents Mbeki and Obasanjo; the Omega plan pioneered by President Wade and Bouteflika and the UNECA Compact for the African recovery, championed by the African Ministers of Finance.¹¹⁵⁷

Notably, OAU recognized the fact that, the three efforts seem to complement each other towards the general effort to rejuvenate economic, social and political spheres of African states. Consequently, the three efforts were merged into one grand initiative that was named the New African Initiative (NIA).¹¹⁵⁸ It is argued that NIA was then renamed NEPAD an initiative that describes the nature of challenges facing Africa continent namely: being endowed with plenty of potential natural and human resources but suffers a paradox of underdevelopment.¹¹⁵⁹ Key factors behind the paradox that NEPAD is set to work on are inclusive;¹¹⁶⁰

...geographical barriers,...effects of historical evils such as slavery,
colonialism, apartheid and neocolonialism, arbitrary colonial imposed
borders and other natural and social barriers...

¹¹⁵⁶Government of Mozambique, 'An over View of NEPAD' <<http://www.minec.gov.mz/index.php/an-overview-of-nepad>> accessed 13 October 2018.

¹¹⁵⁷ *ibid.*; O Agbu, 'NEPAD: Origin, Challenges and Prospect' [2003] *The Indian Journal of Political Science*, p. 99; Hamad and Kitigwa (n 1152), p. 142.

¹¹⁵⁸Government of Mozambique (n 1156).; Hamad and Kitigwa (n 1152), p. 142.

¹¹⁵⁹ Government of Mozambique (n 1156).

¹¹⁶⁰ Boshoff and Owiso (n 1153), p. 268.

Other initiatives such as the OAU and the Constitutive Act of the AU are examples of earlier efforts to collectively handle the African paradox.¹¹⁶¹ Consequently, NEPAD is taken as a re-unifying factor for the African countries and the globe to envision and approach such a paradox in a participatory manner through her people; states and other partners in development.¹¹⁶²

In addition, NEPAD is said to be founded on the need to eradicate poverty; ensure non-discrimination; regional integration and international cooperation to attain sustainable development among the African states. To achieve these NEPAD is set to focus on peace, security, democracy and good governance, economic and corporate governance. It is also focused to addressing the problem of infrastructure. It is acknowledged that one among the key problem in Africa has been poor infrastructure to support development.¹¹⁶³ Consequently, African states are called to individually and jointly work to achieve the growth of African continent as a whole. In particular, NEPAD has identified priority sectors upon which resources have to be mobilized in Africa,¹¹⁶⁴

Domestic savings, improved public revenue collection,... funds from outside African continent. Thus NEPAD, focuses on debt reduction and Overseas Development Assistance (ODA) as... external source...¹¹⁶⁵

¹¹⁶¹ Boshoff and Owiso Pan-Africanism and development in the twenty-first century: A critical analysis of New Partnership for Africa's Development' p. 269.

¹¹⁶² Government of Mozambique (n 1156).

¹¹⁶³ Declaration on the Implementation of the New Partnership for Africa's Development, Assembly of the African Union-Second Ordinary session of 10-12 July 2003 2003 (Assembly/AU/Decl8 (II)). para 3.

¹¹⁶⁴ Hamad and Kitigwa (n 1152). p. 144.

¹¹⁶⁵ *ibid.* p. 144.

Notably, NEPAD was not as such the AU initiative despite being initiated in the OAU.¹¹⁶⁶ Arguably, NEPAD is seen as foreign oriented¹¹⁶⁷ and a parallel initiative to the AU.¹¹⁶⁸ Consequently, it seems to duplicate roles and functions of the AU hence creating a sort of institutional competition rather than complementing each other.¹¹⁶⁹ The need to integrate it to AU framework was inevitable. According to AU decision, both the chairperson of the AU Commission and that of the Head of States and Governments Implementation Committee were mandated to ensure proper linkage of NEPAD into the AU in a form of representation committees and membership to the AU Council. Consequently, NEPAD activities are reported directly to the AU annual summit.¹¹⁷⁰ Ultimately, NEPAD is taken as both the initiative and a mandate of the AU.¹¹⁷¹

4.3.8 The African Commission for Human and Peoples Rights (ACHPR)

The abbreviation ACHPR stands for the African Commission on Human and Peoples' Rights. This is one among the organs of the African Charter that was established in 1987. Notably, the efforts to establish the ACHPR date back to the OAU era. It is argued that, the OAU unlike the AU did not provide for human rights initiatives despite its serious efforts to liberate African States and attainment of self-determination.¹¹⁷² OAU coordinated the entire continent to speak in one voice not only against colonial occupation but also against discriminative and oppressive

¹¹⁶⁶ Agbu (n 1157). p. 104.

¹¹⁶⁷ Boshoff and Owiso (n 1153). p. 273.

¹¹⁶⁸ Government of Mozambique (n 1156).; Agbu (n 1157). p. 104.

¹¹⁶⁹ Hamad and Kitigwa (n 1152). p. 146.; Government of Mozambique (n 1156).

¹¹⁷⁰ Government of Mozambique (n 1156).

¹¹⁷¹ Agbu (n 1157). p. 103.

¹¹⁷² Morris Mbonenyi, *International Human Rights and Their Enforcement in Africa* (Law Africa 2011). p. 103. ;The OAU Charter 1963, articles II and III which provide for objectives and key principles of the organization.

regimes like apartheid.¹¹⁷³ However, both internal and external forces motivated for the establishment of the ACHPR. Among them are said to be gross violation of human rights in African States and push by the powerful States and UN efforts through seminars and workshop on the need for regional human rights framework.¹¹⁷⁴

In particular, the 1961 International Conference of Jurists (ICJr) proposed for the need to establish the African regional human rights charter and the African court on human rights.¹¹⁷⁵ Notably, he then Senegalese president Sengor pioneered the initial drafting of the resolution that established the ACHPR which formed the basis for the African Charter.¹¹⁷⁶ The ACHPR as one among the African charter organ apart from the ACrthPR is mandated to; promote, protect and interpret human and peoples' rights provided under the African Charter. Among the promotion mandate are activities such as devising principles and or rules aimed at solving the human rights problems upon which African states may benchmark their domestic laws.¹¹⁷⁷ The promotional mandate of the ACHPR may be explained in five major ways.¹¹⁷⁸

Firstly, it is mandated to conduct studies and disseminating the results through issuing of resolutions; declarations and various recommendations to the AU States. Secondly, through individual Commissioners' lectures, seminars and papers on human rights in selected African States. Thirdly, the ACHPR seems to have adopted

¹¹⁷³ Issa Shivji and others, *Constitutional and Legal System of Tanzania: A Civic Source Book*, Mkuki na Nyota, Dar es Salaam, 2004. p. 129.

¹¹⁷⁴ Mbondenyi (n 1172). pp. 103-104; 107.

¹¹⁷⁵ *ibid.* 104.

¹¹⁷⁶ *ibid.* 105.

¹¹⁷⁷ African Charter on Human and Peoples' Rights. Art. 45.

¹¹⁷⁸ Mbondenyi (n 1172). pp. 304-307.

the special rapporteurs on various areas where human rights violation seems notorious. Fourthly, through its representation to international cooperation with other human rights organisations. The last way is through the State reporting mechanisms in which the ACHPR examines the reports with the view to: identify the extent of the implementation of the African charter in the domestic framework; identify the nature of human rights problems in a particular State; gather details on best practices among the African States on human rights issues to name but a few.¹¹⁷⁹

Notably, there are a number of ACHPR resolutions; declarations and recommendations issued as part of its promotional mandate. Such resolutions; declarations and recommendations are relevant to the MNCs access to clean water, the subject of this research as discussed above.¹¹⁸⁰ Notably, the ACHPR, resolutions and or declarations binds only the African States but also set some requirements to be adhered by MNCs involved in mining activities.

4.3.9 African Court of Justice

The African Court of Justice was a parallel institution to the ACrHPRS established under the AU Constitutive Act 2002.¹¹⁸¹ Owing to the similarity in function, there was a desire to merge the two into one court namely the African Court of Justice and Human Rights (ACJHR) which is another institution relevant to natural resources governance and human rights issues in Africa.¹¹⁸² In particular, the discussion of the

¹¹⁷⁹ *ibid.* pp. 307-308.

¹¹⁸⁰ See para 4.2.3 above.

¹¹⁸¹ Constitutive Act of the AU. Art. 5 (1) (d).

¹¹⁸² Protocol on the Statute of the African Court of Justice and Human Rights 2008., Art. 5 (1)(d) as on 1st October 2018, only five states had ratified the protocol, source http://www.africancourtcoalition.org/index.php?option=com_content&view=article&id=87

ACJHPR will focus mainly on governance and human rights and as it unfolds below.

Notably, the attempt to merge the ACJ and the ACrthPR as noted above did not impair much the mandate of the ACrthPR. Among the notable differences are inclusive: the number of judges which has changed from 11 to 8; the modality of getting the judges, where the secret ballot is done by the Executive Council and appointment by the Assembly instead and specific consideration on geographical allocation with a favour of Western region of more one judge.¹¹⁸³ Additionally, the ACJHPR seems to be established with two sections, one dealing with general international law affairs and the other dealing with human and peoples' rights affairs.¹¹⁸⁴ Arguably this is administrative approach for easy functioning of the court owing to the fact that the jurisdiction of the court on human rights and even the binding nature of the court decisions remained unaffected.

However, recognition of major challenges contributing to weak governance in Africa continent evidenced in wide spread illicit extraction of natural resources (minerals inclusive among others), AU opted to add a new section under the ACJHPR to deal with criminal matters. Although it is said to have been the desire of the AU to have such a court, Gift Kweka seems to suggest that 1979 was not the right time but now.¹¹⁸⁵ The criminal mandate of the ACJHPR was considered owing to the decision by AU states not to arrest the Sudanese President Al-Bashir as a sign of being dissatisfied with manner the International Criminal Court (ICC) was undermining

¹¹⁸³ *ibid.* Arts. 3 and 7.; Protocol on the Amendment to the Protocol on the Statute of the African Court of Justice and Human and Peoples Rights 2014. Art. 3.

¹¹⁸⁴ Protocol on the Statute of the African Court of Justice and Human Rights. Arts. 33 and 34.

¹¹⁸⁵ Gift Kweka, 'National Prosecution of International Crimes in Africa: Law and Practices from Kenya, Rwanda and Uganda' (University of Dar es Salaam 2017). p. 146.

them.¹¹⁸⁶ Evidenced with the prior experience of the Special Court for Sierra Leone (SCSL) and the International Criminal Tribunal for Rwanda (ICTR), AU therefore, intended to demonstrate that it may deal with its affairs through establishment of criminal section in the ACJHPR.¹¹⁸⁷ Consequently, the African Court of Justice and Human Rights was established.¹¹⁸⁸

Notably, the establishment of the ACJHPR brought substantial changes on the mandate, and organisation of the court. On the one hand of the mandate of the court, the ACJHPR is given additional jurisdiction over criminal matters. Among the crimes under the jurisdiction of the ACJHPR are inclusive; corruption; illicit exploitation of natural resources; unconstitutional change of government; money laundering; mercenarism; trafficking drugs.¹¹⁸⁹

In general the ACJHPR has jurisdiction over 14 crimes subject to be added as the international law expands. On the other hand of organisational structure of the court, it is worth noting here that, the criminal section of the ACJHPR brought with it two offices namely; the prosecutor responsible for initiating criminal proceedings at the court and prosecution of all criminal cases.¹¹⁹⁰ As such, cases to be prosecuted at the ACJHPR may be initiated either by the Assembly, the APSC and or the

¹¹⁸⁶ Cecile Aptel, 'Developments in International Criminal Justice in Africa during 2009' (2010) 10 African Human Rights Law Journal. pp. 282, 291.

¹¹⁸⁷ *ibid.* pp. 291-292.

¹¹⁸⁸ Only 11 countries out of 55 among the AU member states have signed the Protocol with no ratification up to and until February 2018. See AU, 'List of Countries Which Have Signed, Ratified/Accessed to the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights' (2018) <<https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights>> accessed 19 January 2019.

¹¹⁸⁹ The Statute of the African Court of Justice and Human Rights, Art. 28 A; Similar attempts to criminalize illegal extraction of natural resources in African countries is also noted at the African Sub-regional level (ICGLR) discussed under chapter five below.

¹¹⁹⁰ Protocol on the Amendment to the Protocol on the Statute of the African Court of Justice and Human and Peoples Rights. Art. 22A.

Prosecutor.¹¹⁹¹ The other office is that responsible for defending the accused persons in the criminal section.¹¹⁹²

It is argued that, the approach taken by AU offers an avenue for Africa to deal with its internal problem that has been holding Africa from progressing.¹¹⁹³ It is also acknowledged that the fact that some of the crimes to be handled by the ACJHPR are unique to Africa they deserve an African inbuilt strategy to solve them. Similar views are shared by Kweka who argues that despite existence of international criminal law system and institutions since 1945, yet some of the crimes under the Malabo protocol had never been dealt with at such a level.¹¹⁹⁴

Critics however, show that the anticipated ACJHPR with criminal section is already subjected to a number of challenges before its operationalisation. Among such challenges are; the immunity offered to the head of states and top governmental officials who to a largest extent are part to or accomplice to crimes and looting of Africa resources; little capacity basing on the number of judges and the wide range of crimes to be dealt with; lack of clarity in what constitute a crime; limitation of the accessibility to the court by the civic organizations and competing mandate of the ACJHPR with already existing international and local institutions. It is argued that, granting the Assembly and the APSC mandate to initiate criminal cases will end up politicizing the institution.¹¹⁹⁵ Generally, the move by the Africa despite the identified weaknesses of the proposed institution is an indicator of the general

¹¹⁹¹ *ibid.* Art. 15.

¹¹⁹² *ibid.* Art. 22C.

¹¹⁹³ Amnesty International Malabo Protocol: Legal and institutional implications of the merged and expanded African court

¹¹⁹⁴ Kweka (n 1185). p. 146.

¹¹⁹⁵ *ibid.* 149.

political will to guarantee observance of human rights and good governance in Africa which is relevant to MHCs access to clean waters and food security.

4.3.10 African Ministerial Conference on Water (AMCOW)

The abbreviation AMCOW stands for African Ministerial Conference on Water established under Abuja Declaration.¹¹⁹⁶ It is a voluntary forum formed by all 53 AU member States.¹¹⁹⁷ Consequently, the decisions, declarations and frameworks issued by the AMCOW binds and or influence their water sector. In particular, its origin traces from the UN concern on water issues around the globe.¹¹⁹⁸ Given the nature of the wide task and the need to have a close, effective and result oriented initiatives, UN opted to establish working groups in regions on water issues.¹¹⁹⁹ In African region, UN negotiated with the respective ministers concerned with water on the need of such initiative.¹²⁰⁰ Ministers agreed on the need to establish an African oriented initiative to deal with water issues affecting their socio-economic development.¹²⁰¹

Among the objectives of the AMCOW are; to ensure that AU member States have the robust legal and institutional framework regulating water resources.¹²⁰² Also, AMCOW is set to guaranteeing access to clean water and sanitation in all with particular interests on the underdeveloped and climate impacted regions.¹²⁰³ The

¹¹⁹⁶ The Abuja Ministerial Declaration on Water-A key to Sustainable Development in Africa. para 1; AMCOW, 'AMCOW Bulletin, A Summary Report of the Sixth Ordinary Session of the African Ministers' Council on Water (AMCOW 6)' <<http://www.iisd.ca/Africa/Water/AMCOW>>. accessed on 4th July 2020.

¹¹⁹⁷ AMCOW, 'Member States' (2020) <<https://www.amcow-online.org/index.>>.

¹¹⁹⁸ AMCOW, 'Brief History' <<https://www.amcow-Brief online.org/index.>>. visited on 30th June 2020.

¹¹⁹⁹ *ibid.*

¹²⁰⁰ *ibid.*

¹²⁰¹ *ibid.*

¹²⁰² The Abuja Ministerial Declaration on Water-A key to Sustainable Development in Africa. para 4 (a)

¹²⁰³ *ibid.* para 4 (c).

other objective to be achieved by AMCOW is to safeguard proper water allocation in a manner that will guarantee availability of water for domestic uses and food production.¹²⁰⁴

Strategically, AMCOW is designated as Technical Advisory Committee within the AU Specialised Technical Committee on Agriculture Rural Development, Water and Environment.¹²⁰⁵ In order to achieve these objectives and set strategies, AMCOW issues a number of declarations, statements and plans. Notably, despite of the fact that AMCOW declarations are non-binding upon states, they influence the manner in which domestic laws regulating access to water are formulated.¹²⁰⁶ As such both the objectives and the strategic position of the AMCOW makes it very relevant given the nature of the study at hand which investigates the extent to which Tanzanian MHCs rights to clean water and adequate food is guaranteed.¹²⁰⁷

Generally, there are reliable institutional framework with clear vision among others to guarantee MHCs rights to clean water and adequate food in Africa. As noted above, these institutions range from those which formulate, implement and or monitor and interpretation of rules. There are African institutional frameworks focused at solving the African problems. Further these institutions ranges from those which are binding and those which are only influence the area of promotion and protection of human rights and natural resources governance in Africa. As it is vivid in this part, some of newly established institutions seem to overlap in their mandate

¹²⁰⁴ *ibid.* para 4 (d).

¹²⁰⁵ AMCOW, 'Johannesburg Ministerial Statement' (2009). Rev.1, 1800hr (12 Nov. 2009) para 1;Durban Political Declaration signed on the occasion of the World Water Day. para 3.

¹²⁰⁶ Ombella, 'Promoting Water Infrastructure Investment to Accelerate Access to Water in Tanzania' (n 988). p. 176.

¹²⁰⁷ See chapter one above in this study.

with core institutions established prior to their creation.

4.4 Conclusion

Generally, the discussion above has indicated that there exist legal and institutional framework to safeguard MHCs rights to clean water and adequate food in Africa. Notably, the AU legal framework reflects similar principles as provided under the international legal frameworks. However, AU's unique; historical, geographical location, socio-economic, cultural and political factors have influenced the manner in which they are adopted. Among examples are inclusive; the recognition of the PSNR as a human rights principle; limitation of the definition of indigenous peoples, limited scope of stakeholders' consultation and participation and multiple joint cooperation on water resources sustainable management. Others relates to domesticating the global natural resources governance initiatives such as EIT and KPCS.

With respect to institutional framework, a number of them have been established. Worth noting here is the fact that, African countries are aware of the unique African problems in natural resources governance. Consequently, instead of transplanting the UN institutional framework, Africa has adopted institutions designed to provide unique African home-grown solution to the African problems. Despite of such institutions being shown to be overlapping to other similar mandated institution in Africa, it is worth to note the political will to addressing natural resources governance and safeguarding MHCs right to clean water and adequate food.

CHAPTER FIVE

TANZANIA’S LEGAL AND INSTITUTIONAL FRAMEWORKS ON

SAFEGUARDING MHCs’ RIGHTS TO CLEAN WATER AND ADEQUATE

FOOD

5.1 Introduction

The immediate above chapter provides for a critical analysis of the AU legal and institutional frameworks relevant to safeguard MHCs rights to clean water and adequate food. It shows that AU has adopted international principles to fit into African socio-economic, cultural, historical, geographical, political and security circumstances. The current chapter attempts to answer research question two above.¹²⁰⁸ It thus put forward the argument that, Tanzania’s adoption of international legal and institutional frameworks to safeguard MHCs rights to clean water and adequate food is influenced by her; geographical, hydrological, socio-economic, cultural, political and historical factors.

5.2 Tanzania’s Country Mineral Profile and Mining-host Communities (MHCs)

5.2.1 Tanzania Mineral Profile

Tanzania is a country which is geographically located in East Africa. It is formed out of union of two countries namely; Tanganyika and Zanzibar since 1964.¹²⁰⁹ It is estimated to have a population of more than 55 million. Economically, it seems to fluctuate, from least developing countries to lower middle income country between the year 2020 and 2022.¹²¹⁰ Mining as an economic activity seems to be on the rise,

¹²⁰⁸ See para 1.4 above.

¹²⁰⁹ Permanent Mission of Tanzania to the UN <https://www.un.int/tanzania/zh-hans/content/permanent-mission-tanzania-united-nations> (accessed on December 2019).

¹²¹⁰ The World Bank, <https://data.worldbank.org/country/tanzania?view=chart> accessed on 04/07/2020.

but it contributes little to the GDP.¹²¹¹ However, the trend from the year 2014-2021 seems to be increasing from 3.8% in the year 2014, 5.2% in the year 2019 and 6.4% in 2021.¹²¹² Mining is also, reportedly to contribute about 50% of all foreign currency earning.¹²¹³ The level of poverty in Tanzania is estimated to be 47% leaves below 0.60 USD per day.¹²¹⁴

Tanzania as a mineral-rich country, mining activities take place mostly in the Lake Victoria Zone (LVZ) which hosts about nine active large-scale mining sites.¹²¹⁵ However, mineral occurrence is also noted in various regions such as; Mwanza, Shinyanga, Arusha, Mbeya and Mara to name but a few.¹²¹⁶ Tanzania is home to about 120-130 ethnic groups which comprises among others the indigenous; pastoral and semi-pastoral communities.¹²¹⁷ Diversity in the life style (economic, socio-cultural) among these groups is inevitably and diversely impacted by mining.¹²¹⁸ Mining activities trace itself from colonial era to date.¹²¹⁹ Owing to WB lead economic reforms in early 1990s, large-scale mining activities gained pace in Tanzania.¹²²⁰

¹²¹¹ WB, 'The WB in Tanzania' (WB, 2016) <<http://www.worldbank.org/en/country/tanzania/overview>>.

¹²¹² NRG, 'Resources Governance Index-Tanzania' (NRGI, 2021). p. 2.; Mining Commission, 'Annual Report' (Mining Commission 2021). para 3.7 ;Controllor and Auditor General, 'Performance Audit Report on the Management of Mechanisms for Revenue Collections in Mining Sector' (National Audit Office 2022). para 1.1.

¹²¹³ VPO, 'State of the Environment Report 3' (n 106). para 4.7.

¹²¹⁴ The WB in Tanzania (2016) <http://www.worldbank.org/en/country/tanzania/overview>.

¹²¹⁵ The United Republic of Tanzania, Ministry of Minerals, Tanzania Mineral Occurrence 2018 <https://www.madini.go.tz/act-policy-and-useful-doc/> accessed on 8th November 2018

¹²¹⁶ Tanzania Invest (2017) <http://www.tanzaniainvest.com/mining>.

¹²¹⁷ ACHPR, 'Report of the ACHPR Working Group of Experts on Indigenous Populations/Communities' (2005). para 15-17.; TASAF III Government Project Preparation Team, URT Draft TASAF III Indigenous people policy framework 2012, para 1.2; IWGIA 2016 <http://www.iwgia.org>.

¹²¹⁸ Aikins, E, 'The relationship between sustainable development and resources use from geographic perspectives' (2014), Natural Resources Forum 261-262.; Tanzaniainvest, 'Mineral Occurrence in Tanzania 2017' <<http://www.tanzaniainvest.com/minerals>>.

¹²¹⁹ Emel, J., Huber, M. T., & Makene, M. H. 'Extracting sovereignty: Capital, territory, and gold mining in Tanzania,' 30 (2011) Polit Geogr. 74; Lissu T, 'In Gold We Trust: The Political Economy of Law, Human Rights and Environment in Tanzania's Mining Industry', Work in Progress' (2001) Law, Social Justice & Global Development Journal. pp. 36,37,38,39.

¹²²⁰ Ibid.

5.2.2 Tanzania's Mining-Host Communities (MHCs)

Although mining in Tanzania is carried out in various regions, this study focuses on LVZ. Consequently, the term MHCs in this study refers to LVZ (regions bordering Lake Victoria). Such a focus is based on three main reasons. Firstly, Lake Victoria is one of the largest African trans-boundary shared between almost 10 countries.¹²²¹ Consequently, international principles regulating trans-boundary water resources gains validity. Secondly, LVZ represents an area which is large-scale mining intensive.¹²²² Reportedly, about 10 out of 14 large-scale mining sites in Tanzania in the year 2008 were operating within the LVZ.¹²²³ In addition, the reviewed literatures identify LVZ as area grossly impacted by mining.¹²²⁴ It is also noted that last year LVZ specifically in Kahama, communities adjacent to Petra Diamond Ltd were affected by breach of the Tilling Dam where their homes, crops and water sources were affected.¹²²⁵ Also, the LVZ is noted as home to Hadzabe indigenous peoples among other diverse ethnic groups.¹²²⁶

Furthermore, the choice of LVZ is also influenced by available records of food security issues despite of the general report that Tanzania is a food sufficiency state.¹²²⁷ Notably, however, there has been a trend of food insufficiency in regions where mining activities take place the most. It was estimated that LVZ will suffer

¹²²¹ Tanzania, Vice President's Office, 'National Climate Change Strategy' (2012). para 2.1.2.

¹²²² United Republic of Tanzania, 'The Mineral Policy of Tanzania' (Ministry of Energy and Minerals, 2009). para 2.

¹²²³ United Republic of Tanzania, 'Report of the Presidential Mining Review Committee to Advise the Government on Oversight of the Mining Sector' (2008) <http://www.policyforum-tz.org/sites/default/files/BomaniReport-English_0.pdf>. para 2.5.1-2.5.14.

¹²²⁴ See para 1.8 above.; VPO, 'State of the Environment Report 3' (n 106).para 9.1.1 (c).

¹²²⁵ See para 1.8 above.

¹²²⁶ The International Work Group for Indigenous Affairs (IWGIA), 'The Indigenous World 2016' (International Work Group for Indigenous Affairs, 2016) <www.iwgia.org>.pp 424 and 427.

¹²²⁷ Jamhuri ya Muungano ya Tanzania, Wiazara ya Kilimo, Chakula na Ushirika, Hotuba ya Waziri wa kilimo, MH. Japhet Ngailonga Hasunga (MB), Kuhusu makadirion ya mapato na matumizi ya fedha ya Wizara ya Kilimo kwa mwaka 2019/2020. para 3.1.

from inadequate food in the year 2014/2015.¹²²⁸ A similar projections were noted in the year 2019/2020.¹²²⁹

One among noted reason for low food production in the named regions in the 2019/20120 is said to be climate variation.¹²³⁰ As such these findings seem to contravene majority perceptions and legitimate expectation of socio-economic benefits once mining activities are in their vicinity.¹²³¹ Notably, there are international standards that may be realised to safeguard MHCs right to water and food. In order to apply such principles, they need to be domesticated in Tanzania

5.3 Tanzania's Practice of Domestication of International Law Principles

Generally, international principles once agreed by states do not directly get to be applied in every State.¹²³² In Tanzania as it is for Common Law countries that have adopted the dualist approach of international law, further steps have to be taken for them to function domestically.¹²³³ Basically, signing of international treaty, is a third stage after negotiation and adoption of its principles.¹²³⁴ Signing, signifies agreement and or acceptance of results of negotiations by the State. Ratification of the treaty, which is a fourth stage, is the one that guarantees its principles may be enforced in

¹²²⁸ Ministry of Agriculture, Livestock and isheries, 'The 2014/2015 Preliminary Food Crop Production Forecast for 2015/2016 Food Security' (2015). p. 8.

¹²²⁹ Ministry of Agriculture, 'Food Security Report: Preliminary Food Crop Production Assessment for 2019/2020 Food Security.' (2019). para 6-7.

¹²³⁰ *ibid.* para 6.2.; Bunge la Jamhuri ya Muungano wa Tanzania, 'Kamati Ya Kudumu Ya Bunge Ya Ardhi, Maliasili Na Utalii: Taarifa Ya Utekelezaji Wa Shughuli Za Kamati Kwa Kipindi Cha Januari 2016-Januari 2017' (Bunge la Jamhuri ya Muungano wa Tanzania, 2017). para 3.1 (v); See also, Wiazara ya Kilimo, Chakula na Ushirika, 'Hotuba Ya Waziri Wa Kilimo, MH. Japhet Ngailonga Hasunga (MB), Kuhusu Makadirion Ya Mapato Na Matumizi Ya Fedha Ya Wizara Ya Kilimo Kwa Mwaka 2019/2020.' (Wiazara ya Kilimo, Chakula na Ushirika, 2019). para 3.1.

¹²³¹ Institute for Human Rights and Business (IHRB), 'Human Rights in Tanzania's Extractive Sector' (Institute for Human Rights and Business (IHRB) 2016) <www.ihrb.org/focusareas/commodities/human-rights-in-tanzanias-extractive-sector-exploring-the-terrain>. para 5.

¹²³² See para 1.8 above.

¹²³³ A Mbuya, 'Justiciability of Economic, Social and Cultural Rights in Tanzania' (2018) 1 East African Journal of Social and Applied Sciences. p.18.

¹²³⁴ Shivji and others (n 270). pp. 88-89.

domestic courts.

Ratification entails, enacting a new law and or amending existing laws to avoid such laws from conflicting with international principles.¹²³⁵ Arguably, a constitutional approach in adoption of international principles seems to be better than an Act owing to the fact that, the later does not minimize potential contradiction with international principles.¹²³⁶ In Tanzania, the executive arm of the state is responsible to signing international treaties which are to be ratified by the Parliament.¹²³⁷

5.4 Tanzania's Legal and Institutional Frameworks to Safeguarding MHCs'

Rights to Water and Adequate Food

Tanzania is duty bound to adopt legal and other relevant measures to guarantee progressive realisation of human rights inclusive the right to water and food.¹²³⁸ This part argues that Tanzania has relevant legal and institutional frameworks in place to safeguard MHCs rights to clean water and adequate food. The discussion focuses on binding and non-binding principles. The term binding principles refers to laws that are in force in Tanzania. However, the term non-binding principles refers to principles contained in; parliamentary bills, enacted laws which are yet to be enforced, policies, plans, strategies, guidelines and visions. To maintain coherent discussion, this part firstly, adopts HRBA as noted above.¹²³⁹ Secondly, analysed principles are similar to those discussed at international levels.¹²⁴⁰

¹²³⁵ *ibid.* p. 89.; Frans Viljoen, *International Human Rights Law in Africa* (Oxford University Press 2012). p. 522.

¹²³⁶ Ssenyonjo (n 6). p. 153 (para 408).

¹²³⁷ URT Constitution 1977. Art 63 (3) (e).

¹²³⁸ Ministry of Constitution and Legal Affairs (n 18). p. 19.

¹²³⁹ See para 3.1 and 4.1 above.; *ibid.* para 1.1.4 -1.1.5.

¹²⁴⁰ See para 3.2 and 4.2 above.

5.4.1 Safeguarding MHCs Right to Adequate Food

The right to food in Tanzania is not expressly provided under the constitution. Hence, its enforcement depends on other human rights such as; the right to health environment and right to property which are expressly provided under the law.¹²⁴¹ Notably, unlike the right to water, the right to food seems to have narrow legal and policy relevancy in Tanzania.¹²⁴² However, in a wider perspective, recognition of access to land which is prime to food production adds value to right to food. The discussion below, intends to show how Tanzania's legal framework provides for principles relevant to safeguard MHCs ability to sustainably produce their own sufficient and safe food.

5.4.1.1 Permanent Sovereignty over Natural Resources

Tanzania inherited the colonial principles in regulation of natural resources such as; land and minerals.¹²⁴³ Prior to colonial invasion in African countries, land has been owned communally and in accordance with the peoples' customs.¹²⁴⁴ In particular to mining, although Germans were not involved in such a sector, the British rule started mining activities which were regulated under the Tanganyika Order in Council in 1920 (TOC).¹²⁴⁵ Through TOC 1920 all the land and other natural resources in

¹²⁴¹ United Republic of Tanzania Constitution. Art. 24 ;Environmental Management Act. s 4(1); Ministry of Constitution and Legal Affairs (n 18). para 2.2.3.1.

¹²⁴² The Law of the Child Act 2009. s 8(1)(a) (2).; Ministry of Health, 'The Food and Nutrition Policy for Tanzania' (1992). part A para 3.; Ministry of Health and Social Welfare, 'National Nutrition Strategy JULY 2011/12 – JUNE 2015/16' (2015). para 115.

¹²⁴³ Nshala Rugemeleza, 'Management of Natural Resources in Tanzania: Is the Public Trust Doctrine of Any Relevance?' (2000) <<https://dlc.dlib.indian.edu/dlc/handle/10535/1405>>. p. 1; URT Law Reform Commission, 'Position Paper on the Legal Framework for Development of Mining Industry' (Law Reform Commission). para 3.2.

¹²⁴⁴ Siri Lange, 'Land Tenure and Mining in Tanzania' (CHR Michelsen Institute 2008). para 2.1; URT Law Reform Commission (n 1243). para 2.; See also para 4.2.1.1 above on regulation of resources prior to colonialism in Africa.

¹²⁴⁵ Lange (n 1244). para 3.

Tanganyika were placed under the King of England as a trustee.¹²⁴⁶ Consequently, any prospecting activity by licensed mining companies ought to have been in collaboration with the colonial government via the governor.¹²⁴⁷

In particular, to the principle of trusteeship, Tanzania inherited the colonial principle of trusteeship. Hence, all natural resources laws recognize [minerals and land] for example are vested to the President as a trustee.¹²⁴⁸ Rugemeleza Nshala is of the view that, under the trusteeship rules, the trustee owes the beneficiary a fiduciary duty. Such a duty entails the requirement to; act loyal and to the interest of the beneficiary, preserve the trust property, furnish information, make the trust productive, observe impartiality to the beneficiary and act with prudence, diligence and in good faith with the beneficiary.¹²⁴⁹ As such these principles are to transpire through enacted laws to guarantee; access to land resources, security of tenure, and promote proper regulating mining activities.

With respect to secured land rights, it is reportedly that, land is the prime asset upon which all other socio-economic activities are dependent on.¹²⁵⁰ The right to adequate food is connected to land as food is largely produced on land through cultivation, animal husbandry fishing, hunting and gathering to name but a few means.¹²⁵¹

¹²⁴⁶ The Tanganyika Order in Council 1920. s 8.(3-4).

¹²⁴⁷ Lange (n 1244). para 3; URT Law Reform Commission (n 1243). para 2.4.

¹²⁴⁸ Land Act 1999, s 1(a); Village Land Act 1999. s 3 (1) (b).; Natural Wealth and Resources (Permanent Sovereignty)Act 2017.

¹²⁴⁹ Rugemeleza (n 1243). pp. 2-3.

¹²⁵⁰ URT Ministry of Lands, Housing and Human Settlements Development, 'Revised National Land Policy,1995 Draft' (2018). para 1.2.8,3.29,3,3.30.2.

¹²⁵¹ IDLO and Irish Aid, 'Realising the Right to Food: Legal Strategies and Approaches' (International Development Law Organisation, 2015) <<https://www.idlo.int/publications/realizing-right-food-legal-strategies-and-approaches>>. para 3.1.2.1; Djire Moussa, 'The Agriculture Policy Act (LOA) of Mali-Great Potential for Realizing the Right to Food through Equitable Access to Land and Natural Resources' in Lorenzo Cotula (ed), *The right to food and access to natural resources* (IIED 2008). p. 48; Lorenzo Cotula, 'The Right to Food and Resource Access- Conceptual Links', (IIED 2008)' in Lorenzo Cotula (ed), *The right to food and access to natural resources* (IIED 2008). p. 35.

Ownership of land in Tanzania is thus envisaged under the Granted Right of Occupancy (GRO) or Customary Right of Occupancy (CRO).¹²⁵² Under the GRO the right to occupy land is limited to 99 years while that of customary occupancy is infinite.¹²⁵³

In particular, both GRO and CRO do not confer upon its holders the rights to minerals, oil and gas underneath the soil.¹²⁵⁴ Consequently, upon discovery of minerals on any land, the land is subjected to government acquisition process in an attempt to exploit them.¹²⁵⁵ It is noted that rural communities in developing countries are the one that suffer the most due to; discovery of minerals in their area, value of land and lack of awareness of people in defending their rights, and unsecured land tenure.¹²⁵⁶ For example, although it is estimated that 80% of the Tanzanians live in villages where they occupy 12 million parcels of lands customarily, only 400,000 certificates have been issued to secure their land.¹²⁵⁷ Unsecured land tenure results into MNCs taking rural lands at a relatively cheap price. To exemplify this, it is reportedly that, local mining company procured mining sites of more than 30 hectares by paying 200USD for every hectare of land.¹²⁵⁸

Generally, agriculture is the main source of food and income to majority of Africans and is mainly carried out in a form of small-scale.¹²⁵⁹ Agriculture is used to mean

¹²⁵² Land Act 1999, s 19 (10 (a).; Village Land Act 1999. s 8 (5) for village and urban lands respectively

¹²⁵³ Land Act 1999, s 22 (1) (e) and Village Land Act 1999, s 18 (1) (c) respectively.

¹²⁵⁴ Land Act 1999, s 22 (2).; The Natural Wealth and Resources (Permanent Sovereignty) Act 5 2017, s 4 (91) and 5(2).; The Village Land Act 1999. s 3.

¹²⁵⁵ The Land Acquisition Act 1967. s 4.

¹²⁵⁶ See para 1.8 above; Ombella, 'Upholding Human Rights in AU Member States' Extractive Sector: Review of Aspects of Food Security to Communities Neighbouring Mines in Selected Countries' (n 231). pp. 22-23.

¹²⁵⁷ URT Ministry of Lands, Housing and Human Settlements Development (n 1250). para 1.2.1.

¹²⁵⁸ E Daley and others, 'Gender, Land, and Mining in Pastoralist Tanzania' (UK Mokoro Ltd and HakiMadini 2018) 2. p. 48.

¹²⁵⁹ SADC, 'Regional Agricultural Policy' (SADC Secretariat, 2014). see the preamble.

and include crops farming, animal husbandry, fisheries, forestry and hunting.¹²⁶⁰ In Tanzania for example agriculture employs about 75% of total labour force.¹²⁶¹ In taking cognizant of this fact, it is prohibited to mine in areas where agricultural activities are taking place and or in farms which are prepared for agricultural activities without the occupiers' consent.¹²⁶²

However, the Mining Act 2018 limits agriculture to farming involving crops growing, ignoring the animal husbandry, hunting, and fruits gathering. It is shown that Tanzania leads among the African countries with large number of livestock.¹²⁶³ As such livestock keeping in Tanzania seems to be mostly nomadic where no formal farms are prepared for the use rather shifting from one place to another searching for pasture.¹²⁶⁴ In particular, nomadism was once noted as a problem to be eliminated rather than to be worked on in an effort to accommodate them in the policy and laws regulating agriculture and land tenure system.¹²⁶⁵ Arguably, there is a view that nomadic pastoralist preserves land as it allows vegetation to recover after grazing.¹²⁶⁶ Consequently, despite the above reality on the practice of nomadism, land for grazing animal or hunting may be prone to mining activities under the pretext that it is not prepared for farming activities.

¹²⁶⁰ United Republic of Tanzania and Ministry of Agriculture Food Security and Cooperatives, 'National Agriculture Policy' (2013). para 1.2.

¹²⁶¹ *ibid.* para 1.2.

¹²⁶² *Ibid.* s. 95 (1) (b) (ii-iii).

¹²⁶³ URT Ministry of Lands, Housing and Human Settlements Development (n 1250). para 1.2.4.

¹²⁶⁴ *ibid.* para 1.2.4.

¹²⁶⁵ United Republic of Tanzania and Ministry of Land, Human Settlement and Development, 'National Land Policy (2nd Edition)' (1997). para. 7.3.2 read together with para. 7. 3.3.

¹²⁶⁶ Tenga Ringo, 'The Right to Food and Security of Pastoral Resources Rights in the United Republic of Tanzania' in Lorenzo Cotula (ed), *The right to food and access to natural resources* (IIED 2008). (50-59). p. 52.

In particular, there is equal access to land in Tanzania and everyone is allowed to apply and be allocated part of land subject to set legal requirements.¹²⁶⁷ It is argued that equitable access to resources like land and water has a bearing on the realisation of the right to adequate food and generation of income to buy food.¹²⁶⁸ Women for example are reportedly to be highly involved in subsistence agriculture than men, they also produce more than half of the food crops in households.¹²⁶⁹

Despite all these facts, it is reportedly that only 27% of women in Tanzania own land.¹²⁷⁰ Among factors behind this situation are; cultural aspects, inadequate land use plan, inadequate skills in drafting gender related policies and laws, non-enforcement of laws, poverty and little awareness of women on land issues.¹²⁷¹ It is argued that, although Tanzania is shown to have ratified the Maputo Protocol 2003 most of her laws are gender blind.¹²⁷²

In particular, to indigenous peoples, Tanzania seems not explicitly recognizing internal self-determination of sub-groups. She maintains that all her peoples are indigenous as they existed before the colonial inversion.¹²⁷³ This position seems a paradox for two major reasons. Firstly, Tanzania has not domesticated international

¹²⁶⁷ Village Land Act 1999. s 23 (1) (c) (i).

¹²⁶⁸ IDLO and Irish Aid (n 1251). para 3.1.2.1.

¹²⁶⁹ Jeniffer Duncan and Scholastica Haule, 'Women in Tanzania Set for Equal Land Rights-Lets'make It Happen' (Dar Es Salaam, 2014) <<https://www.theguardian.com/global-development/poverty-matters/2014/oct/15/women-tanzania-equal-land-rights>>; Sophia Kongela, 'Gender Equality in Land Ownership and Agricultural Lands in Rural Tanzania: Does Matrelenia Tenure System Matter?' [2020] African Journal of Land Policy and Geospacial Sciences. p. 23.

¹²⁷⁰ URT The Ministry of Health, Community Development, Gender, Elderly and Children, 'Tanzania Country Gender Profile' (2016). para 4.5.2.3.

¹²⁷¹ *ibid.* para 4.5.2.3; Garance Genicot and Maria Hernandez-de-Benito, 'Women Land Rights and Village Council in Tanzania' (Economic and Development Institute, 2019) <<https://edi.opml.co.uk/wpcms/wp-content/uploads/2019/12/19EDILandDraft10.1.pdf>>. p. 38; Kongela (n 1269). p. 23.

¹²⁷² Grace Kazoba and Charles Mbandu, 'The Impact of African Charter and Maputo Protocol in Tanzania' in Victor Ayeni (ed) (Pretoria University Law Press 2016). p. 254.

¹²⁷³ Elifuraha Laitaika, 'Indigenous Peoples' Rights in Tanzania and International Rights Law' (2012) 1 Tuma Law Review. pp. 163-162.

frameworks to safeguard indigenous peoples' rights.¹²⁷⁴ Secondly, the principles regulating indigenous peoples such as; consultation and FPIC are not applied when land is to be acquired for mining. It thus offers a general provision which guarantee inalienability of the natural wealth from the peoples of Tanzania with some reflections in some sectors.¹²⁷⁵

It is generally noted that, such wide scope of recognition of the PSNR principle allows the government to exercise wide policy space in formulation her socio-economic, political and cultural development.¹²⁷⁶ However, sub-national groups are recognised under the non-binding framework in Tanzania.¹²⁷⁷ Such a recognition offers a stepping stone form indigenous peoples to elevate their push towards recognition and protection against harms from mining sector.

5.4.1.2 Common but Differentiated Responsibilities

The CDR principle seem to transpire narrowly in Tanzania through prioritising signing and engaging into international agreements with strategic benefits to Tanzania.¹²⁷⁸ It is noted above that there international principles relevant to address deforestation, droughts and biodiversity conservation through reforestation.¹²⁷⁹ Notably, food insecurity in Tanzania is based on; absence of required technology in food production, processing, distribution, storage and inadequate government

¹²⁷⁴ See for example ratification of; Convention Concerning Indigenous and Tribal Populations.; Indigenous and Tribal Peoples Convention.

¹²⁷⁵ Natural Wealth and Resources (Permanent Sovereignty)Act. s 5(1).

¹²⁷⁶ John Ombella, 'Liberal Rules on Trade and Investment and the False Promise in Developing Countries: A Tanzanian Perspective' (2018) 1 Institute of Judicial Administration Lushoto Journal. pp. 37-38.

¹²⁷⁷ Proposed Constitution 2014.

¹²⁷⁸ *ibid.* Art 22(1) (e).

¹²⁷⁹ See para 3.2.1.1 and 3.2.1.2 above.

budget.¹²⁸⁰ In particular, the value land cover restoration and conserved biodiversity such as; plants and bees in food production may not be overemphasized.¹²⁸¹ Arguably, inadequacy of the law and proper policies limits MHCs deriving benefits from international frameworks relevant to food security.¹²⁸² Ratification of international instruments may offer a solution to food related challenges such as; inadequate number of extension officer and weak and ruined agricultural infrastructures.¹²⁸³

However, there seems to exist strong political and administrative will to provide for legal and institutional frameworks relevant to land cover restoration, combating drought and other natural disasters.¹²⁸⁴ Also, Tanzania strategizes to enact laws that may attract private investment in restoring degraded lands, reforestation and other environmental friendly technology relevant to food security.¹²⁸⁵ Worth to note though, that most of the climate related initiatives are not enforceable yet.

5.4.1.3 No Harm Rule

In order to safeguard MHCs right to food, prior to any large-scale development project such as mining, there is a need to conduct EIA.¹²⁸⁶ As noted above, EIA intends to identify all potential and actual threats to socio-economic and environmental impacts in case the project will be approved. Notably, among criteria

¹²⁸⁰ Ministry of Constitution and Legal Affairs (n 18). para 2.2.3.3 (iii); Ministry of Health and Social Welfare (n 1242). para 79 (iv).; Legal and Human Right Center, “‘Unknown Assailants’: A Threat to Human Rights: Tanzania Human Rights Report’ (2018). para 5.4.1.; United Republic of Tanzania, ‘Sustainable Industries Development Policy SIDP 1996-2020’ (Ministry of Industries and Trade, 1996). para 3.4.8.

¹²⁸¹ See para 3.2.1.3 above.

¹²⁸² United Republic of Tanzania, ‘Draft National Forest Policy’ (2008). para 4.4.12.

¹²⁸³ Ministry of Constitution and Legal Affairs (n 18). para 2.2.3.3 (iii-v); VPO, ‘Guideline for Integrating Climate Change Adaptation into National, Sector Policies, Plans and Programmes of Tanzania’ (2012). para 3.1.3, and 3.1.9.; The United Republic of Tanzania Ministry of Water, ‘Guidelines for the Preparation of Water Safety Plans - Resilient to Climate Change for Rural Water Supply Services’ (2015). para 1.5 and 1.7.

¹²⁸⁴ VPO, ‘Implementation Strategy for the National Environmental Policy 2(021) for the Period of 2022-2032’ (2021). para 3.1.1 (iii).

¹²⁸⁵ *ibid.* para 2.3 (b) (vii).

¹²⁸⁶ Environmental Management Act. s 81 vide Second schedule; The Forest Act 2002. s. 18; The Beekeeping Act. s. 26 (1).

for review of natural resources contracts in Tanzania, environmental preservation and their impacts on peoples' wellbeing are considered.¹²⁸⁷ Adoption of EIA in Tanzania legal framework reflect precautionary rule at international level.¹²⁸⁸

In order to safeguard MHCs right to food, there is a duty to protect biodiversity (forest, bees and fisheries) through prohibition of cutting down trees, mining and or disposing wastes in forests.¹²⁸⁹ Cutting down trees is linked to; soil erosion and degradation, climate variation, dwindling of biodiversity such as bees which are vital for pollination in food production, and limitation of natural regeneration of forests.¹²⁹⁰ Despite all these legal provisions limiting harm to environment and biodiversity, it is indicated that deforestation takes place at the rate of 400,000 hectares per year in Tanzania.¹²⁹¹ Among factors that contribute to deforestation and land pollution in Tanzania are inclusive; large-scale mining activities.¹²⁹²

Notably, such a trend of pollution and deforestation diminishes land fertility and impairs fresh water productivity. Deforestation also diminishes the carbon absorption which may trigger climate change which poses a serious challenge in food production. In addition, many rural communities lack proper technologies say for food production and storage.¹²⁹³ Absence of incentivised laws to allure

¹²⁸⁷ Natural Wealth and Resource Contracts (Review and Renegotiation of Unconscionable Terms) Act 2017. s 6(2) (j-k)

¹²⁸⁸ See para 3.2.1.3 above.

¹²⁸⁹ The Forest Act. ss 17 (1) (a-h) 26(a); The Beekeeping Act. s 17 (2).

¹²⁹⁰ The Forest Act. s 66 (a-c); The Beekeeping Act. s. 17 (1) (2).

¹²⁹¹ United Republic of Tanzania, 'UN Environment: National Report for Conservation on Biological Diversity' (2019) 6th. p.10.

¹²⁹² Martin Kijazi and others, 'Multi-Level Governance, Carbon Management and Land Use Decisions in Tanzania' (Centre for International Forestry Research 2017). p. 17.; United Republic of Tanzania, 'UN Environment: National Report for Conservation on Biological Diversity' (n 1291). p. 8.

¹²⁹³ Dolf Lintelo and others, 'Tanzania Story of Change in Nutrition: Political Commitment, Innovation and Shrinking Political Space' (2020) 24 Global Food Security. p. 5.

technological and or private investment as a means to bridging the food related infrastructure gap may not escape to be pointed.¹²⁹⁴

5.4.1.4 Equitable and Reasonable Utilisation (ERU)

In Tanzanian perspective the ERU principle is used to guarantee sustainable utilisation of natural resources under sectors such as; minerals, land, forest and bees.¹²⁹⁵ With respect to village land, for example, it is required to be planned in a manner to allow its sustainable utilisation.¹²⁹⁶ It is reportedly that, inadequate land use plan limits food production at village levels.¹²⁹⁷ To exemplify this, out of twelve thousands villages that exist in Tanzania only 13.5 % of their lands have been planned.¹²⁹⁸ Absence of an integrated land development plan and strategies inhibit Tanzania from carry out mining and food production concomitantly, which is common in other African countries.¹²⁹⁹ In addition, absence of clear demarcation to identify mining sites borders contribute towards human rights abuse to those who unknowingly enter the mining sites either for grazing for example.¹³⁰⁰

With respect to forests conservation, Tanzania is hailed as a champion in the Eastern and Southern Africa region with more than 16 million hectors of reserve forests.¹³⁰¹

The major objective of forest conservation is to guarantee protection of biological diversity in forestry, and bees sectors to name but a few.¹³⁰² Available record shows

¹²⁹⁴ Ombella, 'Promoting Water Infrastructure Investment to Accelerate Access to Water in Tanzania' (n 988).

¹²⁹⁵ The Forest Act. part viii; The Beekeeping Act. ss 11, 20 and 23.

¹²⁹⁶ The Village Land Act. s 12.

¹²⁹⁷ Didas Kimaro and Proches Hieronimo, 'Land for Agriculture in Tanzania: Challenges and Opportunities' (2014) 1 Journal of Land and Society. p. 99.

¹²⁹⁸ URT Ministry of Lands, Housing and Human Settlements Development (n 1250). para 1.2.19.

¹²⁹⁹ Ombella, 'Upholding Human Rights in AU Member States' Extractive Sector: Review of Aspects of Food Security to Communities Neighbouring Mines in Selected Countries' (n 231).

¹³⁰⁰ RAID, 'The Deadly Cost of "ethical" Diamonds: Human Rights Abuse at the Petra Diamonds Tanzanian Mine.' (RAID 2020).

¹³⁰¹ Tanzania, Vice President's Office (n 1221). para 2.1.2.

¹³⁰² The Forest Act. s 3 (a, c, e); Water Resources Management Act. s 4 (1) (f).

that about one fourth of the land in Tanzania is comprised of unique ecosystem conserved in various reserves and national parks.¹³⁰³ Such ecological abundance is relevant to food security owing to its richness in diverse biological and genetic materials. Conserved forest is also home to valuable insects such as bees which are known for natural pollination that guarantees natural breeding and ecosystem continuity.¹³⁰⁴

In addition, it is shown that developed countries depend on modern biological breeding in their modern agriculture. However, African countries are dependent on natural biological and genetic diversity in traditional agricultural practices.¹³⁰⁵ Tanzania prioritises land for agriculture through efforts to restore degraded land by planting trees, restoration of depleted fisheries stocks.¹³⁰⁶ Tanzania for example, strives to achieve agricultural transformation leading the agricultural sector into a competitive edge to guarantee food security and income generation.¹³⁰⁷ Indeed, the focus is defeat hunger.¹³⁰⁸

However, regardless of the provisions on conservation of forests and bees and forest, ministers are empowered to revoke the declaration of conservation area.¹³⁰⁹ This is paradoxical owing to the fact that, the decision to conserve involved the MHCs, but the decision to revoke the conservation declaration seems to be made solely by the Minister responsible for forestry. It is apparent that the declaration to revoke

¹³⁰³ United Republic of Tanzania, 'Draft National Forest Policy' (n 1282). para 2.3.

¹³⁰⁴ *ibid.* para 4.2.2.

¹³⁰⁵ Maria Genullis, Thomas Heckelei and Sebastian Rasch, 'Towards Understanding the Governance of Varietal and Genetic Diversity' (2021) 26 *Ecology and Society*.

¹³⁰⁶ The Forest Act. s 66 (2) (c); URT Ministry of Lands, Housing and Human Settlements Development (n 1250). para 3.3.1.3.

¹³⁰⁷ *Ibid.* para 4.2 (iv); Tanzania National Agricultural Policy 2013. para 2.24 (iii).; United Republic of Tanzania, 'Agricultural Sector Development Programme Phase Two (ASDP II)' (2016). para 3.3.2.

¹³⁰⁸ *ibid.* para 3.3.2.

¹³⁰⁹ The Beekeeping Act. s 15 (1).

conservation status resonates to the compulsory land acquisition for mining activities. Such wide discretionary powers are noted in above as limiting efficiency of the law in achieving its developmental objectives.¹³¹⁰

Additionally, budgetary increment to revolutionize agricultural sector is named as a solution of food insecurity in Africa.¹³¹¹ Such commitments are reiterated in Tanzania under the ASDP II.¹³¹² However, it is reportedly, that the period of 2010/11-2013/14 the budget allocation for agriculture was between 3%-3.7% of the total government budget.¹³¹³ Consequently, such inadequate budget may hardly contribute into a meaning full agricultural revolution.

Notably, Tanzania's land potential food production is about 44 million hectors that are suitable for agriculture and approximately 30 million hectors suitable for irrigation.¹³¹⁴ However, only 10 million are used for agriculture while approximately 0.5 million hectors are under irrigation.¹³¹⁵ Majority of Tanzanians in rural areas are dependent on rain supported agriculture which is prone to climate changes.¹³¹⁶ Consequently, it is hard for Tanzania to fill the food related infrastructure gap. Poor investment in agricultural sector resulting into poor infrastructure in the sector and hence low food produce resonates to the resource curse theory postulated by Collier and Ross above.¹³¹⁷

¹³¹⁰ See para 2.3.3.1 (a) (ii) above.

¹³¹¹ See para 1.8 and 4.2.1.3 above.

¹³¹² United Republic of Tanzania, 'Agricultural Sector Development Programme Phase Two (ASDP II)' (n 1307). para 17.

¹³¹³ *ibid.* para 40.

¹³¹⁴ URT Ministry of Lands, Housing and Human Settlements Development (n 1250). para 1.2.2 and 3.3.1.

¹³¹⁵ *ibid.* para 1.2.2 and 3.3.1.

¹³¹⁶ Ministry of Constitution and Legal Affairs (n 18). para 2.2.3.2.

¹³¹⁷ For detail description of the theory see para 2.3.1 in this study.

5.4.1.5 Notification

Generally, the Mining Act 2018 unlike the Mining Policy 2009 seems to be silent on the need of notice to the MHCs prior to commencement of mining activities. The policy requires that members of public have to be provided with up-to-date information about mining.¹³¹⁸ Arguably, information in the mining sector will have to cut across a number of aspects such as; whether an area is to be subjected to mining or not, the methods or type of mining, the potential impacts on their livelihood, compensation scheme, nature and scope benefit they will gain, impacts on climate to name but a few. The policy seems silent on the nature of information and manner through which the notice is to be issued and or challenged.

In addition, since this study deals with mining on rural land, land and forests related laws are worth to be examined here. At the village level for example, any proposed use of village land has to be preceded with a notice to the land users, occupiers and or owners.¹³¹⁹ As shall be noted below the villagers are the owners of the village land and for that purposes they have to be informed through the Village Assembly.¹³²⁰ Also under forest sector, before the Minister declares an area as national, or village or private forest and or bee reserve, such a decision has to be gazetted.¹³²¹ Unlike the Mining Act 2018 and the Forest Act 2002, the Beekeeping Act 2002 seems to have a more wide scope of notification to stakeholders.¹³²² For example, firstly, the notice has to be circulated into local newspapers in Tanzania.¹³²³

¹³¹⁸ United Republic of Tanzania, 'The Mineral Policy of Tanzania' (n 1222). para 4 (a).

¹³¹⁹ The Village Land Act.

¹³²⁰ *ibid.* s 11(2) and 169 (1) (a)(i-iii).

¹³²¹ The Beekeeping Act. s 11.

¹³²² *ibid.* s. 13.

¹³²³ *ibid.* s 13 (a).

Secondly, the information has to be displayed in public areas such as; local government offices and or village offices.¹³²⁴ Thirdly, information has to take into account the peoples and or communities dependent on such reserve and their customs.¹³²⁵ In particular to peoples' custom requirement, it resonates to FPIC principle discussed above.¹³²⁶

Despite such legal and policy frameworks, they both seem not express on how and where MHCs may challenge the notice of the planned measures. In addition, the two frameworks seem silent on the status of the proposed project in case MHCs will challenge it. It is also shown that, since most of international law documents are in English language, no funds to translate them into local language for wider public awareness of global concern of biodiversity loss and or varying climate.¹³²⁷

5.4.1.6 Consultation and Negotiation

The principle of consultation and negotiation is domesticated in Tanzanian laws regulating mining.¹³²⁸ Initially, consultation and negotiation, resonates to MHCs opportunity to participate in decision making on issues affecting their wellbeing such as; relocation and compensation.¹³²⁹ However, despite such legal and policy requirement, it is noted that MHCs are seldom consulted in making such a decision.¹³³⁰ As such the Mining Act grants the relevant minister power to waive the

¹³²⁴ *ibid.* s 13 (b); The Village Land Act. s 169 (1) (a) (i-iii).

¹³²⁵ The Beekeeping Act. s 13 (c).

¹³²⁶ See para 3.4.1.5 and 4.2.1.1 above.

¹³²⁷ Michal Nachmany, 'Climate Change Governance in Tanzania: Challenges and Opportunities' (Grantham Research Institute, 2018). p. 5.; United Republic of Tanzania, 'UN Environment: National Report for Conservation on Biological Diversity' (n 1291). p. 4.

¹³²⁸ The Mining Act.; Natural Wealth and Resource Contracts (Review and Renegotiation of Unconscionable Terms)Act.

¹³²⁹ The Village Land Act.; The Mining Act.

¹³³⁰ United Republic of Tanzania, 'The Mineral Policy of Tanzania' (n 1222). para 5.9.

consent requirement when land is to be acquired for mining activities.¹³³¹ It is also noted that MHCs are not properly involved in evaluating their compensation in case their land is taken from mining.¹³³² Little or non-involvement of MHCs in allocating mineral rights results into gross impacts of their livelihood from mining activities.¹³³³

Also, the principle of consultation and negotiation is a key principle to enable the government to do away with burdensome extractive contracts. Notably, consultation and negotiation in this form does not include MHCs, but the state and MNCs involved in extractive sector. Among factors that may be considered in review and renegotiation of extractive contracts; when contracts deny the government and peoples of Tanzania a tangible benefit when resources are extracted by MNCs and where such contracts limit the power of the state to regulate environmental standards.¹³³⁴ Renegotiation of contracts is also a means to disentangle the government from stabilization clauses contained in the already signed mining contracts which undermines government policy space and any other clause which is harmful to peoples wellbeing if implemented.¹³³⁵

Notably, the National Assembly of Tanzania is mandated to review all extractive contracts and require the government to re-negotiate them accordingly.¹³³⁶ Recently, the government used such provisions of the law and renegotiated mining contracts

¹³³¹ Mining Act 2018 (CAP123).

¹³³² United Republic of Tanzania, 'Report of the Presidential Mining Review Committee to Advise the Government on Oversight of the Mining Sector' (n 1223).

¹³³³ United Republic of Tanzania, 'The Mineral Policy of Tanzania' (n 1222), para 5.9.

¹³³⁴ Natural Wealth and Resource Contracts (Review and Renegotiation of Unconscionable Terms) Act.

¹³³⁵ *ibid.*

¹³³⁶ See para 5.5.1 below.

with Baric Gold Co.¹³³⁷ As a result, the government secured 16% undiluted free carried participation through shareholding in the mining licence issued to Baric Gold.¹³³⁸ To effect such negotiations, the government established Twiga Cooperation where such shares are held for and on behalf of the peoples of Tanzania.¹³³⁹

Despite the remarkable achievement by the government, to enact laws to reclaim the state sovereignty over its resources a number of challenges may be identified. It is argued for example that, renegotiation of signed contracts requires the consent from the MNCs which may not necessarily be provided especially where they are benefiting from previous signed contracts.¹³⁴⁰ Consequently, a state unilateral measure to withdrawal from the contract may trigger dispute settlement procedures under ICSID framework noted above.¹³⁴¹ In addition, since Tanzania has ratified some of investment treaties, the stability clauses contained in these treaties and or agreements may compel the state to remain bound for some years before they cease to operate.¹³⁴²

In addition, since mining activities have impacts on land cover, review of forest and or biological conservation laws on consultation and negotiation is vital.¹³⁴³ Although the Mining Act seems silent on procedures through which consultation may be effected, biological diversity regulating laws such as forest and bees direct that

¹³³⁷ Baric, 'The Launch of Twiga Minerals Heralds Partnership Between Tanzanian Government and Barrick' (Barrick, 2019) <<https://www.barrick.com/English/news/news-details/2019/>>; Faustine Kapama, 'Land Mark Deal Sets Templet' *Daily News* (Dar Es Salaam, 13 July 2020).

¹³³⁸ See para 5.4.1.6 below.

¹³³⁹ Kapama (n 1337).

¹³⁴⁰ John Ombella, 'Liberal Rules on Trade and Investment and the False Promise in Developing Countries: A Tanzanian Perspective' (2018) 1 Institute of Judicial Administration Lushoto Journal. p. 40.

¹³⁴¹ *ibid.* p.40-42.; see also para 3.3.2.2 above.

¹³⁴² *ibid.* p.41.; The Mining Development Agreement Model 2010. para 15.2.

¹³⁴³ The Beekeeping Act. s 8(5).

consultation has to be carried out through meeting near to the area so proposed to be conserved.¹³⁴⁴

In particular to peoples whose life is dependent on the forests and or area to be subjected to conservation, the law is categorical that, information about conservation has to take into account their customs.¹³⁴⁵ Such a requirement is noted above to open a room to FPIC rule which is relevant to indigenous communities who are also shown to exist in Tanzania. Despite all these legal requirement, it is noted above that, MHCs are rarely consulted when their land is earmarked as potential for mining activities.

Secondly, consultation and negotiation is also identified as a tool to amicably settle disputes among stakeholders in mining legal framework.¹³⁴⁶ In particular, Tanzania mineral investment related disputes may be explained in threefold. Firstly, all disputes related to land acquisition and compensation are subjected to the jurisdiction of the Mining Commission.¹³⁴⁷ Secondly, dispute settlement in the mineral investment projects are subjected to the international arbitral frameworks.¹³⁴⁸ However, the international arbitral frameworks are dedicated to settling disputes not between states and its nationals, but nationals of other states.¹³⁴⁹

As such this discriminatory approach may be arising from MNCs lack of trust to rely on domestic institutions on such issues like impartiality and competence. Thirdly,

¹³⁴⁴ *ibid.* s 13 (b).

¹³⁴⁵ *ibid.* 13 (c).

¹³⁴⁶ The Mining Development Agreement Model. para 15.; The Forest Act. s 16(2) (g); The Beekeeping Act. s 18 (2)(g).; Proposed Constitution. Art. 22 (1) (e).

¹³⁴⁷ See para 5.5.2 below.

¹³⁴⁸ See para 3.3.2.2 above

¹³⁴⁹ See para 3.3.2.2 above.; Tanzania Investment Act 2002. s 23 (2)(b-c);The Mining Development Agreement Model. para 5; The Mining Act 2010.s 10 (d).

nationals are required to access justice in the local institutions like courts and or domestic arbitral forums.¹³⁵⁰

It is observed that, Tanzania's approach of dedicating international institutions such as arbitral tribunals limit their policy space and that they are not predictable owing to no-application of precedent principle say for example.¹³⁵¹ Consequently, adopted new laws seem to withdraw Tanzania from such a framework.¹³⁵² It is however, noted that, such a move does not operate with immediacy when the state adopt new laws, but rather ceases basing on stabilization clauses contained in specific mineral development agreements and Bilateral Investment Treaties (if any).¹³⁵³

5.4.1.7 Stakeholders Participation

The principle of stakeholders participation has national recognition in Tanzania.¹³⁵⁴ Apart from the stakeholders named above, in mining activities in Tanzania key stakeholders are; land owners and occupiers (Village Assembly, families and or individuals). Other stakeholders are; private sector companies such as; MNCs, the government (central and local) and the non-governmental organisations, research cum professional institutions and regulatory organs to name but a few.¹³⁵⁵

Such groups are relevant because, firstly, they are required to form part of the decision whether to mine or not.¹³⁵⁶ Citizen participation signifies a room to defend

¹³⁵⁰ See para 5.5.4 below.

¹³⁵¹ Ombella, 'Liberal Rules on Trade and Investment and the False Promise in Developing Countries: A Tanzanian Perspective' (n 1340). p. 40.

¹³⁵² Natural Wealth and Resources (Permanent Sovereignty) Act. s.11.

¹³⁵³ Ombella, 'Liberal Rules on Trade and Investment and the False Promise in Developing Countries: A Tanzanian Perspective' (n 1340). pp. 40-42.

¹³⁵⁴ The Village Land Act. s. 3.; The Forest Act. s 3 (b); The Beekeeping Act. s 3 (1)(b).

¹³⁵⁵ The Tanzania Extractive Industries(Transparency and Accountability) Act 2015. s 5 (2) (c) ; NEMC, 'The National Environmental Research Agenda for Tanzania 2017-2022' (NEMC, 2017). pp. 47-51.

¹³⁵⁶ Land Act 1999, s 3 (i).

their interests inclusive their right to access land for food productions hence guaranteeing food security. Civil organisations for example are shown to be instrumental in guaranteeing transparency and government accountability in the extractive sector at a global, sub-regional and Tanzania in particular.¹³⁵⁷ In order to guarantee peoples' meaningful participation Tanzania guarantees the right to freedom of speech and or opinion.¹³⁵⁸

Notably, however, it is reportedly that laws and practice in Tanzania amount to violation of the freedom of speech through limiting media from publishing information to public, threatening and or disappearance of journalist, detaining and prosecution of journalists, disruption of internet to name but a few.¹³⁵⁹ In addition, Tanzania has once been held to violate her international obligation to guarantee rule of law transparency and good governance by banning media outlets.¹³⁶⁰ It is also reportedly, that the process of compulsory land acquisition does not necessarily seek the consent of the land occupiers in Tanzania.¹³⁶¹

Secondly, stakeholders are expected to benefit from the decision they make. Benefit from mineral sector in Tanzania seems to take various forms, such as; compensation, royalties/levy, participation, employment, training and procurement, issued shares for local subscription and Corporate Social Responsibility (CSR). However, for the purpose of clarity, this part discusses compensation, royalties, levy and training and

¹³⁵⁷ The Tanzania Extractive Industries(Transparency and Accountability) Act. s. 5 (2)(c).

¹³⁵⁸ United Republic of Tanzania Constitution. Art. 18.

¹³⁵⁹ Legal and Human Right Center (n 1280). para 2.2.4; Legal and Human Right Center, 'Summury of the Tanzania Human Rights Report' (Legal and Human Rights Centre 2020). para 2.2.

¹³⁶⁰ *Managing Editor Mseto, HaliHalisi Publishers Ltd v AG* [2018]. para 74 (a).; *Media Council Tanzania, Legal and Human Rights Centre and Tanzania Human Rights Defenders Coalition v AG* [2019]. para 112 and 117.

¹³⁶¹ Legal and Human Rights Center (LHRC), Human rights and business report 2016, para 3.2.2.

employment.

With respect to compensation for land taken for mining activities is one form of benefits among others.¹³⁶² In particular to mining, all claims related to compensation are dealt with in the first instance by the Mining Commission.¹³⁶³ Other mining human rights related violations are dealt with by either the High Court or Commission for Human Rights and Good Governance.¹³⁶⁴ In particular, compensation for land compulsorily acquired for mining is dependent on the value of the exhausted improvement by the occupier.¹³⁶⁵ Consequently, one is compensated not on the basis of mere ownership but based on the value he added on the land.¹³⁶⁶

Such a legal position is subjected to a number of criticisms. Firstly, it does not take into account the indigenous nomadic pastoral and fruit gathering societies whose nature of life does not necessarily add value on land. Secondly, it is reportedly that MHCs are not involved in the evaluation of compensation leave alone it being issued in a once and for all lump sum, inadequate and delayed.¹³⁶⁷ Perhaps the recent land policy reform on the mode of compensation offers a more fair perpetual compensation scheme.¹³⁶⁸

¹³⁶² Ibid. Art 24 (1)(2); The Village Land Act. s 3(1) (h).

¹³⁶³ See para 5.5.2 below.

¹³⁶⁴ See para 5.5.4 and 5.5.5 below.

¹³⁶⁵ *Attorney General vs Lohay Akonay*, Civil Appeal N0.31 of 1994, Court of Appeal.

¹³⁶⁶ Ibid. pp. 12-13.

¹³⁶⁷ United Republic of Tanzania, 'Report of the Presidential Mining Review Committee to Advise the Government on Oversight of the Mining Sector' (n 1223), para 2.1.4 (g) and 2.12; Godfrey Massay, 'Compensating Land Holders in Tanzania: Law and Practice' (2014) 1 *Journal of Land and Society*. p.51.; Faustin Maganga and Thabit Jacob, 'Defying the Looming Resource Curse with Indigenisation? Insights from Two Coal Mining in Tanzania' (2016) 43 *African Review*. p.153.; URT Ministry of Lands, Housing and Human Settlements Development (n 1250), para 1.2.6.

¹³⁶⁸ URT Ministry of Lands, Housing and Human Settlements Development (n 1250), para 1.2.27.

With respect to royalties and levy both the central and local governments are involved. Firstly, the government beneficial arrangements there is a compulsory government participation in all issued mineral rights under mining licence.¹³⁶⁹ Historically, mining companies were mostly allocated mineral rights independent from the government. The government role was merely regulatory and collection of revenue.¹³⁷⁰ Recent amendment introduced mandatory government participation in all large-scale mining licence to be issued.¹³⁷¹ Such amendment grants the government 16% undiluted free carried interest in all mining licence to be issued.¹³⁷²

However, such amendment gives primacy to the Central Government, ignoring Local Governments and or MHCs. The international frameworks and states best practices shows that MHCs are entitled to a percentage of benefits accruing for resource extraction.¹³⁷³ Such a contrast signals lack of transparency in negotiation of mineral contracts. It is argued that absence of good governance in allocating mineral rights to state owned companies and or indigenous Tanzanians' will not spur the intended socio-economic empowerment to the country and MHCs in particular.¹³⁷⁴

Other socio-economic benefits are paid to local governments through levies at the rate of 0.3 % of the corporate turnover of all companies (including mining) operating within their jurisdiction.¹³⁷⁵ It may be argued that the LGAs (District Council) are composed of political elected representatives of the respective wards in their

¹³⁶⁹ United Republic of Tanzania, The Written Laws (Miscellaneous Amendments) Act 2021 [4]. s 24.

¹³⁷⁰ United Republic of Tanzania, 'The Mineral Policy of Tanzania' (n 1222). para 7.1-7.2.

¹³⁷¹ United Republic of Tanzania The Written Laws (Miscellaneous Amendments) Act (n 1369). s 24.; The Mining Act. s.10 (1).

¹³⁷² United Republic of Tanzania The Written Laws (Miscellaneous Amendments) Act (n 1369). pp. 27-28.

¹³⁷³ See para 3.2.1.7 and 4.2.2.7 above.

¹³⁷⁴ Maganga and Jacob (n 1367). pp. 154-155.

¹³⁷⁵ The Local Government Finance Act 2019. s 6 (1) (u).

jurisdiction.¹³⁷⁶ District Councils are therefore administrative areas pre-determined and established by the responsible minister, not necessarily the MHCs.¹³⁷⁷ Also, both payment of royalties and levy seem to be impacted by corrupt government officials who underreport the value of minerals in the mineral concentrates to be processed abroad.¹³⁷⁸ In addition, the government adopted a fixed amount of 200,000 USD per year as a means to attract investment.¹³⁷⁹ Consequently, where mining companies make more profit, the LGAs receive the little fixed amount of levy hence limiting their ability to repair and or establish new infrastructure such as water and road.¹³⁸⁰

With respect to employment, training, and procurement it may be argued that these are measures intended to empower MHCs. It is reportedly that, Tanzania ranks at number 93 and 105 out of 153 countries on two key areas namely; women in decision making, women with professional and or technical skills.¹³⁸¹ Among factors limiting women participation are inclusive; cultural practices, inadequate laws, poverty and little participation in decision making in mining sector.¹³⁸² In particular to mining sector Ombella points out some of the legal factors behind the inadequacy to be; uncoordinated multiple resources allocation organs, unregulated discretionary powers of administrative officials, little margin of women representation in decision making organs and absence of legal requirement to empower women through

¹³⁷⁶ Local Government (District Authorities) Act 1982. s 35 (1)(a-f).

¹³⁷⁷ *ibid.* s 5.

¹³⁷⁸ Kamati Maalumu iliyoundwa na Rais wa Jamhuri ya Muungano waa Tanzania, 'Taarifa Ya Kamati Maalum Kuchunguza Mchanga Uliokkatika Makontena Yenye Mchanga Wa Madini (Makinikia) Yaliyopo Katika Maeneo Mbalimbali Nchini Tanzania.' (2017) I. p. 11.

¹³⁷⁹ United Republic of Tanzania, 'Report of the Presidential Mining Review Committee to Advise the Government on Oversight of the Mining Sector' (n 1223). para 3.6.4.

¹³⁸⁰ *ibid.* para 3.4.1.

¹³⁸¹ World Economic Forum (n 715). at 316.; World Economic Forum, 'Global Gender Gap Report' (World Economic Forum 2019). pp. 331.

¹³⁸² United Republic of Tanzania, 'The Mineral Policy of Tanzania' (n 1222). para 6.2.; Ministry of Constitution and Legal Affairs (n 18). para 2.2.1.3.

procurement of goods and services related to mining.¹³⁸³ In addition, MHCs are not involved in planning, implementation, monitoring and evaluation of development plans, but the LGAs.¹³⁸⁴ This is so despite the existence of Development Vision to eradicate gender discrimination in all sectors by 2025.¹³⁸⁵ Such a vision may hardly be achieved if there are not effective legal measures to guarantee women involvement in the mining sector.

5.4.1.8 International Cooperation

Global and regional legal frameworks noted above compel natural resources-rich states to cooperate as a means to guarantee good governance and sustainable extraction, processing, and trading in minerals. Good natural resources governance is shown above to have a bearing on MHCs realisation of their rights inclusive the right to adequate food.¹³⁸⁶ Tanzania is therefore bound to cooperate with international and sub-regional initiatives such as KPCS and EITI which are relevant to governance in mineral sector. With respect to KPCS, Tanzania has adopted legal framework to harmonise its laws with the KPCS initiative. In case of large-scale mining, once the licence has been issued every mining sites are allocated Mining Resident Officer (MRO) to monitor all minerals mined and sorted daily.¹³⁸⁷ Data of minerals sorted are entered in a book jointly by the MRO and mining site supervisor or his agent. Presence of the MRO is mainly to guarantee government revenue through proper

¹³⁸³ John Ombella, 'Enhancing Local Participation in Extractive Sector through Local Content Requirements: A Survey of the Policy and Legal Framework in Tanzania' (2018) 7 International Journal of Legal Studies and Research (IJLSR). p. 57 ; John Ombella, 'Review of Tanzania's Mining Legal-Framework on Women Participation in Decision-Making in Mining Sector' (2021) 1 Journal of Contemporary African Legal Studies. p.128.

¹³⁸⁴ The Mining Act. s 105 (1)(4).

¹³⁸⁵ United Republic of Tanzania, 'The Tanzania Development Vision 2025' (1995) <<http://www.mof.go.tz/mofdocs/overarch/vision2025.htm>>. [accessed on 29 January 2021]

¹³⁸⁶ See para 2.2.6 - 2.2.8 above.

¹³⁸⁷ The Mining Act. s 27.

records, but also to limit possible infiltration of diamonds from other unregulated areas.¹³⁸⁸

In addition, every mining sites is required to establish a strong room where minerals mined and or sorted will be kept for safety before being transferred. Access to the room is limited to the authorised officers namely the MRO and the mining site supervisor and or his agent.¹³⁸⁹ Such a strict regulation is aimed at addressing the above noted concerns of inadequate data on amount of diamond produced and potential infiltration of diamonds from other unregulated areas.¹³⁹⁰

Moreover, diamonds so mined may be removed from the mining site for trading in the established mineral trading houses and or for export, only under government supervision.¹³⁹¹ International trading of rough diamond is regulated under specific regulation owing to lack of local beneficiation industries in Tanzania.¹³⁹² Consequently, the Mining Commission is authorised to deal as the country focal point to certify all rough diamonds from Tanzania, and or those which are on transit.¹³⁹³ As such, no rough diamond consignment may be exported and or imported to Tanzania unless it complies with the KPCS.¹³⁹⁴ Regulation of dealing with minerals through licensing, mining site supervision, export and or import permits resonates to Tanzania's obligation to promote peace, security and human rights at the global and sub-regional levels.¹³⁹⁵

¹³⁸⁸ *ibid.* s 100 B (1-2).

¹³⁸⁹ *ibid.* s 100 A (1-2).

¹³⁹⁰ See para 3.2.1.1 above.

¹³⁹¹ The Mining Act. s 100 C (1).

¹³⁹² The Mining(Diamond Trading) Regulations 2019.

¹³⁹³ See para 5.5.2 below for more details.

¹³⁹⁴ Ministry of Energy and Minerals, 'Procedure for Exporting and Importing Minerals in Tanzania: Version1.0' (Tanzania Mineral Audit Agency). Para 4.

¹³⁹⁵ See para 1.7 above.; John Ombella, 'International Regulation of Trade in Rough Diamonds: An Appraisal of the Tanzanian Mineral Laws' Compliance' (2021) 2 The Tanzanian Lawyer Journal. pp.141-142.

Notably, the area of penalty in case one deals with minerals in unauthorised manner seems to be fluctuating.¹³⁹⁶ For example, in the year 2018 penalty for an individual person was set at the maximum of ten million TSHS and or imprisonment for not more than 3years.¹³⁹⁷ With respect to corporate person the fine was set at the maximum of 50 Million TSHS.¹³⁹⁸ However, the year 2019 amendment brought with it a seemingly lenient approach where minimum penalties were set and absence of penalties to company directors. In case of individual person the fine of not less than 5million TSHS but not exceeding 10million TSHS and or imprisonment for one or not more than three years.¹³⁹⁹ In case of corporate person fine is set at the minimum of 10 Million TSHS and maximum of 50 TSHS.¹⁴⁰⁰

However, there are proposed amendment which seems to provide for more deterrent penalties. For example, it is proposed that, fines for individuals to rise from the minimum of 5-10Million TSHS to a minimum of 10-50Million TSHS.¹⁴⁰¹ In case of corporate person, the fines are proposed to increase from a minimum of 10-50 Million TSHS to a minimum of 50-100 million TSHS.¹⁴⁰² It may be noted that, despite such deterrent penalties the proposed amendments are yet in force, they are silent on criteria to guide the court in reaching decision. Leaving a wide discretion may create environment that fuel corrupt practices to law interpretation and

¹³⁹⁶ The Written Laws (Miscellaneous Amendments) Act 2019. s 27.; See also discussion in para 3.2.1.8 above

¹³⁹⁷ The Mining Act. s 18 (4) (a).

¹³⁹⁸ *ibid.* s 18(4) (b).

¹³⁹⁹ The Written Laws (Miscellaneous Amendments) Act. s 20(b)

¹⁴⁰⁰ *ibid.* s 20(b).

¹⁴⁰¹ United Republic of Tanzania The Written Laws (Miscellaneous Amendments) Act (n 1369). s 25.

¹⁴⁰² *ibid.* s 25.

enforcement organs in order to get lenient penalty on conviction.¹⁴⁰³

Notably, rough diamond is mainly mined in Shinyanga where the Petra Diamonds Company a subsidiary of Williamson Diamond Limited is operating.¹⁴⁰⁴ According to two reports on Tanzania's compliance with the KPCS dated 2018 and 2020, the Petra Diamonds contribute more than 90% of all exported rough diamonds from Tanzania.¹⁴⁰⁵ Both the mining company and the government have turned a blind eye on the reported human rights violation linked with the rough diamond mining in Shinyanga. According to RAID, MHCs face human rights abuse from the security companies and or police officers, hired by the mining company long since 2015.¹⁴⁰⁶ Among abuses are linked to extra judicial killings, torture, harassment and ill treatment.¹⁴⁰⁷

In particular, the KPCS reports above seem silent on these allegations posed by the RAID report. Potential grounds of such a silence may be argued in twofold. Firstly, the adopted definition of rough diamond as a conflict mineral at international level has excluded, diamonds mined in human rights conflicts induced by non-rebel and or belligerent groups. A good example is noted above over the Marange saga in Zimbabwe.¹⁴⁰⁸ Secondly, most of the victims of human rights abuse are generally categorized as criminal trespassers in to the Petra Diamond mines. This seems

¹⁴⁰³ Ombella, 'International Regulation of Trade in Rough Diamonds: An Appraisal of the Tanzanian Mineral Laws' Compliance' (n 1395). pp.158-159.

¹⁴⁰⁴ See para 5.2.1 and 5.2.2 above.

¹⁴⁰⁵ Ministry of Minerals and Mining Commission, 'A Report on Kimberly Process Certification Scheme for Tanzania 2018' (Ministry of Minerals and The Mining Commission 2019). para 6.; Ministry of Minerals and Mining Commission, 'A Report on Kimberly Process Certification Scheme for Tanzania' (Ministry of Minerals and The Mining Commission 2020). para 6.

¹⁴⁰⁶ RAID (n 1300). 27.

¹⁴⁰⁷ *ibid.* pp. 14, 16-19 n and 24-27.

¹⁴⁰⁸ See para 3.2.2.8 above.

contrary to the experience noted above, where both mining and agricultural activities may be carried out concurrently.¹⁴⁰⁹ Consequently, instead of being protected they are charged, convicted and jailed.¹⁴¹⁰

Government and law enforcers attitude towards victims seems to silence their voice against the company for remedy. Even those who attempt to press for their rights against the mining company, they end up being threatened, discouraged and on top of it have no financial ability to file cases against the company.¹⁴¹¹ Such a reality may be argued in two folds. Firstly, it cast a shadow upon the KPCS as a scheme desirous to empower locals leave alone halting human rights abuse in areas where mining is taking place. Secondly, it violates the international standard upholding all human rights as being interdependent and indivisible which is also recognized in Tanzania.¹⁴¹²

With respect to Tanzania's efforts to guarantee transparency and accountability in the extractive sector, it also joined with the international and sub-regional initiative on the same. Owing to its strong political will to guarantee transparency in the sector, Tanzania joined the EITI since 2009 and approved in 2012 three years before enacting a specific law on the same.¹⁴¹³ In particular, Tanzania domesticated the international framework on transparency under her extractive related laws in the year 2015 and reformed it in the year 2017.¹⁴¹⁴

¹⁴⁰⁹ See para 4.2.1.1 above.

¹⁴¹⁰ RAID (n 1300). p. 29.

¹⁴¹¹ *ibid.* pp.29-30.

¹⁴¹² Ministry of Constitution and Legal Affairs (n 18). para 1.2.3.; See also para 3.2.1.8 and 4.2.1.8 above.

¹⁴¹³ Frank Okuthe-Oyugi and others, 'ICGLR Addressing Challenges of Natural Resources Governance in Great Lakes Region: Status of the Implementation of the EITI in ICGLR Member States' (ICGLR Levy Mwanawasa Regional Centre for Democracy and Good Governance, 2016). p. 29.

¹⁴¹⁴ The Tanzania Extractive Industries(Transparency and Accountability) Act; Natural Wealth and Resource Contracts (Review and Renegotiation of Unconscionable Terms)Act.

Under such laws, mining companies therefore are duty bound not only to submit their contracts, licenses, environmental plans and beneficial ownership to the established Committee but also publish them on their websites.¹⁴¹⁵ Also mining companies and state departments are also required to submit accounts of all monies paid and received respectively, to the established Committee.¹⁴¹⁶ Such information is reconciled by independent auditor who eventually produces a report to be debated not only in the parliament but also, the general public.¹⁴¹⁷ Mining companies and or state departments are to be faced with a penalty ranging from 10-150 in case they will not cooperate with the established committee.¹⁴¹⁸

According to Japhace Posian and Hendry Kagodi, the move by Tanzania to domesticate the transparency initiative has offered public access to information they may bank on to hold the state into account.¹⁴¹⁹ Transparency laws are also shown to be a tool to mainstream transparency and accountability in government departments and attracting foreign investment.¹⁴²⁰ Similar view is also shared by Ombella who praises the adopted laws granting National Assembly mandate to review mining contracts as a means to hold the government into account.¹⁴²¹

However, despite the positive impacts of the transparency laws, it is reportedly that; mining impacts on MHCs is still very weak, unclear resource-revenue sharing to

¹⁴¹⁵ The Tanzania Extractive Industries(Transparency and Accountability) Act. s.14.

¹⁴¹⁶ *ibid.* s.14.

¹⁴¹⁷ *ibid.* s. 19.

¹⁴¹⁸ *ibid.* ss. 23-24.

¹⁴¹⁹ Japhace Pocian and Hendry Kigodi, 'Transparency Initiatives and Tanzania's Extractive Industry Governance,' (2018) 5 Development Studies Research. p.117.

¹⁴²⁰ TEITI, 'Short Version of the 10th Tanzania Extractive Industry Transparency Report for the Period July 2017 and June 2018' (Tanzania Extractive Industries Transparency Initiative 2020). p.17. ;Okuthe-Oyugi and others (n 1413). p.29.; Jafari Juma, 'Advancing Accountability in Extractive Sector Key to Growth' *The Citizen* (Dar es Salaam, 23 February 2022).

¹⁴²¹ Ombella, 'Liberal Rules on Trade and Investment and the False Promise in Developing Countries: A Tanzanian Perspective' (n 1340).

local communities, little or no report of beneficial owners in mining companies and dwindling of voices from the public in holding the government into account.¹⁴²² In addition, records of mining companies operating in Tanzania seem confusing and hence hinder states efforts to hold such companies into account. It is reportedly for example that out of 50 mining companies obliged to report to the Committee, only 32 did actually report.¹⁴²³ Even the few reporting companies about half of them did not report on beneficial ownership.¹⁴²⁴ Among reasons advanced against such a trend are; companies had long relocated to other countries, others did suspend their operation and others could not be located.¹⁴²⁵ Indeed, such grounds signals inadequate coordination.

5.4.2 Safeguarding MHCs Access to Clean Water in Tanzania

The right to water in Tanzania is not expressly provided for under the Constitution. However, it is impliedly provided for through recognition of the right to life and or the right to clean and safe environment. In addition, the right to clean water is also provided impliedly where parents and or guardians are required to provide for basic necessities relevant to support child growth.¹⁴²⁶ Notably, the National Water Policy 2002 seems to recognise the right to water.¹⁴²⁷

However, since the policy is not a legal instrument, its recognition is relevant only to influence enactment of laws relevant to water resources management. In addition,

¹⁴²² NRG (n 1212).

¹⁴²³ TEITI (n 1420). pp. 6-7.

¹⁴²⁴ *ibid.* p.15.

¹⁴²⁵ *ibid.* pp. 6-7.

¹⁴²⁶ The Law of the Child Act. s 8 (2).

¹⁴²⁷ United Republic of Tanzania: Ministry of Water and Livestock Development, 'National Water Policy' (2002).

the legal framework seems silent on elements relevant to right to water which include its; availability, quality, accessibility. Such a fact seems to be influenced by the obligation upon the government and other water sector stakeholders to guarantee progressive realisation of such a right.

Notably, in defining the right to water, Tanzania seems to refer international instruments such as; UDHR, ICESCR and UNGA resolutions which are relevant to water.¹⁴²⁸ As noted above these instruments set the required standards on quality, quantity and other elements such as cultural acceptance of water services.¹⁴²⁹ In particular, this part critically, discuss quality aspects of water owing to noted potential and actual mining impacts on water pollution.¹⁴³⁰ To arrive at logical conclusion, same international principles are examined hereunder.

5.4.2.1 Permanent Sovereignty over Natural Resources

Generally, the PSNR principle is guaranteed under natural resources and wealth regulating laws.¹⁴³¹ State sovereignty over water resources is also explicitly provided under water resources management law.¹⁴³² Consequently, the state is empowered to enact laws and regulations on access and use of water resources which will guarantee not only its access but also its justiciability.

However, apart from the fact that the MHCs right to water is not justiciable, even its access to rural communities is a challenge.¹⁴³³ It is estimated that more than 60% of

¹⁴²⁸ Ministry of Constitution and Legal Affairs (n 18). para 2.2.4 and 4.2.4.

¹⁴²⁹ See para 3.2.1 above.

¹⁴³⁰ See para 1.8 above.

¹⁴³¹ Natural Wealth and Resources (Permanent Sovereignty) Act 2017. ss 4-5.

¹⁴³² Water Resources Management Act. s 10.

¹⁴³³ John Ombella, 'Legal Impediments Limiting Mining-Host Communities' Access to Clean Water in Tanzania' (2021) 2 The Tanzanian Lawyer Journal.

the rural communities do not have access to clean water in Africa.¹⁴³⁴ In particular to Tanzania, in the year 2016 only 59% of the rural communities have access to clean water.¹⁴³⁵ Recently, it is reportedly that the rate of access to clean water is 70%-84% to rural and urban communities respectively.¹⁴³⁶ As such the trend signifies progressive realisation of right to clean water by rural communities which is a principle recognised at international, regional and domestic level.¹⁴³⁷ However, still a considerable number of rural communities are subjected to unsafe water sources; boreholes, streams, rivers, and lakes.¹⁴³⁸

In particular, to sub-national groups, the legal framework recognizes customary rights over water resources.¹⁴³⁹ On this, Water Users Associations (WUAs) are allowed to not only manage but own water resources and infrastructures relevant for water supply.¹⁴⁴⁰ Recognition of customary water resources ownership and management is relevant in Tanzania where the state seems to have meagre budget to finance water supply infrastructure to all.¹⁴⁴¹ Recognition of customary rights in water resources signals implied recognition of the internal self-determination in water sector. However, Tanzania seems to be very cautious in expressly providing for internal self-determination as it insist on state cohesion and national border integrity.¹⁴⁴²

¹⁴³⁴ Economic Commission for Africa, *The Africa Water Vision for 2025: Equitable and Sustainable Use of Water for Socioeconomic Development*, p. 13.

¹⁴³⁵ East African Secretariat, *East African Community Facts and Figures 2016 Report*, para 2.4.

¹⁴³⁶ Wizara ya Maji, 'Hotuba Ya Waziri Wa Maji Mhe. Prof. Makame Mbarawa (MB) Akiwasilisha Bungeni Makadirio Na Mapato Na Matumizi Ya Fedha Ya Wizara Ya Maji Kwa Mwaka 2020/2021' (Wizara ya Maji, 2020), para 20.

¹⁴³⁷ See para 3.2.4.1 and 5.4 above

¹⁴³⁸ Ministry of Constitution and Legal Affairs (n 18), para 2.2.4.2.

¹⁴³⁹ Water Resources Management Act, ss. 52-53.; Water Supply and Sanitation Act 5 of 2019, ss 32- 33; Proposed Constitution, Art. 56.

¹⁴⁴⁰ Water Resources Management Act, ss. 52-53.; Water Supply and Sanitation Act 5 of 2019, ss 32- 33.

¹⁴⁴¹ Ombella, 'Promoting Water Infrastructure Investment to Accelerate Access to Water in Tanzania' (n 988).

¹⁴⁴² Proposed Constitution, Art. 8 (1).

Furthermore, with regard to access to water for domestic uses, the water regulating laws seem to provide for a requirement to provide clean water to vulnerable communities.¹⁴⁴³ Notably, the law seems to suffer two weaknesses. Firstly, it is silent on the definition of the term economically disadvantaged persons, which would have set the scope of the persons to be considered by the Water Supply and Sanitation Authority (WSSA). Consequently, it seems that the section may hardly be enforced owing to the fact that, it confers no right to anyone in particular.

Secondly, the wording of the statute in the provision seems to be a soft law for two major reasons. Firstly, the section seems too general to confer any right. As such the provision uses the word, ‘shall take into account’ which may hardly be determined to have happened or not, because there are no criteria set to measure whether the authority did take into account or not. Secondly, there seems to lack compelling forces on the side of the WSSA to implement the section. Absence of sanction in coined to the set obligation makes it a mere aspiration.

5.4.2.2 Common but Differentiated Responsibilities (CDR)

Water regulating law in Tanzania has domesticated the CDR principle.¹⁴⁴⁴ The CDR principle recognition in Tanzania is relevant to address water sector challenges such as; adequate human resources and limited domestic sources relevant to finance water related infrastructure.¹⁴⁴⁵ Others are inclusive; limited budget, inadequate experts on climate change and adaptation and limited hydrological technologies.¹⁴⁴⁶ It is also

¹⁴⁴³ Water Supply and Sanitation Act 5 of 2019, s 23.

¹⁴⁴⁴ Water Resources Management Act. s. 5 (f).

¹⁴⁴⁵ Ministry of Constitution and Legal Affairs (n 18). para 2.2.4.3 (i-iv) ; Ombella, ‘Promoting Water Infrastructure Investment to Accelerate Access to Water in Tanzania’ (n 988). pp. 187-188, 198.

¹⁴⁴⁶ Ministry of Constitution and Legal Affairs (n 18). para 2.2.4.3 (i and iv); Nachmany (n 1327). p. 5.

reportedly that, lack of sustainability in water infrastructure projects and inadequately repaired water infrastructure which in turn impacts both water quality and quantity are among the challenges of water sector in Tanzania.¹⁴⁴⁷

As such, climate change impacts are real in Tanzania as evidenced by decreasing of the glacier on top of Mount Kilimanjaro, and increase of the sea level resulting into disappearance of Miziwe and Fungu la Nyani islands.¹⁴⁴⁸ Other impacts are also noted with respect to storms and cyclones which destroy various infrastructures including relevant to; transport and water storage and supply.¹⁴⁴⁹ Reportedly, more than 70% of natural disasters in Tanzania are linked to climate change impacts.¹⁴⁵⁰ It is estimated that Tanzania needs about USD 500 million to mitigate the impacts of climate change.¹⁴⁵¹ Such amount is also projected to raise to USD one billion by 2030.¹⁴⁵² Such impacts are felt by Tanzania despite her negligible contribution towards increasing effects of climate change.¹⁴⁵³

Notably, there is an indication of political will in addressing the climate change impacts in Tanzania. As above noted, UN member states under the Paris Agreement are obliged to file their National Determined Contribution.¹⁴⁵⁴ The key objective of the NDC is to provide for state priorities, identify how states will implement the adoption or mitigation of climate change and exposing areas that need support from

¹⁴⁴⁷ Legal and Human Right Center (n 1359). para 3.3.

¹⁴⁴⁸ VPO and NEMC, 'National Environmental Policy' (2021). para 1.2.7.

¹⁴⁴⁹ *ibid.* para 1.2.7.; VPO, 'Guideline for Integrating Climate Change Adaptation into National, Sector Policies,, Plans and Programmes of Tanzania' (n 1283). para 3.1.9.

¹⁴⁵⁰ VPO, 'Nationally Determined Contribution' (VPO, 2021). para 3.1.

¹⁴⁵¹ *ibid.* para 1.2.

¹⁴⁵² *ibid.* para 1.2.

¹⁴⁵³¹⁴⁵³ *ibid.* para 3.

¹⁴⁵⁴ See para 3.2.2.2 above.

global partners in climate change regulation.¹⁴⁵⁵ In addition, laws and policies are being reviewed to mainstream climate change issues. For example, through established funds under various sectors, Tanzania is expected to be aligned to international donors and or private firms related to international conservation of nature and biodiversity.¹⁴⁵⁶

Notably however, Tanzania is yet to enact a policy and or legislation relevant to addressing climate change issues.¹⁴⁵⁷ This is so despite of the fact that, through climate related legislation, Tanzania may benefit from global partners such as Global Environmental Facility among others.¹⁴⁵⁸ Consequently, climate related benefits seem to be project specific owing to absence of clear climate change policy and missing links in the existing sectoral policies.¹⁴⁵⁹

5.4.2.3 No harm Rule

The no harm rule is recognised under environmental and water related laws.¹⁴⁶⁰ In particular, safeguarding the right to clean water environmental laws require anthropogenic activities to limit the amount of effluents they discharge to water bodies.¹⁴⁶¹ With respect to mining activities, they are restricted to be carried beyond 200 metres near water sources.¹⁴⁶² However, the Environmental Management Act 2004 (EMA 2004) unlike the Mining Act 2018, sets a distance of 60 metres.¹⁴⁶³

¹⁴⁵⁵ VPO, 'Nationally Determined Contribution' (n 1450). para 1.

¹⁴⁵⁶ The Forest Act. s 80; The Water Supply and Sanitation Act 2019. s 55 (3) (b).

¹⁴⁵⁷ VPO and NEMC (n 1448). para 3.7.

¹⁴⁵⁸ Tanzania, Vice President's Office (n 1221). para 4.7.3 (a-g).

¹⁴⁵⁹ Dorothea Amwata and others, 'Review of Policies and Frameworks on Climate Change, Agriculture, Food and Nutrition Security in Tanzania' (InfoNote, 2020). p.3; Nachmany (n 1327). p. 3.

¹⁴⁶⁰ Water Resources Management Act. ss. 9 and 39; The Forest Act. ss 8,9 vide s 18.

¹⁴⁶¹ Environmental Management Act. s 60 (2) (a-c).

¹⁴⁶² Mining Act, CAP 123 R.E 2018, s. 95 (1) (a) (iii).

¹⁴⁶³ Environmental Management Act. s. 57 (1).

In particular, to distance from water sources, the two laws seem to contradict each other. Firstly, contradiction may be noted where the EMA 2004 sets a shorter distance than it is provided under the Mining Act 2018. Secondly, the contradiction seems on the scope of protection where the EMA 2004 protects all water bodies, but the Mining Act 2018 focuses on reservoir and dams. The limited scope ignores lakes, rivers, streams and boreholes which are major sources of water in rural communities.¹⁴⁶⁴

The third contradiction may be noted on the fact that the EMA 2004 being the general law on environment, no law is expected to contradict its provisions.¹⁴⁶⁵ The fourth contradiction is also noted in the proposed amendment of the EMA 2004. The amendment seems allow human activities to take place in a range of less than 60 metres from water sources subject to approval by the Cabinet.¹⁴⁶⁶ Consequently, despite the good intention under the Mining Act 2018, such inconsistency may pose a challenge in safeguarding MHCs access to clean water.

In addition, the EMA 2004 provides another avenue to safeguard MHCs access to clean water by holding mining companies accountable for pollution if any.¹⁴⁶⁷ Consequently, despite of the fact that the right to clean water is not expressly provided for under the Mining Act, 20018 and the EMA 2004 still the right to clean water may be pursued through other rights such as the right to clean safe and healthy environment evidencing the fact that human rights are “indivisible, interdependent

¹⁴⁶⁴ National Audit Office, ‘Performance Audit on the Management of Water Supply Projects from Boreholes Sources in Tanzania: Report of the Controller and Auditor General of the URT’ (National Audit Office 2019).

¹⁴⁶⁵ The Environmental management Act. s 232.

¹⁴⁶⁶ URT, The Written Laws (Miscellaneous Amendments) Act 2021 [3]. s 6.

¹⁴⁶⁷ Environmental Management Act. s 5 (1).

and interrelated.”¹⁴⁶⁸

However, in Tanzania instances of mining activities polluting river waters are reportedly common.¹⁴⁶⁹ In order to address this challenge, mining companies are required not to pollute water sources.¹⁴⁷⁰ Mining companies are also required to report to BWB the data of underground waters in their daily routine.¹⁴⁷¹ It may be argued that, perhaps the ongoing water resources pollution is contributed by factors such as; inadequate monitoring and questionable ethics of governmental officials and less severe penalties, and inadequate monitoring.

With respect to inadequate monitoring, water sector law seems to bring the sense of self-regulation in the water sector when mining companies are required to report data on underground waters in their activities. This is because nothing in this section seems to show that mining companies will comply with the set obligations. Such a weakness of the law coupled with absence of ties between the issuing of mining license and water protection condition, noted under the Mining Act 2018 inhibits MHCs from accessing clean water.

With respect to questionable ethics of state officials, it was once alleged by the then President of Tanzania His Excellency John Magufuli that he knew that the NEMC report on pollution of River Mara tributary was doctored under the influence of

¹⁴⁶⁸ The WSSD Copenhagen declaration on social development A/CONF.166/9 of 14th March 1995, Commitment 1 para (g).

¹⁴⁶⁹ http://protestbarrick.net/downloads/SomeoneElsesTreasure_tanz.pdf. Last visited 13, January 2020. ; Fumbuka Nw’anakilala, ‘Tanzania Orders Clean-up at Acacia Gold Mine and Threatens Closure’, (BusinessLive, 2019) <<https://www.businesslive.co.za/bd/world/africa/2019-03-08/>>., last visited on 13 January 2020.

¹⁴⁷⁰ Water Resources Management Act 2009. s 39 (1).

¹⁴⁷¹ *Ibid.* s 58.

investors.¹⁴⁷² As such, Tanzania is indicated to suffer from inadequate governance owing to a mismatch between law and practice, a sign that may resonate to corruption and or weak institutions.¹⁴⁷³ With respect to penalties, upon conviction of polluting water resources the minimum fine is set at one million TSHS and or imprisonment not less than six months.¹⁴⁷⁴ The Basin Water Board (BWB) is not given criteria to base their decision to issue higher penalty. Consequently, it is left to their discretion, a fact that may act as a sanctuary for corrupt practices.

5.4.2.4 Equitable and Reasonable Utilisation (ERU)

Water is vital for domestic use, hydropower generation, agriculture, industrial growth and ecosystem continuity to name but a few.¹⁴⁷⁵ Basing on its importance the principle of reasonable and equitable utilisation is domesticated in Tanzania.¹⁴⁷⁶ Under the Mining Act 2018 for example the principle requires mineral rights holders to use their rights in a reasonable manner such that other peoples' interests will not be affected, MHCs inclusive [emphasis added].¹⁴⁷⁷

In order to achieve reasonable and equitable utilisation of water resources, water and forest resources management plans are given primacy to any development projects.¹⁴⁷⁸ Through plans, criteria for allocation of water for domestic, industrial use and or ecological conservation will be set clear. In addition, peoples' rights and

¹⁴⁷² The Guardian Reporter, 'JPM Tough on NEMC over Water Chemical Pollution by Goldmine' *The Guardian* (Dar es Salaam, 8 September 2018). p. 1; Pius Rugonzibwa, 'JPM Revives Tigite River Saga...orders Fresh Investigation as First Report Was 'doctored' *Daily News* (Dar es Salaam, 8 September 2018). p. 1.

¹⁴⁷³ NREGI (n 1212).

¹⁴⁷⁴ Water Resources Management Act. s. 103.

¹⁴⁷⁵ United Republic of Tanzania: Ministry of Water and Livestock Development (n 1427). para 2.

¹⁴⁷⁶ *ibid.* para 3.4; Water Resources Management Act. s 4 (1) (a-b) and s. 5.

¹⁴⁷⁷ The Mining Act. s 96 (1).

¹⁴⁷⁸ The Forest Act. s 11 (1-2); Water Resources Management Act. s. 31.

obligations towards the resources will be ironed out.¹⁴⁷⁹ For example, water resources management laws requires access to clean water for domestic use, to be given primacy over, ecological conservation and anthropogenic development activities.¹⁴⁸⁰ It is argued that, through village land use plans the size of potential village land will be identified, for settlement and or investment purposes will be set aside.¹⁴⁸¹

Despite such notable value of water resources plans, it is reported that about one-third of all boreholes drilled in the country since 2014-2018 are dry.¹⁴⁸² Although not specifically pointed out, increased deforestation has a bearing on droughts and hence impacts water accessibility. Notably, water accessibility among other factors is caused by poor quality of water from majority of functioning boreholes.

Water from bore holes is reported to be of poor quality owing to presence of harmful elements such as; alkaline, iron and manganese. Such challenges are reportedly to be caused by absence of sustainable plans relating to utilisation of underground waters and mining activities [emphasis added].¹⁴⁸³ It is shown for example, that there is no any underground monitoring stations in Lakes Victoria and Tanganyika.¹⁴⁸⁴ In addition, it is shown that water related development activities are delinked and poorly coordinated even under Ministry of Water.¹⁴⁸⁵

¹⁴⁷⁹ The Forest Act. s 11 (3) (a-1).

¹⁴⁸⁰ Water Resources Management Act. s. 6 (1-2).

¹⁴⁸¹ Godfrey Massay, 'Energy and Food Demands., Drivers of Land Grab: A Case of Rufiji River Basin in Tanzania', *Natural resource management, agricultural policies and cooperation in the area of land grabbing* (HAKIARDHI 2012). p. 7.

¹⁴⁸² National Audit Office (n 1464). p. 68.

¹⁴⁸³ *ibid.* p. 68.

¹⁴⁸⁴ *ibid.* pp.66-67.

¹⁴⁸⁵ United Republic of Tanzania: Ministry of Water and Livestock Development (n 1427). para 6 and 8.

5.4.2.5 Notification

At the country level, the notification principle applies, although it takes different approaches under various sectors. For example, under the water resources notification takes an approach of Government Notice (GN). This is common tool of communication between the government and the general public when the Minister responsible for water resources makes decision. It is show for example among decision the Minister can make classification and declaration of water reserves.¹⁴⁸⁶ Such a declaration identifies anthropogenic activities which shall be restricted near the water reserve. It also set time frame and objectives of reserving the water resources.¹⁴⁸⁷

As such, a notice to MHCs on issues related to mining seems not provided for under the Mining Act. Despite such a gap, relevant policies on water, mineral and forests set a requirement of integrated resources planning and management.¹⁴⁸⁸ In particular, they require involvement of all villages and ward levels in planning and decision making before a project is approved, hence they need to be notified of such projects.¹⁴⁸⁹ This presupposes the down-top approach to development which will guarantee MHCs' interests and priorities will be preserved.¹⁴⁹⁰ However, it is noted that, even when notice is a legal requirement most African states prefer Government Notice (GN) in publicising their plans to the public. Arguably, the GN approach

¹⁴⁸⁶ Water Resources Management Act. ss. 32 (3), 33 (1).

¹⁴⁸⁷ *ibid.* s 32(3) (a-c).

¹⁴⁸⁸ United Republic of Tanzania, 'Draft National Forest Policy' (n 1282). para 4.4.11; United Republic of Tanzania: Ministry of Water and Livestock Development (n 1427). para 6.1.3.

¹⁴⁸⁹ United Republic of Tanzania: Ministry of Water and Livestock Development (n 1427). para 6.1.5.

¹⁴⁹⁰ United Republic of Tanzania, 'The Mineral Policy of Tanzania' (n 1222). para 5.9; United Republic of Tanzania: Ministry of Water and Livestock Development (n 1427). para 6.1.3.

seems not friendly since not all members of public get access to them.¹⁴⁹¹

Borrowing experience from other sector related to water, such as forest, notice is required when the Minister and or Director of Forest intend to declare any land as national or village land forest reserve.¹⁴⁹² It is also required as a means to curb widespread of bush fire which threatens vegetation cover and water resources as well.¹⁴⁹³ As such the notice has to be precise as on the area, time and scope of the fire that he will kindle.¹⁴⁹⁴

5.4.1.6 Consultation and Negotiation

At the national level, the principle of consultation and negotiation applies in relation to preserving water resources for its sustainable availability. For example, there is a requirement that respective Ministers in water and forests, to consult; environmental experts, BWB, Local Governments, forest and water users associations and research institutions before they declare an area as water or forest protected zones.¹⁴⁹⁵ As such consultation is used as a tool to gain knowledge, and acceptance of the proposed plan by the Minister among stakeholders.¹⁴⁹⁶

In addition, consultation and negotiation is also relied in reaching an agreement of joint management of forest reserves between stakeholders such as; village and

¹⁴⁹¹ E Abotsi, 'Ghanas' Environmental Framework Law and Balancing of Interests' in Michael Faure and Du Pessis Willemien (eds), *The balancing of interest in environmental law in Africa* (Pretoria University Law Press 2011). p. 153.

¹⁴⁹² The Forest Act. ss.7, 23 (1) (a), 34 (1), (5).

¹⁴⁹³ *ibid.* s. 70 (1).

¹⁴⁹⁴ *ibid.* s. 70 (2-3).

¹⁴⁹⁵ *ibid.* ss 65 and 67; Water Resources Management Act. ss 29(1) and 37(1).

¹⁴⁹⁶ The Forest Act. s 14 (1).

district councils, private firms, individuals, associations and or other groups.¹⁴⁹⁷ It is thus a mandatory element to be covered in any forest concession agreement to protect peoples' livelihood.¹⁴⁹⁸ In particular, the nature and scope of consultation of the forest people is unclearly provided. Despite of the fact that Tanzania voted for the UNDRIP 2007, it has denied existence of indigenous peoples within her borders.¹⁴⁹⁹ It is argued that, many states are cynical in recognition and protection of indigenous peoples owing to their potential veto in accessing resources within their territory.¹⁵⁰⁰

Despite such fear, it is shown that the potential veto power does not exist when consultation and FPIC is properly procured.¹⁵⁰¹ Even where the resources are unreasonably withheld by the indigenous communities, laws may be used to regulate their access. Regulation of resources in indigenous territories may take place in two major ways, firstly by allocating them the right to exploit such resources. Secondly, by proceeding to exploit them provided the indigenous peoples' livelihood is not grossly impacted and that they gain benefits from the extraction of the resources.¹⁵⁰²

Next, consultation and negotiation is also regarded as a means to settle disputes at international and national levels.¹⁵⁰³ Since a number of stakeholders are involved in forest conservation, potential disputes may also arise. With regard to water resources

¹⁴⁹⁷ *ibid.* s 16(1).

¹⁴⁹⁸ *ibid.* s 20(10)(i).

¹⁴⁹⁹ UN, 'United Nations Declaration on the Rights of Indigenous Peoples : Resolution / Adopted by the General Assembly' (UN Digital Library, 2007) <<https://digitallibrary.un.org/record/609197?ln=en>> accessed 10 January 2021.

¹⁵⁰⁰ John Ombella, 'Regulation of Natural Resources Located In Indigenous Communities Territory under the Principles of Consultation and Free, Prior-Informed Consent: Perspectives in Selected Countries' (2021) 29 *African Journal of International and Comparative Law*.

¹⁵⁰¹ *ibid.*

¹⁵⁰² *ibid.*

¹⁵⁰³ The Forest Act. s 48(4).

consultation as a dispute settlement mechanism is impliedly provided where the responsible minister is empowered to represent Tanzania in all consultations and negotiations related to trans-boundary water issues.¹⁵⁰⁴

5.4.2.7 Stakeholders Participation

Stakeholders' participation in decision making is vital principle recognised as a means to safeguard MHCs right clean water in Tanzania.¹⁵⁰⁵ In addition to the above noted stakeholders in water sector, Tanzania recognises the following; water users associations, groups, families, individuals, local communities, environmental experts, village councils and LGAs.¹⁵⁰⁶ It is above noted that, consultation of these stakeholders is vital in preparation of forest management plan.¹⁵⁰⁷ Despite of the relevancy of the stakeholders participation in safeguarding MHC right to water, it is shown that, MHCs are rarely involved in planning, implantation, monitoring and assessment of mineral and water resources.¹⁵⁰⁸

In order to guarantee effective participation of these groups in decision making, the need to safeguard access to information, access to justice and protection of informers is vital. With respect to access to justice for example, the water sector laws designate the Catchment Committee as an organ to settle water related disputes.¹⁵⁰⁹ It may be noted here that such an organ offers a general administrative remedy in case of water disputes among its users. In addition, it functions independently, from the Mining

¹⁵⁰⁴ Water Resources Management Act. s 99(e); United Republic of Tanzania, 'National Water Sector Development Strategy 2006-2015' (Ministry of Water and Irrigation, 2006). para 2.1.1.

¹⁵⁰⁵ The Forest Act. s 3 (b) (h); Water Resources Management Act. s. 5(d); Natural Wealth and Resources (Permanent Sovereignty) Act. s 8.

¹⁵⁰⁶ The Forest Act. s 4 (1) (e). ; See para 3.2.1.7, 3.2.2.7, and 4.2.1.7 above.

¹⁵⁰⁷ See para 5.4.1.4 above.

¹⁵⁰⁸ Ombella, 'Legal Impediments Limiting Mining-Host Communities' Access to Clean Water in Tanzania' (n 1433).

¹⁵⁰⁹ See para 5.6.8 below for details; Water Resources Management Act. s. 29(2)(b).

Commission which handles disputes arising from allocation of mineral rights.¹⁵¹⁰

The discussion above however, indicates that Kenya have established a special tribunal on water related disputes a move which signals justiciability of the right to water.¹⁵¹¹

In addition, participation in decision making resonates to benefit sharing from the management and or use of water resources. Among notable benefits accruing to stakeholders in shared water resources are reportedly to be; equitable allocation of water resources for their socio-economic and cultural use, guarantee of good water resources governance through established institutions and guarantee of progressive realisation of human rights linked to water resources such a right to water and food.¹⁵¹² Despite such notable benefits, it is noted above that, the River Nile Basin seems to be constrained owing to competing interests among riparian states.

5.4.2.8 International Cooperation

It may be noted from the discussion above that two major initiatives at international levels on sustainable regulation of minerals sector namely, KPCS and EITI.¹⁵¹³ With respect to KPCS, the key principle seems to be delinking minerals from violating human rights in areas where they are mined. However, the KPCs framework seems to be silent on environmental issues.¹⁵¹⁴ It is noted above RMOs are allocate in every mining sites to verify data related to sorting, and quantity of minerals mined

¹⁵¹⁰ See para 5.5.2 below.

¹⁵¹¹ See para 4.2.2.1 above.

¹⁵¹² Jessica Campese, 'Equitable Benefit Sharing: Exploring Experience Ad Lessons for REDD+ in Tanzania' (Tanzania Natural Resource Forum 2012). pp. 8 and 30.; IUCN, 'Sharing the Benefits from River Basin Management: From Theory to Practice' (International Union for Conservation of Nature and Natural Resources 2020).pp.13-14.

¹⁵¹³ See para 3.2.1.8 above.

¹⁵¹⁴ See para 1.8 and 5.4.1.8 above.

per day.¹⁵¹⁵ The mandate of RMO is not linked to issues such as; environmental and or underground water data.

With respect EITI, its focus lies on instilling transparency in natural resources revenue which includes mining as well. It is noted above that with time the EITI scope of transparency has been widening, from revenue, beneficial ownership, to contracts, laws, environment, and gender. A notable distinction between the KPCs and EITI lies on the progressive coverage of a number of aspects to be disclosed, for example, by the year 2019, environmental issues are also among aspects to be disclosed.¹⁵¹⁶

Although EIA is noted above as a weak approach towards safeguarding MHCs rights to water, its recognition under the EITI signals a new beginning where such rights may be protected. It is shown that, communities are calling for disclosure of environmental pollution fines and how are they spent to mitigate MHCs impacts caused by mining on water say for example.¹⁵¹⁷ However, despite the evolution and EITI reporting standards, the TEITA seems to have not provided gender issues under her transparency and accountability laws.¹⁵¹⁸

In addition, Tanzania's geographical location in the Great Lakes Zone of Eastern Africa compels cooperation on sustainable utilisation of such water resources.¹⁵¹⁹ In

¹⁵¹⁵ See para 1.8 and 5.4.1.8 above.

¹⁵¹⁶ EITI Secretariat, 'EITI Global Factsheet' (EITI, 2020). p. 2.

¹⁵¹⁷ Emma Wilson and James Alstine, 'Localising Transparency; Exploring EITIs' Contribution to Sustainable Development' (International Institute for Environment and Development, 2018) <<http://pubs.iied.org/16555IIED.html>>. pp. 52-53.

¹⁵¹⁸ The Tanzania Extractive Industries(Transparency and Accountability) Act. s 16(1)(a-d).

¹⁵¹⁹ Water Resources Management Act. s 5 (e).

recognition of the principle of intentional cooperation Tanzania has negotiated and signed a number of international instruments regulating shared water resources such as; Lake Victoria, Tanganyika, River Nile and River Zambezi.¹⁵²⁰ Tanzania's approach to manage shared water bodies through joint commissions and or authorities tallies with the call for harmonisation of legal frameworks to safeguard MHCs rights to water noted above.

However, despite such achievements by Tanzania, a number of challenges are still notable. Among them are; unsustainable use of trans-boundary water resources as human activities overrides conservation.¹⁵²¹ Other challenges are; inadequate human resources, inadequate technology and limited budget.¹⁵²² Additionally, non-ratification of international principles and political instability which acts as a sanctuary for mistrust among riparian states seem to limit joint efforts to safeguard shared waters.¹⁵²³

5.5 Institutional Framework

It is noted above that institutions are relevant in guaranteeing progressive realisation of human rights.¹⁵²⁴ In Tanzania for example institutions such as courts are relevant in remedying potential and or actual violation of human rights either by the government and or other development partners.¹⁵²⁵ It is also argued that one among the challenges facing Tanzania's efforts safeguard MHCs rights to clean water and

¹⁵²⁰ Protocol for Sustainable Development of Lake Victoria Basin.; The Convention on the Sustainable Management of Lake Tanganyika.; Agreement on the establishment of the Zambezi Watercourse Commission (The ZAMCOM Agreement).

¹⁵²¹ United Republic of Tanzania: Ministry of Water and Livestock Development (n 1427). para 4.9.

¹⁵²² Ministry of Constitution and Legal Affairs (n 18). para 2.2.4.3 (iii).; United Republic of Tanzania, 'National Water Sector Development Strategy 2006-2015' (n 1504). para 8.2.1; United Republic of Tanzania: Ministry of Water and Livestock Development (n 1427). para 4.7.

¹⁵²³ URT Ministry of Water, 'Benefits and Challenges of Trans-Boundary Water Cooperation for Tanzania 2008/9-2018/19' (Water Resources Division, 2019). para 6.1-6.6.

¹⁵²⁴ See para 3.3 and 4.3 above.

¹⁵²⁵ United Republic of Tanzania Constitution. Art. 30 (3).

adequate food is inadequate institutions relevant to coordinate and guarantee good resources governance.¹⁵²⁶ It is noted that, ability of the state to establish robust institutions will spur good governance and limit arbitrariness of the government officials and or corruption.¹⁵²⁷

In particular to Tanzania, there is a strategic projection that, by the year 2025, there should exist strong institutional framework to address governance in resources extraction.¹⁵²⁸ Good governance in resources extraction is shown above to have a great bearing on realisation of MHCs rights to clean water and adequate food.¹⁵²⁹ Consequently, this part critically discusses both institutions relevant for protection of human rights and good natural resources governance. The discussion is organised in two major levels which are the national and local. The discussion begins with national level institutions;

5.5.1 Parliament of Tanzania

The Parliament of the United Republic of Tanzania (PURT) is one among the three constitutional organs of the state namely the judiciary, executive and legislature.¹⁵³⁰ It is composed of two main parts namely the President and the National Assembly (the Assembly).¹⁵³¹ As such matters to be decided by the PURT example passing of legislation have to gain the approval of both the President and the Assembly.¹⁵³²

¹⁵²⁶ Nachmany (n 1327). p. 3; Jane Kabogo and others, 'Facilitating Public Participation in Water Resources Management: Reflections from Tanzania' (2017) 22 Ecology and Society.

¹⁵²⁷ UNECA (n 922), para 26-27.

¹⁵²⁸ VPO, 'Implementation Strategy for the National Environmental Policy 2(021) for the Period of 2022-2032' (n 1284). para 2.3 (b) (xi).

¹⁵²⁹ See para 2.2.6, 2.2.7 and 2.2.8 above

¹⁵³⁰ United Republic of Tanzania Constitution. Art. 62 (1).

¹⁵³¹ *ibid.* Art. 62 (1).

¹⁵³² *ibid.* Art. 62 (3).

The National Assembly is composed of three main types of members. Firstly there are elected members who are representatives of their respective constituencies where they contested during the general election and or by-election.¹⁵³³ In this category the number is fixed basing on the number of constituencies declared by the Electoral Commission. Secondly there are appointed and or nominated members. On the first hand of the nominated members, the URT Constitution grants power to the president to appoint a maximum of ten members of the Assembly of his choice. On the second hand of the appointed members, these are women special seats who are not less than 15% of the total number of members of the Assembly.¹⁵³⁴ Notably, the percentage is proportionately shared between the political parties that have won seats in the Assembly.¹⁵³⁵ The third group of members is the representatives from the House of Representatives of Zanzibar whom are limited to five in total.¹⁵³⁶

According to the Constitution, the PURT is an organ that has dual role. Firstly it is responsible for making and unmaking laws.¹⁵³⁷ It is noted above that all the international treaties have to be domesticated through either a special Act of the parliament or through amendments of an existing laws for there to be compliance.¹⁵³⁸ In making or unmaking laws, the parliament is required to involve various stakeholders for comments and in puts to the proposed laws.¹⁵³⁹ Hamud Majamba argues that, the essence of the rule that ignorance of law is not a defence is based on

¹⁵³³ *ibid.* Art. 66(2) (a).

¹⁵³⁴ *ibid.* Art. 66 (2) (b) vide Art. 78 (1).

¹⁵³⁵ *ibid.* Art. 78 (1).

¹⁵³⁶ *ibid.* Art. 66 (2) (c).

¹⁵³⁷ *ibid.* Art. 63 (3)(d), 64 (1).

¹⁵³⁸ See para 5.3 above.

¹⁵³⁹ Bunge la Jamhuri ya Muungano wa Tanzania, 'Kanuni Za Kudumu Za Bunge: Tangazo La Serikali Na. 626' (Bunge la Jamhuri ya Muungano wa Tanzania, 2020). Kanuni 93 (3).

the fact that public is involved by the parliament in making laws through tabling and public hearing laws of bills.¹⁵⁴⁰

However it is argued that the parliament has a tendency of passing bills under certificate of urgency a fact which limits stakeholders' participation.¹⁵⁴¹ Notably, even when stakeholders are involved, they are filtered or rather a public notice issued in short notice to limit their participation.¹⁵⁴² Such a trend has once been argued to create a general perception that, natural resources laws have been passed with the view not to benefit locals but rather to meet interests of foreign extractive MNCs.¹⁵⁴³

Secondly, it is the organ that holds the government into account basing on its daily activities.¹⁵⁴⁴ It is argued that the recently passed laws regulating natural resources have incorporated the democratic principle of transparency through granting power to the Assembly to review and order renegotiation or otherwise all natural resources contracts.¹⁵⁴⁵ Despite such achievement, the current composition of the parliament shows that, the ruling party has more than 300 seats while the opposition parties jointly have less than 20 representatives.¹⁵⁴⁶ Primarily, strong oppositional political party representatives are vital in holding the government accountable as they aspire

¹⁵⁴⁰ Hamudi Majamba, 'The Paradox of the Legislative Drafting Process in Tanzania' (2019) 40 Statute Law Review. p. 330.

¹⁵⁴¹ Florance Luoga, 'Challenges in Setting up Legal Frameworks for Natural Resources Governance in the Eastern African Countries' (2016) 43 African Review. p. 8; Jesse Ovadia, 'Local Content in Tanzania's Gas and Minerals Sectors: Who Regulates?' (Chr Michelsen Institute, 2017) <<https://www.emi.no/publications/6314-local-content-in-tanzanias-gas-and-minerals>>.

¹⁵⁴² Luoga (n 1541). p. 8.; Legal and Human Right Center (n 1359). para 2.3.

¹⁵⁴³ Jody Emel, Matthew Huber and Madoshi Makene, 'Extracting Sovereignty: Capital, Territory and Gold Mining in Tanzania' (2011) 30 Political Geography. p. 77.

¹⁵⁴⁴ United Republic of Tanzania Constitution. Art. 63 (2),(3) (a-e); See also para 5.4.1.8 above and para 5.5.8 below.

¹⁵⁴⁵ Ombella, 'Liberal Rules on Trade and Investment and the False Promise in Developing Countries: A Tanzanian Perspective' (n 1276). p. 39.

¹⁵⁴⁶ URT Parliament of Tanzania, 'Members of the Parliament' (The Parliament of Tanzania, 2021) <<https://www.parliament.go.tz/mps-list>> accessed 23 September 2021.

to one day lead the government.¹⁵⁴⁷

With respect to elected women members of the parliament, it is reportedly that according to results of 2020 general election, women composition is less than ten percent of the total elected members.¹⁵⁴⁸ As such this feeble representation of women resonates to the above noted gender gap in policy formulating organs of the state.¹⁵⁴⁹ Consequently, such a composition is not healthy for such an organ entrusted to hold the government into account. Unlike members of oppositional parties, ruling party members may be influenced by party loyalty that will undermine their role in monitoring government activities. This is even true given the powers of the parliament in amending the constitution, and or repealing or suspending application of legislation, such powers are said to be very wide.¹⁵⁵⁰

However, it is shown that, a number of factors limit the potentials of a member of parliament in making decision relevant to extractive sector.¹⁵⁵¹ Among such factors, some are relevant to Tanzania example; the levels of education of members of national assembly compared to the complex and technical nature of the extractive sector, influence from the extractive firms and confidentiality clauses which are common in mining contracts.¹⁵⁵²

¹⁵⁴⁷ G Kanyeihamba, *Commentaries on Law, Politics and Governance 2nd Impression* (Law Africa 2006).p.118.

¹⁵⁴⁸ Legal and Human Right Center (n 1359), para 2.3.

¹⁵⁴⁹ See para 3.2.1.7 and 6.4.2.1 above.

¹⁵⁵⁰ United Republic of Tanzania Constitution. Art. 98 (1).; *Rev Christopher Mtikila v the Attorney General* [1993] High Court of Tanzania (Dodoma) Civil Case No. 5. pp. 12-13.

¹⁵⁵¹ Annie Chikwanha, 'Combating Corruption in the Extractive Industry in Africa' (Swedish International Development Cooperation Agency, 2016). p. 13.

¹⁵⁵² *ibid.* p.13.

5.5.2 Mining Commission

Mining Commission, is an organ established under the Mining Act 2018.¹⁵⁵³ It is composed of nine members headed by the chairman.¹⁵⁵⁴ The chairman as it is for the rest of other members save for two co-opted are presidential appointees.¹⁵⁵⁵ It is worth to note here that the Mining Act 2018 does not provide for criteria to guide the president in appointing such members. However, the two co-opted members, one of them is required by the law to be a woman with relevant skills to mineral affairs.¹⁵⁵⁶ This signals a narrow approach to gender inclusion in mineral sector decision making. In practice, the Commission shows gender imbalance owing to the fact that out of the nine members only one is a woman.¹⁵⁵⁷ Taking cognisance of the, mining impacts on women and the mandate of the Commission, women representation is badly needed.

Notably, the Mining Commission is empowered to carry out a number of functions inclusive; allocation of mineral rights to applicants, monitoring the compliance of the Mining Act 2018, settlement of mineral related disputes such as compensation issues, cancelling and or renewing of mining licences, and advising the minister responsible for minerals on all matters related to mining.¹⁵⁵⁸ Since Tanzania is also a partner state to the KPCs the Mining Commission is also designated as a the state focal point to verify and or issue the KPCS certification in case of exportation and or

¹⁵⁵³ Mining Act 2018. s 21.

¹⁵⁵⁴ *ibid.* s 21.

¹⁵⁵⁵ *ibid.* s 21 As such almost six of the members to the Commission gain such membership by virtue of their offices in the government departments and or ministries. Notably, they also gained their original office through presidential appointment.

¹⁵⁵⁶ The Mining Act. s 21(7)(h).

¹⁵⁵⁷ The Mining Commission, 'Members of the Commission' (2021) <<https://www.tumemadini.go.tz/pages/board-members>>.[accessed on 29 January 2021].

¹⁵⁵⁸ Mining Act. ss 20-22 and s. 119; Ombella, 'Review of Tanzania's Mining Legal-Framework on Women Participation in Decision-Making in Mining Sector' (n 1383). pp. 117-118.

importation of rough diamonds.¹⁵⁵⁹

With respect to safeguard environment the Mining Commission' role is generally to monitor all mining activities in the country. Consequently, it has to be informed of potential mining impacts on environment prior to issuing the mineral rights. However, such a role is tasked to NEMC an organ which is independent from the Commission as described below.

5.5.3 National Environmental Management Council (NEMC)

The National Environment Management Council (NEMC) is a governmental agency established under the EMA 2004 with the key objective to ensure that the provisions of the Act are complied with.¹⁵⁶⁰ Notably, NEMC was an organ inherited from the repealed National Environmental Management Act No. 19 of 1983.¹⁵⁶¹ Enactment of such an organ is said to be influenced by the Stockholm declaration noted above, which required every states to have an organ to regulate environmental issues related to development.¹⁵⁶² Among other objectives are to monitor and review all EIA carried out in the country for the purposes of safeguarding environment from harm.¹⁵⁶³ NEMC is also assigned the duty to enforce environmental standards in the country.¹⁵⁶⁴

¹⁵⁵⁹The Mining(Diamond Trading) Regulations. 7(a); Ombella, 'International Regulation of Trade in Rough Diamonds: An Appraisal of the Tanzanian Mineral Laws' Compliance' (n 1395). p.147.

¹⁵⁶⁰ Environmental Management Act. s. 16 (1), 17 (1).

¹⁵⁶¹ Angela Malisa, 'Situation, Challenges and Plans for Environment Statistics in Tanzania' (2007). p. 6.

¹⁵⁶² *ibid.* p. 6.

¹⁵⁶³ Environmental Management Act. s. 17 (1).

¹⁵⁶⁴ VPO, 'Guideline for Integrating Climate Change Adaptation into National, Sector Policies,, Plans and Programmes of Tanzania' (n 1283). para 2.4 (c).

In order to achieve such objectives NEMC is mandated to carry out and or promote research related to environmental conservation, carry out survey aimed at protecting environment from harm and approve or otherwise all EIA reports carried in the country.¹⁵⁶⁵ Since environmental aspects impacts large part of the public, NEMC is also mandated to be the national focal point where the general public may be informed about environmental issues.¹⁵⁶⁶ This function of NEMC focuses on raising public awareness on environmental issues.¹⁵⁶⁷

Notably, NEMC is headed by the board which is composed of the chair, director responsible of environmental issues, and other seven members who are appointee of the minister responsible for environmental affairs.¹⁵⁶⁸ In order to assure that environmental standards are being observed, there are criteria set to guide the Minister in appointing the seven members. However, the criteria are based on academic and professional qualifications.¹⁵⁶⁹ No any provision that calls for gender consideration in the ministerial appointments. Given the mandate of NEMC, the noted potential impacts mining may cause on environment and the fact that women are more prone to such impacts than men, gender consideration at this decision making point is vital. It is even shown that, a non-gender informed decision will lead to inefficient strategies and hence hinder achieving broad-based socio-economic empowerment.¹⁵⁷⁰

¹⁵⁶⁵ Environmental Management Act. s 17 (2).

¹⁵⁶⁶ *ibid.* s 17 (2).

¹⁵⁶⁷ Malisa (n 1561). p. 6.

¹⁵⁶⁸ Environmental Management Act. s 19 (1) (2) (a-c).

¹⁵⁶⁹ *ibid.* s 19(4).

¹⁵⁷⁰ VPO, 'The National Guideline for Mainstreaming Gender into Environment' (2014). para 4.1.

5.5.4 The Judiciary

According to the Constitution there is established a judicial arm of the state.¹⁵⁷¹ This is an independent organ of the state responsible to deal with dispensation of justice in Tanzania.¹⁵⁷² In order to guarantee judicial independence, the composition of the judiciary is made up of Chief Justice who is the head and other judges. Both the Chief Justice and other judges are appointees of the president.¹⁵⁷³ However, the President does not have the sole mandate to remove neither the Chief Justice nor any judge from office. This allows checks and balance in the democratic states where a special tribunal has to be established to advise the president on either to remove the judge or otherwise.¹⁵⁷⁴

In particular, the High Court of Tanzania is established with unlimited jurisdiction in both, human rights, criminal and civil matters.¹⁵⁷⁵ Firstly, with regard to human rights, the High Court is identified as the court of the first instance.¹⁵⁷⁶ As such, in Tanzania human rights were for the first time entrenched under part III of the Constitution in 1994.¹⁵⁷⁷ In particular, upon their entrenchment they did not become enforceable instantaneously, instead a period of three years elapsed to give a room for the government to make it compatible with other laws.¹⁵⁷⁸

¹⁵⁷¹ United Republic of Tanzania Constitution. Art. 107 A.

¹⁵⁷² *ibid.* Art. 107B.

¹⁵⁷³ *ibid.*

¹⁵⁷⁴ *ibid.* Art. 110 A (3).

¹⁵⁷⁵ *ibid.* Art. 108 (2).

¹⁵⁷⁶ Basic Rights and Duties Enforcement Act 2002. s 8 (1).

¹⁵⁷⁷ Alphonse Mbuya, 'United Republic of Tanzania: Introductory Note' in Rudiger Wolfrum, Rainer Grote and Charles Fombad (eds), *Constitutions of the Countries of the World* (Oxford University Press 2019). p.11; United Republic of Tanzania Constitution. Art. 12-29.

¹⁵⁷⁸ Mbuya (n 1577). p. 23.

Despite of the fact that the right to water and adequate food are not expressly provided, inference may be made through interpretation of other rights such as right to life. However, in order to enforce human rights in Tanzania, reference has to be made to the Basic Rights and Duties Enforcement Act 2002. Although the nomenclature of this piece of legislation sounds convincingly, its content coupled with the court interpretation depicts an opposite reality with respect to enforcement of human rights. In particular, the epicentre of this paradox is noted above as structural and procedural limitations in enforcing such rights.¹⁵⁷⁹

Consequently, MHCs rights to water and adequate food remain as mere aspirations and state policy objectives as they may hardly be enforced in courts of law. According to Ackson Tulia,¹⁵⁸⁰ the Fundamental Objectives and Directive Principles of State Policy seems to contain all the socio-economic rights which seem to have budgetary implications on the State, while those with less budgetary implications are protected under the enforceable part. This position stems from the fact that socio-economic rights have a positive duty that requires States to provide for them in an event their citizens are unable to attain them by themselves.

Secondly, with regard to criminal matters it is noted from above, illicit extraction of natural resources is one among the challenges of many African states to realise good governance in natural resources extraction.¹⁵⁸¹ Consequently, the Tanzanian government manifested its strong desire to address the increased threats corrupt

¹⁵⁷⁹ See para 1.2 above.

¹⁵⁸⁰ Ackson T, 'Justiciability of socio-economic rights in Tanzania', 3 (2015) African Journal of International Comparative Law p. 363.

¹⁵⁸¹ See para 1.8 above.

practices by establishing a special court to handle such cases. The Corruption and Economic Crimes Division (CECD) of the High Court is tasked to deal with corruption and other organized crimes.¹⁵⁸² The jurisdiction of CECD is on corruption cases ranging from one billion and above.¹⁵⁸³ Consequently, it targets the grand corruptions which seem to have been systemic in the Tanzanian government.¹⁵⁸⁴

In order to deter everyone from indulging into corrupt practices, the Act seems to provide a very severe punishment to those who will be convicted of corruption. For example, upon conviction the court is limited to issuing a sentence of not less than 20 years and not more than 30 years imprisonment.¹⁵⁸⁵ In any event the court feels to issue other penalty, they are to be in addition and not in alternative to the imprisonment. For effective functioning of this court, first it relies on the effective investigation by the PCCB but also independent judiciary.

Notably, among challenges facing judiciary are reportedly to be; corruption, delayed investigation, meagre budget, inadequate high court zones, inadequate professional human resources such as advocates, inadequate awareness on human rights issues among the public, poverty that limits access to court and backlog of cases.¹⁵⁸⁶ With respect to corruption in the judiciary for example, it is reportedly that, there is a declining trend of the public perception from 35% to 21% between the years 2014 to

¹⁵⁸² The Written Laws (Miscellaneous amendment) Act 2016 s. 8.

¹⁵⁸³ The Written Laws (Miscellaneous amendment) Act 2016 s. 8 (3) (a).

¹⁵⁸⁴ Riziki Mazinge, 'The Doctrine of Permanent Sovereignty over Natural Resources in International Law and the Case of the Mining Sector in Tanzania' [2008] African Yearbook of International Law Online. pp. 244, 255-258.; Hazel Gray, 'The Political Economy of Grand Corruption in Tanzania' (2015) 114 African Affairs.

¹⁵⁸⁵ The Written Laws (Miscellaneous amendment) Act 2016 s. 13 (a).

¹⁵⁸⁶ Legal and Human Right Center (n 1280). para 2.3.1.

2017 respectively.¹⁵⁸⁷ Other challenges relate to; cost of litigation, language barrier as most of the judgement are issued in English language.¹⁵⁸⁸ Also, since Tanzania is a dualist state, the High Court seems to be reluctant to rely on international law principles in interpreting the domestic statutes unless such principles are domesticated.¹⁵⁸⁹

Notably, corruption is great hindrance to judicial independence.¹⁵⁹⁰ As such, war against corruption is fought from various angles and organs including the parliament.¹⁵⁹¹ Notably, however, the CECD of the High Court recorded a reasonable number of cases in a very short period of time since its inception.¹⁵⁹² For example, for the period of 2016-2021 about 84 cases have been disposed.¹⁵⁹³

5.5.5 The Commission for Human Rights and Good Governance (CHRGG)

The CHRGG, is a constitutional creature.¹⁵⁹⁴ It is composed of the Chairman and a maximum of five commissioners both of which are presidential appointees.¹⁵⁹⁵ The Commission is not fully independent institution owing to potential of receiving directives from the President in their functioning and other range of limitations.¹⁵⁹⁶ It also seems to work as an administrative arm of the Ministry of Constitutional Affairs

¹⁵⁸⁷ Lulu Olan'g and Jamal Msami, 'In Tanzania Anti-Corruption Efforts Seen as Paying Dividends Need Citizen Engagement: Afrobarometer Dispatch No. 178' (2017) <http://www.repoa.or.tz/images/uploads/AD178-Corruption_in_Tanzania-Afrobarometer_dispatch-4dec17.pdf> accessed 27 January 2019.

¹⁵⁸⁸ Guardian Reporter, 'African Judicial Dialogue Deliberates on Efficacy and Effectiveness of Judiciary' *The Guardian* (Dar es Salaam, 11 September 2021). p. 5.

¹⁵⁸⁹ See para 1.8 and 5.3 above.

¹⁵⁹⁰ Pius Msekwa, *Reflection on Tanzania's First Multi-Party Parliament 1995-2000* (Dar-es Salaam University Press 2000). p. 31.

¹⁵⁹¹ *ibid.* p. 105.

¹⁵⁹² Polycarp Machira, 'Corruption Court Registers 25 Cases since It Started Operation' *The Guardian* (26 April 2017).

¹⁵⁹³ TANZLII, 'High Court Corruption And Economic Crimes Division of Tanzania' (Tanzania Legal Information Institute, 2021) <<https://tanzlii.org/judgments/high-court-corruption-and-economic-crimes-division/date/2020>> accessed 23 September 2021.

¹⁵⁹⁴ Chapter 6 of the *URT Constitution of 1977*.

¹⁵⁹⁵ United Republic of Tanzania Constitution. Art. 129 (3-4); The Commission for Human Rights and Good Governance Act 2001. s 7(2).

¹⁵⁹⁶ United Republic of Tanzania Constitution. Article 130 (4).

instead of existing independently.¹⁵⁹⁷ The Commission works as an ombudsman. Among its most relevant functions are; conducting of inquiry in all instances of alleged violation of human rights and good governance, prosecuting perpetrators of human rights violation, and carrying out inquiry of potential abuse by any person or institution.¹⁵⁹⁸

In particular, the CHRGG seems to have a wide scope to investigate and prosecute any person who might be contributing to human rights violation and or impacting good governance in Tanzania. However, the Constitution and the Act establishing CHRGG seem to limit the scope of individuals who might be investigated. Among the individuals and offices not subjected to investigations are the President of the United Republic of Tanzania, and the President of Zanzibar.¹⁵⁹⁹ This seems to be one of its weaknesses among others namely; dependency on the state fund that inadequate, immunities granted to some institutions that may be involved in human rights violation; lack of adequate human resources and its inaccessibility owing to little rate of public awareness coupled with inadequate geographical coverage of the CHRGG offices.¹⁶⁰⁰

Other challenges are inclusive; inadequate working tools and unethical conducts of some of its officials.¹⁶⁰¹ Machelo Hasungule¹⁶⁰² when commenting on the challenges

¹⁵⁹⁷ Fombad (n 1092). p. 717.

¹⁵⁹⁸ United Republic of Tanzania Constitution. Art. 130 (1).

¹⁵⁹⁹ The Commission for Human Rights and Good Governance Act. s. 16 (1-2).

¹⁶⁰⁰ Hamisa Omari and Faham Mtulya, 'Human Rights and Alternative Dispute Resolution in Tanzania: A Practice and Challenges of the Commission for Human Rights and Good Governance' (2012) 2 Zanzibar Yearbook of law..pp.281-285; Commission for Human Rights and Good Governance, 'Shadow Report Relating to the 7th and 8th Tanzania Report on the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) Presented by the Tanzania Human Rights Institutions' (Commission for Human Rights and Good Governance 2016). p. 10.

¹⁶⁰¹ Legal and Human Right Center (n 1359). para 6.1.

facing the African states in implementation of the African charter principles argues that;

...it is one thing to establish, adopt and ratify a system of instruments but quite another for the system to work on the ground...

Consequently, adoption of human rights principles does not guarantee their enjoyment in a situation where there is poor governance and lack of political will to have the rights realized through establishment of weak institutions.

5.5.6 Prevention and Combating Corruption Bureau (PCCB)

Unlike the CHRGG which is established by the constitution, the PCCB is a statutory creature.¹⁶⁰³ The PCCB is headed by the Director who is appointed by the president.¹⁶⁰⁴ The PCCB is tasked to adopt various measures to prevent and combat corruption both in private and public sector.¹⁶⁰⁵ Its establishment allows it to independently to investigate and institute criminal proceedings based on such investigations.¹⁶⁰⁶

Despite such mandate of the PCCB, its efficiency seems limited due to; lack of security of tenure of the top officials,¹⁶⁰⁷ subjecting appointment and removal of the top officials to president, limited powers to enforce their findings.¹⁶⁰⁸ The PCCB for example will only prosecute grand corruption cases upon securing the consent of the

¹⁶⁰² Machelo Hasungule, 'Challenges to the African Human Rights System with Special Reference to the United Republic of Tanzania' (2011) 1 Zanzibar Yearbook of Law. p. 191.

¹⁶⁰³ The Prevention and Combating of Corruption Act 2007. s 5 (1).

¹⁶⁰⁴ *ibid.* s 6 (1).

¹⁶⁰⁵ *ibid.* s 7.

¹⁶⁰⁶ *ibid.*

¹⁶⁰⁷ *ibid.* s 6 (2).

¹⁶⁰⁸ Lukiko Lukiko, 'Exploring a Sustainable Anti-Corruption Regime for Tanzania' (Western Cape 2017) <<http://etd.uwc.ac.za/xmlui/handle/11394/5692>>. 74.; *ibid.* p. 74; LHRC 2016 Report on the United Republic of Tanzania General Election of 2015 para 2.3.4.

Director of Public Prosecution (DPP).¹⁶⁰⁹

In addition, the DPP exercises the power to intervene the court proceedings at any stage before judgment.¹⁶¹⁰ Among the potential results of intervention by the DPP into the court proceedings are: termination of the criminal proceedings and discharge of the accused person.¹⁶¹¹ Such powers seem to weaken the fight against illicit extraction of natural resources contrary to the international standard requiring independent anticorruption authorities. Lukiko Lukiko further points out that the nature of sanctions which provide the possible seal in case of fine and maximum sentence for imprisonment are not deterrent enough.¹⁶¹²

In particular to mineral sector, it is reportedly that Tanzania's efforts to fight corruption increased from 44 score in the year 2017 to 66 in the year 2021.¹⁶¹³ Despites such records, government accountability is relatively low at the rate of 53 with poor law enforcement which stands the score of 48 in the year 2021.¹⁶¹⁴ Trends of weak records in combating corruption resonates to government inability to provide for socio-economic rights to its population leave alone MHCs.¹⁶¹⁵

5.5.7 The Public Leaders Ethics Secretariat

The Public Leaders Ethics Secretariat (Secretariat) is established under the Constitution.¹⁶¹⁶ The Secretariat is composed of the commissioner and other

¹⁶⁰⁹ The Prevention and Combating Corruption Act 11 of 2007. s 57.

¹⁶¹⁰ Criminal Procedure Act 1985. s 91.

¹⁶¹¹ *ibid.* s 91.

¹⁶¹² Lukiko (n 1608). pp. 73-74.

¹⁶¹³ NREGI (n 1212). p. 2.

¹⁶¹⁴ *ibid.* p. 2.

¹⁶¹⁵ Shane Darcy, "'The Elephant in the Room': Corporate Tax Avoidance & Business and Human Rights' (2017) 2 Business and Human Rights Journal. p. 28.

¹⁶¹⁶ United Republic of Tanzania Constitution. Art. 132.

employees both of whom are presidential appointees.¹⁶¹⁷ The key objective of the Secretariat is monitoring illicit enrichment of state officials. Illicit extraction of natural resources seems to be a new crime established to guarantee sustainable harnessing of natural resources including minerals and water.¹⁶¹⁸

The secretariat addresses illicit enrichment in two major ways. Firstly, it receives and keep records of the public leaders' declarations of assets and liabilities. Secondly, it receives allegations of potential and or actual breach by the public leaders of the code of ethics of public leaders from general public.¹⁶¹⁹ Notably, declarations of assets and liabilities of the public leaders act as a yard stick upon which the assessment of the increasing richness may be measured.¹⁶²⁰

However, it is argued that, the right to access information especially when that information is in the hands of the government becomes cumbersome.¹⁶²¹ To exemplify this, information concerning the public officials' declaration of their personal properties are not publicly accessible unlike the mineral revenue, licenses which are published online.¹⁶²² Since such information would help the public to hold into account the government and its officials respectively, inaccessibility of such information impacts transparency and accountability respectively. Perhaps, the rule that, peoples' right to access information in government hands is not absolute may be the founding rule against public access to such data.¹⁶²³

¹⁶¹⁷ *ibid.* Art. 132 (1) ; The Public Leadership Code of Ethics Act 2002 (398). s 18(7).

¹⁶¹⁸ See para 4.2.2.1 above.

¹⁶¹⁹ United Republic of Tanzania Constitution. Art. 132(2).; The Public Leadership Code of Ethics Act. s 18 (2) (a-c).

¹⁶²⁰ Kalawole Olaniyan, *Corruption and Human Rights Law in Africa* (Hart Publishing 2016). p.127.

¹⁶²¹ James Jesse, 'Freedom of Expression and Limitations in Tanzania: Lessons from International Experience' (2012) 2 Zanzibar Yearbook of Law. p. 235.

¹⁶²² See para 5.4.1.8 above.

¹⁶²³ Dorota Mokrosinska, 'The Peoples' Right to Know and State Secrecy' (2018) XXXI The Canadian Journal of Law and Jurisprudence. p.106.

5.5.8 Tanzania Extractive Industry (Transparency and Accountability) Committee. (TEITC)

In responding to the international extractive industry transparency frameworks Tanzania has established the TEITC.¹⁶²⁴ In order to guarantee the TEITC efficiency, the law grants it independence, from influence of whatever kind.¹⁶²⁵ Despite of the EITI initiative being voluntary by nature, in Tanzania it is binding.¹⁶²⁶ TEITC is composed of the Chairperson who is presidential appointee. It is also composed of other 15 individuals in the following category; five members from the government; five from the extractive sector representing all extractive companies in Tanzania and five from the non-governmental organisations.¹⁶²⁷ Such an institutional structure seems to harmonise EITI framework with Tanzania's domestic laws to propel transparency in resources governance.¹⁶²⁸

Although the law establishing TEITC requires women participation, its enabling provisions suffers two setbacks.¹⁶²⁹ Firstly, it is silent on the margin of women to be represented. Secondly, the section applied a general term that appointments 'shall have regard to gender balance'. Such a term is hard to be enforced owing to its generality. Concerns of women representation in extractive sector is vital to guarantee broad-based economic empowerment.

In order to guarantee independency of the TEITC, the law has established two major obligations. Firstly, all extractive companies in Tanzania are required to furnish

¹⁶²⁴ The Tanzania Extractive Industries(Transparency and Accountability) Act. s. 4 (1).

¹⁶²⁵ *ibid.* s 4(2).

¹⁶²⁶ *ibid.*

¹⁶²⁷ *ibid.* s. 5.

¹⁶²⁸ Okuthe-Oyugi and others (n 1413). p. 30.

¹⁶²⁹ The Tanzania Extractive Industries(Transparency and Accountability) Act. s 5(5).

information on all revenue they paid to governments (both central and local levels).¹⁶³⁰ Secondly, states owned mining companies, departments and or authorities are called to furnish revenue and or benefits the received from extractive companies.¹⁶³¹ To guarantee compliance with these obligations, a fine between 10-150 million TSHS will be imposed upon them respectively.¹⁶³²

Notably, the received financial and environmental information from the government and mining companies are used to develop a report. As such the report is prepared by an independent auditor through reconciling the government and mining companies records.¹⁶³³ Upon submission of the report to the Committee by the auditor, the Committee ultimately, submit it to the National Assembly and general public for discussion. Such a trend is founded on the fact that, access to information enables the Assembly and general public to hold the government into account.

It is argued that, despite the noble functions of the TEITC participation of the non-governmental organisation seem a challenge due to communication breakdown among them.¹⁶³⁴ Also, budgetary and inadequate skills to use TEIT reports in holding the government into account undermines efficiency of most of civil organisations.¹⁶³⁵ In addition, questionable political will seems to be evidenced in two major ways. Firstly, there is a notable government crackdown of oppositional voices.¹⁶³⁶ Secondly, there is notable inability of some state departments to do away

¹⁶³⁰ *ibid.* s. 14.

¹⁶³¹ *ibid.* s. 14.

¹⁶³² *ibid.* s. 23.

¹⁶³³ *ibid.* ss. 17-19.

¹⁶³⁴ Okuthe-Oyugi and others (n 1413). p. 33.

¹⁶³⁵ *ibid.* p. 33.

¹⁶³⁶ Pocian and Kigodi (n 1419). p. 118.

with their institutional bureaucracy and a mere transferring of officials who are implicated instead of prosecuting them.¹⁶³⁷

5.5.9 Vice Presidents' Office (VPO)

Generally, the VPO through its Environmental Division is an overseer of environmental related issues and sustainable use of natural resource in the country.¹⁶³⁸ To achieve this goal, it is imperative that relevant laws, policies, strategies and plans be designed, implemented, monitored and evaluated across various socio-economic sectors.¹⁶³⁹ Since mining activities are reportedly, to impact environment, the VPO mandates becomes relevant in this study.

5.5.9.1 National Climate Change Focal Point (NCCFP)

The National Climate Change Focal Point (NCCFP) is established under the National Climate Change Strategy 2012.¹⁶⁴⁰ The Environmental Division of the VPO is regarded as the National Focal Point on environmental issues.¹⁶⁴¹ The NCCFPs' mandate is to collaborate with other stakeholders in formulating relevant national policies, plans and strategies to address climate change challenges in Tanzania.¹⁶⁴² The NCCFP receives advice from the National Climate Change Technical Committee.¹⁶⁴³ However, absence of a dedicated organ to address climate change casts a doubt on the political will to address it.¹⁶⁴⁴

¹⁶³⁷ *ibid.* p.118.

¹⁶³⁸ United Republic of Tanzania and Ministry of Agriculture Food Security and Cooperatives (n 1260). para 5.1.2.

¹⁶³⁹ *ibid.* para 5.1.2.

¹⁶⁴⁰ Tanzania, Vice President's Office (n 1221). p. x.; VPO, 'Guideline for Integrating Climate Change Adaptation into National, Sector Policies,, Plans and Programmes of Tanzania' (n 1283). para 2.4 (b).

¹⁶⁴¹ URT Vice President's Office, 'National Adaptation Programme of Action' (2007). para 7 and 8.

¹⁶⁴² Tanzania, Vice President's Office (n 1221). p. 7.

¹⁶⁴³ *ibid.* p. x.

¹⁶⁴⁴ Nachmany (n 1327). p. 3.

5.5.9.2 The National Climate Change Technical Committee (NCCTC)

The National Climate Change Technical Committee is comprised of technical experts on wide range of sectors, experiences and expertise.¹⁶⁴⁵ It is noted that climate change issues are not sector specific owing to the fact that almost every sector either contributes and or suffers the impacts of climate change. The NCCTC is thus an organ relevant to provide technical advice related to climate change to the National Climate Change Focal Point.¹⁶⁴⁶ It is also mandated to coordinate climate change issues such as plans, strategies in various sectors in Tanzania.¹⁶⁴⁷ It is noted that there is inadequate skills to conserve biodiversity which is vital for food security.¹⁶⁴⁸

5.5.9.3 National Climate Change Steering Committee (NCCSC)

The NCCSC is a national organ established under the National Climate Change Strategy 2012.¹⁶⁴⁹ It is tasked among other functions to regulate cross-sectoral policies and guidelines related to climate change in the country.¹⁶⁵⁰ It is above indicated that, climate change issues are seldom reflected in most of sectoral policies. Hence ongoing review of such policies signal inclusion of climate change issues.¹⁶⁵¹

¹⁶⁴⁵ Tanzania, Vice President's Office (n 1221). p. x.

¹⁶⁴⁶ *ibid.* p. x.

¹⁶⁴⁷ VPO, 'Guideline for Integrating Climate Change Adaptation into National, Sector Policies,, Plans and Programmes of Tanzania' (n 1283). para 2.4(b).

¹⁶⁴⁸ United Republic of Tanzania, 'UN Environment: National Report for Conservation on Biological Diversity' (n 1291). pp. 37-38; AF Makauki, 'Developing a Competency Framework for Environmental Policy Implementation by Morogoro Municipal Council in Tanzania' (North West University 2017). para 6.6; United Republic of Tanzania, 'Draft National Forest Policy' (n 1282). para 4.4.3.

¹⁶⁴⁹ Tanzania, Vice President's Office (n 1221). p. x.

¹⁶⁵⁰ *ibid.* p. x.

¹⁶⁵¹ See para 5.5.10 and 5.5.11 below.

5.5.9.4 National Carbon Monitoring Centre (NCCM)

There is established the CMC hosted by the Sokoine University of Agriculture.¹⁶⁵² The CMC is established and entrusted to develop, monitor and create climate related data base.¹⁶⁵³ These data are very relevant to identify the extent to which Tanzania contributes towards carbon absorption and or carbon emission. The NCCM is also expected to prepare and disseminates report on the national levels of carbon absorption and emissions.¹⁶⁵⁴ In particular availability of such data is vital owing to the fact that, Tanzania needs to benefit from the international climate frameworks.¹⁶⁵⁵

5.5.9.5 Environmental Appeal Tribunal (EAT)

The EAT provides for the framework of handling environmental related disputes.¹⁶⁵⁶ EAT traces back to the then proposed Environmental Tribunal under the 1997 Environmental Policy but was not established to date.¹⁶⁵⁷ Among functions of the EAT is to hear and issue binding decision in environment issues.¹⁶⁵⁸ Indeed the Tribunal, seems to address challenges such as; limited scope and procedural technicalities among existing dispute settlement institutions in mining sector.¹⁶⁵⁹

However, for proper functioning of this proposed institution much reliance is placed firstly; on the availability of qualified human resources, the legal framework relevant to address climate issues, available funds and independency from the government

¹⁶⁵² VPO, 'State of the Environment Report 3' (n 106). para 12.6; VPO, 'National Climate Change Response Strategy 2021-2026' (2021) 2021-20. para 4.1.

¹⁶⁵³ VPO, 'State of the Environment Report 3' (n 106). para 12.6.

¹⁶⁵⁴ VPO, 'National Climate Change Response Strategy 2021-2026' (n 1652). para 4.1.

¹⁶⁵⁵ VPO, 'State of the Environment Report 3' (n 106). para 12.6.

¹⁶⁵⁶ VPO and NEMC (n 1448). para 5.2 (ix).

¹⁶⁵⁷ Para 5.2 (ix).

¹⁶⁵⁸ VPO and NEMC (n 1448). para 5.2 (ix).

¹⁶⁵⁹ See para 5.5.2 and 5.5.4 above.

and or other stakeholders in rendering its decisions. Secondly, concerns the political will of the government owing to its failure to establish the same organ since the year 1997. Political will is also vital in reversing the practice of mining projects overriding environmental and ecological safeguard.

5.5.10 Relevant National Sectoral-Funds

A number of sector specific funds have been established with the view to mobilise enough resources to finance projects relevant to MHCs rights to food and water.¹⁶⁶⁰ The most relevant funds to this study are related to water and forest.¹⁶⁶¹ Such funds are established to address financial, technical and human resource gap to guarantee MHCs clean water and food.¹⁶⁶²

It is shown for example that, the government budgetary allocation to forest sector is estimated to 1% of her total budget, while foreign donors contribute more than 50%.¹⁶⁶³ In particular, the National Water Fund (NWF) for example, its main source of funds apart from government budget and donors support, it generates fund from charges of about 50TSHS from every one litre of fuel sold.¹⁶⁶⁴ Despite this additional source to the NWF still it is noted to be inadequate and further inquiry on how to mobilise funds are called for.¹⁶⁶⁵

¹⁶⁶⁰United Republic of Tanzania, 'UN Environment: National Report for Conservation on Biological Diversity' (n 1291). para 8 (p.23).

¹⁶⁶¹ The Forest Act. s 79 (1); The Water Supply and Sanitation Act. s. 55.; The Beekeeping Act.

¹⁶⁶² United Republic of Tanzania, 'National Forest Policy' (1998). para 4.4.12.; URT Vice President's Office (n 1641). para 5; United Republic of Tanzania, 'Draft National Forest Policy' (n 1282). para 4.4.6; United Republic of Tanzania and Ministry of Agriculture Food Security and Cooperatives (n 1260). para 1.3.; The Water Supply and Sanitation Act. s 55 (3) (a).; Ombella, 'Promoting Water Infrastructure Investment to Accelerate Access to Water in Tanzania' (n 988). p. 174.

¹⁶⁶³ United Republic of Tanzania, 'Draft National Forest Policy' (n 1282). para 2.4.

¹⁶⁶⁴ URT Ministry of Water, Water sector status report, 2015-2020, para 5.2.1.

¹⁶⁶⁵ Ombella, 'Promoting Water Infrastructure Investment to Accelerate Access to Water in Tanzania' (n 988). p. 174.

In particular to grants and or donors, reference may be made to international framework which offers financial support to developing countries.¹⁶⁶⁶ Notably, three observations may be drawn here. Firstly, the use of financial resources in these funds are not gender sensitive to address the gender gap in mineral sector owing to women lack of skills.¹⁶⁶⁷ Secondly, such funds lack independency such that, they are influenced to invest in urban than in rural areas.¹⁶⁶⁸ Lastly, evidence suggest that, such funds are overly dependent upon foreign aid.¹⁶⁶⁹ Consequently, most projects initiated by donors suffer ability to sustainably exist at the end of donors support.¹⁶⁷⁰ Such findings cast shadow on the philosophy that there is an African home grown solution for African problems.¹⁶⁷¹

5.6 Sub-national Institutions

This section discusses sub-national institutions relevant to safeguarding MHCs rights to clean water and adequate food. The term sub-national institution refers to institutions at the grassroots levels such as; Village Council, Village Assembly and Water Users Associations (WUA).

5.6.1 Village Council

It is noted that land resources acquisition by the government and or private companies take place mostly, in rural areas.¹⁶⁷² As such land acquisition is informed by the discovery of minerals in such areas. Also, rural areas are preferred by MNCs

¹⁶⁶⁶ See para 3.2.1.2 and 3.2.2.2 above.

¹⁶⁶⁷ See para 3.2.2.1, 4.2.1.1 and 5.4.2.1 above.

¹⁶⁶⁸ Water and Sanitation Program, 'An AMCOW Country Status Overview: Water Supply and Sanitation in Tanzania Turning Finance into Services for 2015 and Beyond' (2011). p. 16.

¹⁶⁶⁹ United Republic of Tanzania, 'National Forest Policy' (n 1662), para 4.4.12.

¹⁶⁷⁰ *ibid.* para 4.4.12.

¹⁶⁷¹ See para 4.3.2 above.

¹⁶⁷² See para 1.8 above.

due to cheaply available land.¹⁶⁷³ It is noted that, there is a trend of investors such as mineral rights holders to be allocated a large track of land that they do not use all at once either due lack of capital or holding it for speculation.¹⁶⁷⁴ Perhaps this lies on the fact that Village Council does not have set criteria for evaluating potential investors ability to invest on their land.

In particular, village land is vital not only to support settlements but also food production and sources of clean air and water.¹⁶⁷⁵ However, the village land is subjected into challenges such as; demographic increase, keeping excessive large herd of cattle, allocating investors excessively large land which is rendered idle and land climate variation.¹⁶⁷⁶ Consequently, the need to balance such interests in order to guarantee MHCs access to adequate food and clean water in rural areas becomes paramount. The study therefore, focuses on rural areas in Tanzania which is governed by the Village Land Act 1999.

In particular, the organ responsible for management of village land in Tanzania is the Village Council. This organ is not established under the Village Land Act 1999 but the Local Government (District Authorities) Act.¹⁶⁷⁷ Its composition is made of elected and nominated representatives of various political parties from particular locality.¹⁶⁷⁸ As such, the Village Council is not the owner but a trustee of the village land.¹⁶⁷⁹ Notably, management of the village land involves also supervising village

¹⁶⁷³ See para 5.4.1.1 above

¹⁶⁷⁴ URT Ministry of Lands, Housing and Human Settlements Development (n 1250). para 1.2.6

¹⁶⁷⁵ URT Ministry of Lands, Housing and Human Settlements Development, 'Guideline for Participatory Village Land Use Planning, Administration and Management' (National Land Use Planning Commission, 2012).para 1.1.

¹⁶⁷⁶ URT Ministry of Lands, Housing and Human Settlements Development (n 1250). para 1.1.2,1.2.6, 1.2.7 1.2.29.

¹⁶⁷⁷ Local Government (District Authorities) Act. s 25.

¹⁶⁷⁸ *ibid.* s 56.

¹⁶⁷⁹ The Village Land Act. s 8 (1).

land use plan.¹⁶⁸⁰ It thus has the power to allocate land to potential applicants for settlement and or investment subject to approval by Village Assembly.

However, it is argued that factors such as; political influence, limited education of the members of the council and lack of awareness of villagers, grossly impacts land allocation decisions at the village level.¹⁶⁸¹ Consequently, it is not surprising that, village Council ends up allocating land to non-villagers for speculation purposes which shrinks village land for food and water conservations.¹⁶⁸²

5.6.2 Village Assembly

Village Assembly refers to an institution composed of all adults (men and women) members of a particular village.¹⁶⁸³ It is too an institution established not under the Village Land Act 1999 but the Local Government (District Authorities) Act 1982. The Village Assembly holds into account the Village Council on issues pertaining to village land.¹⁶⁸⁴ Consequently, the Village Council has to report to the Village Council all their proposed land plan and allocation for approval.¹⁶⁸⁵

With respect to women representation in this organ it seems to be challenging for a number of reasons. Firstly, the number of women residents in a particular village is not legal issue. Secondly, women socio-cultural obligations such as; food preparation, care giving to the young and ill, and fetching water, limits their attendance to such meetings.¹⁶⁸⁶ Thirdly, there seem not legal requirement of gender

¹⁶⁸⁰ URT Ministry of Lands, Housing and Human Settlements Development (n 1675). para 1.6.

¹⁶⁸¹ Massay (n 1481). pp.7-8.

¹⁶⁸² Ministry of Constitution and Legal Affairs (n 18). para 2.2.1.3.

¹⁶⁸³ URT Ministry of Lands, Housing and Human Settlements Development (n 1675). para 1.6.

¹⁶⁸⁴ The Village Land Act. s 8 (2).

¹⁶⁸⁵ *ibid.* s 8 (5-6).

¹⁶⁸⁶ See para 1.8 above.

balance in the final decision of the Village Assembly. It is argued that only the minutes of the meeting are regarded as valid. The law is silent on potential beneficial arrangements between the village and the intended investment.¹⁶⁸⁷ Perhaps, the proposal on perpetual benefits accruing from land acquisition for investment like mining, may bring blessing and not a curse to villages where such land are used.¹⁶⁸⁸

5.6.3 Basin Water Board (BWB)

Tanzania is reportedly to have numerous rivers and lakes which create interlocking water basins within and beyond her borders.¹⁶⁸⁹ In order to sustainably manage such resources BWB are established in respective basins.¹⁶⁹⁰ Among the functions of the BWBs are; approving the water resource use and management plans; collection and dissemination of water data, allocate water rights through issuance of and or cancelling water permits; monitor enforcement of the water laws, control of water pollution and coordination between other sectors on issues to do with water, among others.¹⁶⁹¹ Despite these noble duties tasked to the BWBs, challenges such as; inadequate human resources on hydrology issues, inadequate technology and ill repaired hydrological stations around the country seem to limit its efficiency.¹⁶⁹²

As such, malfunctioning hydrological stations signify inadequate and or unreliable data on water resources. Absence of water data in terms of quality for example,

¹⁶⁸⁷ Massay (n 1481). p. 7.

¹⁶⁸⁸ See para 5.7.1.7 above.

¹⁶⁸⁹ United Republic of Tanzania; Ministry of Water and Livestock Development (n 1427).p.49; Tanzania, Vice President's Office (n 1221). para 2.1.2.; United Republic of Tanzania, 'National Water Sector Development Strategy 2006-2015' (n 1504). para 3.10.1.

¹⁶⁹⁰ Water Resources Management Act. s 22(1).

¹⁶⁹¹ *ibid.* s 23.

¹⁶⁹² URT Ministry of Water and Irrigation, 'Water Sector Status Report' (2009). para 3.1 and 4.2-4.3.; United Republic of Tanzania and Ministry of Water, 'Water Sector Status Report 2015-2020' (2020).

grossly affect rural communities who mostly are dependent on both surface and underground waters.¹⁶⁹³ It is argued that water data are vital in influencing decision on construction of relevant water infrastructure and or designing adoptive measures.¹⁶⁹⁴ In addition, it is indicated above that, mining activities takes primacy over ecological and or environmental conservations, a fact which cast doubt on the efficiency of BWBs.¹⁶⁹⁵

5.6.4 Catchment Committee

The term catchment is defined to mean an area of land which is considered to be the source of surface and underground water such as a reserved forest.¹⁶⁹⁶ Catchment Committees, are established through GNs with a view to conserve such areas and guarantee sustainable supply of clean water to MHCs.¹⁶⁹⁷ Among the functions of Catchment Committee are; preparation of integrated water use and management plans, resolving water related conflicts in the catchment area and aid the BWB in controlling pollution emphasis added.¹⁶⁹⁸ However, it is indicated above that, the use of GN compared to local notices on the LGAs office and Village Assembly meeting seems not efficient way to inform the general public of the intention of the government.¹⁶⁹⁹

¹⁶⁹³ Water and Sanitation Program (n 1668). p.15.

¹⁶⁹⁴ Bureau of Meteorology, 'Good Practice Guidelines for Water Data Management Policy: World Water Data Initiative' (Melborne Australia, 2017). para 2.1; United Republic of Tanzania: Ministry of Water and Livestock Development (n 1427). para 4.5.

¹⁶⁹⁵ See para 5.6 above.

¹⁶⁹⁶ Water Resources Management Act. s 3.

¹⁶⁹⁷ *ibid.* s 29 (1).

¹⁶⁹⁸ *ibid.* s 29 (2)(a-c).

¹⁶⁹⁹ See para 5.4.1.4 and 5.4.1.5 above.

5.6.5 Water Users Association (WUAs)

The term WUA is used to refer an entity or organisation voluntarily created by a group of water users registered to operate in a given location.¹⁷⁰⁰ As such it may take the form of a company, trust and or a non-governmental organisation.¹⁷⁰¹ WUAs are intended to; facilitate management of the water resources, assure supply of water resources to its members, control of discharge of any effluents into water sources such as rivers, streams, forests and or lakes.¹⁷⁰²

In practice, WUA is entitled to own water infrastructure networks, install water taps, and set rules on fees chargeable to all who will receive water services from them.¹⁷⁰³

It is argued that, despite such mandate of the WUA in charging water fees from its members, few do actually collect fee, a fact that contributes to poor water infrastructure in most MHCs.¹⁷⁰⁴ Other challenges of WUAs are reportedly, inadequate knowledge on laws relating to water and budgetary constraint in establishing, managing them.¹⁷⁰⁵

In addition, although the law seems unclear, the WUA may also be inferred under the customary water rights. Consequently, MHCs may also claim water rights under their customary rules where such rights are recognised by the BWBs.¹⁷⁰⁶ In particular, recognition of customary water rights signifies safeguarding MHCs right to clean water with specific regard to indigenous communities discussed above.¹⁷⁰⁷

¹⁷⁰⁰ Water Resources Management Act. s 3.

¹⁷⁰¹ The Water Supply and Sanitation Act. s 32 (2).

¹⁷⁰² Water Resources Management Act. s 80 (1); The Water Supply and Sanitation Act. s 33 (1).

¹⁷⁰³ The Water Supply and Sanitation Act. s 33(1).

¹⁷⁰⁴ Kabogo and others (n 1526).

¹⁷⁰⁵ *ibid.*

¹⁷⁰⁶ Water Resources Management Act. s 52 (1).

¹⁷⁰⁷ See para 5.4.1.1 above.

5.7 Conclusion

This chapter was set to address research question number two in this study. It shows that, Tanzania has adopted both legal and institutional principles to safeguard MHCs rights to clean water and adequate food. However, the manner in which these principles are adopted seems to be unique as it does not fully guarantee MHCs of their rights to water and food. As such, the uniqueness is contributed by factors such as; geographical, hydrological, historical, political, cultural and socio-economic which influenced a patchy approach to domesticating international standards.

The immediate chapter below is set to answer research question three above. Its focus is to establish the extent to which Tanzanian legal framework is in harmony with the international standards. It shows converging and diverging trend in adoption of international standards. In the end the chapter answers research question two noted above.

CHAPTER SIX
STATE OF COMPLIANCE OF TANZANIAN LAWS WITH
INTERNATIONAL LEGAL AND INSTITUTIONAL FRAMEWORKS

6.1 Introduction

The immediate chapter above presents the Tanzania's legal and institutional frameworks relevant to safeguard MHCs rights to water and adequate food. It shows a patchy approach in domestication of international and regional principles in Tanzania's frameworks. The current chapter is an attempt to provide answers to research question three set above.¹⁷⁰⁸ It does so through drawing inferences from both descriptive and critical analysis of key principles in the above chapters. In particular, Tanzania as one among UN and AU member states, is expected to adopt laws and institutions relevant to safeguard MHCs from potential and actual mining impacts on rights to water and food.

This chapter puts forward the argument that, Tanzania has adopted both international and regional legal principles and institutions to guarantee firstly, progressive realisation of MHCs right to clean water and food towards fulfilling its international obligation.¹⁷⁰⁹ However, historical, geographical, hydrological, socio-economic, cultural, demographic, political and ethical factors seem to dictate the manner in which such principles are domesticated and implemented in Tanzania.

¹⁷⁰⁸ See para 1.4 above.

¹⁷⁰⁹ See para 3.2, 4.1 and 5.4 above.

6.2 Compliance of the Tanzanian Legal Framework on Safeguarding MHCs

Rights to Clean Water and Adequate Food

It is shown above that, for international principles to be enforced in Tanzania, they need to be ratified.¹⁷¹⁰ Ratification in Tanzania is the duty entrusted to the Parliament.¹⁷¹¹ In essence, ratification of international principles by Tanzania will not only offer MHCs chance to safeguard their right to water but also guarantee harmonisation of legal frameworks in the AU region.¹⁷¹² Harmonisation is shown to be instrumental to guarantee safeguarding MHCs right to clean water and adequate food.¹⁷¹³ It is also relevant in legitimatising extraction and trading of minerals such as rough diamonds. Legitimate trade in rough diamonds is vital not only in abetting their contribution to human rights violation, maximisation of revenue to the government and MHCs but also attaining socio-environmental safeguard.¹⁷¹⁴ Maximisation of revenue from resources extraction and environmental safeguards have a great bearing on the MHCs realisation of the right to clean water and adequate food.

In particular, MHCs rights to water and food are dependent on existence of relevant infrastructure, capital, advanced science and technology, quality human resources and incentivised legal and policy frameworks to attract private investment among others. Consequently, mineral resources revenue will thus guarantee attainment of such rights.¹⁷¹⁵ Ability of states to control, and proportionately share mineral

¹⁷¹⁰ See para 5.3 and 5.5.1 above.

¹⁷¹¹ See para 5.3 above.

¹⁷¹² See para 2.2.5 above.

¹⁷¹³ See para 2.2.5 above.

¹⁷¹⁴ See para 3.2.1.8; 4.2.1.8 and 5.4.1.8 above.

¹⁷¹⁵ See para 1.8 above.

resources revenue is vital in reversing the resource curse as theorised above, in some countries affected by illicit mineral resources extraction.¹⁷¹⁶

In order to be able to get relevant findings and draw a logical conclusion, the study focused on the LVZ to represent MHCs.¹⁷¹⁷ This part argues that there are efforts in Tanzania to harmonise her legal framework to international and regional set principles. Such efforts may be relied to guarantee MHCs rights to clean water and adequate food. However, Tanzania's efforts are not free from some limitations as discussed below.

6.2.1 Tanzania's Compliance with the Legal Framework to Safeguard MHCs Right to Food

The right to adequate food has international and regional recognition.¹⁷¹⁸ In addition there are states practices among few African states where the right to food has constitutional protection.¹⁷¹⁹ Key elements are provided in defining this right inclusive for example; availability, safety and quality.¹⁷²⁰ The right to food entails its sustainable accessibility, of required quality such as; it has to be nutritious and meet peoples' culture. Unlike the right to water, the right to food does not place emphasis on minimum volume but its safety, nutritional levels and the relevant cost to procure such food.

¹⁷¹⁶ See para 2.3.1 above.

¹⁷¹⁷ See para 5.2.2 above.

¹⁷¹⁸ See para 3.2.1, 4.2.1 and 5.4.1 above.

¹⁷¹⁹ See annex I to this thesis.

¹⁷²⁰ See para 3.2.1, 4.2.1 and 5.4.1 above.

The study at hand focuses mainly on the ability of the MHCs to sustainably produce their own sufficient and nutritious food which is free from harmful elements.¹⁷²¹ Notably, factors such as; demographic increase, cultural, socio-economic, political and geographical are noted to influence the right to food.¹⁷²² The discussion in this part puts forward the argument that, the legal framework that reflects the international and regional principles is vital to safeguard MHCs right to adequate food.

6.2.1.1 Permanent Sovereignty over Natural Resources

PSNR principle is one among the fundamental principle relevant to natural resources that is domesticated in the Tanzania. Through this principle the common law doctrine of public trust is also reflected in the Tanzanian natural resources laws. Consequently, a number of laws are enacted with respect to regulating natural resources relevant to food security in Tanzania. Among them are those related to; land tenure security, land acquisition, mining laws, compensation and penalties to those who are involved in illicit natural resources extraction.¹⁷²³ Access to land has a bearing to guaranteeing MHCS right to adequate food since land is prime in cultivation of food crops, animal hasbary, fruits gathering and or hunting.¹⁷²⁴

In addition, in a bid to avoid the resource curse noted above, Tanzanian legal framework requires all natural resources such as minerals to be value added in Tanzania before they are to be exported. Such a requirement diminishes the

¹⁷²¹ See para 3.2.1 above.

¹⁷²² See para 3.2.1.1, 4.2.1.1 and 5. 4.1.1 above.

¹⁷²³ See para 5.4.1.1 above.

¹⁷²⁴ See para 5.6.1 above.

potentials of Tanzania trading in raw minerals such as rough diamonds. Ability to achieve this position of the law will not only guarantee domestic value addition but also government revenue and maximisation of employment and technological transfer to its people.

However, the domestication of the PSNR principle is not without criticisms. Firstly, it is shown above that, laws in Tanzania are not expressly providing for the right to adequate food. Such laws also, guarantee equality in land ownership but seems silent on equality on access to such resource. Women for example are shown to be inadequately represented in land ownership in Tanzania. Since land is relevant to food security, equal access to land is vital in guaranteeing eradication of hunger in Tanzania and Africa in general.¹⁷²⁵

Secondly, inadequate security of tenure in rural land resources is noted through compulsory land acquisition followed with inadequate compensation. It is shown that, MHCs are not involved in decision making, such as; allocating mineral rights and evaluation of land or extent of compensation. Consequently, eviction and or resettlement among MHCs are common in Tanzania.¹⁷²⁶ It is also noted that the valuation of land basing on exhausted improvements grossly impact indigenous communities who are nomadic pastoralists and fruits gathers. As such they depend on natural environment not necessarily adding value to it apart from protecting it against human induced harms.¹⁷²⁷ Such concerns stems from non-recognition of the

¹⁷²⁵ See para 5.4.1.1 above.

¹⁷²⁶ See para 1.8.

¹⁷²⁷ See para 5.4.1.1 above.

internal self-determination which is sub-principle in the PSNR.

Thirdly, it is noted above that the area of penalties is not stable owing to numerous amendments. Currently, the binding legal framework seems to provide a bit lenient penalties to those who will contravene trade in minerals. However, the non-binding legal framework calls for a more stringent rule on penalties to deter illicit dealing with mineral resources. Deterrent penalties seems to be a tool to minimise illicit transaction on mineral extraction and trading hence increases revenue that can finance the above noted infrastructure gap.¹⁷²⁸

6.2.1.2 Common but Differentiated Responsibilities

The CDR principle is noted above calling for joint efforts to curb loss of biodiversity and impacts climate variation at the global level. Tanzania has responded through signing a number of international conventions and frameworks which contains the CDR principle.¹⁷²⁹ It is noted above that Tanzania stands to benefit from global biodiversity and climate change legal frameworks through adoption of relevant strategies, laws and institutions. Administratively, Tanzania is shown to have adopted some guidelines and strategies relevant to curb climate change impacts. These administrative efforts are not enforceable but they predict the unfolding legal frameworks on the same. Generally, efforts are undertaken to review some of policies on various sectors such as forest, fisheries and land to address among other issues climate variation.¹⁷³⁰

¹⁷²⁸ See para 5.4.1.1 above.

¹⁷²⁹ See para 5.4.2.2 above.

¹⁷³⁰ See para 5.4.1.2 above.

Notably however, it is indicated above that, Tanzanian policies and laws seem silence on climate variation issues. Unlike Kenya and South Africa, Tanzania seems to have no comprehensive policy and or law that addresses climate change issues. Consequently, climate variation issues are given less weight when considered as general environmental issues. Absence of clear policy and legal framework on climate variation limits Tanzania's potential to benefit from international climate change related frameworks.¹⁷³¹

6.2.1.3 No Harm

Tanzania recognises the need to avoid harm on land and water that may be irreversible and hence impacts food security to MHCs among others. It thus domesticated precautionary principles such as the need to carry out EIA prior to all large-scale development projects such as mining. Laws on safeguarding biodiversity such as forestry, bees, and fisheries prohibit discharging pollutants to the environment.¹⁷³² Avoidance of harm on biodiversity is very relevant to guaranteeing MHCs adequate food.

Despite laws and policies on avoidance of harm the practices seem to be challenging. Among such challenges are; increased illegal encroachment of reserved areas, increased rate of deforestation due to mining, bush fire and discharge of effluents into environment from among others mining activities.¹⁷³³ Such a challenge threatens continued existence of biodiversity which in turn exacerbate MHCs' food insecurity.

¹⁷³¹ See para 5.4.1.2 above.

¹⁷³² See para 5.4.1.3 above.

¹⁷³³ See para 5.6.2.3 above.

Also, the Tanzania legal framework seems silent on other assessment such as human rights impacts assessment apart from the EIA. Since food security is a human right aspect, conducting HRIA will set the base upon which such right may be respected, promoted and or protected as proposed under the AU regional level.¹⁷³⁴

6.2.4.4 Equitable and Reasonable Use

The principle of reasonable and equitable utilisation of natural resources is well enshrined under the Tanzanian legal frameworks. It is reflected under a number of laws and policies such as those regulating forest, land, fisheries, bees and minerals to name but a few.¹⁷³⁵ On a special note the non-binding legal framework recognises the principle of reasonable utilisation of natural resources as a tool to balance interest between resources utilisation, environmental and ecological conservation.¹⁷³⁶ Tanzania is hailed as an example in conserving nature and natural resources which are vital for food production.

In addition, it is shown above that, integrated land use plan in rural areas is prerequisite to guaranteeing sustainable use of such land. Land use plan, will identify areas for settlement, conservation, and large-scale projects like mining. Proper land resources use plan is also instrumental to pre-empt disputes among stakeholders. However, only few villages have been able to strategically plan their land use. Majority of villages seem to have failed to implement this obligation.¹⁷³⁷

¹⁷³⁴ See para 4.2.2.3 above.

¹⁷³⁵ See para 5.4.1.4 above.

¹⁷³⁶ See para 5.6.2.4 above.

¹⁷³⁷ See para 4.2.1.4 and 5.4.1.4 above.

Inadequate and or absence of land use plan, pose the following challenges; firstly, it resonates to land degradation and pollution from anthropogenic activities such as mining. Secondly, MNCs are allocated large chunk of land which is not used at once resulting to diminishing land which is vital to agricultural use by MHCs. Thirdly, absence of land use plan denies MHCs to conduct food production activities simultaneously with mining activities, especially where mining takes the form of underground than open pit approach.¹⁷³⁸

Notably, there is a move towards industrialisation, hence, the legal framework calls for incentivised laws and policies to allure environmental friendly technological investment in Tanzania. Such technologies may be targeted to reform; food production, processing, distribution and or storage.¹⁷³⁹ It is also worth to note that in a bid to reflect the regional obligation of guaranteeing agrarian reforms, Tanzania has committed to set 10% of her annual budget to finance agriculture sector.¹⁷⁴⁰

As noted above, a number of factors grossly impacts the conserved lands and forests in Tanzania. Among such factors are; forest fire, increased rate of deforestation due to human settlement and mining activities and land pollution due to mining activities. Others are; illegal extraction of natural resources such as cutting trees for charcoal. Also, food sector related laws and policies seem silent on incentives towards alluring technological investment in Tanzania.¹⁷⁴¹

¹⁷³⁸ See para 4.2.1.4 and 5.4.1.4 above.

¹⁷³⁹ See para 5.6.2.4 above.

¹⁷⁴⁰ See para 5.6.2.1 above.

¹⁷⁴¹ See para 5.4.1.4 above.

In addition, poor agricultural infrastructure to support food production and security seems common in Tanzania. Inadequate budget is noted as a challenge that Tanzania has to find a solution on. Despite her commitment to provide 10% of her budget to agriculture, it is shown that only 3.7 % is provided which even less than half of the target. Consequently, food production, processing distribution, marketing and storage is weakened in Tanzania hence contribute towards food insecurity in some areas.¹⁷⁴²

6.2.1.5 Notification

As noted from international framework notification is a key principle to safeguard MHCs access to adequate food against the potential harms of proposed development plans.¹⁷⁴³ Such a principle is also domesticated in Tanzania with respect to food security related laws such as; land, forests and beekeeping. It is also noted as a vital tool to guarantee good neighbourhood both among states and communities within a state.¹⁷⁴⁴ For example it is shown that notification is a gate way to consultation and negotiation between stakeholders such as; states, mining companies and MHCs to name but a few.¹⁷⁴⁵

Irrespective of its recognition in food related laws, notification is not provided for under the Mining Act 2018. Perhaps such anomaly is founded on the compulsory land acquisition for mining activities noted above. Also, even in areas where notification is called for, limited finance seems to contribute to inability to translate

¹⁷⁴² See para 5.6.2.1 above.

¹⁷⁴³ See para 3.2.2.5 above.

¹⁷⁴⁴ See para 5.4.1.5 above.

¹⁷⁴⁵ See para 3.4.1.5 above.

the climate related documents into Swahili for majority to understand climate variation issues.¹⁷⁴⁶ Moreover, the law providing for notification does not offer a room to object the proposed investment in the notice as it is silent on time frame and directives towards relevant offices for MHCs to submit their concerns if any. It is also noted that, when notification is done in the meeting say for example Village Assembly, women may not be well informed due to inadequate attendance to such a forum owing to a burdensome socio-cultural obligations upon them.¹⁷⁴⁷

6.2.1.6 Consultation and Negotiation

Tanzania has domesticated the principle of consultation and negotiation based on sector specific laws. With respect to mining consultation and negotiation seem generally provided. It is considered to be general since, the call for consultation and negotiation covers all natural resources contracts. The Parliament is granted powers to order the government to renegotiate terms of any natural resources which seem to jeopardise the sovereignty and or does not benefit Tanzanians. Despite such a law being in force for almost five years only one contract is reportedly to be renegotiated. Also, consultation and negotiation seems to be focused between the state and the MNCs, ignoring MHCs involvement.¹⁷⁴⁸

However, in other sectors such as forest consultation and negotiation it is well recognised both as a tool to widen the scope of understanding and joint efforts to conserve natural resources such as forests and land. Also it is a tool that may

¹⁷⁴⁶ See para 5.4.1.5 above.

¹⁷⁴⁷ See para 5.6.5 above.

¹⁷⁴⁸ See para 5.4.1.6 above.

promote forest dependent communities' interests against other competing interest like mining or logging.¹⁷⁴⁹ Despite such recognition, since the law recognise the compulsory acquisition of land for mining, then the provisions under the land and forest offer little if no safeguard at all.

Among stakeholders, consultation and negotiation is also a tool to settle disputes if any. Under the non-binding legal framework; indigenous peoples, farmers, livestock keepers and fishermen are guaranteed their rights to natural resources relevant to food security. Unlike their position in the binding framework, their consultation seems to be inevitable.¹⁷⁵⁰ Given that Tanzania shares natural resources such as forests and waters with other states, consultation and negotiation of joint cooperation is a tool to guarantee sustainable use of such resources. In addition, non-recognition of indigenous peoples in Tanzanian binding legal framework shrinks their protection through consultation and negotiation in case of mining activities.¹⁷⁵¹

6.2.1.7 Stakeholders' Participation

Stakeholders' participation is one among the key principle which is also domesticated in Tanzanian legal and policy frameworks. Firstly, as a principle, it grants stakeholders the right to be part of decisions. Various food-related sector laws provide for the need of various stakeholders to be part of the decision that may affect their interest. Among such stakeholders are MHCs, women, youths, private companies, central and local government to name but a few.¹⁷⁵²

¹⁷⁴⁹ See para 5.4.1.6 above.

¹⁷⁵⁰ See para 5.4.1.6 above.

¹⁷⁵¹ See para 5.4.1.6 above.

¹⁷⁵² See para 5.4.1.7 above.

Secondly, stakeholders' participation requires the beneficial arrangement between the involved parties in decision making. Laws in Tanzania provide for such beneficial arrangements with respect to mining for example through; central government royalties, local government levies MHCs benefits through CSRs and through subscription of shares when they are issued by MNCs in stock markets.¹⁷⁵³ Currently, there is a proposal to compel all mineral rights holders to grant the Central Government free and undiluted participatory right.¹⁷⁵⁴ Unlike the position at international level and states best-practices showing that MHCs are also involved in mineral related benefits sharing, Tanzania's approach seems to focus on Central Government interests.¹⁷⁵⁵

Arguably, despite such legal framework, some stakeholders, such as women are inadequately represented in decision making in the mineral sector in Tanzania. It is shown that women are double impacted when they are not part of the decision making in mining sector. Their participation may not be more emphasised.¹⁷⁵⁶ Also MHCs are reportedly not involved in assessment of the compensation to be awarded in case their land is compulsorily taken.¹⁷⁵⁷

In addition, the existing legal framework on benefit sharing seems to have ignored the MHCs as it relies on existing Local Government political pre-established institutions and not the MHCs in particular their established trusts.¹⁷⁵⁸ The

¹⁷⁵³ See para 5.4.1.7 above.

¹⁷⁵⁴ See para 5.6.2.7 above.

¹⁷⁵⁵ See para 3.2.1.7 above.

¹⁷⁵⁶ See para 3.2.1.7 and 5.4.1.7 above.

¹⁷⁵⁷ See para 1.8 and 5.4.1.7 above.

¹⁷⁵⁸ See para 5.4.1.7 above.

discussion at international level and states best-practices show for example that, indigenous communities' benefits directly not through government established institutions.¹⁷⁵⁹

In particular, to the proposed amendments on government participation in all mineral rights to be granted to MNCs, it is challenging that; apart from being silence on the percentage of the government participatory rights the proposal seems to have ignored other beneficiaries such as; MHCs and women.¹⁷⁶⁰ Guaranteeing MHCs participation in benefit sharing is relevant to broad-based empowerment that will help the Tanzanian to defeat the resource curse noted above.¹⁷⁶¹

It is also noted above, that Tanzania among other few African countries are withdrawing from the direct access to the ACrtHPRs by individuals and and or NGOs.¹⁷⁶² Limiting acces to this institution signals dwindling of avenues where MHCs may access remedies in case of violation of their rights in Tanzania. As such stakeholders participation is shown above to entail access to remedy wherever MHCs rights are violated.¹⁷⁶³

6.2.1.8 International Cooperation

The duty to guarantee global peace and human rights observance is noted above to be shared by all UN member states. It is even pertinent to reiterate such a duty

¹⁷⁵⁹ See para 3.2.1.7 above.

¹⁷⁶⁰ See para 5.4.1.7 above.

¹⁷⁶¹ See para 3.4.2.7 above.

¹⁷⁶² See para 4.3.6 above

¹⁷⁶³ See para 4.2.1.7 above

especially in areas where resources extraction fuel human rights (including the right to clean water and adequate food) violation. Consequently, global community has to adopt legal and policy initiatives to halt the link between mineral resources extraction and human rights violation. The discussion above shows that, two major initiatives namely; the KPCs and EITI have been deployed at international level to guarantee good governance in resources extraction, processing and trading.¹⁷⁶⁴

With respect to KPCS, it is shown above to have emanated from voluntary arrangements among states and other stakeholder in rough diamond industry. Owing to the primary goal of the UN fostering human rights observance and promotion of peace, the UNSC adopted resolution compelling all rough diamond exporting and or importing states to adopt the KPCS. UN values the KPCS as a tool to halt the contribution of trade in rough diamonds to human rights violation in areas they are mined. It is noted above that, even though it started as a voluntary scheme, with the UNSC resolution it become binding to all UN members.¹⁷⁶⁵

In particular the KPCS seems to have yielded positive results in a number of African countries such as; Sierra Leon, Angola, and Liberia where rebels were delinked from accessing international market for rough diamonds.¹⁷⁶⁶ Delinking rebels and belligerents access to international rough diamond markets does not only weaken the rebels access to capital to buy weapon but also increases government revenue from legitimate trade in rough diamonds. Since most resources-rich developing countries

¹⁷⁶⁴ See para 3.2.1.8 and 4.2.1.8 above.

¹⁷⁶⁵ See para 3.2.1.8 above.

¹⁷⁶⁶ See para 3.2.1.8 and 4.2.1.8 above.

are faced with challenges such as; budgetary issues, science and technology and poor infrastructure to revolutionise agriculture, then increased revenue to the state resonates to guarantee to right to food among others.

Despite such a valuable contribution of the KPCS in regulating international trade in rough diamonds, some limitations are never missing. Firstly, the KPCS seems to put much emphasis on large-scale mining. Hence, the rough diamond produced from the small-scale mining activities falls out of the scope of the KPCS. Secondly, the definition adopted regarding as to what amount to rough diamond and or conflict minerals in this case seems to be too narrow. KPCS for example does not cover human rights violation which may be instigated by the states and or private securities companies hired by MNCs.

It is above noted that, despite the government involvement in human rights abuse in Marange diamond mining in Zimbabwe, still the consignment ultimately was given approval to access international markets.¹⁷⁶⁷ Similar concerns are also raised in Tanzania where by Private Security Company is allegedly to have killed and tortured villagers who are allegedly trespassed in to the Petra Diamond mining sites.¹⁷⁶⁸ It would appear that, KPCS gains support from states as one of its major stakeholders. Hence, adopting a broad definition to include state lead human rights violation will scare states to join such an initiative hence losing its validity. Such an approach is identified above to contravene international principle which regards human rights as being interdependent and indivisible.

¹⁷⁶⁷ See para 3.2.1.8 above.

¹⁷⁶⁸ See para 5.4.1.8 above.

Thirdly, the KPCS is less concerned about how the government utilises the revenue collected from the legitimate trade in rough diamonds. As such, it is not that direct to MHCs access to adequate food. Moreover, it is reportedly that, unethical state officials in collaboration with MHCs in rough-diamond industry collude to under report the actual value of diamonds so certified.¹⁷⁶⁹ Lastly, the KPSC initiative seems less concerned with environmental issues where mining activities are taking place. Consequently, environmental degradation, clearing forests for mining to take place seems to be beyond the purview of the KPCS. The right to food may hardly be discerned from environmental and biodiversity conservation.

With respect to EIT initiative, it is above shown that transparency and accountability in mineral sector is relevant to guarantee good governance.¹⁷⁷⁰ Both states and mining companies are called to be transparent by; publishing mining contracts, licenses, beneficial ownership, laws and regulation among others. Equally MNCs are required to publish all monies paid to the government, environmental plans and gender issues as well. It is shown that, transparency in the mining sector contribute to increase in revenue and other benefits from the sector as it inhibits potential corruption practices.¹⁷⁷¹

Unlike the KPCS which seems to be a bit rigid in widening its scope the EITI is shown to progress from mere revenue and contracts disclosure, to environmental plans and gender issues.¹⁷⁷² Since mining is reportedly to contribute towards

¹⁷⁶⁹ See para 5.4.1.6 above.

^{1770/1770} See para 3.2.1.8 and 4.2.1.8 above.

¹⁷⁷¹ See para 2.2.6, 2.2.7, 3.2.1.8 and 34.2.1.8 above.

¹⁷⁷² See para 3.2.1.8 and 5.4.1.8 above.

environmental degradation which ultimately affects food production the EITI initiative gain more validity to safeguard MHCs right to food.¹⁷⁷³ In addition, it is worth noting here that, adoption of both KPCS and EITI may not only reinforce human rights observance and good natural resources governance but also guarantee socio-economic empowerment of MHCs.

However, despite Tanzania's adoption of the EITI it is shown above that not all mining companies are participants into the reporting framework. It is noted above that poor records of mining companies involved in mining sector contribute to this challenge. As such, some of mining companies had either ceased to operate and or transfer their business but still were expected to report.¹⁷⁷⁴ Also, unethical state officials collude with MNCs to underreport the actual value of minerals to be exported.¹⁷⁷⁵ Other noted concern is based on the newly standards on gender adopted by EITI in the year 2019 which are not provided for in the TEITA 2015.¹⁷⁷⁶ Such concerns seem to cast doubt on the efficiency of the EITI initiatives at the national level.

Moreover, the EITI initiative bank on stakeholders' participation inclusive in holding the government into account based on the published revenue, and or contracts and or environmental plans. However, it is noted above that, the government seems to weaken opposition political parties and diminish freedom of speech by banning some newspapers which are vital in informing the public and ultimately to hold the

¹⁷⁷³ See para 1.8 above.

¹⁷⁷⁴ See para 5.4.1.8 above.

¹⁷⁷⁵ See para 5.4.1.6 above.

¹⁷⁷⁶ See para 5.4.1.8 above.

government into account.¹⁷⁷⁷ Consequently, the direct impacts of the transparency in revenue and or contracts may not yield the expected results unless freedom of speech, freedom of assembly are guaranteed in practice.

Generally, the Tanzanian legal framework for safeguarding MHCs right to adequate food seems to reflect elements of international, regional standards and states best-practices. Principles such as PSNR, CDR, avoidance of harm, reasonable and equitable use to name but a few are ratified in domestic laws. Consequently, such principles may be relied by MHCs to defend their rights to adequate food. Notably, Tanzania's approach of domestication of these principles seems to be partial. This is evidenced by the recognition of such principles firstly, in some sectors such as; forestry and land but not with respect to mining sector.

In addition, issues of enforcement, for example of; the right to food, environmental standards and holding mining companies accountable remains a challenge. Less deterrent penalties and adoption of a legal framework that does not recognise indigenous communities poses a threat to MHCs when mining activities are to take place. A promise though, seems to be reflected under non-binding legal framework which seems to encompass to a large extent reliable principles to safeguard MHCs access to adequate food.

6.2.2 Tanzania's Compliance with Legal Framework to Safeguard MHCs Right to Clean Water

The right to clean water is shown above to be relevant in supporting human life.¹⁷⁷⁸

¹⁷⁷⁷ See para 5.4.1.8 above.

¹⁷⁷⁸ See para 1.1 above

Although the right to water entails its availability, accessibility, quantity and quality, the focus in the research lies on water quality. It is therefore, necessary that everyone to access clean water irrespective of where he/she lives. As such water has to be free from harmful elements such as; chemicals and or heavy metals and other effluents from mining activities.

Owing to variation of peoples' socio-cultural back ground, social and cultural values are also attached to water services as ones' culture shapes his life as well.¹⁷⁷⁹ Example, culturally, water is regarded as sacred and used for initiation ceremonies.¹⁷⁸⁰ In particular, this part intends to argue that, the legal framework that meets the international and regional standards is instrumental in safeguarding MHCs right to clean water in Tanzania.

6.2.2.1 Permanent Sovereignty over Natural Resources

Principally, the PSNR principle is shown at the international, and regional levels to be people centred.¹⁷⁸¹ Consequently, laws and regulations relevant to resource extraction have to take into account peoples' rights and safeguard them against resource extracting companies. Among such rights is the right to clean water. In particular, international and regional frameworks recognise the primacy of water for domestic uses over other competing water uses.¹⁷⁸² It is worth to note that, Tanzania have adopted the same principle under her laws with very clear indication that natural resources and wealthy are owned by the people and should benefit them

¹⁷⁷⁹ See para 3.2.1 and 4.2.2 above.

¹⁷⁸⁰ See para 5.4.1 above.

¹⁷⁸¹ See para 3.2.1.1, 4.2.2.1, and 5.4.1.1 above.

¹⁷⁸² See para 5.4.1.1 above.

accordingly. Despite such recognition the government is entrusted to deal with natural resources for and on behalf of peoples of Tanzania.

However, the legal framework safeguarding MHCs right to clean water is still weak. With respect to PSNR for example, while the water sector laws seem to recognise some elements of internal self-determination through recognising customary rights of ownership and management of water resources, the mineral sector does not. Other noted limitations are; absence of express legal recognition of the right to clean water, unclear legal provision on the right to clean water to vulnerable groups, non-recognition of the existence and protection of indigenous peoples, absence of clear provision guaranteeing women access to and ownership water resources.¹⁷⁸³

In addition, the legal framework suffers from; non-enforcement of the laws against polluters such as mining companies and adoption of non-deterrent penalties.¹⁷⁸⁴

Also, some of the adopted measures such as CSRs seems ambiguous with respect to cancelation of mineral rights in case mining companies failed and or do not implement the agreed CSR plan.¹⁷⁸⁵ However, the non-binding legal framework seems to offer a broader safeguard of MHCs access to clean water in the above named aspects.¹⁷⁸⁶ Since the non-binding frameworks remains unenforceable, it only offers persuasive legal position towards safeguarding MHCs access to clean water.

¹⁷⁸³ See para 5.4.1.1 above.

¹⁷⁸⁴ See para 5.4.1.1 above.

¹⁷⁸⁵ See para 5.4.1.7 above.

¹⁷⁸⁶ See para 5.6.1.1 above.

6.2.2.2 Common but Differentiated Responsibilities

Relatively, when compared with other principles discussed above, CDR is a new principle at international level. Although it is traceable back to 1974, it was mostly related to trade issues than biodiversity and or climate aspects as reflected on 1992 international initiatives. In Tanzania legal framework seems to be weak owing to absence of relevant policy, legal framework and its inadequate integration in other sectors like mineral. For example, while it is recognised under the water and forest related laws it is hardly reflected in the Mining Act. In addition, the CDR principle seems to be regulated at the national level through Central Government not at the grass root level where MHCs faces the challenge on water quality.¹⁷⁸⁷

Although CDR principle offers a room to finance climate mitigation and adaptation related projects such as; re-forestation and water infrastructure, most rural communities are still dependent on unsafe waters from lakes, rivers and bore holes which are polluted by mining activities among others. It has been observed that African countries (Tanzania inclusive) suffer from; inadequate technologies, finances and human resources relevant to influence the water sector. However, Tanzania's weak legal framework inhibits her from tapping benefits from international climate variation frameworks.¹⁷⁸⁸ It is noted that Kenya and South Africa are exception as they have comprehensive laws on climate aspects.¹⁷⁸⁹

6.2.3.3 No Harm Rule

Tanzanian legal framework recognises the rule against harm on water resources.

¹⁷⁸⁷ See para 5.4.2.2 above.

¹⁷⁸⁸ See para 3.2.2.2; 4.2.2.2. above.

¹⁷⁸⁹ See para 4.2.2.2 and 4.2.2.3 above.

Firstly, it provides for no go zone as a means to preserve water sources. Secondly, it sets EIA as a mandatory requirement before any large-scale development projects such as mining. Thirdly, it prohibits cutting trees and or causing fire in water and forest reserve areas. Such standards are set at international and sub-regional levels as precautionary rule to safeguard sustainable use of natural resources.¹⁷⁹⁰

Notably, other internationally recognised assessments such as Human Rights Impact Assessment (HRIA) are not provided for in the Tanzanian legal framework.¹⁷⁹¹ Also, there is a very sharp legal contradiction on the distance to be kept from water sources. While the environmental law requires 60 metres mining law requires 200 metres. Consequently, presence of such legal contradictions, inadequate enforcement of laws and absence of deterrent penalties contribute to water stress to MHCs.¹⁷⁹² It is unprecedented that, there is a proposal that through special agreement approved by the Cabinet, human activities inclusive mining for example may take place within the prohibited areas. Such a proposal poses a serious threat that may subject MHCs' right to clean water in jeopardy.¹⁷⁹³

In addition, water laws seem to have allowed mining companies to self-regulate with respect to encountered underground waters. MNCs involved in mining activities therefore are expected to report to the BWBs the data on encountered underground waters. Such an approach weakens ability of the BWBs and Catchment Committee to enforce water laws since they depend on underground-water data from mining

¹⁷⁹⁰ See para 3.2.2.3 above.

¹⁷⁹¹ See para 4.4.1.3 above.

¹⁷⁹² See para 5.4.1.3 above.

¹⁷⁹³ See para 5.6.1.3 above.

companies who are prime polluters of such waters.¹⁷⁹⁴ As such it inhibits progressive realisation of right to water to about 30 % of rural communities in Tanzania.¹⁷⁹⁵

Allowing MNCs self-regulation on water data seems a paradox. It is noted above that, to make MNCs accountable on minerals mined, MROs are allocated in every large-scale mining sites to monitor daily mined and sorted minerals.¹⁷⁹⁶ As such the government does not allow MNCs to self-regulate on this aspect. Also, the MRO are less concerned with environmental issues say for him/her to report on water data. Such lacunae signal government prioritisation of mining activities and their revenue therefrom at the expense of MNCs right to water.

6.2.2.4 Reasonable and Equitable Utilisation (REU)

Tanzania has domesticated the REU principle in her water related laws as discussed above. In particular, water resources are not to be used and or allocated basing on specific volumes but subject to criteria that are set in a particular place and time.¹⁷⁹⁷

With the REU water for domestic utilisation is given primacy in Tanzania.¹⁷⁹⁸ Presumably, this is the only legal principle that seems to signal justiciability of the right to water in Tanzania.

Despite such recognition arriving at a practical balance between competing needs of water seems a challenge in Tanzania. As it is other African countries, human activities seem to take primacy over hydrological, ecological and biodiversity

¹⁷⁹⁴ See para 5.4.2.3 above.

¹⁷⁹⁵ See para 5.4.2.1 above.

¹⁷⁹⁶ See para 5.4.1.8 above.

¹⁷⁹⁷ See para 5.4.2.4 above.

¹⁷⁹⁸ See para 5.4.2.4 and 5.4.2.4 above.

preservation leave alone the right to clean water. The main reasons are; prevalence of socio-economic underprivileged situation, poor planning and inadequate coordination of the sectoral development plans.¹⁷⁹⁹ It is shown above that there are two separate institutions dealing with water and mineral rights allocations.¹⁸⁰⁰ In absence of coordination, water rights are impacted by mining activities. Ultimately, since water sources are dependent on continued well preserved biodiversity, MHCs right to clean water shrinks with the pace with which unregulated anthropogenic activities such as mining are carried out.

In addition, geographical and historical aspects relevant to Tanzania, sets difficulties to realise reasonable and equitable utilisation of Lake Victoria and or River Nile water resources among riparian countries. While some of the riparian states (Egypt, and Sudan) rely on the colonial set principles on how to share the Lake Victoria Basin, River Nile waters, some other countries call for negotiation on how best to regulate them under post-colonial established frameworks.¹⁸⁰¹

Owing to these differences among riparian states, negotiation for common principles and or establishment of joint commission seem to take long to materialise.¹⁸⁰² Also existence of multiple frameworks under River Nile, and Lake Victoria may cause not only interpretation but also coordination challenges at the African sub-regional level. Poor coordination on the sustainable management of shared water resources may hardly guarantee water from pollution from human activities such as mining.

¹⁷⁹⁹ See para 5.4.2.4 above.

¹⁸⁰⁰ See para 5.5.2; 5.6.3 and 5.6.1 above.

¹⁸⁰¹ See para 4.2.2.4 above.

¹⁸⁰² See para 4.2.2.4 and para 5.4.2.8 above.

6.2.2.5 Notification

The notification of the planned development measures among water resources interested parties is a principle that has domestic ratification.¹⁸⁰³ Both the international and states best-practices show that notification to the MHCs is mandatory and has to take place in their local languages.¹⁸⁰⁴ In particular, the key water resources stakeholders such as MHCs are required to be notified of any planned measure likely to affect their access to waters. The approach used to notify MHCs has been through GN, meeting or local newspapers.¹⁸⁰⁵

However, the use of GN is less popular among MHCs in African countries and Tanzania in particular. Notably, the notification is mostly recognised in forests related laws and that it is mainly when forest reserve is to be established at a local government level and or village level.¹⁸⁰⁶ In particular to mining activities, no requirement of prior notification. MHCs are surprised with the resettlement and compensation schemes as the land is most often compulsorily acquired. Perhaps this signals lack of political will to put open their plans with the fear of potential appreciation of the value of land and other interests which may hick-up the cost of investment. Such an approach however, operates at the detriments of MHCs right to clean water. Adding on the absence of climate change policy and or law, MHCs are thus prone to potential harms of mining without notice and or time to prepare for mitigation and or adoption to the varying climate.

¹⁸⁰³ See para 6.4.1.5 above.

¹⁸⁰⁴ See para 3.2.2.5 above.

¹⁸⁰⁵ See para 5.4.2.3 above

¹⁸⁰⁶ See para 5.2.2.5 and 5.4.2.5 above.

6.2.2.6 Consultation and Negotiation

The principle of consultation and negotiation seems to be the cornerstone of international and regional framework on good neighbourhood.¹⁸⁰⁷ It is also a principle which helps in influencing riparian states to jointly form institutions to sustainably manage international water bodies which are sources of clean water that supports our lives. With respect to development projects, consultation and negotiation is the tool to foster consensus among stakeholders such as; the government, mining companies, MHCs and others.¹⁸⁰⁸ As noted above, Tanzania has domesticated the principle with exception of the recognition of the indigenous peoples.¹⁸⁰⁹

Non-recognition of indigenous peoples and their framework of consultation means less protection of MHCs access to clean water when mining are to take place. It is worth noting that, the legal framework under the Proposed Constitution 2014 offers a recognition of indigenous peoples as minority groups, farmers and fishermen to name but a few.¹⁸¹⁰ Perhaps, with time and pressure from civil societies and global development partners, the binding legal framework may be influenced by the this proposed framework to recognise and protect the indigenous peoples.

6.2.2.7 Stakeholders Participation

Three major roles of the principle of stakeholder's participation are noted in the discussion above. Firstly, it offers the right to be part of decision from when it is

¹⁸⁰⁷ See para 1.6; 3.2.2.6, and 5.4.2.6 above.

¹⁸⁰⁸ See para 3.2.2.6 read together with para 5.4.2.6 above.

¹⁸⁰⁹ See para 4.2.2.5 and 5.4.2.5 above.

¹⁸¹⁰ See para 5.4.2.6. above.

being made, implemented, monitored, evaluated and or reviewed. On this it offers a room to hold into account those in government and or private firms in relation to the decision made. Emphasis is made that all parties who may potentially affected by the decision have to be part of it. With respect to mining, MHCs, women, youths, disabled and historically disadvantaged group are shown to be commonly referred as such. Although Tanzania recognises this principle, it is worth to note here that the recognition seems to be in piecemeal. For example, it is more pronounced in other laws and policies regulating; land, and forestry than it is in mining laws.¹⁸¹¹

Secondly, it offers a room for those involved in the decision to derive benefit from it. At international, regional and states best-practices; central, local government, MHCs and or individuals do benefit directly from resources extracted.¹⁸¹² In Tanzania the beneficial opportunities that may be enjoyed by MHCs as stakeholders are through the LGA levies, CSRs, participation through subscription of issued shares, employment and technological transfers.¹⁸¹³ However, it is shown that, political set-up of the LGAs, none or little collection of the revenue by LGAs and non-involvement of the MHCs in planning, implementing, monitoring and evaluation of the CSRs inhibits MHCs from fully deriving benefits from mining sector in Tanzania.¹⁸¹⁴ A tangible revenue from mining sector to MHCs may not be over emphasised given how feeble water infrastructure are in Tanzania.¹⁸¹⁵

¹⁸¹¹ See para 3.2.2.7 above.

¹⁸¹² See para 3.2.2.7 above.

¹⁸¹³ See para 5.4.2.7 above.

¹⁸¹⁴ See para 5.4.2.7 above.

¹⁸¹⁵ See para 5.4.2.2 and 5.6.5 above

Thirdly, stakeholders' participation offers a room for MHCs to access justice wherever their right to water is infringed by the MNC say for example. It is above noted that, the judiciary, Commission for Human Rights and Good Governance, Mining Commission are responsible to handle concerns over human rights infringement in the country.¹⁸¹⁶ Challenges facing these institutions ranging from lack of independency, limited scope of their mandate and remedy they may offer resonates to lack of good governance.¹⁸¹⁷ It may also be argued here that, such institutions are relevant to locals not the MNCs whose disputes are rather internationalised through the ICSID and other international arbitral tribunals.¹⁸¹⁸

6.2.2.8 International Cooperation

International cooperation with respect to mining and trans-boundary water resources is vital in safeguarding MHCs rights to water. It is noted above that two key international initiatives namely KPCS and EITI are relevant to safeguarding MHCs right to food.¹⁸¹⁹ As such KPCS initiative seems to be focused in abetting human rights violations perpetrated by rebels. Although civil unrest and loss of peace has a bearing on sustainable resources use, KPCS is not as such covering environmental issues. Indirectly however, the KPCS impacts say for example; in revenue mobilisation by the state, may be allocated to water infrastructure, capacity building and good water resources governance. This seems indirect approach to promoting MHCs right to water though.

¹⁸¹⁶ See para 5.5 and 5.6 above.

¹⁸¹⁷ See para 5.5 above.

¹⁸¹⁸ See para 3.3.2.2 above.

¹⁸¹⁹ See para 3.2.1.8, 4.2.1.8 and 5.4.1.8 above.

With respect to EITI states and MNCs are shown to be required to disclose revenue, beneficial arrangements, contracts, gender and environmental aspects.¹⁸²⁰ It is above noted for example, when mining activities cause water stress due to pollution women are grossly impacted not only health wise but carry a heavy burden to fetch water for the families. Consequently, disclosure of environmental and or gender issues in mining sector will offer the public a room to safeguard access to clean water by holding the government and or MNCs into account.

However, the EITI initiative in Tanzania seems to have not incorporated gender issues under her laws. Also absence of monitoring extractive companies seems to be inadequate such that companies may cease to operate and or transfer its business without the knowledge of the relevant offices in Tanzania.¹⁸²¹ Such a loop does no good to MHCs right to water because, suppose such companies polluted environment, holding them into account will be challenged when such a company is no longer operating in Tanzania or has been wound up.

Notably, Tanzania shares fresh water resources with a number of African countries. International cooperation is also relevant in sustainably harnessing shared waters. Hence, international cooperation with respect to shared water resources is noticeable through joint commissions in the following water resources; Lake Tanganyika, Lake Victoria and River Nile to name but a few.¹⁸²² Tanzania is also a signatory to the SADC Revised Protocol on Shared Water 2002, which reflects principles under the UNWC 1997. Also, Tanzania is in the process to establish legal and institutional

¹⁸²⁰ See para 3.2.1.8 and 5.4.1.8 above.

¹⁸²¹ See para 5.4.1.8 above.

¹⁸²² See para 5.4.2.8 above.

frameworks relevant to tap the global opportunities and benefits emanating from the CDR principle which is relevant to MHCs right to water among others.¹⁸²³

However, it is noted that, despite efforts by Tanzania on joint cooperation on water resources some of other shared water resources are not enforced owing to lack of required ratification, for example River Nile Framework. In addition, despite of the fact that the Water Resources Management Act 2009 grants power to the minister to formulate a guideline on how to reasonably and equitably use the shared waters, no such a guideline exists to date.

Hence, the discussion in this part shows that the mining legal framework in Tanzania has adopted a patchy approach in domesticating international and regional principles relevant to safeguarding MHCs access to clean water. It is also noted that, even the domesticated principles seem not fully enforced and that MHCs are shown to be inadequately involved in decision making relating to mining activities. Despite existence of joint cooperation on shared waters, Lake Victoria, it is indicated that it is impacted by unsustainable water use and management. Unsustainable water use in Lake Victoria signals not only existence of weak legal framework but also governance issues.

Generally, legal frameworks to safeguard MHCs right to clean water in Tanzania falls short of international and regional standards and states best practices. It is evident that; the right to clean water is not justiciable, access to water resources is not guaranteed at the national level, right to clean water to vulnerable group remain

¹⁸²³ See para 5.5.9 above.

ambiguous, practices show that anthropogenic activities are given primacy over right to water, no clear balance between human activities, conservation of biodiversity and water for domestic use, absence or inadequate notification of planned measures to MHCs, little or no consultation of MHCs especially in case of mining activities, little or no direct benefits derived by MHCs from mining activities, weak legal framework to tape international benefits from the climate variation frameworks.

6.3 Tanzania's Institutional Framework to Safeguard MHCs Right to Clean Water and Adequate Food

This part reiterates the argument noted above that there is a need of robust institutions to firstly guarantee promotion, protection and enforcement of MHCs rights to clean water and adequate food.¹⁸²⁴ However, since this study deals with mining of rough diamond, robust institutions are also relevant in hold the government and large-scale mining companies into account as a means to safeguard MHCs right to clean water and adequate food.¹⁸²⁵ It is shown above that good natural resources governance has a bearing on abating gross violation of human rights (including right to clean water and a right to adequate food) in most natural resources rich developing countries.

As such, established institutions in Tanzania are expected to reflect the international and regional standards such as; independency, gender balance, proper constitution of relevant institutions, well financed and qualified human resources and relevant

¹⁸²⁴ See para 3.3, 4.3 and 5.5 above.

¹⁸²⁵ See para 2.2.6, 2.2.7, 2.2.8, 3.3, 4.3 and 5.5 above.

technology and that institutions should be accessible.¹⁸²⁶ Consequently, despite the fact that Tanzania has established relevant institutions to safeguard MHCs' rights to water and food, their effectiveness remains questionable. A number of factors inhibit such institutions from effective implementation of their function as may be noted below;

6.3.1 Institutional Overlap

While it is true that Tanzania has established a number of institutions relevant to safeguard MHCs right to water and food their mandates seem to overlap. Overlapping mandate in these institutions undermines MHCs efforts to safeguard their rights. Since the focus of this study is on mining in village land unlike mining in water bodies three relevant institutions namely; Village Assembly, Water Users Association (WUA) and Mining Commission are analysed here.

The overlap among these institutions is based on the mandate they have over land, minerals and or water resources. Village Assembly is shown as the owner of the village land and it has final mandate on land allocation either for settlement or investment.¹⁸²⁷ WUA is also shown to have rights over water sources, and its distribution infrastructures.¹⁸²⁸ The Mining Commission has mandate on minerals and is empowered to allocate mineral rights to potential MNCs.¹⁸²⁹ Based on the government compulsory land acquisition, both the Village Assembly and WUA mandates are ignored.

¹⁸²⁶ See para 3.3 and 4.3 above

¹⁸²⁷ See para 5.6.2 above.

¹⁸²⁸ See para 5.6.5 above.

¹⁸²⁹ See para 5.5.2 above.

Also wide discretionary powers of the minister responsible for mining ignores the need of consent from land owners and or occupier when land is taken for mining. Such institutional arrangements, denies MHCs form participating in mineral resources rights allocation processes, which ultimately limit their ability to safeguard their rights at the resources rights allocation stage. Such an approach seems to contradict the HRBA to development which calls for mainstreaming of human rights in all stages of development projects such as mining.

6.3.2 Inadequate Experts

Securing MHCs rights to water and food against gross impacts mining activities on biodiversity deforestation and water pollution requires relevant capital and human resources. This is even true since, deforestation is noted above to exacerbate climate change African countries. International framework provides for finance and relevant technology to mitigate and or adopt to climate variation impacts. Tanzania's geographical and socio-economic circumstances qualifies it to benefit from the global climatic regulatory frameworks. Despite of this reality, concerns of lack of experts in developing countries and Tanzania in particular is noted above.¹⁸³⁰ For example, in order to enact specific law on climate change, legal experts conversant with the climate change issues are inevitable.

Also, in order to prepare new competitive water resources projects, and or proper management of existing water infrastructure, expertise in water resources, hydrology and climate variation inevitable. This is because climate change has a bearing on the

¹⁸³⁰ See para 5.5.4 and 5.5.9 above.

existing and future water and or agricultural infrastructures. In addition, in order for judges to pass judgement in favour of ecological balance and safeguarding MHCs right to water and food, they must be conversant with climate frame works and its impacts on human rights. Tanzania as it is for most developing countries, seems to lack enough financial and human resources with such expertise.¹⁸³¹

6.3.3 Impaired Institutional Independence

Independent institution is the cornerstone in efforts to hold government and other mineral related stakeholders into account and guarantee good governance. Although Tanzania has established relevant institutions with the view to safeguard MHCs rights to clean water and food, there is a concern on their independency. Lack of independency may be discussed in two main ways which are; party loyalty and limited mandate. With respect to party loyalty, the above composition of the Parliament of the United Republic of Tanzania is dominated by members from the ruling party.¹⁸³² Oppositional parties are marginally if not represented at all. It is shown that existence of oppositional parties is instrumental in holding the government and its allies in natural resources extraction into account. Absence of proportional opposition members in the house of parliament, weakens its ability to hold the government into account, which is its prime function.

With respect to limited mandate, laws establishing critical institutions such as; PCCB and CHRGG impose limitation on their powers. It is above shown that, these institutions are limited from carrying out inquiry related to the top governmental

¹⁸³¹ See para 5.5.4 above.

¹⁸³² See para 5.5.1 above.

officials such as President.¹⁸³³ This seems a paradox given the fact that, the government and in particular the President is entrusted with all natural resources in Tanzania for the betterment of Tanzanians. Such a concern, seems to raise doubts on the motto that Africans should find African solution to African problems.

6.3.4 Financial Constraints

It is above shown that, most developing states as Tanzania are financially constrained in their budget relevant to finance water and agricultural infrastructure. Financial difficulties of such countries become worse when climate change impacts such as; floods and droughts severely hits the existing weak infrastructures. It is reportedly, above that, repair and or installing new hydrological equipment's in Tanzania is shown to be impacted by budgetary constraints. In addition, it is above noted that, people's awareness of climate change issues in Tanzania is constrained owing to meagre budget in translation of the English written climate change documents into Swahili.¹⁸³⁴

It may be argued here that financial constraint founded on weak legal framework relevant to safeguard MHCs right to clean water and food. Firstly, MHCs are not involved in revenue distribution from mining activities in their vicinity. Non-participation of MHCs impacts their ability to invest in water and food infrastructure.¹⁸³⁵ Secondly, Tanzania's legal framework lacks relevant incentives to allure private sector and other benefits offered at the international climate change

¹⁸³³ See para 5.5.5 and 5.5.6 above.

¹⁸³⁴ See para 5.4.1.5 and 5.5.4 above.

¹⁸³⁵ See para 5.4.1.7 above.

frameworks. Thirdly, the regional commitments to finance agriculture and water sector at the rate of 10% of its annual budget and 0.5% of its GDP respectively are not domesticated in any law.¹⁸³⁶ Arguably, it is above shown that, weak legal framework in most resource-rich African states is the foundation of the resource curse.¹⁸³⁷ Little investment in water and agricultural investment resonates to resource curse theory discussed above.¹⁸³⁸

6.3.5 III Composition of Institutions

The concern that institutions established in Tanzania are inappropriately composed may be discussed in twofold. Firstly, some institutions lack gender equality in their compositions. Secondly, some of institutions are politically composed which dilute the desire to properly serve the MHCs. To begin with gender issues, it is shown that Tanzania has established a number of institutions to safeguard MHCs rights to clean water and adequate food. It is also evident that, women participation in decision making is a tool to guarantee broad-based socio-economic empowerment.

In addition, women have been depicted to be grossly impacted by the mining impacts owing to socio-economic and cultural practices that seem to be gender biased. Both international and regional frameworks calls for gender balance as a key to good governance.¹⁸³⁹ However, despite all these realities, some of established institutions seem to have inadequate women representation. Among institutions faced with this challenge are; the Parliament of Tanzania, Mining Commission,

¹⁸³⁶ See para 5.4.1.4 above.

¹⁸³⁷ See para 4.2.2.4 and 5.4.2.4 above.

¹⁸³⁸ See para 2.3.1 above.

¹⁸³⁹ See para 2.3.2, 3.2.1.1, 3.2.2.7, 4.2.1.7 and 4.2.2.7 above.

NEMC, and Village Council.¹⁸⁴⁰ Consequently, the decision of such institutions may seldom be relied to address the gender gap in mining sector.

In particular, institutional overlap noted above, is one of the factor that undermines women involvement in large-scale mining sector in Tanzania.¹⁸⁴¹ The decision of the government through the minister for example to compulsorily acquire village land, ignores the Village Assembly which is constituted among others women of a particular village. Also, it is shown for example that, members of the Mining Commission are not appointed on individual capacity but rather based on the office they occupy.¹⁸⁴² Since women are depicted to be marginally represented in decision making positions, reliance of representation of those offices further undermine women involvement in mining sector.

Secondly, the principle that, stakeholders have to be consulted once there is a proposal for large-scale development projects such as mining has international, regional and domestic recognition. In particular, MHCs have to be involved not only in making decision but also benefiting from the project. Both international, and regional frameworks and states best-practices call for benefits to be shared directly to MHCs trusts. However, Tanzania's practice seems to be politicised as the benefits are shared to politically established organs such as District Council.¹⁸⁴³ Considering that some of MHCs may be composed of indigenous peoples who may not be represented in this political constituted organ, the stream of benefits may not reach

¹⁸⁴⁰ See para 5.5.1, 5.5.2, 5.5.3 and 5.6.2 above.

¹⁸⁴¹ See para 6.3.1 above.

¹⁸⁴² See para 5.5.2 above.

¹⁸⁴³ See para 5.4.1.7 above.

them. Equally, the development desire and or plans of these communities may not reach the politically constituted organ for their consideration.

6.3.6 Existence of Non-binding Institutions

It is also above shown that, existence of robust institutions is vital in holding governments and its allies and even belligerents accountable in exploitation of resources such as minerals. Globally, there are various initiative which may be relied by various stakeholders to safeguard MHCs rights to water and adequate food. Tanzania is shown to have established some institution that may tape benefits provided under the global initiative such as; sector funds under forestry, fisheries and beekeeping and NCMC. Such institutions seem to be focused at the central government and hence lack local representations such as villages and or communities.¹⁸⁴⁴

Moreover, in particular, to climate variation the VPO Environmental Division is responsible to regulate and co-ordinate them country wise. Notably, the established institutions under the VPO environmental division seems to lack legal status owing to the fact that, they are established under a non-binding framework. Consequently, decision form these institutions lack legal enforcement.

In addition, such institutions are only at the national level, ignoring lower levels such as villages where climate change hit the most. Perhaps, such a weakness is founded on the assumption that, climate variation is a mere environmental issue.¹⁸⁴⁵ Such a

¹⁸⁴⁴ See para 5.5.9 above.

¹⁸⁴⁵ See para 5.5.9 above.

challenge seems to reinforce the above discussed concern over absence of experts who could lead Tanzania to benefiting from the global financial arrangement under the climate change frameworks.¹⁸⁴⁶

6.3.7 Inadequate Up-to date Technology and or Working Infrastructure

Adoption of science and technology in curbing mining gross impacts on water and food production is inevitable. Such technologies range from those relevant to; hydrological testing equipment and technology; agricultural infrastructure relevant to farming, food processing, distribution and storage to name but a few. Although Tanzania has established for example the NW, its functioning is reportedly impaired due to ruined metrological stations and equipment relevant to forecasting weather and or hydrological issues which are relevant to MHCs right to food and water.¹⁸⁴⁷

Apart from the hydrological infrastructure, the justice delivery infrastructure is also subjected to similar challenge. For example, litigating rights to clean water and adequate food as human rights the High Court is the court of first instance. However, due to financial constraints named above, not all regions have the High Court office.¹⁸⁴⁸ MHCs are therefore subjected into the challenge of accessing justice owing to inadequate court infrastructure.

6.3.8 Absence of Representation at the Local level

The discussion above shows that Tanzania has amended some of her laws with the view to tape the benefits from the global natural resources governance framework.

¹⁸⁴⁶ See para 6.3.2 above.

¹⁸⁴⁷ See para 5.5.11 above.

¹⁸⁴⁸ See para 5.5.4 above.

Examples of such institutions are; NCMC, NEMC, Funds established under the forest, beekeeping, water and fisheries sectors. Despite such efforts, these institutions are managed and organised at the national level. Since MHCs as defined in this study represents rural communities, absence of representation of such institutions at the local level limits MHCs from potential benefits thereto.¹⁸⁴⁹ Such a lacuna may be argued to have its foundation in absence of a specific legislation on climate change, instead few laws provide for some elements on climate change, leave alone presumption that climate change is an environmental issue.

6.3.9 Global, Regional and Countries Conflicting Interests

Although international cooperation is named above as instrumental in guaranteeing promotion and observance of human rights, it seems hard to reconcile all UN and or AU member states to harmonise their laws towards that end. With respect to mineral resources for example, EITI and KPCS are identified as tools to foster not only human rights observance but broad-based economic empowerment of states and MHCs. However, they are not implemented by all UN member states. Available record indicates that out of 54 AU member states, 34 and 29 are not implementing KPCS and EITI initiatives respectively.¹⁸⁵⁰ Such a trend signals absence of harmonisation of legal framework to guarantee mineral resources governance.

It is also above noted that, unlike the KPCS the EITI gradually begun with revenue transparency but to date it has included environmental and gender issues. Conflicting interest between states and mining stakeholders seem to inhibit adoption of a broader

¹⁸⁴⁹ See para 5.6.3 and 5.6.4 above.

¹⁸⁵⁰ See annexure 1 at the end of this thesis.

definition of conflicting minerals which will cover state lead human rights violations under KPCS for example.¹⁸⁵¹ In particular, even where the KPCs is adopted, still it is reportedly that, diamond is smuggled from DR Congo through neighbouring countries to access international market.

In addition, rebel groups operating in DR Congo are allegedly hosted in neighbouring countries.¹⁸⁵² Unless the international community and AU in particular identify the root cause of behaviour of its member states harbouring such groups, delinking rough diamond from human rights violation in AU countries will remain challenged.

Also the international framework establishing global institutions such as the WB seems to adopt protective approach to potential liabilities that may arise from their activities.¹⁸⁵³ Among key activities relevant to this study are; advising mineral resources-rich African countries on proper legal and institutional frameworks to regulate mining and financing large-scale mining activities in such countries. However, its establishing instrument limit states and even MHCs from holding it liable in case human rights will be violated in large-scale projects funded by WB. This seems a paradox owing to international requirement that states should not only adopt strong legal framework but also establish mechanisms where remedies may be obtained from MHCs in case of human rights violation and or other sort of damages.¹⁸⁵⁴

¹⁸⁵¹ See para 3.2.1.8 above.

¹⁸⁵² See para 4.2.18 above.

¹⁸⁵³ See para 3.3.6 above.

¹⁸⁵⁴ See para 3.2.1.7 above.

With respect to biodiversity loss and climate change which are global concern, it is seen and interpreted differently by countries and or communities depending on their geographical, socio-economic, cultural and political factors. Despite of the international recognition of such a reality under the CDR principle, yet at the regional level, there are geographical, socio-economic, historical and political factors that need to be addressed jointly among states. Among issues which undermines some of established institutions are for example; non-ratification of conventions and or protocol to regulate sustainable use of shared water bodies. For example, Sudan and Egypt are members of the River Nile Framework geographically but has not ratified such agreements.¹⁸⁵⁵

Also, geographical, historical, political and socio-economic factors seem to have impact on establishment and functioning trans-boundary water resources management institutions. Geographically river Nile Basin may hardly be excluded from sustainable management of Lake Victoria Basin. However, historical and political factors grossly impact the River Nile Joint Commission.¹⁸⁵⁶ Instead of African states to jointly work to derive benefits from global frameworks, they internally compete to protect their national interest as a means to address socio-economic concern of their peoples.

6.3.10 Ethical Issues of the State Officials

The discussion above has identified global efforts to delink the mining and trading of rough diamond from its potentials in fuelling human rights violation where they are

¹⁸⁵⁵ See para 4.2.2.8 above.

¹⁸⁵⁶ See para 4.2.2.4 above.

mined.¹⁸⁵⁷ KPCs has been heralded as a scheme which has proved effective in restoration of peace and tranquillity and exponential increase of government revenue from mining and trade in rough diamond in some countries.¹⁸⁵⁸ Tanzania is named above as one among the KPCs partner states and has enacted laws in that regard. The Mining Commission is named as a national Focal Point with respect to KPCs issues.¹⁸⁵⁹ Consequently, no rough diamond that will be allowed in Tanzania neither will Tanzania process for export rough diamonds which does not follow the KPCs processes of certification. Despite such a tight legal and institutional frameworks, and well established institutions still, concerns over rough diamond smuggling from other country such as DR Congo through the borders of Tanzania is alarming.¹⁸⁶⁰

Notably, the discussion above has identified potential unethical state officials who connives in underrating and or underreporting the actual value of minerals in all exports.¹⁸⁶¹ This is so despite of the existence of special organs which have mandate to assess and evaluate ethical standards and potential illicit enrichment of state officials.¹⁸⁶² Reportedly, limited human resources and budgetary constraints seem to limit its full functioning.¹⁸⁶³ In addition, given the scope of this study, that is large-scale mining, small-scale mining (SSM) is thus not covered.¹⁸⁶⁴ Understanding the parameters through which rough diamond may be smuggled into Tanzania, dictates a separate research to identify SSM contribution towards potential infiltration of rough diamonds from other non-KPCs partner states.

¹⁸⁵⁷ See para 3.2 and 4.2 above.

¹⁸⁵⁸ See para 3.2.1.8 and 4.2.1.8 above.

¹⁸⁵⁹ See para 5.5.2 above.

¹⁸⁶⁰ See para 4.2.1.4 above.

¹⁸⁶¹ See para 5.4.1.7 above.

¹⁸⁶² See para 5.5.6 and 5.5.7 above.

¹⁸⁶³ See para 5.5.6 and 5.5.7 above.

¹⁸⁶⁴ See para 1.7 and 6.2.1.8 above.

6.4 Conclusion

This chapter presents a critically inference of the discussion of the extent to which Tanzanian legal and institutional frameworks safeguards MHCs rights to clean water and adequate food. It shows the extent to which Tanzania legal and institutional frameworks comply with the international (UN and AU) and state best-practices in that respect.

Firstly, Tanzanian legal framework relevant to safeguard MHCs rights to clean water and adequate food, this chapter shows partial compliance with international standards and states best-practices. Among evidencing factors of this partial compliance are; non-justiciability of the right to adequate food, insecure land tenure in rural areas, imbalance between human activities and environmental or ecological preservation, inadequate land use plans, inadequate or absence of notice to stakeholders when mining activities are to take place, little or absence of stakeholders participation in decision making and benefit schemes, and weak legal framework to tape international benefits from climate variation frameworks.

Secondly, the legal and institutional frameworks relevant to guarantee MHCs right to clean water also noted that Tanzania has not fully incorporated the international, regional standards and states best-practices. The following are identified as factors limiting Tanzania from fully compliance with international standards; weak legal framework evidenced by non-justiciability of the right to clean water, non-recognition of internal self-determination, less deterrent penalties for violation of natural resources related to water, absence of grassroots link to national initiatives to curb climate change. Also, limitations related to conflicting legal framework on

preservation of water resources from mining activities and absence or little land use plans, increased deforestation evidencing inadequate enforcement of laws.

With respect to governance issues, it is noted that Tanzania has established a number of institutions relevant to safeguard MHCs right to adequate food. Such institutions may be categorised in two groups. Firstly, those which operate at the national level, and secondly, those which operate at the sub-national level. Examples of institution with national coverage are; the PURT, NEMC, the Judiciary, PCCB, CHRGG, VPO, and Mining Commission. At the sub-national level institutions such as; Village Council, Village Assembly, BWB, Catchment Committee and WUAs exemplify them.

Notably, despite establishment of such noble institutions with their entrusted mandates, they still lack independency from the political influence in their functioning. Also, they suffer from limitations in their operations in terms of investigation and or prosecutions mandate and inadequate working infrastructure. In addition, limitations are noted on; wide discretionary powers, budgetary issues and human resources necessary to enable them implement their functions. Other limitations are inclusive; gender imbalance in their composition and that they suffer from inadequate representations at the grassroots level where mining operation are actually situated, to note but a few.

Generally, Tanzania's approach to domestication of the international (UN and AU) and states best-practices is shown above to be influenced by a number of factors such as; legal, historical, geographical, hydrological, socio-economic, cultural and

political circumstances. Such factors inhibit Tanzania from fully domestication of international (UN and AU) standards and best states practices in safeguarding MHCs rights to clean water and adequate food. The immediate chapter below provides for general conclusion of the study and puts forward proposal for an ideal frameworks to safeguard MHCs rights to water and adequate food in Tanzania. Such a proposed framework is also relevant to other developing countries which are endowed with similar natural resources.

CHAPTER SEVEN

CONCLUSION AND RECOMMENDATIONS

7.1 Introduction

The previous chapter (Chapter 6) presents an analysis of the extent to which Tanzania's legal and institutional frameworks comply with international and regional frameworks relevant to safeguard MHCs rights to clean water and adequate food. This chapter (Chapter 7) presents the general conclusion and recommendations of the study. In particular, it; firstly, recapitulate the key objective behind this study. Secondly, it summarises research questions and describe the extent to which answers are provided. It is upon the answer to research questions where the general conclusion is drawn and recommendations are proposed.

7.1.1 Recapping the Research Objective

This research explores the extent to which the Tanzania's legal and institutional frameworks comply with the international and regional principles relevant ensure better protection of MHCs' rights to clean water and adequate food. Owing to existence of various standards relevant to two rights investigated, the study focused on, water quality and ability of MHCs to engage in sustainable production of their own sufficient, nutritious food free from harm. In order to achieve this main objective, the following specific objectives were set:

1. To explore the international legal and institutional frameworks relevant to safeguard MHCs' rights to clean water and adequate food.
2. To explore the extent to which Tanzania's complies with the international frameworks relevant to safeguard MHCs' rights to clean water and food security.

3. To recommend an ideal legal and institutional frameworks to better safeguard MHCs' rights to clean water and adequate food.¹⁸⁶⁵

The above objectives are set basing on weak legal and institutional frameworks relevant to address mining impacts on quality of water sources and dwindling of rural land relevant to sustainably produce sufficient food free from harm in Tanzania. In chapter one, mining is shown to grossly impact water quality and vegetation cover, land pollution and massive resettlement of MHCs. Such impacts on land and water sources undermine the MHCs rights to clean water and adequate food. However, the international, regional and states best-practices provide for principles relevant to secure human rights among the MHCs where minerals are mined. In addition, states are required to guarantee progressive realisation of human rights in this case right to water and adequate food. This study focused on the two human rights to food and water owing to their value to support human life. Consequently, the need to investigate Tanzania's compliance with these frameworks seems unavoidable.

7.2 Response to Research Questions

The key question this research is set to answer is, whether the Tanzanian mining legal and institutional frameworks comply with international principles to safeguard MHCs rights to clean water and adequate food. As such where international principles are referred, it also includes African regional frameworks and state best practices. In order to find answers to this research question, qualitative doctrinal methodology was applied. In this methodology, review and qualitative analysis of

¹⁸⁶⁵ See para 1.3 above.

primary and secondary sources was carried out. Themes were developed and through descriptive and critical explanatory approach answers to questions are provided.

The study shows that there are international, regional and state best practices legal and institutional frameworks relevant to address mining impacts on MHCs rights to clean water and adequate food. In particular, to legal framework, the study found that, international framework provides for broad principles to be adopted by regions and or states. Consequently, it is the duty of regional blocks and or states to adopt such principles, subject to their; socio-economic, cultural, political, geographical, demographic and historical circumstances.

In particular, to the AU regional frameworks, it is noted that unique relevant principles such; creation of a new offence named illicit enrichment. AU also calls for guaranteeing of good governance in mineral sector. With respect to KPCS and EITI initiatives both are provided under non-binding AU regional level framework as relevant to mineral resources governance.¹⁸⁶⁶ AU frameworks calls for good governance and adoption of strong legal and institutional framework in the mineral sector. Unlike the UN initiative on trading of rough diamonds, the AU binding framework calls for domestic beneficiation of all mineral resources. Local beneficiation seems to a tool to empower locals through employment, technological transfer to name but a few.

KPCs and EITI for example are shown to be initiatives to regulate the manner of; exploration, extraction, processing and trading of minerals. These two initiatives are

¹⁸⁶⁶ Sere parab 4.2.1.8 above.

heralded as a solution to address the nexus between illegal exploitation of natural resources and civil wars. Questionable mineral resources governance that inhibit states and its people from benefiting when such minerals are extracted is noted above as resources curse.

In addition, the AU region for example noted among others inadequate human resources relevant to sustainably manage its abundant resources. The establishment of the Mineral Development Centre (MDC) responsible for capacity building on mineral related skills on areas such as governance.¹⁸⁶⁷ MDC is also mandated to provide support to AU states to harmonise their mining regulating codes. Harmonisation of mining laws is vital in sustainable management of mineral sector towards increasing its contribution to socio-economic empowerment of MHCs and state in general.¹⁸⁶⁸

Parallel with that, unique institutions are established to deal with the AU peace, human rights and good natural resources governance. It is thus argued above that the AU regional frameworks indicate the desire to adopt an African home grown solutions to Africa's problems. Despite the uniqueness of the AU framework, it is never without criticism. For example, it is noted that, some of established initiatives seem to overlap in their mandate. Moreover, established institutions suffers from several limitations such as; budgetary constraints, inadequate human resources, weak base to deal with human rights issues, questionable political will, and proliferation of rebel groups in AU countries such as; DR Congo, Rwanda and Mozambique.

¹⁸⁶⁷ See para 4.3.5 above.

¹⁸⁶⁸ See para 2.2.5 above.

Regardless of the relevancy of the AU framework to African peace and sustainable resources governance, it is still questionable if it is a real African solution to Africa's problems.

With respect to Tanzania it is found that subject to; geographical, historical, socio-economic, cultural and political factors, the international and regional principles are domesticated. It is found for example that, despite of signing of international treaty by the executives, the parliament has to ratify it for it to become binding. Consequently, even where international and or regional frameworks have clear principles to safeguard MHCs right to water and food, unless it is ratified, it remains unenforceable in Tanzania. Moreover, even when laws are established, they seem to be framed in a manner that ensue contradiction among different sectors say for example, mining and environmental or water resources sectors. Consequently, Tanzania is shown to adopt patchy approach in domesticating of international principles.

In particular, patchy approach is evidenced in three major instances. Firstly, through recognition of some principles say for example in water, land and forest sectors but not the mining sector. Secondly, adoption of mere administrative measures and or quasi institutions to guarantee MHCs access to clean water and adequate food. Notably this seems to defeat the desire of Africa to attain harmonisation of legal and institutional frameworks identified in chapter one of this study.

With respect to institutional framework it is found that a number of them have been established to safeguard MHCs rights to clean water and adequate food. Their

relevance in promotion and protection of human rights in mining sector is clearly shown. Such institutions are also relevant in guaranteeing good governance in natural resources extraction (minerals in particular) which has a bearing on promotion and protection of human rights. However, they are shown to lack the expected international and regional standards of independence in the due course of implementing their functions. Also, mode of their establishment and composition seem to have little concern on gender balance. In addition, budgetary limitations hampers established institutions from fully functionality.

It is shown above that, natural resources-rich developing countries usually depict resource curse elements through their weak legal and institutional frameworks. Hence, resource abundance brings with it civil unrest, less public participation in decision making and weakened infrastructure relevant to socio-economic services (water and food inclusive). The study, identify the Human Rights Based Approach (HBRA) to natural resources governance as a solution to human rights violation in all natural resources exploitation. HRBA insists that, human rights consideration need to be embodied in the natural resources legal and institutional frameworks. As such, every stage in natural resources plan, exploration, exploitation, processing, trading and closure has to respect and or contribute towards realisation of human rights.

However, the situation as depicted above seems to be different. Through legal positivism, laws identified and critically analysed depict absence of harmony between the international standards with the domestic frameworks regulating MHCs rights to water and food. Consequently, the answer to research question number

three is answered in-affirmatively. That is to say, Tanzania's legal and institutional frameworks to safeguarding MHCs rights to clean water and adequate food, partially comply with the international principles and states best-practices.

7.3 Recommendations

It is shown that exploration and discovery of minerals in rural areas unleash legitimate expectation of MHCs that its extraction will positively contribute towards their wellbeing. In particular to the study at hand, MHCs legitimately expects mining will guarantee realisation of their right to clean water and adequate food. However, there are other potential benefits such as; revenue collection, employment, technology transfer, potentials of sharing infrastructure to name but a few. All these adds to better improving MHCs right to clean water and adequate food.

However, absence of strong legal and institutional framework to regulate all stages of mining activities; from exploration, extraction, processing and trading such legitimate expectation by MHCs turns into illusion. Mining instead, grossly affect their rights to water, and food among others. Such a paradox is noted above as a resource curse. Since international and regional frameworks provide for principles to properly regulate mining activities, its reliance may safeguard MHCs rights to water and food among others. Through adoption of HRBA in all stages of mining activities will guarantee sustainable safeguard of MHCs rights to water and food. In addition, having in place harmonised and robust legal and institutional frameworks is vital in mitigating mining impacts on the two rights. This study therefore, recommends as follows;

- i) Tanzania has to ratify the modern UN and AU regional frameworks to guarantee justiciability and progressive realisation of rights to clean water and adequate food.
- ii) Tanzania has to ratify international principles relevant to guarantee internal self-determination of sub-national groups such as indigenous peoples.
- iii) Mining activities should only be allowed to take place in a village land with land use plans to avoid impacts on other resources such as water which is vital for human life.
- iv) Tanzania has to amend her mining legal framework with the view to; limit the ministerial discretionary powers to waive legal requirement to consult land owners and occupiers instead of compulsory acquisition. Also the Mining Act should guarantee stakeholders' participation. For example, on sharing of revenue among the mining stakeholders inclusive MHCs. Guaranteeing sharing of revenue entails availability of funds that may be relied to establish water and food related infrastructure which seem a challenge in Tanzania. It is also a tool to foster for MNCs Social Licence to Operate (SLO) in the locality of MHCs. Among benefits of SLO are inclusive; pre-empting MHCs clashes and or objections to the mining projects, provision of continued communication between the stakeholders and planning, implementing, monitoring and evaluation of MHCs and MNCs common interests.
- v) Responsible sector ministries, mining, land and water regulating legal and institutional framework should guarantee effective coordination of their mandate in a manner to harmonise their strategy, plans and policies.

- vi) Tanzania has to adopt incentivised legal framework in order to gain from the international transfer of capital and technology relevant to food and water investment.
- vii) Tanzania has to establish domestic robust and independent institutions relevant to guarantee holding the government into account in the mining sector. Strong institutions form the base of MHCs to defend their rights to clean water and adequate food against their government and mining companies.
- viii) Tanzania should capitalise on capacity building of her human resources human rights and governance. Human resources are relevant in preparation of various contracts inclusive mining. It is also relevant in framing of; policies, strategies, programs administrative and legal frameworks to safeguard MHCs rights to water and food. Among those who make decisions are inclusive; judges, advocates, responsible ministers, members of the parliament, Commissioners, members of District Council, Research and academic institutions, NGOs and villagers among others.

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APPENDIX

List of African States with constitutional recognition of rights to clean water and adequate food and membership to global natural resources governance initiatives.

S/N	Name of the AU States	Governing Article(s) on the right to		Name of the Statute/year	Membership to Global Resources Governance Initiatives ¹⁸⁶⁹	
		Clean water	Adequate food		EITI ¹⁸⁷⁰	KPCs ¹⁸⁷¹
1.	Angola	x	X	Angola's Constitution 2010	X	✓
2.	Congo DRC	Article 48	Article 47	Congo (Democratic Republic) Constitution of 2005 (As amended in 2011)	✓	✓
3.	Malawi	x	X	The Constitution of the Republic of Malawi of 1998	✓	X
4.	Mozambique	Article 43	Article 43	Mozambican Constitution of 2004 (As amended in 2007)	✓	✓
5.	Namibia	x	X	Namibia's Constitution	X	✓
6.	United Republic of Tanzania	x	X	URT Constitution 1977.	✓	✓
7.	Zambia	x	X	Constitution of Zambia 18 of 1996.	✓	X
8.	Zimbabwe	Article 77	Article 77	Constitution of Zimbabwe Act 20 of 2013.	X	✓
9.	Burundi	x	X	Burundi's Constitution 2005.	X	X
10.	Central African Republic	x	X	Central African Republic's Constitution 2016.	✓	X
11.	Kenya	Article 43 (1) (d)	Article 43 (1) (c)	Republic of Kenya Constitution 2010	X	X
12.	Rwanda	x	X	Rwandan Constitution 2003	X	X
13.	Southern Sudan	x	X	South Sudan Constitution 2011	X	X
14.	Sudan	x	X	Sudan Constitution 2005	X	X
15.	Uganda	x	X	Ugandan Constitution 1995	✓	X
16.	Botswana	x	X	The Constitution of Republic of Botswana 1996 (Revised 2005)	X	✓

¹⁸⁶⁹ See African Union (n 811). para 3.

¹⁸⁷⁰ Source: EITI Secretariat, 'EITI Association – Members' Registry as at 12 May 2022' (EITI, 2022) <https://eiti.org/sites/default/files/2022-05/EITI%20members%20registry%20as%20of%2012%20May%202022_0.pdf>.

¹⁸⁷¹ Source: KPCS member states: <https://www.kimberleyprocess.com/en/participants> 27/05/2022

S/N	Name of the AU States	Governing Article(s) on the right to		Name of the Statute/year	Membership to Global Resources Governance Initiatives ¹⁸⁶⁹	
		Clean water	Adequate food		EITI ¹⁸⁷⁰	KPCs ¹⁸⁷¹
17.	Egypt	Article 79	Article 79	Egypt's Constitution of 2014.	X	X
18.	Ethiopia	Article 90 (1)	Article 90 (1)	Constitution of the Federal Democratic Republic of Ethiopia 1994.	✓	X
19.	Algeria	X	X	Constitution of the People's Republic of Algeria 1989 (Amended 1996).	X	X
20.	Benin	x	X	Constitution of the Peoples Republic of Benin 1990.	X	X
21.	Seychelles	x	x	Constitution of the Republic of Seychelles of 1993 (As amended in 1996)	✓	X
22.	Cameroon	x	Article 25 (1)	Cameroon Constitution of 1996	✓	✓
23.	Cape Verde	x	X	The Constitution of the republic of Cape Verde 1992.	X	X
24.	South Africa	Article 27	Article 27	Republic of South Africa Constitution 1996.	X	✓
25.	Chad	x	X	Constitution of the Republic of the Chad 1996.	✓	X
26.	Comoro	x	X	Constitution of the Federal Islamic Republic of the Comoros 1996.	X	X
27.	Congo	x	X	Republic of the Congo Constitution 2001.	✓	✓
28.	Djibouti	x	X	Republic of Djibouti Draft Const 1992.	X	X
29.	Equatorial Guinea	x	x	Equatorial Guinea's Constitution 1991 (Amended 2012)	x	X
30.	Eritrea	x	X	Eritrea Constitution	X	X
31.	Mauritius	x	X	Constitution of the Republic of Mauritius 1968	X	✓
32.	Swaziland	x	X	Constitution of the Kingdom of Swaziland Act 2005.	X	✓
33.	Gabon	x	X	Gabon's Constitution 1991 (Amended 2011)	✓	✓
34.	Gambia	Article 216 (4)	Article 216 (4)	Constitution of the Republic of Gambia 1997.	X	X
35.	Ghana	x	X	Ghana's Constitution of 1992 (As amended 1996)	✓	✓
36.	Guinea	x	X	Guinea's Constitution	✓	X

S/N	Name of the AU States	Governing Article(s) on the right to		Name of the Statute/year	Membership to Global Resources Governance Initiatives ¹⁸⁶⁹	
		Clean water	Adequate food		EITI ¹⁸⁷⁰	KPCs ¹⁸⁷¹
				2010.		
37.	Guinea Bissau	x	X	Constitution of the Republic of Guinea-Bissau 1984.	X	X
38.	Ivory Coast	x	X	Ivory Coast Constitution 2016	✓	✓
39.	Liberia	x	X	Liberia Constitution 1986	✓	✓
40.	Libya	x	X	Libya Constitution 2011	X	X
41.	Mali	x	X	Mali Constitution 1992	✓	✓
42.	Mauritania	x	X	Constitution 2006	✓	X
43.	Morocco	Article 31	X	Constitution 2011	X	X
44.	Niger	Article 12	X	Niger Constitution 2010	✓	X
45.	Nigeria	x	Article 16 (2)(d)	Nigerian Constitution 1999	✓	X
46.	Sahrawi Arab Democratic Republic	x	X	Sahrawi Arab Democratic Republic Constitution 2015	X	X
47.	Sao Tome & Principe	x	X	Sao Tome & Principe Constitution 2003	X	X
48.	Senegal	x	X	Senegal Constitution 2001	✓	X
49.	Sierra Leone	x	X	Sierra Leone Constitution 1991	✓	✓
50.	Somalia	Article 27(1)	X	Somalia Constitution 2012	X	X
51.	Lesotho	x	X	The Constitution of Lesotho 2004	X	✓
52.	Madagascar	x	X	Madagascar's Constitution 2010	✓	X
53.	Togo	x	X	Togo Constitution 1992	✓	✓
54.	Tunisia	Article 44	X	Tunisia Constitution 2014	X	X