

# *LIGHT THROUGH THE STORM: SAFEGUARDING THE HUMAN RIGHT TO WATER IN CHALLENGING LANDSCAPES IN AFRICA*

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## **Abstract**

*The poor regulation of water resources, particularly in Africa, has affected the availability of and accessibility to quality water. The international community has, through a soft and controversial approach, recognised the human right to water, which is generally argued to entitle everyone to sufficient, quality, accessible and affordable water for personal and commercial uses. Through a comparative approach, this article discusses the evolving concept of and states' practice relating to the human right to water in Africa. Using the Democratic Republic of Congo (DR Congo), Ghana, Nigeria, South Africa, Tanzania, Zambia and Zimbabwe as case studies, it examined the national regulatory frameworks for safeguarding access to quality water for both domestic and commercial use. The article further explores the challenges surrounding the legal protection and realisation of the right to water in the context of mineral resources extraction in the selected African countries. The article discovered obsolete laws and policies and weak institutional design and capacity as the major challenges in protecting the right to water in the selected countries. It therefore contends that while national regulation remains important in promoting and safeguarding the right to water, policymakers should be primarily mindful of its limitations in the face of institutional bottlenecks, implementation gaps and socioeconomic realities. Accordingly, capacity-building initiatives should aim to educate stakeholders in equitable water resources management and, generally, recognise the close link between the right to water, wellbeing and other human rights.*

**Keywords:** Access to water, African human rights system, extractive industries, environmental protection, human right to water

*La mauvaise réglementation sur les ressources en eau, en particulier en Afrique, a affecté la disponibilité et l'accessibilité à une eau de qualité. La communauté internationale a, à travers une approche molle controversée, reconnu le droit*

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*humain à l'eau, qui est généralement considéré comme garantissant à tous une eau suffisante, de qualité, accessible et abordable pour des usages personnels et commerciaux. A travers une approche comparative, cet article discute le concept en évolution et la pratique des états concernant le droit humain à l'eau en Afrique. Utilisant la République Démocratique du Congo (RD Congo), le Ghana, le Nigéria, l'Afrique du Sud, la Tanzanie, la Zambie et le Zimbabwe comme cas d'études, elle a examiné les cadres réglementaires nationaux pour garantir l'accès à une eau de qualité. L'article explore en outre les défis entourant la protection juridique et la réalisation du droit à l'eau dans le contexte de l'extraction des ressources minérales dans les pays africains sélectionnés. L'article a découvert des lois et des politiques obsolètes et une structure et une capacité institutionnelle faible comme étant les principaux défis pour la protection du droit à l'eau dans les pays sélectionnés. Il soutient donc que, si la réglementation nationale demeure importante pour promouvoir et sauvegarder le droit à l'eau, les décideurs politiques devraient avant tout tenir compte de ses limites face aux goulets d'étranglement institutionnels, aux lacunes de mise en œuvre et aux réalités socioéconomiques. En conséquence, les initiatives de renforcement des capacités devraient viser à éduquer les parties prenantes à une gestion équitable des ressources en eau et, en général, reconnaître le lien étroit entre le droit à l'eau, le bien-être et les autres droits humains.*

**Mots-clés :** *Accès à l'eau, système africain des droits de l'homme, industries extractives, protection de l'environnement, droit humain à l'eau*

## INTRODUCTION

Water is an essential resource that requires efficient regulation to satisfy pressing varied needs in both nature and human beings.<sup>1</sup> It has been reported that an estimated 1.8 billion people across the globe cannot access potable water.<sup>2</sup> The consequence of this situation is alarming since most governments and private corporations in developing regions, particularly in Africa, ignore the predicament of these people. An estimated 2 million people die annually with most of them being children below the age of 5 who die due to diarrhoeal diseases.<sup>3</sup> Most of these deaths occur in sub-Saharan Africa.<sup>4</sup> For instance, in the DR Congo, a country endowed with vast water resources in Africa, it is reported that about 51 million of the population do not have access to safe drinking water.

<sup>1</sup> Neil S Grigg 'Water as a connector among societal needs' in *Integrated water resource management* (2016) 1.

<sup>2</sup> The United Nations Special Rapporteur on the human right to safe drinking water and sanitation, A/HRC/24/44, 11 July 2013, section 2.

<sup>3</sup> Philip J Landrigan et al 'The Lancet Commission on pollution and health' *The Lancet Commissions* (2017) 1.

<sup>4</sup> World Health Organisation 'Safer water, better health: Costs, benefits and sustainability of interventions to protect' (2008).

This country possesses an approximated 52 per cent of surface water reserves in Africa. Conversely, DR Congo is associated with one of the countries with the least access to water rates in the world with only 26 per cent of the populace having access to potable water.<sup>5</sup> Poor access to water is regarded as one of the major factors that reinforce negative dynamics that undermine sustainable development such as poverty, inequality and underdevelopment in Africa.<sup>6</sup> Particularly, the negative effects that mining-induced water pollution can have on the affected communities have been emphasised by experts.<sup>7</sup>

The challenges that extractive industries have on the availability, accessibility and quality of water as a result of poor management of hazardous chemicals and mineral wastes in Africa was also highlighted by the Special Rapporteur on the human right to safe drinking water and sanitation.<sup>8</sup> The prevailing circumstances of water pollution by extractive activities make water one of the most affected resources by mineral resources extraction in Africa. The poor regulatory frameworks in most African countries therefore offer inadequate protection to water resources and consequently affect the availability of and accessibility to safe clean water for various users.

It is well documented globally that the environment and, particularly water resources and water quality, has suffered as a consequence of rapid economic development. Additionally, the adverse effects of climate change and poor regulation of extractive activities especially in developing countries especially Africa have significantly affected the quantity and quality of water.<sup>9</sup> Studies have recognised major environmental concerns such as heavy atmospheric pollution, pollution of water and soil as well as considerable ecological degradation and high risks for the environment caused by poorly regulated extractive activities and unreasonable industrial structure.<sup>10</sup> The bold decision by the UN Committee on Economic, Social and Cultural Rights (ESCR Committee) and the Human Rights Council to recognise the human right to water in 2002 is of particular importance to African countries.<sup>11</sup>

<sup>5</sup> Andrés Zaragoza Montejano 'In search of clean water: human rights and the mining industry in Katanga, DRC' (2013) 6, viewed 28 October 2017, from <http://ipisresearch.be/publication/search-clean-water-human-rights-mining-industry-katanga-drc/>; United Nations Environment Programme, The Democratic Republic of the Congo. Post-Conflict Environmental Assessment, Synthesis for Policy Makers (2011) 41.

<sup>6</sup> UN Special Rapporteur op cit note 2.

<sup>7</sup> UN Special Rapporteur op cit note 2, para 37.

<sup>8</sup> Ibid.

<sup>9</sup> Michael Addaney, Elsabe Boshoff and Bamisaye Olutola 'The climate change and human rights nexus in Africa' (2017) 9 *Amsterdam Law Forum* 5–28.

<sup>10</sup> Montejano op cit note 5 at 10.

<sup>11</sup> UN Committee on Economic Social and Cultural Rights, General Comment No15 (2002) on the right to water (articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights) (2002) para 2.

Despite the progress made at the international and regional levels, the protection and realisation of the human right to water in most African countries remain a pipe dream.<sup>12</sup> Therefore through a comparative approach, this article discusses the evolving concept of and states' practices relating to the human right to water under international, regional and national human rights law in Africa. Using the DR Congo, Ghana, Nigeria, South Africa, Tanzania, Zambia and Zimbabwe as case studies, it examines the regulatory frameworks governing the protection and realisation of the right to water in the context of mineral resources extraction at the domestic level in Africa. Section 2 analyses the evolving notion of the human right to water at the global and regional levels. Section 3 evaluates the application of the human right to water in selected African states. Section 4 draws the analysis together to conclude the article.

### **THE UNIVERSAL HUMAN RIGHT TO WATER: NORMATIVE BASIS AND EVOLVING DEVELOPMENTS**

The human right to water is not broadly recognised in the substantive international human rights treaties. This therefore creates confusion as to why such an essential human need has not been unequivocally recognised by the core human rights mechanisms at the global level. Two main arguments have been proffered to justify the non-recognition of the human right to water. The first is that the human right to water does not exist, because it is not broadly expressed in the core international human rights treaties.<sup>13</sup> The second argument is that it is a derivative of other existing human rights such as the right to life and the right to health. For example, it has been argued that 'the right to water cannot be assumed unless the rights to which it is a constituent are infringed'.<sup>14</sup> The implication is that the human right to water is not recognised as a stand-alone right and thus, its enforcement cannot be claimed by itself. The lack of an explicit recognition of the right therefore makes it difficult for the fundamental obligation of states parties to promote, protect, respect and fulfil it to be applicable.<sup>15</sup> Consequently, at the national and local levels, this implies that the right holders face an insurmountable task to exact its enforcement or to claim remedies for its violation. O'Neil contends that until the right is widely recognised, it would be difficult to establish an infringement of obligation and subsequently hold someone accountable when there is inadequate access to water for domestic or

<sup>12</sup> Mark Manns *Pipe dream or progress? Implementing the human right to water in South Africa and Kenya* (2010) 1.

<sup>13</sup> Amanda Cahill 'Protecting Rights in the Face of Scarcity: The Right to Water' in Mark Gibney and Sigrun Skogly (eds) *Universal Human Rights and Extraterritorial Obligations* (2010) 194.

<sup>14</sup> *Ibid.*

<sup>15</sup> Frédéric Mégret 'Nature of Obligations' in Daniel Moeckli et al (eds) *International Human Rights Law* (2010) 130–2.

personal use.<sup>16</sup> The argument by O’Neil has been succinctly emphasised by El-Hadji Guissé that ‘it is rudimentary to establish and elucidate the legal foundation of the fundamental right to water because demanding its realisation without legal bases would be challenging’.<sup>17</sup>

The evolution of the human right to water therefore holds an enormous potential in ensuring that both human beings and nature have access to adequate quantities of safe clean water for their sustainable growth and development. Due to the vital nature of water, it would have been imagined that its associated right would merit immediate implementation.<sup>18</sup> Nevertheless, a case was made that most developing nations do not have the resources to fulfil such a commitment immediately.<sup>19</sup> It was therefore generally agreed during the adoption of the ICESCR for it to be progressively realised.<sup>20</sup> Article 11(1) of the ICESCR provides that:

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.<sup>21</sup>

As the treaty monitoring body overseeing the enforcement of the ICESCR, the UN Committee on Economic, Social and Cultural Rights (CESCR Committee) issued a General Comment in 2002 relating to the right to water as provided in articles 11 and 12.<sup>22</sup>

In the General Comment, the Committee relied on the word ‘including’ as used in the expression ‘including adequate food, clothing and housing’ to assert that the list of rights protected by article 11(1) is not comprehensive.<sup>23</sup> The Committee elaborated that:

The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival. Moreover, the Committee has previously recognized that water is a human right contained in Article

<sup>16</sup> Onora O’Neill ‘The Dark Side of Human Rights’ (2005) 81 *International Affairs* 427, 430.

<sup>17</sup> Sub-Commission on the Promotion and Protection of Human Rights, ‘Sub-Commission Begins Consideration of Economic, Social and Cultural Rights’ (Press Release, 7 August 2003) viewed 24 March 2018 from <http://www.unhcr.ch/hurricane/hurricane.nsf/0/9E2A907D8C9AB866C1256D7C0026017B?opendocument>.

<sup>18</sup> International Covenant on Civil and Political Rights, 999 UNTS 171 (1966); International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3 (1966).

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

<sup>21</sup> ICESCR op cit note 18 at article 11(1).

<sup>22</sup> General Comment 15 op cit note 11.

<sup>23</sup> Takele Soboka Bulto ‘The Emergence of the Human Right to Water in International Human Rights Law: Invention or Discovery?’ (2011) 12 *Melbourne Journal of International Law* 290–314.

11(1) (see General Comment No. 6). The right to water is also inextricably related to the right to the highest attainable standard of health (Art. 12(1)) and the rights to adequate housing and adequate food (Art 11(1)).<sup>24</sup>

The approach adopted by the Committee might possibly appear as a tricky technique of recognising the right to such a vital resource as water. It is however practically incontrovertible that as water, analogous to air, is fundamental to human existence, therefore its recognition as a human right must be considered as a requisite underpinning every other human right.<sup>25</sup> It is therefore taken for granted if water was considered by the Committee chaired by Eleanor Roosevelt that drafted the 1948 Universal Declaration which eventually culminated into the covenants. However, McCaffrey argues that the Eleanor Roosevelt-led committee candidly ‘anticipated that everyone can access sufficient amount of quality water to sustain their lives’.<sup>26</sup> Therefore, the purposive interpretation by the CESCR Committee was basically to uphold the purpose underpinning the invention of international rule of law by filling normative gaps in the human rights framework.<sup>27</sup> Bulto succinctly emphasised this when he opined that:

The CESCR Committee’s approach in the General Comment No 15 serves two purposes. By defining the right holders’ entitlements and duty bearers’ obligations in the realisation of the human right to water, it expanded and promoted the human rights guaranteed under the ICESCR. More importantly, by explicating the latent content of the ICESCR in relation to the human right to water, it attempted to fill the gap in the protective regime relating to the human right to water that had been missing from the explicit terms of the ICESCR.<sup>28</sup>

Since the purpose and object of article 11 of ICESCR is to ensure that every human being lives a life of dignity by having access to the fundamentals of life, with food, clothing and housing rudimentary to this, the addition of water to the catalogue is in compliance to the spirit of article 11(1).

The approach taken by the Committee in interpreting article 11 is not without criticism. Relying solely on the word ‘including’ by the Committee to locate the right to water in article 11 has been particularly criticised. According to Tully, this approach generates speculation on the

<sup>24</sup> General Comment 15 at para 3.

<sup>25</sup> Stephen C McCaffrey ‘The Human Right to Water: A False Promise?’ (2016) 47 *University of the Pacific Law Review* 221.

<sup>26</sup> *Ibid.*

<sup>27</sup> Henry G Schermers and Denis F Waelbroeck *Judicial Protection in the European* (2001) 21.

<sup>28</sup> Bulto *op cit* note 23.

quantity and makeup of the fundamentals to a satisfactory standard of living which were, however, not captured by the ICESCR.<sup>29</sup> He goes on to list a superficially inexhaustible catalogue of basic needs including access to postal services and blood as plausible candidates to be added to article 11.<sup>30</sup> He therefore argues for restraint in interpreting treaty provisions when there is vagueness in the wording.<sup>31</sup> Other scholars disagree with Tully. For instance, Bulto argues that using the phrase ‘including’ is not novel in the preparation of legal texts at the domestic and global levels because lawmaking institutions cannot always fully enumerate the rights and responsibilities they seek to control.<sup>32</sup> Langford clarifies that ‘such blurriness allows for filling in as well as detailing the normative content of treaties to address emerging challenges without going through a tedious and challenging process to adopt a new treaty or protocol.’<sup>33</sup> Grönwall consequently observes that ‘the approach used by the Committee would not lead to any flood of additional rights due to the universal recognition of the peculiar nature of water’.<sup>34</sup>

Explicit reference to the right to water can be found in two group-specific international human rights instruments. The Convention on the Elimination of Discrimination against Women (CEDAW) obliges state parties to undertake suitable actions to ensure that women enjoy adequate living conditions including adequate water supply.<sup>35</sup> The added value of CEDAW in this respect is its gender-specific approach.<sup>36</sup> It addresses the gender stereotypes that disproportionately affect women in accessing water, particularly in Africa.<sup>37</sup> In most rural settings where water is inaccessible, women bear the sole responsibility of fetching water from extremely long distances risking their safety and physical wellbeing. The CEDAW therefore calls upon states to eliminate practices that negatively affect the rights of women.<sup>38</sup> With the CEDAW and the Convention on the Rights of the Child (CRC) as the only universal treaties to unequivocally recognise

<sup>29</sup> Stephen Tully ‘A Human Right to Access Water? A Critique of General Comment No 15’ (2005) 23 *Netherlands Quarterly of Human Rights* 37.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> Bulto op cit note 23.

<sup>33</sup> Malcolm Langford ‘Ambition That Overleaps Itself? A Response to Stephen Tully’s Critique of the General Comment on the Right to Water’ (2006) 24 *Netherlands Quarterly of Human Rights* 433.

<sup>34</sup> Jenny T Grönwall, *Access to Water: Rights, Obligations and the Bangalore Situation* (PhD Thesis, Linköping University, 2008) 215.

<sup>35</sup> UN Convention on the Elimination of Discrimination Against Women, 1249 UNTS 20375 (1979) article 14(2).

<sup>36</sup> Anne Hellum, Patricia Kameri-Mbote and Barbara van Koppen *Water is life: women’s human rights in national and local water governance in Southern and Eastern Africa* (2015) 37.

<sup>37</sup> Ibid.

<sup>38</sup> CEDAW op cit note 35 at article 5.

the right to water, its recognition cannot be argued to be widespread.<sup>39</sup> For example, the CEDAW's recognition of the right to water does not include men and boys. Additionally, the CRC provides for the provision of clean drinking water as a measure to ensure the attainment of the highest attainable standard of health.<sup>40</sup> The CRC Committee, in this regard, has taken a bold stand by recommending the prioritization of provision of safe drinking water and ensuring universal access to drinking water for children.<sup>41</sup>

The UN Human Rights Council, a body mandated to mainstream human rights in the UN system, adopted a resolution to affirm the right to water and sanitation in 2010. The resolution was significant in affirming the human right to water as earlier recognised by the CESCRC Committee in 2002. Particularly, the resolution adopted by the Human Rights Council declares that:

The human right to safe drinking water and sanitation is derived from the right to an adequate standard of living and inextricably related to the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity. This means that for the UN, the right to water and sanitation is contained in existing human rights treaties and is therefore legally binding. The right to water and sanitation is a human right, equal to all other human rights, which implies that it is justiciable and enforceable.<sup>42</sup>

This resolution by Human Rights Council and Resolution 64/292 of the UN General Assembly on the human right to water and sanitation is an express acknowledgement by the international community that 'clean drinking water and sanitation are essential to the realisation of every human right'.<sup>43</sup> However, it is reported that when the UN General Assembly was adopting the resolution on the human right to water in 2010, the voting was not by consensus.<sup>44</sup> Several countries including Japan, the United Kingdom and the United States abstained from voting due to

<sup>39</sup> Cahill *op cit* note 13 at 391.

<sup>40</sup> Convention on the Rights of the Child, 1577 UNTS 3 (1989) at article 24(1).

<sup>41</sup> John Tobin *The right to health in international law* (2012) 279.

<sup>42</sup> Catarina de Albuquerque (2012) 'On the Right Track: Good Practices in Realising the Rights to Water and Sanitation', United Nations Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, Statement at the First Consultation on Post-2015 Monitoring of Drinking Water and Sanitation, Berlin, Germany, May 2011 viewed 23 March 2018, from [http://www.ohchr.org/Documents/Issues/Water/BookonGoodPractices\\_en.pdf](http://www.ohchr.org/Documents/Issues/Water/BookonGoodPractices_en.pdf).

<sup>43</sup> The human right to water and sanitation (2014) viewed 28 October 2017, from [http://www.un.org/waterforlifedecade/human\\_right\\_to\\_water.shtml](http://www.un.org/waterforlifedecade/human_right_to_water.shtml).

<sup>44</sup> General Assembly Resolution A/64/292, para 1, UN Doc A/RES/64/292 (29 July 2010); Human Rights Council Resolution 15, UN Doc A/HRC/15/L14 (24 September 2010).

their opposition to the acceptance of water as a human right.<sup>45</sup> McCaffrey observes that these countries opposed a universal right to water:

as a matter of principle especially because the process of formation of a norm of customary international law has not matured sufficiently or it is borne of a concern that these countries' practices will be held up to a scrutiny that they fear, or that they are concerned that, morally if not legally, recognition of the right would put pressure on them to provide assistance to the alleviation of problems of providing potable water.<sup>46</sup>

The inability of the international community to accept the recognition of water as a fundamental right is a major obstacle to the evolution of the right. The authenticity of the fundamental right to water at the international level and within national jurisdictions cannot however be ignored.

The right to water is also recognised in many international policy documents such as the Sustainable Development Goals (SDGs).<sup>47</sup> The seventeen SDGs to be achieved by 2030, though not binding, have the capacity to persuade world leaders and stakeholders to prioritise and implement efforts towards sustainable development as they are embedded in principles, such as non-discrimination, that have a strong appeal and status in international and national law.<sup>48</sup> Goal 6 of the SDGs specifically focuses on 'improving the quality of water through reducing pollution, eliminating dumping and minimizing release of hazardous chemicals and materials'.<sup>49</sup> This is an area that Africa is grappling with as it tries to achieve development through natural resource exploration and exploitation such as mining.

At the regional level, although the right to water is not explicitly captured in the African Charter on Human and Peoples' Rights (African Charter), it provides for the right to health and to a general satisfactory environment. However, other group-specific substantive instruments of the AU provide for the right to water. The Protocol to the African

<sup>45</sup> Press Release, 'General Assembly Adopts Resolution Recognizing Access to Clean Water, Sanitation as Human Right, by Recorded Vote of 122 in Favor, None against, 41 Abstentions', UN Press Release GA/10967 (28 July 2010) viewed 23 March 2018, from <http://www.un.org/press/en/2010/ga10967.doc.htm>.

<sup>46</sup> McCaffrey *op cit* note 25 at 221.

<sup>47</sup> UN *From MDGs to Sustainable Development For All: Lessons from 15 Years of Practice* (2000) viewed 28 October 2017, from <http://www.undp.org/content/undp/en/home/librarypage/sustainable-development-goals/from-mdgs-to-sustainable-development-for-all.html>.

<sup>48</sup> Karin Arts and Atabongawung Tamo 'The right to development in international law: New momentum thirty years down the line?' (2016) 3 *Netherlands International Law Review* 221–249.

<sup>49</sup> UN Water Annual International Zaragoza Conference, *Water and Sustainable Development: From Vision to Action* (2015) viewed 28 October 2017, from [http://www.un.org/waterforlifedecade/waterandsustainabledevelopment2015/open\\_working\\_group\\_sdg.shtml](http://www.un.org/waterforlifedecade/waterandsustainabledevelopment2015/open_working_group_sdg.shtml).

Charter on Human and Peoples' Rights on the Rights of Women in Africa recognises the right to access to clean drinking water for women only.<sup>50</sup> The Convention for the Protection and Assistance of Internally Displaced Persons (IDPs) in Africa provides for access to clean water for IDPs while the African Charter on the Rights and Welfare of the Child (ACRWC), similar to its global counterpart, provides for safe drinking water as a measure to ensure the realisation of the highest attainable state of health for children.<sup>51</sup> Despite this apparent normative deficiency at the international and regional levels, the African Commission on Human and Peoples' Rights (the African Commission) has progressively interpreted the African Charter in a manner that recognises the right to water although not recognising it as an autonomous right as well as enumerating its normative elements.<sup>52</sup>

The African Commission read the right to water into other rights recognised in the African Charter. For instance, it recognised the right to water as a subset of the right to dignity (article 5), the right to health (article 16) and the right to a healthy environment (article 24).<sup>53</sup> In the *Free Legal Assistance Group and Others v Zaire* case, the African Commission held that the 'failure of the government to provide basic services such as safe drinking water and electricity and the shortage of medicine ... constitutes violation of article 16 [right to health]'.<sup>54</sup> In the landmark case of *Socio-Economic Rights Action Centre v Nigeria* (the *SERAC* case), the complainants alleged contamination of water sources. However, the African Commission found a violation of the right to health and the right to satisfactory environment in relation to the alleged contamination.<sup>55</sup> Similarly, in the case of *Sudan Human Rights Organization & Another v Sudan*, the complainants alleged inter alia the poisoning of water sources and denial of access to water by the Government of Sudan in the Darfur region and requested the Commission to find a violation of the right to water.<sup>56</sup> The African Commission ruled that 'the poisoning of water sources, such as wells, exposed the victims to serious health risks and amounts to a violation of article 16 of the African Charter'. Although this decision was bold and revolutionary in the protection of the access,

<sup>50</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa AHG/Res240 (XXXI) (1995) article 15(a).

<sup>51</sup> African Charter on the Rights and Welfare of the Child 7773 Treaty 0014 (1990) article 14(1).

<sup>52</sup> Takele Soboka Bulto 'The human right to water in the corpus and jurisprudence of the African human rights system' (2011) 11 *African Human Rights Law Journal* 341–367.

<sup>53</sup> *Ibid* at 345.

<sup>54</sup> *Free Legal Assistance Group and Others v Zaire* (2000) AHRLR 74 (ACHPR 1995) para 47.

<sup>55</sup> *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (SERAC) (2001) AHRLR 60 (ACHPR 2001) paras 49–54.

<sup>56</sup> *Human Rights Organization & Another v Sudan* (2009) AHRLR 153 (ACHPR 2009) (Sudan) para 207.

availability and quality of water, it undermines the push for a substantive and stand-alone right to water in Africa.

The African Commission has also adopted resolutions on the right to water based on the notion that a violation of the right to water (water pollution, for example) affects other rights that are dependent on access to water. For instance, the Resolution on a Human Rights-based Approach to Natural Resources Governance calls on state parties to ‘ensure the protection of and respect for human rights in all matters of natural resources exploration and extraction’.<sup>57</sup> Another Resolution on the Right to Water Obligations recalls the Tunis Reporting Guidelines on Socio-economic Rights and implores states to protect water resources from pollution and prioritise water provision. It further urged state parties to ‘guarantee the justiciability of the right to water as well as to establish mechanisms for the participation of individuals and communities in decision-making on the management of water resources ... including protecting water resources from abusive use and pollution’.<sup>58</sup> The intent of these resolutions and other international and regional human rights law instruments is to influence national legislation on the protection of water resources and the right to water in particular.

A very important but underrated instrument that can be used to ensure the quality, availability and accessibility of water in Africa is the African Convention on the Conservation of Nature and Natural Resources (the Revised African Convention).<sup>59</sup> The Revised African Convention bestows upon state parties the liability to maintain their water resources at the highest possible quality and quantity by taking actions to prevent degradation and protect it from contamination.<sup>60</sup> It further provides for the harvesting, conservation, management and utilisation of underground water and rainwater.<sup>61</sup> It obliges state parties to take necessary measures to achieve its objective through preventive measures and application of the precautionary principles.<sup>62</sup> The inclusion of the principle of prevention and the application of precautionary measures in ensuring sustainability is crucial in combating climate change and its adverse impacts on the availability, quality and accessibility of water. However, the Revised African Convention suffers from a low-ratification status and took over 15 years

<sup>57</sup> African Commission on Human and Peoples’ Rights, Resolution 224 on a Human Rights-Based Approach to Natural Resources Governance’ (2012) viewed 28 October 2017, from <http://www.achpr.org/sessions/51st/resolutions/224/>.

<sup>58</sup> African Commission on Human and Peoples’ Rights, Resolution 300 on the Right to Water Obligations – ACHPR/Res.300 (EXT.OS/XVII) (2015) 20 viewed 28 October 2017, from <http://www.achpr.org/sessions/17th-eo/resolutions/300/>.

<sup>59</sup> African Convention on the Conservation of Nature and Natural Resources No 14689 (1968, Revised in 2003).

<sup>60</sup> *Ibid.*, at article VII.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*, at article IV.

from 2003 to 2016 before obtaining the 15 mandatory ratifications to enter into force. It is noteworthy that the Revised African Convention is an environmental law and not a human rights instrument. The provisions of the Revised African Convention are therefore not crafted in a manner that gives rights to individuals or groups. Rather, its enforcement mechanism is geared towards promoting and enhancing compliance with the Convention.<sup>63</sup> Nevertheless, the responsibilities it imposes on member states are intended to benefit individuals and groups.<sup>64</sup>

The human right to water is without contestation subject to progressive realisation since it is derived from articles 11 and 12 of the ICESCR.<sup>65</sup> The conception of the doctrine of progressive realisation of economic, social and cultural rights originates from article 2(1) of the ICESCR. It provides that:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.<sup>66</sup>

This is further elaborated by General Comment 3 on the nature of states parties' obligations (article 2(1)) by the CESCR Committee, where the concept of 'progressive realisation' is carefully explained as follows:

The concept of progressive realisation constitutes recognition of the fact that full realisation of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. ... Nevertheless, the fact that the realisation over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realisation of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d'être*, of the Covenant which is to establish clear obligations for States Parties in respect of the full realisation of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would

<sup>63</sup> International Union for the Conservation of Nature, *An introduction to the African Convention on the Conservation of Nature and Natural Resources* (2004) 19.

<sup>64</sup> Bulto *op cit* note 52.

<sup>65</sup> General Comment 15 *op cit* note 11, at para 1; ICESCR *op cit* note 18, article 2(1).

<sup>66</sup> ICESCR *op cit* note 18, article 2(1).

require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.<sup>67</sup>

The Committee emphasises that even under extremely difficult circumstances, states still have the obligation to strive to guarantee the enjoyment of relevant rights to the widest possible extent under the prevailing conditions.<sup>68</sup> Through accumulated experience, the Committee opines that the minimum core obligations guarantee the realisation of, at least, minimum essential levels of the recognised rights as well as their associated obligations imposed on the states.<sup>69</sup> It submits a scenario that a state with large populations of individuals deprived of essential foodstuffs, basic housing and essential healthcare or basic education is a *prima facie* failure to perform its duties under the Covenant.<sup>70</sup> The Committee was of the opinion that without establishing minimum core obligations, the Covenant would be denied of its *raison d'être*.<sup>71</sup> The minimum core obligations prevent states from relying on the principle of progressive realisation in relation to the maximum utilisation of available resources to render the rights meaningless.<sup>72</sup>

The CESCR committee in General Comment 15 on the human right to water therefore acknowledged a number of 'core obligations' involving the human right to water which were to be effective immediately. The Committee identified nine core obligations which make up the fundamental nature of the right. The first three, for purposes of illustration, are the following:

- (a) to ensure access to the minimum essential amount of water, that is sufficient and safe for personal and domestic uses to prevent disease; (b) to ensure the right of access to water, and water facilities and services on a non-discriminatory basis, especially for disadvantaged or marginalized groups; (c) to ensure physical access to water facilities or services that provide sufficient, safe and regular water; have a sufficient number of water outlets to avoid prohibitive waiting times; are at a reasonable distance from the household.<sup>73</sup>

<sup>67</sup> ICESCR Committee 'General Comment 3: The Nature of States Parties' Obligations (article 2[1])' Fifth Session, (1990) UN Doc E/1991/23, para 9.

<sup>68</sup> CESCR Committee op cit note 11, at para 11.

<sup>69</sup> Ibid, at para 10.

<sup>70</sup> Ibid, at para 10.

<sup>71</sup> Ibid.

<sup>72</sup> Audrey R Chapman and Sage Russell 'Introduction' in Sage Russell and Audrey R Chapman (eds) *The core obligations: Building a framework for economic, social and cultural rights* (2002) 6.

<sup>73</sup> General Comment 15 op cit note 11, at para 37.

Mbazira argues that these obligations challenge the conception of economic, social and cultural rights as being programmatic and incapable of enforcement.<sup>74</sup> Conversely, the CESCR Committee clearly does not have the authority to adopt binding comments or, *a fortiori*, to impose immediate obligations on states parties to the ICESCR. Nevertheless, the Committee has the competence to issue authoritative but non-binding interpretations of the Covenant. Also, the Committee will presumably draw on these evolving concepts in appraising reports submitted by states parties to the Covenant on their performance of the obligations under the ICESCR.<sup>75</sup>

The African Commission has also opined that the measures for the protection and realisation of economic, social and cultural rights include inter alia constitutional, legislative and institutional, policy and budgetary measures, as well as ensuring appropriate administrative and judicial remedies for the violation of these rights.<sup>76</sup> It therefore obliges states to implement a reasonable and measurable plan with achievable parameters that are time-bound to guarantee the enjoyment of economic, social and cultural rights based on the available resources within a state.<sup>77</sup> Otto and Wiseman argue that developing countries must be required to demonstrate that they have made every effort to achieve the minimum realisation of these rights while wealthy economies must be obliged to do more.<sup>78</sup>

Despite the remarkable progress that has been made at the international and regional levels in relation to the recognition and protection of the human right to water, one of the drawbacks as an international human rights law guarantee is that it is not directly applicable to the major culprits, who are mostly multinational corporations (MNCs) and other non-state actors in the extractive sector.<sup>79</sup> This is because international human rights law imposes the primary obligations to promote, respect, protect and fulfil human rights on states. Non-state actors have a responsibility to respect human rights. The CESCR Committee through the purposive interpretation of article 11(1) has therefore established a firm legal basis for the human right to water. Locating the right to water in related rights that have been accorded explicit recognition in the international human

<sup>74</sup> Christopher Mbazira *Litigating Socio-Economic Rights in South Africa: A choice between corrective and distributive justice* (2009) 2.

<sup>75</sup> General Comment 15 op cit note 11, at art 21.

<sup>76</sup> African Commission on Human And Peoples' Rights (The Commission) 'Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights' (2011) 10.

<sup>77</sup> *Ibid*, at 12.

<sup>78</sup> Dianne Otto and David Wiseman 'In Search of effective remedies: Applying the International Covenant on Economic, Social and Cultural Rights to Australia' (2001) 7 *Australian Journal of Human Rights* 5–46.

<sup>79</sup> International Bar Association, *Climate Change Justice and Human Rights Task Force Report on Achieving Justice and Human Rights in an Era of Climate Disruption* (2014) 68.

rights treaties, therefore, provides legal basis to argue for its protection. It also helps to emphasise the utility of the indivisibility, interdependence and interrelatedness of human rights.<sup>80</sup> This consequently leads to the conclusion that there is a strong normative basis for the human right to water and attendant state obligations in the ICESCR.

## **DOMESTICATION AND APPLICATION OF THE HUMAN RIGHT TO WATER: THE LAW AND PRACTICE OF SELECTED AFRICAN COUNTRIES**

The Treaty Initiative to Share and Protect the Global Water Commons states among others:

We proclaim these truths to be universal and indivisible:

That the intrinsic value of the Earth's fresh water precedes its utility and commercial value, and therefore must be respected and safeguarded by all political, commercial and social institutions

That the Earth's fresh water belongs to the earth and all species, and therefore must not be treated as a private commodity to be bought, sold and traded for profit<sup>81</sup>

Despite the progress made at the international and regional levels regarding the promotion and protection of the right to water, the interpretational approaches adopted by the Human Rights Council and the CESCR Committee have affected its essential impact at the national level in most African countries. For instance, almost all African countries except South Africa include the right to water under the directive principles of state policy making the right non-justiciable.<sup>82</sup> This phenomenon, coupled with lack of political will and poor institution design, make the effective regulation and enforcement of the right to safe clean water especially in challenging contexts very difficult. For instance, the extractive industry in Africa, despite being the major driver of economic and social development, comes with severe environmental consequences such as water pollution and environmental degradation. In Niger, a semi-arid country and state party to all the relevant instruments, extractive projects are negatively impacting on access to water for rural communities hosting these operations.<sup>83</sup> The African Commission on Human and Peoples'

<sup>80</sup> See *Vienna Declaration and Programme of Action*, UN Doc A/Conf157/23 (1993) para 5.

<sup>81</sup> The Treaty Initiative to Share and Protect the Global Water Commons (6 September 2001) viewed 24 March 2018 from <<http://vakindia.org/pdf/blue--planet.pdf>>

<sup>82</sup> Bulto op cit note 52.

<sup>83</sup> Elin Wrzoncki 'Mining and oil industries in Niger threaten human rights' Danish Institute for Human Rights (2015) viewed 28 October 2017, from <https://www.humanrights.dk/news/mining-oil-industries-niger-threaten-human-rights>.

Rights' Working Group on Extractive Industries observed that 'the greatest threat to the enjoyment of human and peoples' right in Africa is the unaccountable power of corporations in the extractive sector'.<sup>84</sup>

In Nigeria, a state party to all the substantive instruments discussed above and a country that largely depends on natural resources for economic development, there is continued experience of human rights violations by companies in the extractive sector. Particularly, the peoples' right to water is severely compromised. For instance, in the Zamfara state where there is widespread artisanal gold mining, many children have died (at least 400) due to severe lead poisoning.<sup>85</sup> The processing of ore to extract gold generates contaminated dust which in effect pollutes the water bodies and food.<sup>86</sup> The grave impact of the extractive industries on the environment and water in particular is seen in the *Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) v Nigeria (SERAC case)*. In the *SERAC* case, the Nigerian National Petroleum Company (NNPC) and the Shell Petroleum Development Corporation (SPDC)'s oil extraction activities caused severe environmental damage to Ogoniland, including widespread contamination of water bodies.<sup>87</sup> However, due to the recommendatory nature of the African Commission's decisions, most of its remedial efforts have not been fully complied with by the Government of Nigeria.<sup>88</sup>

This is a major challenge especially as most national legal frameworks in African countries fail to effectively protect human rights of citizens against the adverse environmental impacts of extractive industries on water bodies. This notwithstanding, most African countries have enacted and reviewed their legal, policy and institutional frameworks to enhance accountability in the mining sector in order to strengthen their environmental protection efforts. For example, all the member states of the African Union have environmental impact assessments (EIA) as a requirement for mining undertakings as a measure to ensure environmental sustainability. Promoting environmental sustainability in the extractive industry indisputably positively affects the promotion and protection of the availability of and accessibility to safe clean water. However, in practice, communities hosting extractive entities such as mining and oil drilling companies continue to experience the negative

<sup>84</sup> Speech delivered during the inaugural General Assembly of African Coalition for Corporate Responsibility (2016) viewed 28 October 2017, from <https://www.humanrights.dk/news/mining-oil-industries-niger-threaten-human-rights>

<sup>85</sup> Human Rights Watch *World Report 2013* (2013).

<sup>86</sup> *Ibid.*

<sup>87</sup> *SERAC* case op cit note 55.

<sup>88</sup> Institute for International and Comparative Law in Africa Commissions of Inquiries in Africa information (2016) viewed 28 October 2017, from <http://www.icla.up.ac.za/commissions-of-inquiries-in-africa-project/27-un/commission-of-inquires-in-africa/201-commissions-of-inquiries-in-africa-information>.

impacts of their activities, including environmental degradation and water pollution. For example, Kabwe, a community in Zambia is now ranked as the world's most toxic town due to the devastating and health threatening concentrations of lead dust on the land and metals in water bodies a result of previous mining operations that spanned almost a century.<sup>89</sup>

In addition, a study undertaken in DR Congo's former Katanga province<sup>90</sup> indicates that there is widespread water pollution across the province, and major rivers such as the Kafubu, Kamoto, Luilu, Musonoi, Msesa and Mura, Kakanda and their tributaries are heavily contaminated.<sup>91</sup> The disposal of waste and hazardous substances in water bodies through mining operations (especially joint ventures between government and private-owned companies) affects all the communities within their vicinity harming their health and agricultural production, which serves as their main source of livelihood. The study further indicates that the concentration of heavy metals in these water bodies is far beyond the minimum standards set by the World Health Organisation (WHO) and these dangerous chemicals have permeated into the food chain as well.<sup>92</sup> This is so, despite the relative progressive nature of the Mining Code of 2002 and the Mining Regulations of 2003<sup>93</sup> containing several and detailed environmental regulations including provisions on environmental impact assessments (EIAs). Environmental compliance obligations exist at every stage of a mining project. For instance, it provided that 'any person applying for an exploitation permit is required to submit an environmental impact study and a project environmental management plan, which must contain a description of the "greenfield" ecosystem and of the measures envisaged to limit and remedy harm caused to the environment throughout the duration of the project'. This is largely because DR Congo is a signatory to the African Charter and voluntarily adheres to the Extractive Industries Transparency Initiative criteria. However, the political instability, armed conflict and poor resource governance in the mineral rich provinces have negatively affected the enforcement of protection standards as enshrined in the laws and policies. Therefore, the extractive industries pollute the water bodies undeterred.

<sup>89</sup> Damian Carrington 'The world's most toxic town: the terrible legacy of Zambia's lead mines' *The Guardian* (28 May 2017) viewed 28 October 2017, from <https://www.theguardian.com/environment/2017/may/28/the-worlds-most-toxic-town-the-terrible-legacy-of-zambias-lead-mines>.

<sup>90</sup> Katanga was one of the eleven provinces of the DR Congo between 1966 and 2015, when it was split into the Tanganyika, Haut-Lomami, Lualaba and Haut-Katanga provinces through territorial decentralisation by the Government.

<sup>91</sup> Montejano op cit note 5 at 10.

<sup>92</sup> Ibid.

<sup>93</sup> The Government of DR Congo Act No 007/202 of 11 July 2002, establishing the Mining Code; Decree No 038/2003 of 26 March 2003 on Mining Regulations.

Aside from the Mining Code and its Regulations, there is no national water policy or legislation for evaluating and protecting the quality of the water that people consume.<sup>94</sup> This is a weakness that exists in a country where 51 million people lack access to potable water and only 26 per cent of the population has access to safe drinking water.<sup>95</sup> Also, the post-war transitional government between 2003 and 2006 took a more relaxed approach to investors in the mining sector that put investment first before environmental sustainability and water security. In some instances mining operations commenced without any Environmental Impact Assessment (EIA).<sup>96</sup> This facilitated state-sanctioned human rights violations. Although communities and individuals are able to seek redress through the courts, they face insurmountable challenges in taking this path. Access to justice is still a far cry. The justice system is riddled with hurdles that disadvantage the poor and marginalised communities. Factors such as financial resources, tribal, ethnic and political affiliation determine whether one is able to access justice. In environmental rights violation cases, those involving water pollution in mining communities are rarely investigated.<sup>97</sup> The newly enacted Mining Code of 2018 was voted in by the National Assembly on 8 December 2017 and by the Senate on 22 January 2018.<sup>98</sup> The new code substantially modifies the existing Mining Code dated 2002. It notably provides that ‘any mining title application is subject to the prior granting of an environmental certificate delivered by the *Agence Congolaise de l’Environnement*’.<sup>99</sup> Unfortunately, apart from the general provisions on the protection of the environment especially ‘protected areas’, there is no explicit provision on the protection of water bodies.

Similarly, Ghana, a state party to the relevant instruments has anchored its extractive industry sector on a well-established institutional, policy and legal framework. For instance, the Ministry of Lands and Natural Resources and the Mineral Commission perform a supervisory and oversight role in the extractive sector.<sup>100</sup> All environmental issues, including formulating and implementing environmental policies and enforcing compliance with environmental laws are under the purview of the Environmental

<sup>94</sup> Montejano op cit note 5 at 10.

<sup>95</sup> Ibid.

<sup>96</sup> Newton Mthethwa, ‘Mining in the DRC, a palatable endeavour?’ (2016) viewed 28 October 2017, from <http://ambriefonline.com/2016/02/29/mining-in-the-drc-a-palatable-endeavour/>.

<sup>97</sup> Montejano op cit note 5 at 10.

<sup>98</sup> Julien Barba and Eric Diamantis ‘Congo - DRC: Highlight of the New Mining Code and PPP Reform to be Promulgated Shortly’ Clyde & Co, Insight and Knowledge, 2 February 2018, viewed 24 March 2018, from <https://www.clydeco.com/insight/article/congo-drc-highlight-of-the-new-mining-code-and-ppp-reform-to-be-promulgated>.

<sup>99</sup> The Government of DR Congo, The Mining Code of 2018, article 3(b).

<sup>100</sup> Albert K Mensah et al ‘Environmental impacts of mining: A study of mining communities in Ghana’ (2015) 3 *Applied Ecology and Environmental Sciences* 81–94.

Protection Agency (EPA) established by the Environmental Protection Agency Act of 1994.<sup>101</sup> The national environmental policy seeks to ‘unite Ghanaians in working toward a society where all residents of the country have access to sufficient and wholesome food, clean air and water, decent housing and other necessities of life’.<sup>102</sup> Section 17 of the Minerals and Mining Act of 2006 (Act 703) gives a mineral right holder the right to ‘obtain, divert, impound, convey and use water from a river, stream, underground reservoir or watercourse within the land the subject of the mineral right’ for the purposes of mining operations.<sup>103</sup> This provision promotes direct violation of environmental and water rights and does not comply with international best practice as discussed in section 2 of this article.

As a result of this normative deficiency, the country is witnessing the adverse effects of mining activities, especially the small-scale mining operations locally known as ‘*galamsey*’ on its water bodies.<sup>104</sup> These extractive industries divert rivers and streams, and cause surface and ground water pollution due to the use of harmful chemicals such as mercury and cyanide. The high magnitude of water pollution has dire consequences to rural communities whose sources of water are contaminated.<sup>105</sup> This situation negatively affects the availability as well as accessibility to safe clean water. This is also a clear contradiction to General Comment 15 of the CESCR Committee which elaborates that accessibility includes the four key elements of physical accessibility, economic accessibility, non-discrimination and information accessibility.<sup>106</sup>

In addition, the Ghana Chamber of Mines observes that most small-scale miners (*galamsey*) are not registered and their operations are informal and illegal according to national law.<sup>107</sup> This form of mining therefore disregards environmental standards and pollutes water bodies because their operations are not controlled to uphold environmental protection standards.<sup>108</sup> This has been observed as one of the key challenges that affect the availability of water and hinders communities’ access to safe

<sup>101</sup> Ibid.

<sup>102</sup> Bervelyn Longdon ‘Fighting Galamsey and River Pollution in Ghana’ 27 November 2017 viewed 28 October 2017, from <http://ghana.gov.gh/index.php/media-center/features/3187-fighting-galamsey-and-river-pollution-in-ghana>.

<sup>103</sup> Alex Gardner, Nick Duff, Kwaku Ainuson and Samuel Manteaw ‘Regulating Mining Water Use and Impacts in Ghana: Comparing Australian and Ghanaian Law for Reform Ideas’, International Mining for Development Centre Research Report (2015) viewed 28 October 2017 from <https://im4dc.org/wp-content/uploads/2015/08/Gardner-FR-1psummary-appr.pdf>.

<sup>104</sup> Ibid.

<sup>105</sup> International Growth Centre, The Impact of Chinese Involvement in Small-scale Gold Mining in Ghana (2015).

<sup>106</sup> Ibid.

<sup>107</sup> CESCR Committee op cit note 11.

<sup>108</sup> Gardner et al op cit note 103.

drinking water.<sup>109</sup> For instance, in 2015, *galamsey* operations in the East Akyem District of Ghana reportedly polluted the Birim, Densu and Ayensu rivers and adjacent communities who rely on them for drinking and cooking were severely affected. Since, there are no alternatives; communities continue using the same contaminated water and contract cholera, dysentery, fever and other diseases.<sup>110</sup> This situation does not only violate their right to water but also rights to health and to life as well.

However, in Ghana, the practice is such that those who seek compensation approach the Minister responsible for Land and Natural Resources, although in the Constitution, the High Court has original jurisdiction.<sup>111</sup> Going through politicians such as Ministers does not provide appropriate redress for aggrieved rural communities and individuals as it is the same Ministry that sanctions these mining ventures. This is a serious challenge as it has been observed that the statutory bodies are too incapacitated to monitor the implementation of the legal and policy framework due to selfish political gains and weak institutions. For example, despite the veracity of the cyanide spillages into water bodies, there is no law or policy that specifically addresses cyanide spillages.<sup>112</sup> In addition to this, it has been observed that there are no best practice management systems for applying corporate social responsibilities (CSR) nor are there nationally recognised CSR standards against which a company can benchmark its efforts due to weak institutions and the lack of transparency in the legal regulatory framework in terms of valuation and payment of compensation and royalties, among other factors, in Ghana.<sup>113</sup> It has been observed that, due to the ongoing campaigns against 'illegal mining activities', new developments are taking place in the country as the Chief Justice has constituted fourteen special courts to deal with mining-related offences to protect natural resources such as water bodies.<sup>114</sup> According to the Chief Justice, there will be continuous training for the selected judges to enable them to efficiently discharge their mandate in combating unregulated extractive activities in order to protect environmental and natural resources such as water bodies in Ghana.

In South Africa, the most advanced economy and currently the second largest economy in Africa, mining and water resources are critical to its economy. Therefore, there is a plethora of laws, policies and institutions

<sup>109</sup> Mensah et al op cit note 100.

<sup>110</sup> Longdon op cit note 102.

<sup>111</sup> Ibrahim Aidara, 'Mining and its Impacts on Land and Agriculture in Ghana Paper presented at the United Nations Convention to Combat Desertification Eleventh session of the Conference of the Parties' (2013).

<sup>112</sup> International Growth Centre op cit note 105.

<sup>113</sup> Mensah et al op cit note 100.

<sup>114</sup> Abdur Rahman Alfa Shaban 'Ghana's Chief Justice sets up specialized courts to deal with illegal mining. Africa News' (13 April 2017) viewed 28 October 2017, from <http://www.africanews.com/2017/04/13/ghana-s-chief-justice-sets-up-specialized-courts-to-deal-with-illegal-mining/>.

that regulate mining activities and natural resources management. On the constitutional guarantees relating to health care, food, water and social security, section 27(1)(b) of the 1996 Constitution<sup>115</sup> provides that ‘everyone has the right to access to (b) sufficient food and water’. Section 27(2) obligates ‘the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights. In the *Mazibuko and Others v City of Johannesburg and Others* case,<sup>116</sup> the Constitutional Court held that ‘section 27(1) and (2) of the Constitution must be read together to delineate the scope of the positive obligation to provide access to sufficient water imposed upon the state’.<sup>117</sup> The Court further contended that, the obligation in section 27(1) and (2) requires the state to ‘take reasonable legislative and other measures progressively to achieve the right of access to sufficient water within available resources and does not confer a right to claim “sufficient water” from the state immediately’.<sup>118</sup> The approach taken by the highest court in South Africa weakens the ability of the citizens to demand of the state that it acts reasonably with urgency to ensure that everyone enjoys the basic necessities of life such as water. In so doing, it shackles citizens from holding the government to account for the manner in which it seeks to pursue the realisation of the right to water.

The National Water Act 36 of 1998<sup>119</sup> also creates a comprehensive legal framework for the management of water resources in South Africa. It provides that reasonable measures must be taken to stop or prevent environmental pollution.<sup>120</sup> This provision is in compliance with the Revised African Convention, which bestows on state parties the liability to maintain their water resources at the highest possible quality and quantity by taking actions to prevent degradation and protect it from contamination.<sup>121</sup> The Water Services Act 108 of 1997<sup>122</sup> is the primary legal instrument relating to the accessibility and provision of water services. This includes drinking water and sanitation services, to households and other municipal water users by local government.<sup>123</sup> The Water Services Act defines a water service authority as ‘any municipality, including a district or rural council as defined in the Local Government Transition Act, 1993 (Act No 209 of 1993) responsible for ensuring access to water services’.<sup>124</sup> A water service authority has a ‘duty to all consumers and

<sup>115</sup> Government of South Africa, Constitution of the Republic of South Africa, 1996.

<sup>116</sup> *Mazibuko and Others v City of Johannesburg and Others* 2010 (3) BCLR 239 (CC).

<sup>117</sup> *Ibid.*, at para 57.

<sup>118</sup> *Ibid.*

<sup>119</sup> Government of South Africa, National Water Act 36 of 1998.

<sup>120</sup> Government of South Africa, National Water Act 36 of 1998, section 19.

<sup>121</sup> At article VII.

<sup>122</sup> Government of South Africa, Water Services Act 108 of 1997.

<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid.*

potential consumers in its area of jurisdiction to progressively ensure efficient affordable, economical and sustainable access to water services<sup>125</sup> and must draft a Municipal Water Services Development Plan for implementation within its boundaries. However, the responsibility for the delivery of services falls on the municipality at a local government level, which serves as the first port of call for public users that are not receiving or are having problems with their service. Ultimately, the municipality is responsible to 'all consumers or potential consumers in its area of jurisdiction to progressively ensure efficient affordable, economical and sustainable access to water services'.<sup>126</sup>

The Mineral and Petroleum Resources Development Act 28 of 2002 further imposes a duty on the holder of a mining, prospecting or retention right or mining permit to ensure environmental sustainability, including desisting from polluting the environment such as water sources.<sup>127</sup> These laws place obligations on extractive industries and other non-state actors to adhere to environmental laws that are meant to ensure the availability and accessibility of safe clean water to communities in their operational (mining) areas. In terms of enforcement and compliance, there is the Environmental Management Inspectorate (Inspectorate) that comprises environmental enforcement officials from national, provincial and municipal government departments.<sup>128</sup> They do not prosecute cases but refer cases to the National Prosecuting Authority for prosecution.

Despite the comprehensive framework, the right to water in the country is threatened due to lapses in implementation and institutional bottlenecks. For instance, in a hearing organised by the South African Human Rights Commission, some communities protested that 'while they live next to large dams, which supply mining companies, agribusinesses and tourist companies, they have no access to water'.<sup>129</sup> According to the report, in 2014, in the Madibeng Municipality, 'the local communities protested that while they were expected to go for long periods without any water, wealthy companies did not experience any water cuts'.<sup>130</sup> This generally entails the privatisation of the management of water where the

<sup>125</sup> Ibid.

<sup>126</sup> Ibid.

<sup>127</sup> Government of South Africa, Mineral and Petroleum Resources Development Act 28 of 2002.

<sup>128</sup> Warren Beech and Nicholas Veltman Hogan Lovells, Environmental law and practice in South Africa: overview (20 April 2017) viewed 28 October 2017, from [https://uk.practicallaw.thomsonreuters.com/4-502-7865?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/4-502-7865?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1).

<sup>129</sup> South African Human Rights Commission 'Report on the Right to Access Sufficient Water and Decent Sanitation in South Africa: 2014' 26 viewed 24 March 2018, from [https://www.sahrc.org.za/home/21/files/FINAL%204th%20Proof%204%20March%20-%20Water%20%20Sanitation%20low%20res%20\(2\).pdf](https://www.sahrc.org.za/home/21/files/FINAL%204th%20Proof%204%20March%20-%20Water%20%20Sanitation%20low%20res%20(2).pdf).

<sup>130</sup> Ibid.

licensed entity provides water to users and collects payment in return for the service delivered. The predicament with commodification of water is that a private entity has control over a resource that is essential to human life and dignity. The WHO contends that each citizen should be entitled to at least 20 litres of potable water daily.<sup>131</sup> Privatising the management of water therefore implies that availability is only guaranteed for those who can afford the cost associated with infrastructure and for the actual use of water. This affects efforts to address poverty and inequality and impacts on access to other human rights including health, education, food and environment. The impending day zero in Cape Town which has been moved to 2019 also indicates the weaknesses in the existing framework particularly the fragile institutional capacity and low political will. The drought in the province has been declared a national disaster, with residents in Cape Town required to reduce usage to 50 litres of water per day.<sup>132</sup> Day Zero therefore refers to when the taps will run dry and water will be rationed to a daily 25 litres per person in Cape Town due to the ongoing drought.

In Tanzania, the state has signed and ratified all the relevant international and regional instruments discussed above. The country passed an Environmental Management Act in 2004 (EMA, 2004) to govern its environmental management through establishing the relevant institutional framework for regulating environmental compliance, pollution issues and enforcement to advance sustainable environmental management in that country.<sup>133</sup> The extractive industry sector also has a sector-specific policy on the environment. Environmental and climate change issues are also mainstreamed into the national development and other core national environmental plans and policies.<sup>134</sup> For instance, policies that regulate environmental management include the National Environmental Policy (NEP of 1997), the National Environmental Action Plan (NEAP, 1997), the National Adaptation Programme of Action (NAPA, 2007). The new amendments to the Mining Act of 2010 mandate mining licence holders to take appropriate measures against environmental damage and also

<sup>131</sup> WHO 'How much water is needed in emergencies' 2 Technical Notes on Drinking Water, Sanitation and Hygiene in Emergencies WEDC 9 viewed 24 March 2018, from [http://www.who.int/water\\_sanitation\\_health/emergencies/WHO\\_TN\\_09\\_How\\_much\\_water\\_is\\_needed.pdf](http://www.who.int/water_sanitation_health/emergencies/WHO_TN_09_How_much_water_is_needed.pdf).

<sup>132</sup> Jenni Evans 'Big business moves to meet Cape water crisis demands' FIN24 (23 March 2018) viewed 24 March 2018, from <https://www.fin24.com/Economy/big-business-moves-to-meet-cape-water-crisis-demands-20180323>.

<sup>133</sup> Government of Tanzania, Tanzania Environment and Climate Change Policy Brief (2016) viewed 28 October 2017, from <http://sidaenvironmenthelpdesk.se/tanzania-environmental-and-climate-change-policy-brief-2016/>.

<sup>134</sup> Ibid.

reinforce the need for environmental impact assessment as prescribed under the Environmental Management Act.<sup>135</sup>

The Written Laws (Miscellaneous Amendments) Act 2017 (Amendments Act) imposes strict obligations on extractive industries to control environmental pollution. For example, it provides that 'license holders and contractors are responsible for ensuring that the management of production, transportation, storage, treatment and disposal of waste from mining operations are carried out in accordance with the principles and safeguards prescribed under the Environmental Management Act and other relevant laws'.<sup>136</sup> According to section 112, the Minister may make regulations for any matter such as 'the avoidance of pollution to the air, surface and ground waters and soils and the regulation of all matters relating to the protection of the environment and the minimisation of all adverse impacts to the environment including the restoration of land on which mining operations have been conducted'.<sup>137</sup> This provision is in compliance with the Revised African Convention, which implores states parties to incorporate sustainable environment management principles into their development policies.<sup>138</sup> However, the country is yet to ratify the Revised African Convention.

In addition, the Water Resource Management Act of 2009 and Water Supply and Sanitation Act are framed to ensure the quality of water is fit for consumption. Specifically, the Water Resources Management Act regulates issues relating to pollution and issuance of discharge permits for managing effluents and water bodies. This is in compliance with the African Commission's Resolution 300 on the Right to Water Obligations, which urges state parties 'to establish mechanisms for the management of water resources... and to protect water resources from abusive use and pollution'.<sup>139</sup> However, the presence of laws and policies does not necessarily translate into implementation. Weak monitoring and implementation in Tanzania have disadvantaged communities in mining areas and exposed them to environmental catastrophes such as contamination of their water sources. In 2009, the spill of toxic waste from the Mara mining operations contaminated water in areas such as Thigithe and Mara.<sup>140</sup> The levels of heavy metals in the water sources exceed limits set by the World Health Organisation.<sup>141</sup> Clearly, this violates

<sup>135</sup> Charles W Marwa and Isabela Warioba, 'Challenges posed on the new mining act and its regulations in Tanzania' (2015) 4 *Journal of Politics and Law* 185–190.

<sup>136</sup> Nicola Woodroffe, Thomas Scurfield and Matt Genasci 'Tanzania's New Natural Resources Legislation: What Will Change?' Natural Resource Governance Institute Briefing Paper (2017).

<sup>137</sup> Government of Tanzania, Mining Act (2010).

<sup>138</sup> At article II.

<sup>139</sup> African Commission op cit note 57.

<sup>140</sup> Furaha Lugoe 'Governance in Mining areas in Tanzania with special reference to land issues', The Economic and Social Science Research Foundation Discussion paper 41 (2012) 5.

<sup>141</sup> Ibid.

the principles and the normative content of the human right to water as explained by the CESCR Committee in its General Comment No 15.

In Zambia, the economy is resource-dependent and mining forms a vital part of the country's economic development plans. Zambia has therefore enacted laws and adopted relevant policies that regulate the activities of mining entities. Also, reviews of antiquated legislation are ongoing. The Mines and Minerals Development Act of 2015 provides for safety, health and environmental protection in mining operations. The Environmental Management Act of 2011 also regulates environmental issues in Zambia, including mining-related water pollution. The National Policy on the Environment was greatly influenced by international conventions and protocols on environmental protection.<sup>142</sup> The ongoing revision of environmental laws and policies are very timely and promising. For instance, statutory instruments on Environmental Impact Assessment (EIA), Water and Air Pollution Control Regulations, Statutory Instrument No 29 of 1997, the Mines and Minerals Act (Act No 31 of 1995), the Mines and Minerals (Environmental) Regulations 1997, Statutory Instrument No 102 of 1998, and the Mines and Minerals Regulations (Environmental Protection Fund) Regulations 1998 need to be reviewed to ensure their compliance with international norms and standards in order to provide effective guidelines and enforcement of environmental standards relating to the control of water pollution.<sup>143</sup> The existing fractured framework is not only difficult to enforce but creates other overlaps that increase the vulnerability of communities exposed to extractive activities. For instance, as a result of unsustainable wastewater management by the extractive industries, Zambia's Kafue River, a major water source, is heavily contaminated with effluent from the extractive industries operating along its course. Communities such as Chongola have suffered from exposure to contaminated water.<sup>144</sup> Despite the normative weaknesses in the legal framework, communities in some instances are able to seek redress in courts, although this avenue has enforcement challenges as well.

The courts have however made efforts to interpret the law in favour of vulnerable communities. For example, in the *Nyasulu and Others v Environmental Council of Zambia and Others* case, the High Court ruled in favour of the residents of Chingola against Konkola Copper Mines for discharging harmful effluents from its mining operations.<sup>145</sup> In its ruling, the court indicated that the Konkola mine had no regard for the sacrosanct

<sup>142</sup> Zambian Auditor General, 'Report of the Auditor General on the Management of Environmental Degradation caused by Mining Activities in Zambia' (2014).

<sup>143</sup> Ibid.

<sup>144</sup> *Nyasulu and Others v Environmental Council of Zambia and Others* 2007/HP/1286.

<sup>145</sup> Ibid.

nature of human life and displayed a ‘don’t care attitude’.<sup>146</sup> In a call for international investors to ‘observe high environmental standards’, the court indicated that the ‘fact that the host country (Zambia) is in dire need of foreign investment to improve the well-being of its people does not mean its people should be dehumanized by “Greed and Crude Capitalism” which puts profit above human life’.<sup>147</sup> Despite this progressive decision by the High Court, the Konkola mine has continued the pollution drive as villagers accuse the mine of turning the Kafue River into a ‘river of acid’.<sup>148</sup> This case is still ongoing because the villagers have resorted to suing the parent company, Vedanta, in the UK court for the continued pollution caused by its subsidiary, Konkola Mine.

It has also been observed that the Zambia Environmental Management Authority (ZEMA) has not evaluated the implementation of the environmental policy of various non-state actors such as mining companies due to inadequate financial capacity and expensive technology that is required to effectively carry out its mandate as an environmental watchdog.<sup>149</sup> As a result of this weakness, mining companies do not comply with environmental laws and regulations such as the environmental licensing conditions set by Government. This has created the environment for poor institutional supervision and enforcement of relevant laws and policies governing mining activities. Therefore, the resultant poor mining and mineral processing practices have polluted the environment, including surface and ground water, and their effects continue sometimes long after the mine had stopped operating.<sup>150</sup>

In Zimbabwe, another country that has ratified all the relevant international and regional mechanisms, communities and individuals can approach the courts or other tribunals of competent jurisdiction for recourse if their right to safe and clean water has been violated, because the 2013 Constitution guarantees the right to safe and clean potable water.<sup>151</sup> For instance, the High Court of Zimbabwe recently ordered the Zimbabwe Consolidated Diamond Company to stop mining diamonds in the Marange area until an environmental impact assessment (EIA) has been conducted and issued a licence by the Environmental

<sup>146</sup> Ibid.

<sup>147</sup> Ibid.

<sup>148</sup> Water pollution, Zambian villagers sue mining giant Vedanta in UK court, viewed 23 September 2017, from <http://www.lifegate.com/people/lifestyle/zambia-pollution-case-vedanta>.

<sup>149</sup> Report of the Auditor General on the Management of Environmental Degradation caused by Mining Activities in Zambia (2014).

<sup>150</sup> Committee on Lands, Environment and Tourism on the Auditor General’s Report on Environmental Degradation Caused by Mining Activities for the Fourth Session of the Eleventh National Assembly Appointed on 25 September 2014 (2015).

<sup>151</sup> Government of Zimbabwe, Constitution of the Republic of Zimbabwe, 2013, section 77.

Management Agency.<sup>152</sup> This is because the Environment Management Act prohibits commencement of mining operations before conducting an EIA. However, in this instant case, there was no consultation with the community.<sup>153</sup> This provision also complies with the African Commission's Resolution 300 on the Right to Water obligations, which urges state parties to 'establish mechanisms for the participation of individuals and communities in decision-making on the management of water resources... and protect water resources from abusive use and pollution'.<sup>154</sup> Although there is recourse for the community through the courts, the penalty for environmental crimes such as pollution is not prohibitive enough. Water pollution attracts a fine of only \$4,000, which companies in the extractive sector who are the leading pollutants can easily pay.<sup>155</sup> Thus, it is common in Zimbabwe for mining companies, even state-owned companies to defy the Environment Management Act and start operations without the approval of the Environmental Management Agency.<sup>156</sup>

It is also important to recognise the avenues for redress regarding environmental accountability issues, including violations of the right to water at the regional level when communities have either exhausted local remedies or the remedies are unavailable or the available remedies are unduly prolonged. For instance, Kemba contends that 'human rights abuses by mining companies are a consequence of weak and fragile African states lacking in capacity to enforce their own legislation and regulations'.<sup>157</sup> The *SERAC* case is a demonstration of such mechanisms, where the African Commission decided on a number of rights violated including the right to a healthy environment and by extension the right to water when the Nigerian Government failed in its duty to protect the environmental rights of its citizens against multinational extractive companies operating within its jurisdiction.<sup>158</sup> The challenge with this avenue is that the African Commission faces a conundrum as most of its decisions have not been fully implemented by member states that have violated the African Charter. For example, even after that groundbreaking decision on the *SERAC* case, the Ogoniland communities still face the

<sup>152</sup> Veneranda Langa, 'Marange villagers take on mining giant' *News Day* (7 August 2017) viewed 28 October 2017, from <https://www.newsday.co.zw/2017/08/marange-villagers-take-mining-giant/>.

<sup>153</sup> *Ibid.*

<sup>154</sup> African Commission *op cit* note 57.

<sup>155</sup> *Ibid.*

<sup>156</sup> The source, 'Parastatals chief culprits in defying environmental regulations say EMA' (2017) viewed 28 October 2017, from <http://source.co.zw/2017/08/parastatals-chief-culprits-defying-environmental-regulations-says-ema/>.

<sup>157</sup> Claude Kabemba 'Human Rights and Extractive Industries: Attacking the brand' (18 April 2016) viewed 28 October 2017, from <http://www.sarwatch.org/speech/human-rights-and-extractive-industries-attacking-brand>.

<sup>158</sup> *SERAC* case, *supra* note 55.

same challenges of environmental and water pollution by extractive industries. Although the AU is making efforts to adopt elaborate environment-related laws and policies, these efforts are being hampered by poor implementation and monitoring mechanisms. One characteristic that contributes to these continued negative indicators is the presence of weak institutions and governance systems as discussed above.<sup>159</sup> Even when legal reform initiatives in the mining sector are undertaken, they are intentionally crafted to create a conducive environment to attract foreign direct investment at the expense of social and economic development of local communities who usually suffer injustices such as environmental degradation characterised by pollution of water resources.<sup>160</sup> Also, such investment agreements are usually decorated with a plethora of investor-friendly incentives such as tax relief which, in the end, affect the resources available to the government to provide social services such as potable water to ameliorate the effects of pollution caused by the multinational mining companies.

## CONCLUSION

From the discussion, although the legislation and other policies are promising, most of them including those of the DR Congo, Ghana, Nigeria, Tanzania, and Zambia do not contain explicit substantive guarantees on the human right to water as is the case in South Africa. Most of them also fail to meet the normative and institutional design requirements observed by the CESCRC Committee especially regarding accessibility of water which includes four key elements – physical accessibility, economic accessibility, non-discrimination and information accessibility.<sup>161</sup> Also, none of the legislation or policies contains adequate measures and strategies on how the country intends to meet these requirements as contained in General Comment 15.

The protection of the human right to water under international and regional international human rights law has important implications on environmental conservation and the regulation of extractive activities in Africa. More broadly, this contributes to raising awareness on the need to ensure that economic development does not come at the expense of reducing the availability of and access to safe clean water. However, the lack of an explicit recognition of the right to water by major international human rights instruments and most national legislation as well as weak institutional capacity in most African jurisdictions is a hindrance to its

<sup>159</sup> Portia Manangazira et al, *A Study to Enhancing Transparency and Accountability in the Management of Health Related Issues in the Extractive Industries in Southern Africa* (2016) 14.

<sup>160</sup> The Forest Peoples Programme, 'Extractive Industries and Human Rights in Central Africa' (2015) viewed 28 October 2017, from <http://www.forestpeoples.org/en/eneletters/fpp-e-newsletter-september-2015/news/2015/09/extractive-industries-and-human-rights-cen>.

<sup>161</sup> *Ibid*, at para 12(c).

enjoyment by peoples and communities. The article particularly discovered that the right to water is not recognised in the national legislation of most African countries including the DR Congo, Ghana, Nigeria, Tanzania and Zambia. Therefore, this makes the right non-justiciable in their jurisdictions. To remedy this situation, it is recommended that African countries especially those mentioned above incorporate the ICESCR into their national law and ensure its applicability in the domestic courts. African state parties to the ICESCR and the African Charter must further adopt appropriate measures to protect and preserve their water resources against pollution and promote sustainable use of water.

In conclusion, this article submits that the existing interplay between hard and soft law for the protection of the right to water and water resources without robust institutional mechanism has weakened the national regulation of this right and, consequently, affected people's accessibility to safe and affordable water. Therefore, while national legislation and policy remain important in promoting and safeguarding the right to water, policymakers should be primarily mindful of their limitations in the face of institutional bottlenecks, implementation gaps and socioeconomic realities. Accordingly, capacity-building initiatives should aim to educate stakeholders in equitable water resources management and, generally, recognise the close link between the right to water, wellbeing and other human rights.

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