

THE UNIVERSITY OF MALAWI



CHANCELLOR COLLEGE

FACULTY OF LAW

DISSERTATION

**The challenges of enforcing Environmental Impact
Assessment (EIA) in Malawi: Lessons from the
Kayelekera Uranium Mine.**

Mzati-Kidney Mbeko.

**Submitted to the Faculty of Law in partial fulfillment of the LLB (Hons.) Degree award
requirements in the University of Malawi, Chancellor College, Zomba, Malawi (22nd June,
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Declaration of originality

I declare that this dissertation is my own original work. This work has neither been presented anywhere else before nor has it been submitted at any other university for an award of any degree, whatsoever.

Due acknowledgements have been made, especially in areas where work of other authors has been cited.

Author's signature.....

Mzati- Kidney Mbeko

Dated thisday of2012.

This dissertation is submitted to the University of Malawi for the award of a Bachelor of Laws (Hon.) degree with approval of my supervisor:

Supervisor's Signature.....

Mr. Thokozani James Ngwira.

Dated this.....day of2012

Dedication

I feel myself lucky to dedicate this work to my children: Tupali and Mbumba. All that I am or ever hope to be, I owe to them.

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Mzati-Kidney Mbeko June, 2012.

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Nature is the only superpower.

This we know: the earth does not belong to man, man belongs to the earth. All things are connected like the blood that unites us all. Man did not weave the web of life, he is merely a strand in it, whatever he does to the web, he does to himself.

Timothy E. Wirth.

Abstract

Although regulations governing Environmental Impact Assessment (EIA) have been in force in Malawi for over two decades now, the Kayelekera Uranium Mine Environmental Impact Assessment (KEIA) suggests that EIA implementation and enforcement in Malawi can be inadequate. This study examines the underlying challenges to effective Environmental Impact Assessment implementation and enforcement particularly in the mining industry. In pursuing this, the author critically analyzes the law, policies and practices associated with the EIA processes in Malawi. Locating the discussion in principles of environmental law, critical notions of Foucauldian concept of “Governmentality” and Marxian insights on the state, the study reveals that the EIA process in Malawi is constrained by several challenges but on the whole; political and economic interests weigh more heavily in the scales than environmental values.

Key concepts: Kayelekera, Environmental Impact Assessment, Challenges, Governmentality and Hegemony.

Chapter 1

Introduction

1.1 Background

The mineral industry is fast developing in Malawi¹. The country now stands at a crucial crossroads that is unique in its agro-based history, by virtue of being the source of rare minerals that are of major global strategic significance². It is apparent that the Malawi Government is aiming at generating economic growth by augmenting the country's largely agro based GDP with new inflows from non traditional sources such as the mining industry, uranium in particular, as a potential avenue to boost the economy. This may result in unchecked exploitation of finite natural resources which may inflict adverse impacts on the environment and local communities, if the necessary regulatory framework is not effective. Of course in the modern age environmental and social awareness has become widespread, a fact reflected in environmental legislation and policy worldwide. Indeed Malawi has in place laws, policies, guidelines and institutions regulating the environment and Environmental Impact Assessment (EIA) in particular.³ Moreover, Malawi is a signatory to many conventions on environmental issues for example The Rio Convention.⁴

One would therefore think that the days of mining companies exploiting the local economy, people and environment are moribund. But that would be naive and such a viewpoint cannot hold up to scrutiny, particularly in Africa.⁵ Developing countries still face many challenges in mitigating the negative impacts of mining. Recent examples of bad mining practices in the Southern African region include; toxic serpentinite dumps from chromite and asbestos mining in

¹ Akeel Hajat; Kayelekera Uranium Mine and Mchenga Coal mine: A comparative study p1. Also See Appendix 1.

² Ibid.

³ These include the Constitution 1994, Environment Management Act 1996, Guide lines for Environmental Impact Assessment 1997

⁴ See The United Nations Convention held at Rio De Jeniro in Brazil in 1992.

⁵ Akeel Hajat (*Supra*)

South Africa, Swaziland and Zimbabwe, the spontaneous combustion of coal in Zambia, Zimbabwe and South Africa and diamond rubble dumps in Angola, South Africa, Swaziland, Botswana and Namibia.⁶

It may appear that developing countries like Malawi in a desperate search for the mythical modernization as an escape from backwardness have embraced the ideology of “developmentalism” in a manner which privileges economic growth and undermine environmental protection.⁷ Yet, consequences of poor environmental protection can be severe and irreversible. Thus the need to incorporate sustainability principles into both emerging and existing mines is very essential than ever before.

In Malawi there is a new buzzword – ‘Kayelekera’. A hitherto unknown village situated amidst rolling woody hills approximately 50 km from Karonga in the northernmost region of Malawi.⁸ Kayelekera has become synonymous with uranium mining in Malawi⁹. The project represents the first large scale mining operation in Malawi, no wonder it is being heralded as the beginning of a new chapter in Malawi, a country not previously known for its mineral wealth.¹⁰ However, Uranium mining brings with it a unique suite of challenges due to the radioactivity involved. Hence amidst the optimism, there were concerns during its initial phases over social and environmental equity themes. The case was put forward by several civil society organizations with a human rights and social justice focus. A court injunction ensued which culminated in an ‘out of court’ settlement.

A cursory examination of Environmental Impact Assessment (EIA) conducted at Kayelekera reveals massive inadequacies in the implementation and enforcement of EIA requirements. This

⁶ See Hoadley *et al.*, 2002.

⁷ Sammy Alderman & Abdul Paliwala (Eds) *Law and Development Crisis, African Discourse*, series 4 School of law University of Warwick, London (1993).

⁸ Rafik Hajat (*Infra*).

⁹ Hajat, Kayelekera and the Uranium Mining saga in Malawi: 10

¹⁰ Indeed, the late Dr Kamuzu Banda used to rally the people to greater efforts by stating that although Malawi did not have gold, diamonds and copper, it had something just as valuable – fertile soil and plentiful water. Malawians were thus urged to work hard in the fields to grow more tobacco – our ‘green gold’.

is evident with the fact that both local and international NGOs criticized the government for approving the project without serious regard to radiation and the environment in general.¹¹

1.3 Statement of the research problem

In the convergence of multiple crises that Malawi finds itself now, i.e. fuel and forex shortages, failure of tobacco on the market and the general poverty¹² prevailing in the country, the government seems to be shifting towards fast-tracking mineral exploration to catapult the country out of its economic crisis. This inevitably will have a bearing on the environment. There is need therefore to have an effective EIA regime in place to ensure that potential environmental consequences of these mining activities are identified and considered before the activities are undertaken so that development proceeds in a thoughtful and deliberate way taking into account the need to preserve environmental quality and biodiversity for future generations and that environmental decisions transcend the interests of the passing majority.

However, the credibility of EIA conducted at Kayelekera Uranium Mine, among the scientific and lay communities remains virtually questionable¹³. If this is not checked we could as well be “*sleep walking*” into an environmental catastrophe. This study therefore seeks to explore the current challenges affecting EIA implementation and enforcement in Malawi. This is very crucial as it will help to avoid repeating the past mistakes and that in future, if we are to err, it has to be on the side of precaution.

1.4 Hypothesis

The assumption in this study is that weak EIA legislation and lack of political will on the part of the government to comply with EIA requirements, adversely affect effective EIA implementation

¹¹ Hajat, Kayelekera and the Uranium Mining saga in Malawi: 10

¹² Malawi is one of the poorest countries in the world. It ranks third from the bottom according to the 2003 Human Development Index (HDI) of the United Nations Development Programme (UNDP). At the regional level, the country ranks thirteenth out of the fourteen countries of the region according to the 2000 Southern Africa Development Community (SADC) HDI.

¹³ See Ming- Shen Wang and Gow- Liang Huang, Environmental Impact Assessment for major projects in Taiwan: Problems and solutions p1.

in Malawi. It is further assumed that the institutional structure of Environment Affairs Department constrains its effective operations in enforcing EIA in the country.

1.5 Main argument

Central to the arguments in this study is the claim that the general framework of Environment Management Act, and institutional structure of the Environmental Affairs Department have inherent challenges that affect their ability to implement the Environmental Impact Assessment (EIA) effectively and that the political culture in the country is antagonistic to regulation of this kind, and indeed unsympathetic to environmental concerns. It appears that political and economic interests weigh more heavily in the scales than environmental values.

1.6 Aims and objectives of the Study.

The overall objective of this study is to interrogate the adequacy of EIA system in Malawi using the case of Kayelekera. Through this case study approach, the study delves into an in depth critical investigation in the law, policies and practices associated with EIA process in Malawi.

The specific objectives of the study include;

- To document the prerequisites of an effective EIA process;
- To investigate the challenges faced in applying EIA prerequisites in Malawi.
- To analyze the adequacy of the Kayelekera Environmental Impact Assessment (KEIA).

1.6.1 Research questions.

Generally the present study tries to answer the question, whether the EIA process in Malawi is adequate to secure environmental protection? However, using the Kayelekera as a case study, the following specific questions have also been pursued.

- What are the prerequisites for Environmental Impact Assessment process in Malawi?
- What are the challenges faced in applying EIA prerequisites in Malawi?

- How adequate was the Kayelekera Environmental Impact Assessment in line with the EIA prerequisite?

1.7 Significance of the study.

Historically, Malawi has pursued an agriculturally-driven development strategy since independence.¹⁴ Thus, mining is a new phenomenon, but already it is mining Uranium at Kayelekera; the Kanyika Niobium project in Kasungu by the Globe metal Mining Africa (Pty) Ltd is rolling out soon¹⁵, oil prospecting is under way on Lake Malawi and mineral prospecting suggests that the country has an abundance of precious minerals.¹⁶ This has brought about frenzy on the part of government and the people of Malawi. No wonder, the country is now making strides to hasten a full-scale mining expedition and yet the Kayelekera EIA issues remain unresolved. This study therefore contributes to the EIA jurisprudence in Malawi by exposing the challenges that are affecting the effective EIA implementation in the country. This is very important especially in the aftermath of the Kayelekera EIA incident.

1.8 Literature Review.

1.8.1 Introduction

A review of the literature discloses that the 1969 National Environmental Policy Act of the United States of America (NEPA) is the “grandfather” of the world’s Environmental Impact Assessments.¹⁷ Following the US initiative, several countries implemented EIA systems.¹⁸ Over the years, Environmental Impact Assessment (EIA) has become the most common environmental policy and planning tool used to determine allowable development and conditions of operation for proposed development projects.¹⁹

¹⁴ Chirwa et al 2005.

¹⁵ This was revealed by Allan Kaziputa Principal Environmental Officer at the Environmental Affairs Department on 14th June, 2012 during a Key Informant Interview (KII) by the author.

¹⁶ See Appendices 1&2.

¹⁷ Stevenson H, EIA laws in the 1990s: Can Mexico and USA learn from each other: 1706

¹⁸ Glasson et al.1999 Glasson et al.1999.

¹⁹ Krisnawati Suryanata, Karen Umemoto; Beyond environmental impact: articulating the “intangibles” in a resource conflict.

While the obligation to create an EIA is growing both in recognition and acceptance on an international level as evident with many treaties that incorporate this obligation, and the growing number of countries that have adopted their own domestic regulations concerning EIA,²⁰ scholarship has emerged questioning the absence of a global treaty on the EIA.²¹

This murky terrain is further exemplified In the **Case Concerning the Gabčíkovo- Nagymaros Project** wherein the international Court of Justice (ICJ)²² was called to resolve a long standing dispute between the countries of Hungary and Slovakia. The case dealt with the 1977 treaty between the two countries that created a joint project to construct a series of dams and barrages on the Danube River, which runs along the countries' boarder.²³ In the early 1990s, after Slovakia had spent millions of dollars constructing the Gabčíkovo dam on its territory, Hungary refused to fulfill its treaty obligations until further studies of the project's impact on the environment could be performed. Slovakia argued that both countries already had studied the environmental impacts in detail and that Hungary simply was stalling the project for financial and political reasons (this is akin to what happened between Malawi and Mozambique on the Shire- Zambezi Water way project). In October 1992, Slovakia unilaterally diverted the Danube into an alternate barrage system in order to counteract the delay and receive some benefits from its enormous expenditures on the Gabčíkovo dam. In response, Hungary purported to officially terminate the 1977 Treaty.²⁴The parties then brought this arbitration to the ICJ, asking the court to decide if Hungary had the right to delay and /or terminate the treaty based on its

²⁰ Erika L. Preiss: the international Obligation to conduct an EIA: The ICJ case concerning the Gabčíkovo-Nagymaros project.

²¹ In fact the only detailed agreement on Transboundary EIA to have entered into force is a Regional agreement, The Espoo Convention on EIA in Transboundary context.

²² The international Court of Justice is the principal judicial organ of the United Nations. See ICJ, General information http://www.icj-cij.org/icjwww/general_information.htm. The court's role is to settle the legal disputes between states, in accordance with international law and to assist international organizations by providing advisory opinions on legal questions.

²³ See Treaty Concerning the construction and operation of the Gabčíkovo-Nagymaros System of Locks, Sep.16, 1977, Czech.-Hung., 1109 U.N.T.S 211[hereinafter 1977 Treaty].

²⁴ See the ICJ judgment *supra* note 2 para.13 at 11(describing Hungary's May 19,1992 declaration terminating the 1977 Treaty).

environmental concerns, and if Slovakia's unilateral actions were legal under the treaty and general principles of international law.

While numerous environmental issues in the case were argued and briefed in detail, the court's opinion gives them a short thrift. The text of the majority opinion barely mentions the environmental implications of this dam and barrage system, focusing instead on the parties' obligation under the twenty-year old treaty. While the Gabcikovo-Nagymaros case provided the International Court of Justice with an appropriate vehicle for clarifying the requirement for an EIA, thus making substantive and lasting precedent on an international scale. The court however declined to use this opportunity.²⁵ The long term effect of the court's failure to elaborate on such pertinent issues is difficult to predict.

In contrast to the court's opinion, Justice Weeramantry's concurring opinion directly addressed the issues of environmental law and delineated guidelines for the parties to follow in future negotiations. In particular, Weeramantry discussed environmental impact assessment in detail and stressed that any future version of the project must be preceded by a complete EIA.²⁶

From an environmental perspective, Weeramantry's opinion is much stronger than the decision of the Court. The position of this paper is therefore that principles of international environmental law would have been confirmed and promoted had Weeramantry's discussion been the Court's majority opinion.

Literature is abound suggesting that there is a continued phenomenal growth of indifference towards environmental issues at the global level.²⁷ This is exemplified in the outcome of the December, 2009 World Climate Summit on climate change also known as the Copenhagen

²⁵ The concurring opinion of Justice Weeramantry, however, delved deeply into the environmental issues. See discussion *infra*.

²⁶ *See also* Vereshchetin Dissent note 178, at 21(A continuous monitoring of the scheme[agreed upon by the parties] for its environmental impacts will accord with the principles outlined, and be a part of that operational scheme”).

²⁷ Upendra Baxi, Power and Social Action.

Conference of Parties (COP15). As we all know the Summit failed to achieve the agreement that campaigners had hoped for. Little more than lip service was paid to the overwhelming need for Governments to take strong, decisive action to avert catastrophic climate change.

In the premises, perhaps it should not be surprising that even in industrialized countries such as England; the general legal framework is inadequate to secure the aims of EIA as required by the European Economic Community's Directive on EIA.²⁸ It has been argued that partly this is because the English legal culture is hostile to EIA regulation and unsympathetic to environmental values as regards support for environmental interests²⁹

African countries also face greater challenges in implementing EIA due to such problems as inadequate environmental legislation; inappropriate institutional framework for coordinating and monitoring government activities; a shortage of qualified manpower, inadequate financial resources; absence of public awareness of the need for EIAs; and lack of suitable screening procedures to determine which development projects require an EIA.³⁰ Moreover, most EIA processes put much emphasis on the planning stage of a development project and lacks provisions to ensure that environmental protection measures are actually carried out at the construction and operational phases. The present study recommends that the ideal situation should be to allow an environmental agency to monitor a development project through its design, construction and completion phases. This is important because irresponsible mining can have devastating impacts on the environment. Moreover, the consequences of poor practice are often borne by the local people and government, who in many cases are ill equipped to deal with them.

In Malawi Environmental impact assessment of all development projects is a legal requirement under section 24 of the Environment Management Act of 1996. However, scholarship has observed that The Constitution, The Mines and Minerals Act are EIA blind. It is this study's quest to investigate the impact of this blindness on the environmental protection in Malawi.

²⁸ which required member states to put into place by 3 July, 1988, procedures for assessing the environmental effects of certain land use projects.

²⁹ John Alder, Environmental Impact Assessment-The inadequacies of English Law: 5 J. Env'tl. L. 203 1993.

³⁰ John O. Kakonge, Environmental **Impact Assessment** Review, 1993 – Elsevier.

Generally, the EIA process allows for increased public awareness of impending projects and creates the opportunity for public input prior to the finalization of a project. For this reason, environmental planning is an arena of policy making in which formal public deliberation is among the most extensive.³¹ The EIA process is, however, bounded in scope and, thus, addresses some public concerns more thoroughly than others. More specifically, the EIA process can be an appropriate medium for resolving “distributional disputes” in which participants’ interests, gains and losses are tangible.³² But many environmental disputes are often entangled in issues that some describe as “intangible.” Usually, the most intangible issues are those that make environmental and resource conflicts intractable or difficult to resolve, as they burrow into the seams of social identities, power networks, belief systems and other tightly woven and partly submerged realms of social life.³³

Scholars have written extensively on factors and circumstances that contribute to the intractability of environmental management disputes.³⁴ Some have focused on fundamental differences in values and beliefs with regard to how resources and the environment should be treated.³⁵ Others have highlighted the effects of severe power imbalances between disputing parties and threats to individual or collective identities on intractability.³⁶ Still others underscore competing problem frames among disputants as an important epistemic dimension to many disputes.³⁷ The high degree of uncertainty about the nature and level of environmental risks also complicates public deliberations.³⁸ Existing environmental regulatory frameworks are not adequately equipped to address such types of disagreements. For these types of conflicts,

³¹ Dryzek, 1997.

³² Cf. Susskind and Cruikshank, 1987.

³³ Krisnawati Suryanata, Karen Umemoto, Beyond environmental impact: articulating the “intangibles” in a resource conflict. P5

³⁴ Caton Campbell, 2003.

³⁵ Caton Campbell and Floyd, 1996; Forester, 1999b.

³⁶ Forester, 1999a; Hunter, 1989; Susskind and Field, 1996.

³⁷ Hunter, 1989; Lewicki et al. 2003; Schön and Rein, 1994.

³⁸ MacDonnell, 1988.

mediation scholars have increasingly turned to transformative approaches to conflict resolution³⁹ which seek changes among the disputing parties themselves rather than merely their situations. Using this approach the present study interrogates into dynamics of disputes between the government and CSOs, over the Kayelekera EIA.

1.8.2 Conclusion

In summary, several observations can be made on the literature reviewed this far. Firstly, the literature laments the sluggish development of EIA at the global level but fails to trace the problem to the inherent challenges of domestic EIAs because as they say charity begins at home, thus the absence of this global treaty is a manifestation that all is not well in the domestic EIA regimes of the countries of the world. Secondly, most of literature does not interrogate the interface on power play, of the EIA political economy. Furthermore the literature does not engage the question why there is a tardy growth of judicial oversight on environmental issues. This creates space in the current EIA jurisprudence. It is therefore within this context that this paper proceeds to examine the underlying challenges to effective EIA implementation in Malawi.

1.9 Methodology

In striving to answer the research questions, the study has adopted a case study approach to supplement the desk research. The bulk of data for this paper was collected from the Environmental Affairs Department. The following tools were used in the data collection: Oral interviews, Key Informant Interviews (KII) and stakeholder analysis.

1.9.1 Key Informant Interviews (KII)

This involved purposive sampling coupled with snowballing. The following resource persons were engaged as key informant Mr. Allan Kaziputa, Mr. Patrick Nyirenda, Mrs. Sibale (all principle Environmental Officers at the Environmental Affairs Department) and Mr. Mpetwa Mwanyongo (Assistant Director of Environmental Affairs). The selection was based on their respective positions at the Environmental Affairs Department and their experience in EIA.

³⁹ Bush and Folger, 1994; Hunter, 1989.

1.10 Limitations of the study.

The study was adversely affected by logistical issues to do with financial resources and time. Initially the study was to engage in an in-depth field research but due to financial constraints it just focused on secondary data and some Key Informant Interviews (KII). This has compromised the depth of the paper. However, scholars interested to do a detailed field research on the topic may find this paper useful to gain some insights.

Moreover, being a case study, the study narrowed down on one area- Kayelekera. This may not offer enough grounds for establishing reliability or generality of finding. However, this can be counteracted through transferability of methodology to a different area of study. The study further suffers the usual threat of bias due to the intense concentration on the study area. But with the careful planning the study had, coupled with the deliberate effort to check the same, the study merits some measure of reliability.

1.11 Structure of the paper.

The paper is divided into 5 chapters. Chapter 1 has the introduction which contains, *inter alia*, background to the study, statement of the research problem and the main argument. Chapter 2 has been dedicated to the conceptual and theoretical framework of the study. Basically it discusses the theoretical and philosophical underpinnings that inform the study.

Chapter 3 discusses the prerequisites of the EIA process in Malawi and then it goes on to analyze the challenges that are encountered in the application of these prerequisite in an EIA process. Chapter 4 discusses the adequacy of the Kayelekera Uranium EIA through a case study approach. Lastly, Chapter 5 has the conclusion and recommendations of the study.

1.12 Chapter summary.

This chapter has successfully given the background of the study. It has also outlined problem the study sets out to investigate and that is the challenges affecting the effective implementation of the EIA in Malawi. In order to create space for the study, the chapter reviewed some literature

pertaining to EIA. The literature review has exposed a gap in the discourse which the present study endeavors to fill. In striving to achieve this chapter has described the methodology it will follow. The next chapter discusses the conceptual and theoretical framework underpinning this study.

Chapter 2

Conceptual and Theoretical Framework

2.1 Introduction.

This chapter discusses the conceptual and the philosophical constructs which form the basis of the arguments in this study.

2.2 Conceptual issues.

As it is common in many fields of study, it is necessary that we define some of the concepts that will be regularly used in this study. In the context of challenges faced in implementing Environmental Impact Assessment in Malawi, the study examines the relationship of the following concepts: Environment, EIA, enforcement, credibility, challenges, hegemony and Governmentality.

In the first place, the study understands the term “environment” to mean the physical factors of the surroundings of human beings including land, water, climate sound, odour, taste and the biological factors of flora and fauna including the cultural social and economic aspects of human activity, the natural and the built environment.⁴⁰ However, under the European Community law, ‘environment’ comprises the relationship of humans with water, air, land and all biological forms.⁴¹ There seems to be no general agreement on what the environment encompasses. It is argued that an all encompassing concept of the environment is unacceptable as a workable basis for determining the content of environmental protection, because the nature of such a definition would make all laws environmental law.⁴² In this discourse, the first definition has been adopted and the focus is on the effects of man’s activities and attitudes towards the state of the environment.

⁴⁰ Section 2 of EMA

⁴¹ Directive 79/117, Art 2(10)

⁴² Rabie, Nature and Scope of Environmental Law in Fuggle and Rabie, Environmental Management in South Africa 1992 at p83-92.

The mainstream understanding of the concept “Environmental Impact Assessment” (EIA) is the systematic evaluation of a project to determine its impact on the environment and the conservation of natural resources.⁴³ The theory behind EIA encompasses two distinct conceptions of the value and function of formal assessments. One portrays the EIA process as a systematization of a “thinking before acting” and “prevention rather cure” approach. This viewpoint emphasizes the role of EIA procedures in ensuring that environmental information is available to public officials and citizens before actions are taken.

The other perspective presents EIA as depicting the optimal point in the tradeoff between environmental protection and economic development. In this role, EIA takes into consideration the costs and benefits both of maintaining environmental ecosystems and of building development projects and of their effect on the quality of the environment. By weighing each side of the proposal, the best choices can be made. EIA is therefore useful in defining types of activities that can or cannot be conducted based on scientific findings. In this study both understandings have been adopted because their complementarity gives a holistic view of the EIA process.

On the other hand Moorman⁴⁴ defines EIA as an attempt to improve the quality of human life in a lasting way by examining and documenting the potential environmental impacts of a proposed activity and also considers alternatives that may prevent or mitigate any perceived negative effects thereby enabling fully informed, environmentally conscious decision-making. This study adopts the first definition because of its simplicity.

The verb “enforce” means making people obey something or to compel obedience to a law, regulation or command.⁴⁵ In the context the term enforcement should be understood to mean

⁴³ Section 2 of EMA.

⁴⁴ Promoting and strengthening public participation in China’s EIA process. Comparing China’s EIA Law and US’s NEPA.

⁴⁵ Microsoft Encarta 2009, 1993-2008 Microsoft Corporation.

making “developers” to obey the EIA requirements as provided by the EMA and other environmental laws in Malawi with the Austinian particularity.

Credibility on the other hand should be understood to mean believability i.e. the ability to inspire belief or trust.⁴⁶ In the present study this has been used to test whether under the circumstances we should trust that the EIA conducted at Kayelekera satisfied the EMA requirements.

Furthermore, the study understands the concept of “challenges” within the context of EIA implementation as to mean factors that constrain/ hinder smooth enforcement and implementation of EIA requirements.

Hegemony, on the other hand is conceived by Gramsci as the vehicle whereby the dominant social groups establish a system of ‘permanent consent’ that legitimates a prevailing social order by encompassing a complex network of mutually reinforcing and interwoven ideas affirmed and articulated by those in power.⁴⁷ The concept explains how states and state institutions work to win popular consent for their authority through a variety of processes which disguise their position of dominance⁴⁸. It is a system that ensures elite decision-making and public ratification.⁴⁹ In the premises, the naming and shaming of the CSO members by the government constituted a hegemonic discourse meant to draw attention of the masses away from the ‘real issue’, which was to manufacture consent to allow Paladin commence mining Uranium at Kayelekera.

Finally “Governmentality” is a Foucauldian neologism referring to ‘*government rationality*’ or ‘*the rationality of government*’.⁵⁰ Foucault uses the term to describe the change in technologies

⁴⁶ Ibid.

⁴⁷ See Gramsci’s *Political Thought: Hegemony, consciousness and the Revolutionary Process* (Oxford: Clarendon Press, 1981) pp. 113-15, 120-25.

⁴⁸ Danaher et.al *Understanding Foucault*: 86.

⁴⁹ Noam Chomsky; *Hegemony or Survival*: 5.

⁵⁰ See M Foucault ‘Interview with Michel Foucault’ in J Faubion (ed.) *Power* (New York: New press 2000:240; See also Chikosa Silungwe’s PhD Thesis p.28.

of, and attitudes towards, governing. This involves a greater emphasis on the state's responsibility to manage its resources (including its population) economically and a concomitant increase in state intervention in the lives of its citizens. There have been two major consequences of this change. The first is that citizens are both 'regulated' by the state and its institutions and discourses, and educated to monitor and regulate their own behaviour. The second, which derives from what Foucault calls the 'liberal attitude', is the emergence of an understanding, on the part of citizens, of the need to 'negotiate' those forces of 'subject regulation' through a process of self governing.

2.3 Theoretical issues and Principles of Environmental Law underpinning Environmental Impact Assessment.

This study is grounded in the following principles of Environmental law:

2.3.1 Precautionary Principle.

This principle requires that precaution be taken to prevent or mitigate possible deleterious environmental consequences of social economic activities. The most widely accepted formulation of the principle is found in Principle 15 of the Rio Declaration, which states that:

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

The emergence of the Precautionary Principle (PP) has marked a shift from *post damage* control (civil liability as a curative tool) to the level of a *pre-damage* control (anticipatory measures) of risks. It is about the wisdom of action under uncertainty: 'Look before you leap', 'better safe than sorry', and many other folkloristic idioms capture some aspect of this wisdom. Precaution means taking action to protect human health and the environment against possible danger of severe damage.

According to this principle, a project which is likely to cause serious environmental harm should not be continued see Leatch –v- National Parks & Wildlife Service & Shoalhaven City Council. This principle informs the Environmental Impact Assessment regime in Malawi and it is not

surprising that Section 24 of the Environment Management Act reflects this principle. This principle is very crucial to the present study in that it helps to interrogate why the government of Malawi approved the Kayelekera Uranium project when the negative impacts of the radiation remained uncertain.

2.3.2 The preventive principle.⁵¹

This principle requires that environmental damage should where possible be prevented in advance rather than put right or compensated after the event. It does not concern itself with assessing costs and benefits as such, but lays down preventive strategies that must be followed. The principle informs the design and implementation of EIA in that just like EIA, it determines which projects should be allowed or not. Thus the principle complements the precautionary principle in requiring protective measures to be based on high scientific standards. This principle has been endorsed in a large number of environmental treaties.⁵²

2.3.3 The polluter pays principle.⁵³

This requires that he who causes environmental damage or loss must be held responsible. In **Vellore Citizens Welfare Forum –v- Union of India**⁵⁴ a petition was made to the High Court due to pollution of the agricultural fields, waterways. The pollution was caused by the discharge of untreated effluent from tanneries and other industries. The court ordered the government of India to constitute an authority and to confer on it powers to identify the families who had suffered from the pollution and assess compensation to be paid by the polluters to reverse the ecological damage.

Much as the principle is on its way to becoming the motto of the new international environmental jurisprudence there is too much judicial deference to the interests of the ‘developers’ to the detriment of the environment. Thus, the principle is mostly ineffective when the culprit is a

⁵¹ Principle 17 of the Rio Declaration; see also Article 206 of the UNCLOS.

⁵² Phillippe Sands, Principles of International Environmental Law, 2nd Ed, Cambridge:248.

⁵³ This is provided by principle 16 of the Rio Declaration and it is also reflected in the 2001 Stockholm Convention on Persistent Organic Pollutants, paragraph 17 of the preamble.

⁵⁴ Supreme Court of India, Air 1996 SC 2715, PIL 981-87.

multinational company. For instance the case of **Union Carbide Corporation v. Union of India and others** AIR 1990 Supreme Court 273 suggests that multinational Companies like Paladin enjoy impunity concerning liability of mass catastrophe of the Bhopal magnitude. The case involved a massive lethal release of 47 tones of methyl isocyanate (MIC) on 3 December 1984, killing more than 10,000 people, imposing various degrees of suffering and disability on nearly a quarter of a million human beings and creating extensive environmental damage. The litigation was initiated by the Union of India against the Union Carbide Corporation in the United States District Court, southern District of New York. The preliminary question was whether a court in the USA would assume jurisdiction of a tort that took place in India or deny it on the ground of *forum non conveniens*. The litigation was unique for several reasons. First the mass disaster caused by Union Carbide Corporation (UCC) was unparalleled in recent history, so much so that it involved no hyperbole to call it an industrial Hiroshima. Several thousands of people died in a few hours of the catastrophe and more than 2,000,000 people are still suffering from severe after effects of MIC and other toxic gases. Second, the total damages claimed in the proceedings by the Union of India, and other damage suits were estimated at a staggering US \$150 billion.

The UCC determinedly moved a motion to dismiss the Indian suit on *forum non conveniens* grounds arguing that India was unquestionably an adequate forum and that her legal system had actual and potential capacity to provide expeditious and equitable relief to the Bhopal victims.

The UCC's litigative strategy was clear: Let the Bhopal victims seek justice through the Indian Courts; the Union Carbide India Limited (UCIL) in which the UCC held 50.9% shares, would be in no position to satisfy damages claims beyond US\$ 95.3 million, clearly inadequate by all standards. In other words, the result sought to be achieved by the UCC was that it bore no real liability for mass disaster in Bhopal caused by its acts of commission and omission.

The argument can be furthered through Goodrich's moving account of a case involving the Haida Indians who had attempted to prevent a logging company desecrating their ancestral land.⁵⁵ The company operated under a license given by the Government of British Columbia. It brought an action seeking to uphold the license and to obtain an injunction preventing further

⁵⁵ Goodrich 1990: 179-84)

interference with the logging by the Haida. The Indians wished to represent themselves and to *speak in their own terms*. The first response of the Court to this desire was portentous. It consisted of attempts to persuade the Indians to employ legal representatives, to bring themselves within the language of the law. To this, the Indian response was that ‘*the issue of our lands is too important to leave in the hands of lawyers who are unfamiliar with our people.*’⁵⁶ The Court then adopted a seemingly liberal stance and accepted testimony which ‘took the form of symbolic dress, mythologies, masks, poems, songs and the forms of interpretation that such art and mythology implied (Goodrich 1990: 182-3). These told in Haida terms of the mythic origin of the Haida and their identification with the land. The judicial response was brutal if not intent: the unreserved judgment given by the Court the day after argument ended, had it that the evidence presented by the Haida as regards to the title and relationship with the islands was not legally relevant to the case which simply concerned interference with a valid logging license.

The case confirms the Marxist’s understanding that human society consists of two parts: the *base* and *superstructure*; the base comprehends the forces and relations of production and property relations — into which people enter to produce the necessities and amenities of life. These relations determine society’s other relationships and ideas, which are described as its superstructure. The superstructure of a society includes its culture, institutions, political power structures, roles, rituals, and state. The base *determines* (conditions) the superstructure, yet their relation is *not* strictly causal, because the superstructure often influences the base; the influence of the base, however, predominates. In Vulgar Marxism, the base determines the superstructure in a one-way relationship. Thus the main interest of the Court was to uphold the economic interests and not the social and environmental concerns which were too conspicuous to be ignored. To the Court the, Indians concerns were interference with a valid logging economic enterprise.

Moreover, the argument of the Haida to “*speak for ourselves*” demystifies the legal fiction that the law is impartial. Thus the law is a façade that obscure the power relations and the politics of the law. The law is therefore not neutral and objective. This makes it incapable of resolving legal problems since the judiciary cannot be an impartial arbiter. This is in line with the “crits”

⁵⁶ Ibid p180.

understanding that judges always have their positions and they set out to look for the logic to support their positions. Hence there is no objectivity.

Thus in a global context where capitals are free to flow without restrictions and where the law is not impartial, multinational companies enjoy impunity and they unleash power without responsibility and exploitation without redress.⁵⁷ The long and short of it is: victimization is natural and unrelated to the acts or omissions of those in power.⁵⁸ Thus the UCC, and other multinational corporations, are virtually beyond the tentacles of law, even when they engage in industries in ways which create planned catastrophes for masses of people in the third world.

Perhaps this explains why in 2000, the Kayelekera Uranium project was transferred to the Malawian registered company Paladin Africa Limited a wholly owned subsidiary of Paladin Resources Inc. this might have been done in a bid to avoid massive claims of damages in the eventuality of any catastrophe at Kayelekera.

2.3.4 Promotion of public participation.

Public participation is required for both development and environment conservation. This principle is based on the presumption that while organized society delegates its affairs to public institutions it retains the right to have an input in decision making and enforcement processes. The public must have unimpeded right to ensure that accepted standards are enforced; in that way institutions should not assume they are exclusive custodians of power and would ensure accountability in their actions. The law must therefore guarantee the following rights; access to information on executive decisions, projects and programs; access to justice and effective remedies and public participation in decision making.

However, according to Karl Marx, the executive of the modern state is nothing but a committee for managing the common affairs of the whole bourgeoisie⁵⁹. Thus, power is delegated to “the more capable set of men” who understand that the role of government is “to protect the minority

⁵⁷ Kwame Nkrumah (unpublished) but emphasis mine.

⁵⁸ Upendra Baxi, Power and social action. p4

⁵⁹ See the Communist Manifesto.

of the opulent against the majority”⁶⁰. Marxists understand that the forces of production determine peoples’ production relations; their production relations determine all other relations, including the political. Thus the bourgeoisie control the economy, therefore they control the state. The state in this theory is therefore an instrument of class rule.⁶¹ In premises, the executive arm government must be understood as comprising of “an elite of gentlemen” with “elevated ideals” who are empowered by the bourgeoisie to preserve “stability and righteousness” so that the public is put in its place.⁶² In this scheme, the public is viewed to comprise of ignorant and meddling outsiders deserving just to be spectators and not participants.⁶³ This goal is achieved in part through the manufacture of consent⁶⁴ which enables this “specialized class” to manage the common interests of their bourgeoisie masters in the manner that largely elude public opinion entirely. This ensures that these “responsible men” live free from trampling and the roar of a “bewildered public herd”⁶⁵.

Within this notion the present study argues that in the pursuit of the bloody god profit, the Kayelekera Uranium Mining despite the rhetorical did not allow enough public participation. The NGOs which pressed for public involvement were labeled anti-development demons and no sooner had the Government realized that it had become a “*Gulliver tied up in procedural knots by NGO Lilliputians,*”⁶⁶ than it unleashed the Foucauldian “technologies of normalization.”⁶⁷ This succeeded too well in infusing apathy and atomistic individualism among Malawians. To

⁶⁰ See James Madison.

⁶¹ See Rius, *Introducing Marx*.

⁶² Noam Chomsky, *Hegemony or Survival*, 2003:6.

⁶³ *Ibid*.

⁶⁴ See Fontana Benedetto, *Hegemony and Power*.

⁶⁵ See Noam Chomsky, *Hegemony or survival* 2003:6.

⁶⁶ From *Gulliver’ Travels* in a voyage to Lilliput Jonathan Swift narrates that after being shipwrecked, Gulliver swims to shore and drifts off to sleep. When he awakens he finds that he has been tied down by the Lilliputians a race of people who are only six inches tall.

⁶⁷ See M Foucault, *Introduction*, not 67, 137.

date, the Kayelekera saga seems to be nobody's problem. Unfortunately, this kind of 'by-standarism'⁶⁸ can promote a culture of complicity with environmental injustices.

2.3.5 Sustainability and intergenerational equity.

This principle advocates for management and utilization of the environment and natural resources in such a way as to meet present development interest and aspirations without jeopardizing the interests of future generations to enjoy the same.⁶⁹ In line with this principle, the Rio Declaration requires environmental protection to constitute an integral part of the development process in order to achieve sustainable development.⁷⁰ In Rajendra Parajuli & others –v- Shree Distillery Pvt Ltd & others.⁷¹ The supreme court of Nepal observed that in line with the principle of sustainable development, every industry has an obligation to run its development activities without creating environmental deterioration. The pith of this principle is intergeneration equity. Thus environmental decisions must transcend the interests of the passing majority.

Unfortunately, realistic politicians do not take into account the interest of posterity. They have no time to consider the interests of anyone who cannot get them into power now.⁷² This means that they cannot take into account the interests of babies who will need “Chambo” from Lake Malawi for their nourishment -babies do not vote, babies do not pay tax. Thus in the politics of globalization babies are not a relevant constituency, certainly not if they happen to be Malawian babies born on top of Uranium deposits.

⁶⁸ Upendra Baxi; Power and social Action: 3

⁶⁹ The Brundtland Commission on Environment and Development Report 1987.

⁷⁰ Principle 4 of Rio.

⁷¹ Writ No. 3259, 1996, Supreme Court of Nepal. See also Robert Te Kotahi Mahuta –v- The Waikato Regional Council & and Anchor Products, Environmental Court Decision No.A91/1998, (New Zealand).

⁷² Ayi Kwei Armah, The identity of the creators of Ancient Egypt: New African; Who were the ancient Egyptians?:19.

2.3.6 Chapter summary.

In summary, this chapter has set the definitional boundaries for key concepts of the study. It has also successfully situated the discussion in the relevant principles of environmental law, Foucauldian conception of Governmentality and the Marxist notion of the role of the state in the capitalist state. Perhaps it is befitting to bring this chapter to a close by proclaiming that this study throughout will be faithful to these critical tools of analysis. The next chapter discusses the prerequisites of an effective EIA regime and it also discusses the challenges affecting the application of the prerequisites.

Chapter 3

The prerequisites of an effective EIA Regime

3.1 Introduction.

The focus in the chapter is essentially to appreciate the prerequisites of an effective EIA regime for Malawi. These prerequisites must be understood as constituting ingredients of an effective EIA process. The nature of the inquiry in this chapter necessitates that objectives 1 and 2 be dealt with simultaneously. Thus each prerequisite is immediately followed by a discussion of the challenges that are encountered in its application. This chapter lays a yardstick for discussing the Kayelekera EIA case study in the subsequent chapter. Space constraints forbids a detailed analysis of all prerequisites, as such only the following merit our consideration at the moment; political will, legal framework, EIA funding, Institutional setup, institutional setup and Environmental Management Plan among others.

3.2. Political Will.

Political will is hereby conceptualized as the commitment of political leadership to create an enabling environment, support and endorse EIA procedures. This captures the desire by politicians to enforce EIA requirements. This pre-requisite is vital for successful implementation of environmental policies and sustainable development. This requires the integration of environmental concerns in all major economic and social policies, plans and decision making.

In Malawi section 13(d) of the Constitution under the Principles of national policy reflects Malawi's political will for environmental protection. The provision enjoins the State to actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at managing the environment responsibly in order to prevent the degradation of the environment; to provide a healthy living and working environment for the people of Malawi; to accord full recognition to the rights of future generations by means of environmental protection and the sustainable development of natural resources; and to

conserve and enhance the biological diversity of Malawi. Section 13 (d) therefore provides for the political will of the country for apply Environmental Impact Assessment.

3.2.1 Challenges encountered in applying political will in relation to EIA.

Much as political will on paper is provided, in reality there is lack of political will to conduct Environmental Impact Assessment in Malawi. There are a number of factors affecting this. Firstly, the political will as provided in section 13 (d) is a mere aspiration of Malawi as a state nothing more. This is compounded by the fact that the constitution has other competing provisions that militate against the quest to protect the environment. For instance section 30 of the Constitution provides for the right to development. Furthermore Section 30(4) of the Constitution enjoins the state to respect the right to development and to justify its policies in accordance with this right and to take all necessary measures for the realization of the right to development.⁷³ It must be emphasized that the right to development is a constitutional right and therefore enforceable unlike the principle of national policy to protect the environment envisioned in section 13(d) which is a mere desire.

Moreover, section 2 of The Mines and Minerals Act vest the entire property and control over all minerals in Malawi in the President on behalf of the people of Malawi⁷⁴. This gives the president too much power and discretion over the minerals in the country. Thus politics determines the destiny of the natural environment. In a country like Malawi where many people live below the poverty line, the need to improve the living conditions of the people can put irresistible pressure on the politicians (as policy makers) to choose short- terms gains offered by exploiting natural resources over more sustainable policies. This is not because politicians are congenially myopic, but because they are in a problem solving occupation with short deadlines and they rise and fall according to the strength of their constituency. Constituencies of men and women living in here and now normally want solutions to problems of the here and now, and the nature of their occupation places politicians under a pressing obligation to solve just those types of problems-

⁷³ See Section 30(2) of the Constitution.

⁷⁴ Section 2 of the Mines and Minerals Act.

Short term.⁷⁵ Thus politicians intending on winning subsequent elections, buying latest presidential jets, may have no time to consider environmental aspirations of section 13(d) or indeed the importance of conducting Environmental Impact Assessment of mining activities. This vindicates Foucault's assertion that the essential issue of the art of government is the introduction of the economy into political practice.⁷⁶ Thus 'the very essence of government' is to ensure that its objective is 'the economy'. This suggests that the priority of the government of Malawi to spearhead economic growth by augmenting the country's largely agro based GDP with new inflows from non traditional sources such as the mining industry. In such an expedition it is easy for environmental concerns to be pushed to the periphery at the expense of political and economic interests forgetting that once the genie of environmental harm is out of the bottle, it is at best costly and at worst impossible to put back.⁷⁷

3.3 Legal Framework.

By legal framework we refer to the whole corpus of the law that forms the basis for the application of EIA. Constitutionally Malawi is one of the countries which have not expressly legislated for the EIA requirement or a right to clean and health environment in their constitutions. However, Section 5 of Environment Management Act codifies the right to clean and health environment. This has resulted in some Malawian scholars elevating Environment Management Act (EMA) to the level of the environmental Constitution by virtue of its Section 7.⁷⁸

In other jurisdictions with similar environmentally blind constitutions, reliance has been placed on the right to life and other rights akin thereto.⁷⁹ For instance in **Francis Millin v. Union Territory of Delhi**, the Supreme Court held that the right to life was not limited to the right to

⁷⁵ Ayi Kwei Armah, The identity of the creators of Ancient Egypt: New African; April 2006 p19.

⁷⁶ Michel Foucault, Note 10, 92.

⁷⁷ Brown Weiss et al, International Environmental Law and Policy; Aspen Law and Business, NY USA 1942.

⁷⁸ See Innocent Nebi, Elevating the right to decent environment to a human right in Malawi: A call for legislative Action: Students Law Journal vol.8, No1, 2008:56.

⁷⁹ Gracian Banda & Thoko Ngwira introduction to Environmental law in Malawi p31

mere animal existence, but included the right to live with human dignity and all that goes along with it. The phrase '*all that goes along with it*' includes a clean and health environment. This was reaffirmed in **M.C Mehta v. Union of India**. The jurisprudence of the Courts in India clearly shows that over and above having a specific human right to a clean and health environment, environmental protection can be achieved through the enforcement of human rights in general like the right to life.

In Malawi however, there has not been much litigation relating to this right as enshrined in the EMA. The closest however was the case concerning operations at Njuli quarry mine⁸⁰ which unfortunately did not proceed to trial. One of the reliefs sought by the plaintiffs was a declaration that pursuant to section 5 of the Environment Management Act, the defendant had an obligation to operate their mine in such a way as to ensure that the plaintiffs' right to a clean and health environment is not infringed.⁸¹ The present study doubts whether the courts in Malawi would be innovative and flexible as their Indian counterparts. These doubts are vindicated by considering the rigid stance on *locus standi* in our courts as exemplified by the CILIC case. Thus the Constitution of Malawi does not provide adequate legal framework for environmental protection and indeed EIA.

Nonetheless, Part V of the Environment Management Act particularly under Section 24 (1) provides a legal basis for Environmental Impact Assessment in Malawi. Section 24(1) requires the minister to publish in the Gazette, the types and sizes of projects which cannot be implemented unless an environmental impact assessment is carried out. There is also Guidelines for Environmental Impact Assessment which was enacted in 1997. These guidelines regulate the EIA process in the country.

Mineral activities in Malawi are covered by the Mines and Minerals Act (1981), the Mines and Minerals (Mineral Rights) Regulation (1981), and the Petroleum (Exploration and Production)

⁸⁰ MP Kumbemba; Ngozo, Ngwangwa & Green wigs Ltd -v- Terrastone Ltd, Civil cause No. 576 of 2004 High Court (Unreported).

⁸¹ Thokozani James Ngwira, Assessment of the impact on the environment by influx of imported used motor vehicles, presented at the faculty of law symposium held at Protea Ryalls Hotel from 24th -25th September, 2010.

Act of 1983. All these Acts do not expressly provide for EIA as a prerequisite for any mineral exploration in the same tenor as EMA. However, Section 37 (3) (h) of the Mines and Minerals Act suggests that EIA is a prerequisite under the Act. The section requires that an Application for mining license must be accompanied by a statement giving particulars of the proposed mining operations including a statement of proposals for the prevention of pollution, the treatment of wastes, the safeguarding of natural resources, the progressive reclamation and rehabilitation of land disturbed by mining and for **the minimization of the effects of mining** on surface water and ground water and on adjoining or neighbouring lands; the residual effects on the environment of the mining operations and proposals for their minimization; any particular risks (whether to health or otherwise) involved in mining the mineral, and proposals for their control or elimination. The foregoing is a clear manifestation that Malawi lacks a harmonized legal framework for environmental protection and indeed Environmental Impact Assessment.

3.4 Funding for EIAs.

According to section 25 of EMA, funding of EIA studies is an obligation of the project developer. This is included as part of project costs. Thus the developer hires a consultant to conduct the EIA on their behalf. This requirement is consistent with the poor funding of the Environmental Affairs Department. For instance, the Deputy Director of the Environmental Affairs Department revealed that the budget estimate for the Department during the 2011/2012 Financial year was MK300 million. Of this only MK65 million was approved and the actual disbursement was even less. Of the disbursed funds only MK4 million was allocated to EIA Section. With this kind of funding coupled with lack of such basic resources as appropriate computer software and hardware and inadequate fleet of motor vehicles juxtaposed with how expensive EIA can be, perhaps it is prudent to push the cost to the developer.⁸²

However this allows the developer who is an interested party to conduct an assessment of the environmental impacts of his proposed project. It would fly in the face of logic to expect the developer to shoot himself in the foot. This can therefore result in the consultant being partial to the interests of the developer. However Mr. Allan Kaziputa the Principal Environmental officer

⁸² Allan Kaziputa Principal Environmental Officer.

argues that there is no problem in having the developer funding the EIA process because eventually the consultant has to obtain Terms of Reference from The Environmental Affairs Department. These TOR help to provide the necessary checks and balances on the quality of the EIA. However, one notes that this can easily be defeated by corruption.

3.5 Environmental Management Plan.

This refers to an action plan or a management strategy for the implementation of mitigation measures. Each detailed EIA should have an environmental management plan which provides details of the work programme or schedule. These may include technical control measures, an integrated management scheme, monitoring, contingency measures, operating practices, project scheduling, and joint management with affected groups, mitigation costs and value judgments.

However, capacity challenges (in terms of human resources) of the Environmental Affairs Department are major challenge for effective execution of the environmental management plan⁸³. The Deputy Director explained that the entire Department has 5 technical officers of which only 2 are for EIA. Thus we have an EIA section of 2 people catering for the whole country. Considering how tasking the EIA process can be this is a very big setback for our EIA system and it would be over ambitious to expect the environmental management plan to be effective. All in all, the Environmental Management Plan is inadequate due to serious human resource challenges at the Environmental Affairs Department, which in turn are constraining the effective implementation of the EIA processes.

⁸³ The Deputy Director further lamented that the Department fails to keep lawyers in its legal section. He stated that their first lawyer was Mr. Makawa who left for Foreign Affairs, and then there came Mr. Bright Sopo Mando who after a short stint also left. Currently the Legal section has 2 lawyers and 1 paralegal and it is being headed by Mrs. Victoria Kachimera. The Deputy Director attributed this rate of attrition to frustration because the Department does not keep its promises to the lawyers.

3.6 Public Participation.

The success of the EIA process often depends on the extent to which local affected communities and the public are involved in planning and decision making activities. Accordingly, EIA legislation usually requires one or more of the following: public notification of EIA- related actions or decisions through submission of proposed activities, screening, scoping results and EIA reports; public access to information; opportunity for public comments either written or oral including public hearings and consideration of public comments in making an EIA decision. Thus for any successful development activity it is important to have popular participation right from the grassroots. This allows for accommodating views of those who will benefit or be affected by the proposed activity. In recognition of this, the EMA calls for public consultation in the EIA process. Public participation should ensure that women and children are actively involved since they are the major resource users and managers. This is crucial to ensure environmentally sustainable development.

Despite these provisions, public participation in the EIA remains undeveloped in Malawi, in part because of logistical problems due to long distances between the Environmental Affairs Department and communities. This is largely due to the fact that EIA administration in the country is centralized. Furthermore illiteracy levels prevailing in the country has a negative impact on the ability of the citizens to participate meaningfully in EIA.

But the state itself does not like public participation. Marxists view the executive of the modern state as nothing but a committee for managing the common affairs of the whole bourgeoisie.⁸⁴ The public is therefore viewed as comprising of ignorant and meddling outsiders deserving just to be spectators and not participants.⁸⁵ This goal is achieved in part through the manufacture of consent⁸⁶ which enables this “specialized class” to manage the common interests of their

⁸⁴ See the Communist Manifesto.

⁸⁵ Ibid.

⁸⁶ See Fontana Benedetto, Hegemony and Power.

bourgeoisie masters in the manner that largely elude public opinion entirely. This ensures that these “responsible men” live free from trampling and the roar of a “bewildered public herd.”⁸⁷

Thus, power is delegated to “the more capable set of men” who understand that the role of government is “to protect the minority of the opulent against the majority”⁸⁸. Thus the state becomes an instrument of class rule.⁸⁹ In premises, the executive arm government must be understood as comprising of “an elite of gentlemen” with “elevated ideals” who are empowered by the bourgeoisie to preserve “stability and righteousness” so that the public is put in its place.⁹⁰ Thus the pursuit of the bloody god profit through mining of resources, despite the rhetorical public participation is not encouraged.

3.7 Institutional Set Up.

The EIA process requires the establishment and strengthening of competent national environment authorities through an Act of Parliament. A central authority to coordinate and advise on all environmental issues, including EIA procedures and requirements. In Malawi, the Environmental Affairs Department (EAD) is such an authority. The Environmental Affairs Department collaborates with existing institutions and helps strengthen and improve their competence in carrying out EIAs. In this regard the Environmental Affairs Department guides/monitors the overall application of EIA through issuance of regulations and general guidelines among others.

The institutional set up of the Environmental Affairs Department compromises its role in implementing Environmental Impact Assessment. The department is mandated to coordinate several other lead agencies in protecting and managing the environment. This sectoral separation approach to environmental protection is a challenge in that it limits a holistic appreciation of the environment, in other words it ignores the indivisibility of the ecosystem. Moreover the mere

⁸⁷ See Noam Chomsky.

⁸⁸ See James Madison.

⁸⁹ See Rius, Introducing Marx.

⁹⁰ Noam Chomsky, Hegemony or Survival p.6.

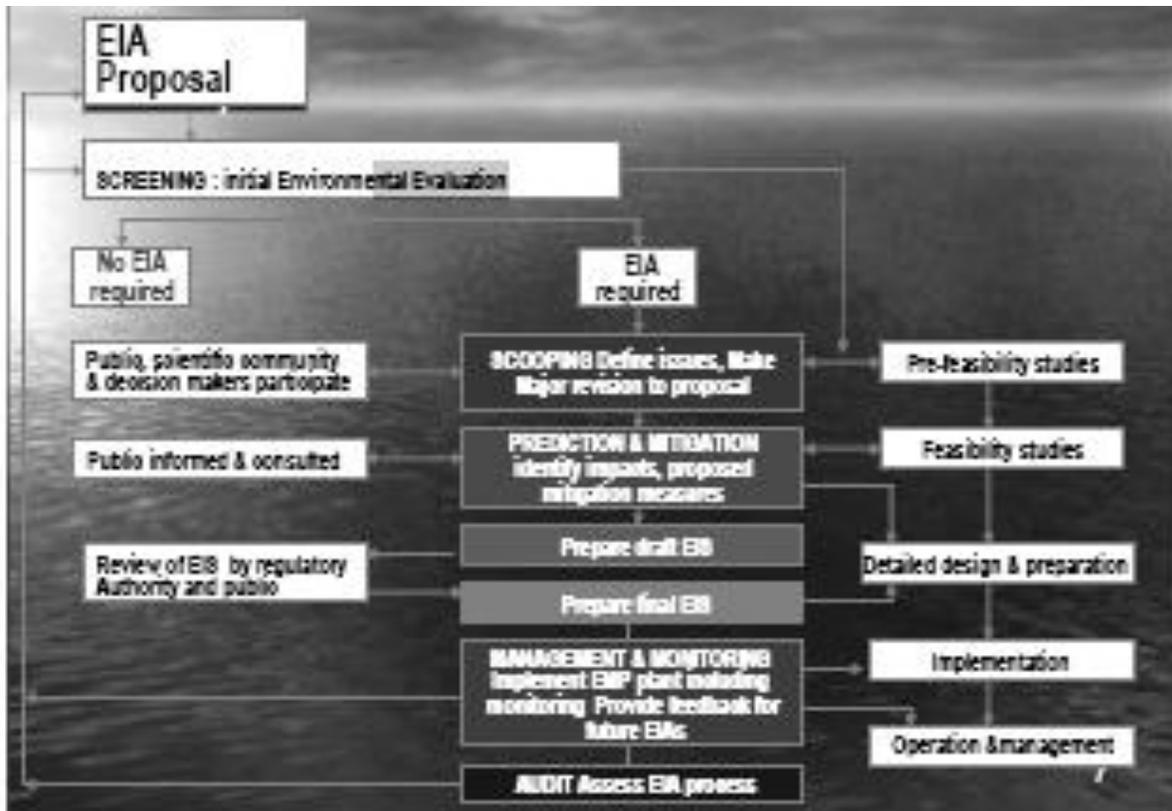
fact that there are many lead agencies dealing with the environment makes the environment every one's baby and eventually it becomes nobody's baby.

Moreover, being a government department it lacks the requisite independence to enforce the EIA requirements against government.

3.8 Integrating EIA into the Project Cycle.

The spirit of section 26 of the Environment Management Act suggests that, any project moves through a number of phases in the course of being transformed from an idea into an operating concern. Typically, a project begins as a concept then moves through pre-feasibility and feasibility studies before a detailed design and then implementation. During implementation, monitoring and evaluation are conducted. This contributes to subsequent development of new project concepts, thus completing the Project cycle.

Malawi's EIA process is specifically designed to integrate EIA requirements within the project cycle. This integration is essential for the EIA study to provide timely environmental information at key stages in the project cycle. Thus, early results from an EIA may indicate practical design changes, which would avoid or reduce negative environmental impacts, or better capture environmental benefits. The project developer may then adopt these changes into the project plan, and the final EIA document would be based upon the revised plan and describe both reduced impacts and more modest needs for impact management. Similarly, Government has the opportunity to review and comment upon a project as it is formulated and, where necessary, requires changes to avoid or reduce adverse environmental impacts before irrevocable project decisions are made. See fig 1 below.



At the start of the EIA process there is screening and scoping stage that result into the production of a Project Brief. The project brief is received and reviewed by Government at the project concept to early pre-feasibility and feasibility study phase.

If an EIA is deemed necessary, it is timed to coincide with feasibility studies and detailed design when the detailed information it provides is most useful to project planners. The purpose of designing EIA requirements in this way is to encourage project developers to include the "EIA team" within the broader project development team and to make constructive use of EIA findings as they are generated. The result is that EIA studies should be useful both to project developers as a planning tool in designing more environmentally sustainable projects and to Government as an evaluation tool in fulfilling its environmental and natural resources management responsibilities.

The challenge faced in executing this is to with perception of EIA in Malawi. Generally EIA is perceived as a stumbling block to economic growth this is due to the complex and time

consuming procedures which are costly and somewhat delay the project approval. Most developers only pay attention to the benefits of their development and turn a blind eye to the cost of the environment. This results in developers downplaying the need to cooperate with the Environmental Affairs Department in integrating the EIA in the project cycle.

Furthermore, this is compounded by inadequate EIA experts in the country. The research shows that there are only 55 EIA accredited experts in the country. The rest are those who just jump on the job and as expected they do shoddy work which eventually compromises the integration of the EIA process and the project cycle.

3.9 Chapter summary.

The chapter has successfully discussed the prerequisites to an effective EIA process. It has also discussed the challenges that are affecting the application of the prerequisites in the implementation of the Environmental Impact Assessment in Malawi. The challenges discussed ranged from lack of political will on the part of government, the institutional setup of the Environmental Affairs. The chapter has also set a foundation for the subsequent chapter which discusses the Kayelekera Case study.

Chapter 4

The Kayelekera Uranium Mine Environmental Impact Assessment Case Study.

4.1 Introduction.

In the previous chapter we concentrated on the EIA prerequisites and their attendant challenges. This chapter discusses the Kayelekera Uranium project as the case study for this paper. The aim being to engage in an in depth inquiry of the challenges of the Malawian EIA process within the real-life context of the Kayelekera Uranium Mine in Karonga. Firstly, the section outlines the geographical location of the project, then it traces the history of the Kayelekera Uranium Mine, and thereafter analyses the bottlenecks of the Kayelekera Environmental Impact Assessment (KEIA) in line with the prerequisites enumerated in chapter 3 above.

4.2 The Kayelekera Uranium Project: Location and Access.

The Kayelekera Uranium Project is located in the Karonga District of the Northern Region of Malawi (Figure 2). It is located approximately 52 km by road to the west of Karonga, in the undulating hills of the lower elevations of the rift escarpment. The project site is accessed from the capital city of Lilongwe via the M1 to Karonga (approximately 570 km) and then via the Karonga-Chitipa Highway (M26) and from Kayelekera Uranium Project by unsurfaced road to Kayelekera Village. The access from the M26 to site is passable for most vehicles during the dry season but impassable to most vehicles during the rainy season.

Fig.2: Map of Malawi showing the location and accessibility of the Kayelekera Project.

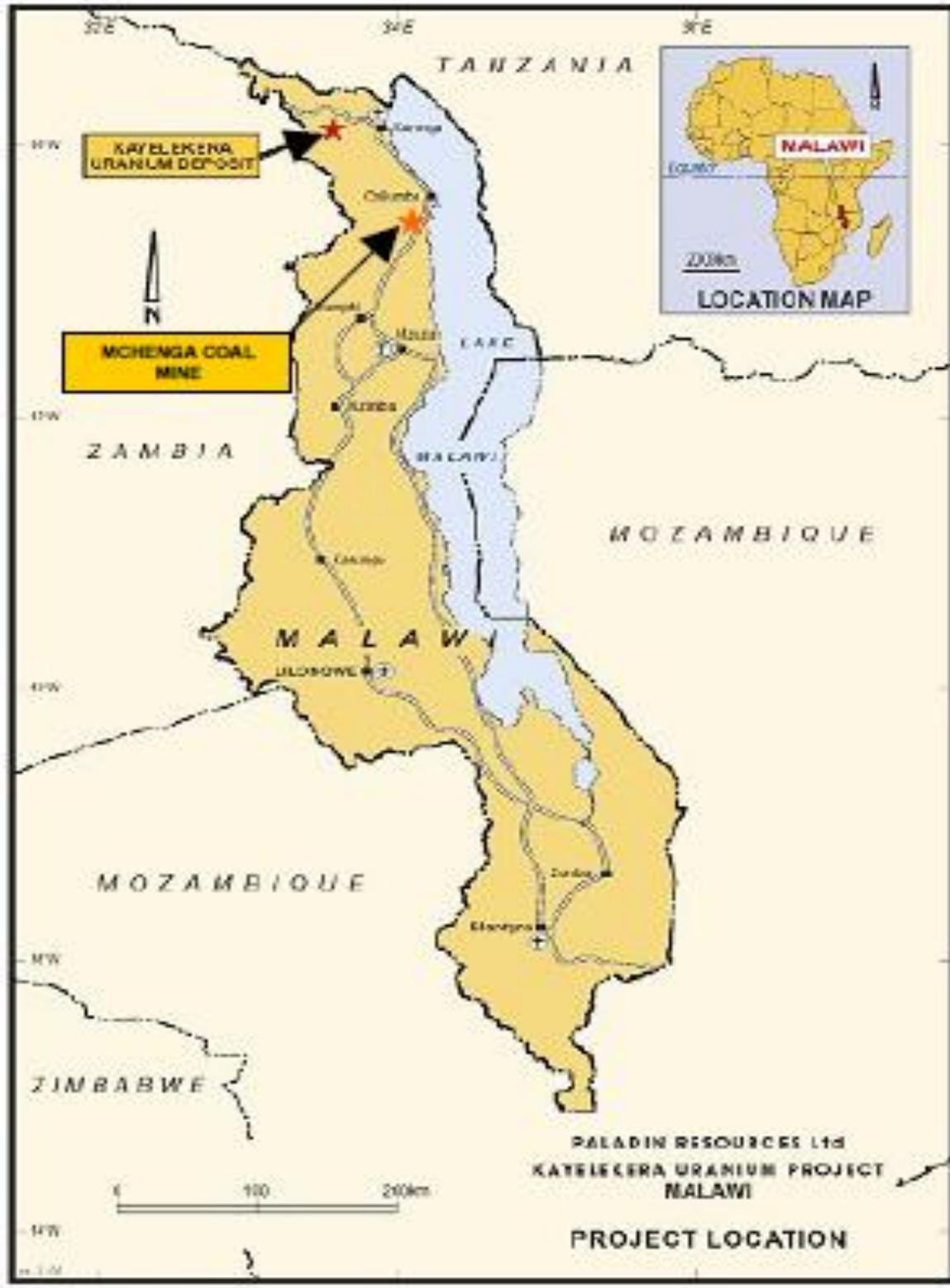
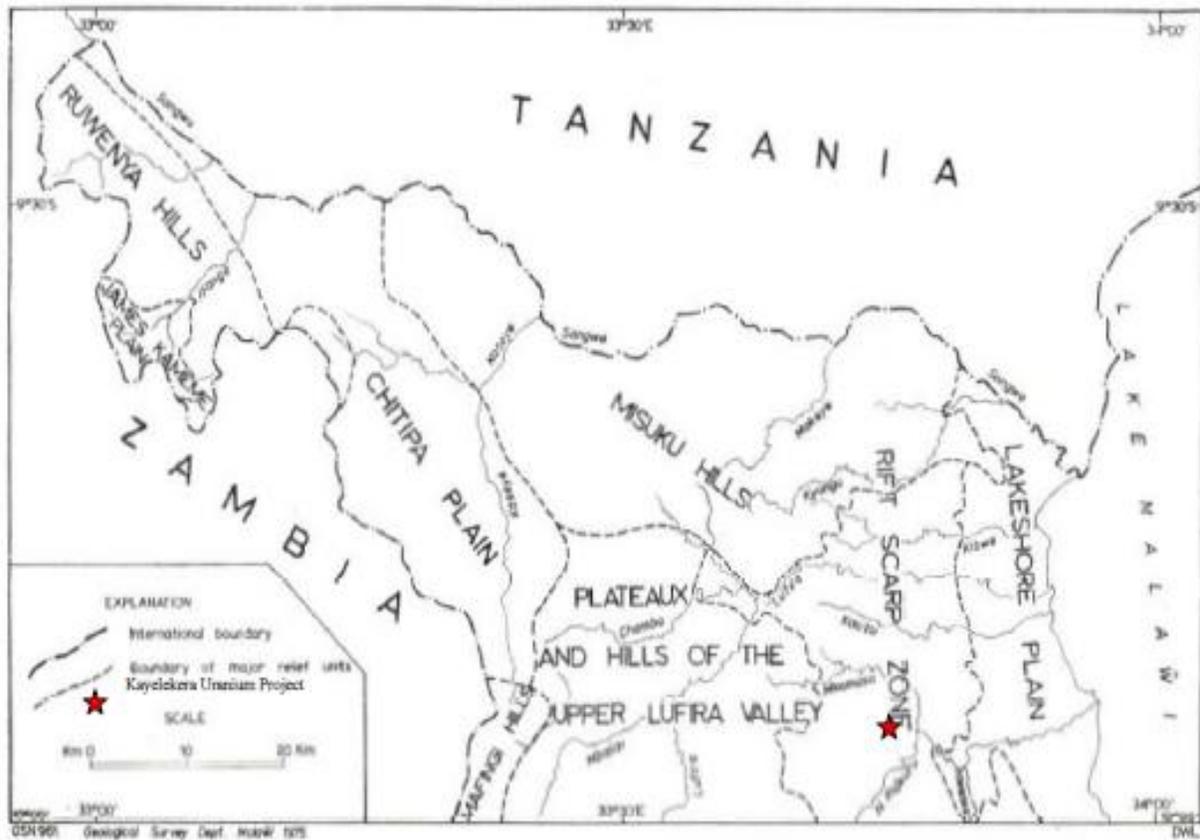


Fig.3: Topographic Map of Kayelekera.



4.3 History of the Kayelekera Uranium Mine.

The Kayelekera Uranium Mine has been on the lime light since three decades ago. Back in the 1980's Central Electricity Generating Board (CEGB) a UK company discovered the high grade Kayelekera sandstone uranium deposit. It is documented that CEGB spent US\$9 million working on the project for over 8 years culminating to a full feasibility study in 1991 by Wright Engineers Limited of Canada. However, the study indicated that the project was uneconomical due to the mining model that CEGB was to adopt and the uranium prices were low at the time. The project was abandoned in 1992, owing to the poor outlook for uranium as well as the privatization of CEGB according to the master minders.

However, in 1999 Paladin Resources Limited Inc an Australian company acquired 90% interest in the project through a joint venture from Balmain Resources Limited, who retained 10% of free carried interest until the completion of the Bankable Feasibility Study (BFS).⁹¹ In 2000, the project was transferred to the Malawian registered company Paladin Africa Limited a wholly owned subsidiary of Paladin Resources Inc. Further, the company proceeded on with engineering and financial evaluation using new project development concepts which showed positive outcome for the economy.

The CEGB 1989-92 pre-feasibility study was also updated and metallurgical and resource drilling commenced in 2004. In May 2005 the BFS commenced to verify new mining/milling concepts that were to be adopted as well as validation (or modification if required) of all other environmental and mine model parameters.⁹²

4.4 The Kayelekera saga and the civil society response.

Civil Society is the medium through which social contracts or bargains between the individuals and centers of political and economic power are negotiated, discussed and mediated.⁹³ This set of non governmental institutions is strong enough to counterbalance the state.⁹⁴ Indeed, the Civil Society played a very crucial role in the Kayelekera saga. It was the trouble shooter of the whole thing. The Civil Society was the first to raise public suspicion about the Kayelekera project with rumours that the Malawi State President, the late Prof. Bingu wa Mutharika, had taken a discreet detour to Australia during a state visit to the Far East, where he stayed as a ‘guest’ of Paladin for seven days.⁹⁵ The Civil Society wondered what this ‘private visit’ entailed, but no credible explanation was forthcoming. Suspicions were heightened when news of the uranium mining

⁹¹ Undule Mwakasungula, CHRR Concerns on Uranium Mining, 2005:1.

⁹² Ibid.

⁹³ Kaldor 2003.

⁹⁴ Gellner, 1983.

⁹⁵ Hajat, Kayelekera and the Uranium Mining Saga in Malawi: Towards the consolidation of Malawi’s democracy; essays in honour of the work of Albert Gisy German ambassador in Malawi (February 2005–june 2008):83

project was featured in the media.⁹⁶ Civil society groups began studying the draft EIA that had been conducted by Knight Piésold Ltd, a consultancy firm based in South Africa and hired by Paladin. These civil society organizations (CSOs) received a frosty reception from government and had to contend with traditional authorities in and around the concessional area who had succumbed to the lure posed by short-term gains emanating from the project. However, the CSOs persisted undaunted in their quest to extract the truth on the Kayelekera concession and prepared a detailed study on the shortfalls prevalent in the project plans.

The CSOs' questions and observations were of a general, nontechnical nature and thus required more expert input in order to counter the technical advantage of Paladin, who could draw upon a team of highly qualified experts to back up its proposals. The Civil Society Mining Forum thus proceeded to enlist the services of Dr Gavin M Mudd,⁹⁷ to review the EIA and provide a report on the potential technical flaws that may be invisible to the untutored eye. Dr Mudd visited Malawi in January/February 2007 to conduct an on-site analysis and subsequently proceeded to voice serious reservations at a press conference in Blantyre. The report highlighted serious fundamental issues that needed to be addressed and corrected before the project was allowed to proceed.⁹⁸

The aforementioned CSOs coalesced into a loose network entitled the Civil Society Mining Network of Malawi (CSMNM) and mounted a desperate campaign to redress the perceived shortfalls. The CSMNM came up against acrimonious opposition from the government, traditional authorities and, indeed, much of the citizenry who did not understand the issues that were being raised, and instead chose to succumb to the 'smear' counter-campaign that had been initiated by unknown agencies who appeared to have vested interests in the uranium mining project.

⁹⁶ Ibid.

⁹⁷ A course director in Environmental Engineering at Monash University in Clayton, Australia,

⁹⁸ Hajat (supra).

In early 2007, the CSMNM initiated litigation in the High Court against the Government of Malawi for entering into an agreement with a foreign investor for the exploitation of finite mineral resources without due regard for the interests and aspirations of local communities in particular and of Malawians in general (Paladin Resources was named as second respondent).

The court granted an interlocutory injunction preventing any work on the site until the issues raised had been fully explored by both litigants and defendants. This action increased pressure on the government to 'come clean'. Paladin was more directly affected by virtue of adverse publicity generated in Australia, with a resultant fall in its share price on the stock exchange. Numerous attempts to initiate dialogue between the protagonists by various entities, including government ministers from Karonga, failed to achieve a breakthrough. The stalemate was finally broken in the last week of October 2007, on the eve of the court hearing. Members of the CSMNM were invited to a meeting with Paladin Resources convened by the Department of Mines and chaired by the then deputy minister for Water Development, the Hon. Frank Mwenifumbo (MP), at Capital Hotel in Lilongwe. This was a last ditch effort to find common ground for an amicable agreement rather than risk protracted (and costly) court proceedings that could delay the mining project for an indefinite period.⁹⁹

The meetings ran for five nights, commencing at 6 pm and generally ending at midnight. The mood during the first encounter was confrontational, with both sides showing unwillingness to make any concessions; but the atmosphere soon warmed up when it was established that civil society was not against mining per se but was merely outraged by the 'raw deal' that militated against the interests of the local communities and the nation as a whole. The meeting gained further gravitas by the arrival of Paramount Chief Kyungu accompanied by four traditional authorities from Karonga, who announced that they wished to observe the proceedings to ensure that the best interests of the people of Karonga were being upheld. After five nights of hard negotiations, which entailed four rewrites of the out of court settlement deed, the meeting finally reached an amicable consensus premised on a series of undertakings by each party in the negotiation.

⁹⁹ Ibid.

The Civil Society did a commendable job. The magnitude of the achievement was confirmed by the then Minister of Finance, Hon. Goodall Gondwe, who admitted in a newspaper article that government ‘underestimated’ civil society¹⁰⁰. This comment has great significance when taken in the context of the Government’s previous contemptuous attitude towards the same grouping. A further commendation was received from CSOs in Zambia who were fighting with little discernible success for more equitable terms in the mining agreements entered into by their government with foreign investors in the Copper belt. CSMNM members were invited by Caritas to Lusaka in December 2007 to inform their counterparts on how this achievement had been realized by the CSMNM, given the embryonic status of the extractive industry in Malawi, when all similar efforts in Zambia, which has been mining copper for 80 years, have come to naught.¹⁰¹

This achievement is good enough but good enough is not always good enough. Firstly, the out of court settlement attracted mixed reaction: some sections of the public hailed it as a stunning victory for the grassroots, while others, slammed it as a civil society ‘sell out.’ Considering the enormity of the disaster which can be caused by the Kayelekera Uranium mine, the CSOs as advocates for environmental justice, were supposed to be steadfast in their campaign. This required them to refuse accepting government commands and opposing subordination, something that could be taken as an exact counterpoint to Austin’s ideal of law.¹⁰² Furthermore, the focus of their advocacy lacked environmental urgency, they were not primarily campaigning for the enforcement of EIA but rather they were advocating for a better deal for Malawians. If anything EIA rhetoric was just a means to the end. This is exemplified with the revelation that one of the undertakings of the out of court settlement was that The CSMNM would be consulted

¹⁰⁰ The Nation Newspaper.

¹⁰¹ The Government of Zambia realizes a pathetic 0.4 of 1% as royalties from copper. The mining companies there enjoy duty free and tax free status and operate with virtual immunity from employment and environmental rules and regulations. Human rights violations occur with callous disregard and the Kafue River has become a cesspool of toxic chemicals and acids.

¹⁰² Ferguson 1966:84.

as a partner in all future mining agreements entered into by the government and it was proposed that one member of the CSMNM be part of the monitoring team of the Kayelekera project, but according to Mr. Nyirenda the CSMNM has not done this. This manifests lack of seriousness and one cannot help labeling the Civil Society in Malawi as slogan mongers. They have forgotten everything about Kayelekera and now are peddling other well paying slogans. This is lamentable considering that CSOs are supposed to be the voice of the voiceless more especially on environmental injustices.

4.5 Critical analysis of The Kayelekera Environmental Impact Assessment (KEIA)

This analysis is based on the EIA Report on Kayelekera released by Paladin Resources Ltd ('Paladin'), owners of the Kayelekera Uranium Project and the independent technical review conducted by Dr Gavin M Mudd which was prepared at the request of Citizens for Justice Malawi. The analysis identifies numerous inadequacies in the EIA process conducted at Kayelekera as follows:

4.5.1 Lack of political will during the implementation of the Kayelekera EIA.

In this discussion political will entails the commitment of political leadership to create an enabling environment for sustainable development. As already pointed out above, this requires the integration of environmental concerns in all major economic and social policies, plans and decision making.

The study's finding is that the government of Malawi's political will to protect the environment at Kayelekera left a lot to be desired. There are a number of reasons substantiating this stand. Firstly the initial stages of the project were shrouded in secrecy. Besides, the Bankable Feasibility Study was rushed and yet the Environmental Impact Assessment Study which is a standard requirement had not been carried out. Moreover, the public did not have the luxury of open, organized political activity during the implementation of the Kayelekera project. For instance On 27th October 2005, some Civil Society Organizations¹⁰³, on a fact finding mission when they visited the Kayelekera uranium site they found some activities taking place and yet

¹⁰³ CHRR together with Karonga Development Trust (KADET).

the ministry had not yet informed Malawians in general let alone the resident communities within the prospective operation area of this project. In addition, the Mines, Natural Resources and Environmental Affairs Minister and his Lands counterpart had on miscellaneous occasions personally visited the Paladin mining camp in Kayelekera, without divulging information. As government officials why had there been no account in regard to these visits either to the National Assembly, the public or elsewhere but just little information in the print media?

Furthermore, the Government of Malawi granted a mining license to Paladin Resources by basing its decision on a *draft* Environmental Impact Assessment and was unmoved by numerous challenges from Civil Society on this deviation from normal procedures. The foregoing makes one not help to question the political will of the government. Thus one cannot help concluding that, government of Malawi was motivated by personal interests of some officials in the government in exploiting the Uranium over more sustainable policies.¹⁰⁴ This rendered its environmental protection aspiration provided by section 13 of the constitution virtually a lip service.

4.5.2 Inadequate Legal framework during the implementation of Kayelekera EIA.

Of course the Malawi Government in 1996 enacted the Environment Management Act within which EIA is a legal requirement for any prescribed project under Section 24 (1) of the EMA. However, as pointed out by the principal Environmental Officer at the Environmental Affairs Department¹⁰⁵ during the Key Informant Interview with the author, EMA is only a framework legal instrument i.e. it is an umbrella Act. As such it does not regulate everything to do with the environment. Thus, for effective EIA implementation, there is a need that EMA be complemented by specific subsidiary legislation. In the context, at the time of implementing the Kayelekera EIA there was no law regulating radiation in Malawi. Nonetheless, despite the lacuna in the legal framework the Government went ahead to approve the project. Of course parliament

¹⁰⁴ Ibid.

¹⁰⁵ Mr. Patrick Nyirenda Principal Environmental Officer at the Environmental Affairs Department.

in 2011 enacted the Atomic Energy Act. But the fact remains that when the government approved the Kayelekera project there was no legal instrument to regulate the same.

4.5.3 Paladin Funded the Kayelekera EIA.

Paladin was responsible for hiring Knight Piésold to conduct the EIA at Kayelekera. This gave Paladin technical advantage as it could draw upon a team of highly qualified experts to back up its proposals. This is true especially where the Environmental Affairs Department acknowledges that Knight Piésold was more advanced in EIA than the whole Environmental Affairs Department. Thus chances of the department of being duped were very high.¹⁰⁶ However Mr. Allan Kaziputa the Principal Environmental officer argues that there is no problem in having the developer funding the EIA process because eventually the consultant has to obtain Terms of Reference from The Environmental Affairs Department. These TORs help to provide the necessary checks and balances on the quality of the EIA. Nonetheless the consultant hired by the investor would not possess the impartiality necessary to produce an undiluted EIA report that would provide a comprehensive picture, including issues that could militate against the client's interests, and the government's failure to produce an independent EIA that could be used as a comparative standard and a reliable source of unpalatable information tilts the balance in favour of the investor. In the context corrupt connivance between Paladin and Knight Piésold cannot be a far-fetched suspicion.

4.5.4 Poor Environmental Management Plan.

The Environmental Affairs Department claims that the KEIA remains the best EIA to have been conducted in Malawi.¹⁰⁷ The officers stated that the KEIA is very comprehensive in that it considered the various aspects of the project. For instance it considered the impact the project would have on seismicity, soil characteristics, air mass movement, water resources, fauna and flora characteristic among others. Moreover, the officers heaped praises on Knight Piésold Ltd

¹⁰⁶ This was the observation of Mr. Allan Kaziputa during the KII with the author.

¹⁰⁷ From the Key Informant Interviews conducted by the author from 11th to 15th June 2012 at the Environmental Affairs Department.

for the comprehensiveness of the EIA process unlike what other consults do. In fact it was conceded that Knight Piésold Ltd did a good job even more than what the Environmental Affairs Department could have done. The EAD attributes the opposition to the KEIA to prejudice of the NGOs towards uranium mining which was also compounded by lack of knowledge of the EIA process.

However, the independent technical review prepared by Dr Gavin M. Mudd at the request of Citizens for Justice (Malawi), exposed a number of flaws in the manner how the KEIA was done. This includes lack of adequate, high-quality environmental and radiological baseline data, poorly argued project alternatives and inappropriate dismissal of viable project options; a completely minimal and inappropriate rehabilitation plan; Paladin's inexperience as a uranium miner, a lack of sufficient technical engineering design detail for critical project components, a lack of appropriate strategic, long-term tailings management plan, and a completely minimal and inappropriate rehabilitation plan among others.¹⁰⁸

The KEIA failed to adequately characterize the baseline environmental and radiological conditions of the Kayelekera region and proposed project. The KEIA fails to present and justify sound technical approaches to major issues and aspects such as protecting the quantity and quality of water resources, tailings deposition and long-term stewardship, potential radiological releases and associated exposures.

Furthermore, the KEIA consistently dismissed various potential issues without sufficient baseline data from field studies and subsequent technical assessment (e.g. water quality, radon, etc).The KEIA fails to make firm commitments and set noble targets for rehabilitation and closure, especially with regards to local community expectations.

Moreover, there was nondisclosure of waste management plans leading to increasing concern since the mine is within the catchment area. The mine is situated next to the Rukuru River, which

¹⁰⁸ Dr Gavin M. Mudd, Comments on the proposed Kayelekera Uranium project Environmental Impact Assessment Report. *November 2006.*

feeds directly into Lake Malawi. It is a pristine freshwater resource that is home to numerous unique fish species. Lake Malawi has an extremely fragile ecosystem that would not be able to withstand any discharge of effluent from the mine, or any inadvertent seepage that may occur through human error or by *force majeure*. The shores are inhabited by hundreds of thousands, if not millions of people that depend on the lake for their livelihood and very survival. Thus, one has to ask who would shoulder the responsibility in the event of any disaster. Will it be Paladin, or the Government of Malawi or both? How would Malawi cope with a scenario of such irreversible catastrophic magnitude as a Chernobyl-type scenario here? Worse still, there are fears that water extraction & usage may conflict with local needs. Considering that while Australia is the world leader in 'yellowcake' (uranium) production and has a highly regulated framework, but despite this, uranium mining has led to negative impacts on the surrounding environment and food sources of local people (e.g. the Ranger mine). It can be observed therefore, that the environmental management plan at Kayelekera failed to meet the required standards.

4.5.5 Inadequate Public Participation during the Kayelekera EIA process.

It is trite that for any successful development activity it is important to have popular participation right from the grassroots. This allows for accommodating views of those who will benefit or be affected by the proposed activity. In recognition of this, the EMA calls for public consultation in the EIA process. Public participation should ensure that women and children are actively involved since they are the major resource users and managers. This is crucial to ensure environmentally sustainable development.

The Environmental Affairs Department maintains that public consultations took place only that the NGOs were not conversant with the EIA process in that they were demanding for information when it was not yet time for the public disclosure. The EAD's observation is confirmed by the KEIA which outlines all the public consultation sessions.

However it is on record that site clearance activities at Kayelekera started even before Paladin was issued a mining license. Shrines sacred belonging to local residents were destroyed thereby

angering local chiefs – this is illustrative of the lack of pre-consultation for the protection of local social and environmental value systems.

Moreover, Paladin Resources refused to provide scoping documents to local community organizations as per requirements under Malawian environmental laws. These scoping documents would ensure that community input is provided at an early stage in the process. Thus the pursuit of the bloody god profit, the Kayelekera Uranium Mining despite the rhetorical did not allow enough public participation.

4.5.6 Institutional Set Up of the Environmental Affairs Department vis- a – vis EIA process at Kayelekera.

The EIA process requires the establishment of a central authority to coordinate and advise on all environmental issues, including EIA procedures and requirements. In Malawi, the Environmental Affairs Department (EAD) is such an authority. Indeed the Environmental Affairs Department collaborated the Kayelekera EIA process.

However, during the Key Informant Interview with the Deputy Director of the Environmental Affairs Department it came out clearly that the institutional set up of the EAD compromises its role as an environmental watch dog largely because the Government was somewhat pushy to expedite the process. As a government department, the Environmental Affairs Department could not block government's development agendas. As such the set up of the EAD did not help matters in the implementation of the KEIA. Against this background, we find James Scott's notion of calculated conformity¹⁰⁹ valuable and complements the Foucauldian idea of Governmentality for the purposes of this study. This is because the analysis so far, demonstrates that the relationship between the Environmental Affairs Department and the government can perfectly be reduced to that of the dominator and a dominated. That is to say, the Environmental Affairs Department which has the mandate of the environmental watch dog, is dominated by

¹⁰⁹ See JC Scott Weapons of the weak: Everyday Forms of peasant Resistance (New Haven: Yale University Press, 1985).

powers above it, to the extent that it could not stop the Kayelekera mining for lack of a proper EIA because the powers above it had stakes in it.

Scott further observes that a 'dominated constituency' does not have the luxury of open, organized political activity. He argues that, often a more open defiance to authority is suicidal. In the context the Director of the Environmental Affairs Department had to tread very carefully during the Kayelekera saga, because the government had its stand and anything to the contrary could be interpreted as anti- development.

4.5.7 Integrating EIA into the Kayelekera Project Cycle.

As already pointed out, any project moves through a number of phases in the course of being transformed from an idea into an operating concern. Typically, a project begins as a concept then moves through pre-feasibility and feasibility studies before a detailed design and then implementation. During implementation, monitoring and evaluation are conducted. This contributes to subsequent development of new project concepts, thus completing the Project cycle.

Thus Malawi's EIA process is specifically designed to integrate EIA requirements within the project cycle. This integration is essential for the EIA study to provide timely environmental information at key stages in the project cycle. Thus, early results from an EIA may indicate practical design changes, which would avoid or reduce negative environmental impacts, or better capture environmental benefits. The project developer may then adopt these changes into the project plan, and the final EIA document would be based upon the revised plan and describe both reduced impacts and more modest needs for impact management. Similarly, Government has the opportunity to review and comment upon a project as it is formulated and, where necessary, requires changes to avoid or reduce adverse environmental impacts before irrevocable project decisions are made. Nonetheless, the KEIA cycle was not properly integrated into the mining project due to economic and political considerations.

4.5.8 Chapter summary.

This chapter has discussed the Kayelekera EIA as a case study. The analysis has exposed that, despite the rhetoric the EIA prerequisites were not fully applied in the implementation of the Kayelekera Uranium EIA. For instance the political will was wavering, the legal framework inadequate among others. It has also been exposed that the Civil Society could have done better in advocating for adherence to the EIA requirements.

All in all much as the EIA conducted at Kayelekera was comprehensive, the analysis so far has raised some doubts in the adequacy of the KEIA process due to some shortcuts and inadequacies in the implementation. This therefore means that the EIA bottlenecks enumerated in Chapter 4 conspired against the effectiveness of the Kayelekera EIA.

Chapter 5

Conclusions and Recommendations

5.1 Introduction.

The study purported to investigate the challenges affecting the effective implementation of the EIA process in Malawi. It adopted the case study approach on the Kayelekera Uranium mine. The motivation to pursue this study was the gap in the EIA jurisprudence that was exposed by the literature review.

Several observations were made from the literature that was reviewed. Firstly, the literature revealed that there is a sluggish development of EIA at the global level but failed to trace the problem to the inherent challenges of domestic EIAs. It has been established by this study that, the absence of this global treaty is a manifestation that the domestic EIA regimes of the countries in the world is a ramshackle. Secondly, the literature reviewed did not interrogate the political economy of EIA. These misgivings prompted the undertaking of this study.

The methodology that was adopted by the study ranged from oral interviews at the Environmental Affairs Department and indeed the bulk of the data analyzed in the study was collected through this methodology and it played an important role for the author to understand the EIA system in Malawi and problems lying within it. Key Informant Interviews (KII) were used to collect specialized data from the experts. The study also relied on secondary data and on that, the Kayelekera Environmental Impact Assessment Report was heavily relied.

The study successfully delineated and defined the key concepts that formed the backbone of the paper and the discourse was situated in the Precautionary, preventive and polluter pays principles of environment law. The Foucauldian conception of Governmentality and critical Marxian notions were used as tools for analysis. In this regard the study successfully discussed the prerequisites to an effective EIA process. It also discussed the challenges that affect the application of the prerequisites in the implementation of the Environmental Impact Assessment in Malawi. The challenges discussed ranged from lack of political will on the part of government, the institutional setup of the Environmental Affairs.

Finally the study analyzed the Kayelekera EIA as a case study. The analysis has exposed that, despite the rhetoric the EIA prerequisites were not fully applied in the implementation of the Kayelekera Uranium EIA due to the challenges that were unmasked. For instance the political will was wavering, the legal framework inadequate among others. All in all much as the EIA conducted at Kayelekera was comprehensive, the analysis so far has raised some doubts in the adequacy of the KEIA process due to some shortcuts and inadequacies in the implementation.

Perhaps it is befitting to bring the discussion to a close by stating that Malawi now stands at a crucial crossroads that is unique in its agro-based history, by virtue of being the source of rare minerals that are of major global strategic significance. However, the present study has revealed that much as the EIA that was conducted at Kayelekera was comprehensive in the eyes of the Environmental Affairs Department, it lacked credibility due to serious irregularities in the implementation. Of course the irregularities emanated from the horde of challenges that are inherent to the EIA process in this country. Indeed it appears that political and economic interests weigh more heavily in the scales than environmental values.

5.2 Recommendations.

Reaching this far the study makes the following recommendations as a way of charting the way forward.

5.2.1 Allocating more resources to the Environmental Affairs Department.

It was found out that the efficiency and effectiveness of the staff at the Environmental Affairs Department is constrained by lack of basic equipment such as computers, motor vehicles among others. The study recommends that Government must allocate enough resources to the Environmental Affairs Department to facilitate the smooth implementation of the EIA process.

5.2.2 EIA awareness Campaigns.

The study established that In Malawi EIA is perceived as a stumbling block to economic growth. The study therefore recommends that the Environmental Affairs Department must be organizing sensitization meetings with all stakeholders on the importance of conducting EIA.

5.2.3 The Environmental Affairs Department must become an independent body.

It has been established in this study that the current institutional set up of the Environmental Affairs Department compromises its role in implementing Environmental Impact Assessment more especially against Government. The study therefore recommends that government must make the department an independent body just like the Anti Corruption Bureau. This will enhance its efficiency and effectiveness in implementing and enforcing EIA in the country

5.2.4 Decentralized EIA system.

The study recommends that the EIA system in Malawi be decentralized to the districts this will reduce costs incurred by developers in transport costs but at the same time will reduce bureaucracy in approving the projects.

5.2.5 Adequate funding of the Environmental Affairs Department.

The study revealed that the Environmental Affairs Department is poorly funded and that constrains its effective operations in conducting and enforcing EIA. As the country makes strides towards mineral exploration the study recommends that parliament must allocate enough financial resources to enhance its operations.

5.2.6 Parliament must gazette Atomic Energy Act so that it becomes operational and must harmonize the existing environmental laws.

Appendix 1

Mining Companies currently operating in Malawi

1. Millennium Mining Limited (MML).

MML holds licence numbers: EPL 096/2000, 103/2000 and 0115/2002 for the exploration of three heavy mineral sands (HMS) projects in Salima, Makanjira (Mangochi) and Lake Chilwa (Zomba) respectively, which aim to extract ilmenite, rutile and zircon. A feasibility report and EIA were submitted for the Halala HMS project in the Lake Chilwa area and a deposit of 15 million tones with economic grades for ilmenite and zircon has been delineated. Its licence numbers: EPL 096/2000, 103/2000 and 0115/2002 for the exploration of three heavy mineral sands (HMS) projects in Salima, Makanjira (Mangochi) and Lake Chilwa (Zomba) respectively, which aim to extract ilmenite, rutile and zircon. A feasibility report and EIA were submitted for the Halala HMS project in the Lake Chilwa area and a deposit of 15 million tones with economic grades for ilmenite and zircon has been delineated.

2. Allied Procurement Agency Limited (APA).

APA is developing the Chipoka HMS project for the extraction of ilmenite, rutile, zircon and garnet. Since Chipoka is a freshwater harbor on Lake Malawi, this project envisages conveyance of concentrate by pipeline from the mine to the harbour and thence onwards by barges. Sources indicate that although this project is at an advanced stage, it may have temporarily stalled due to technical difficulties.

3. Lisungwi Mineral Resources Limited (LMRL).

LMRL together with ACA Howe International carried out compilation and analysis of geological, geochemical and geophysical data, and identified three gold and platinum targets for detailed exploration work, including drilling, to be carried out during the dry season of 2004. At Chimwadzulu, the analytical results indicate platinum and palladium concentrations. It is worth noting that this area also has the Chimwadzulu ruby mine in Ntcheu, which has been owned and operated by the Hargreaves family since 1964. The

mine is the only known source of the world famous 'Nyasa Ruby' that fetches premium prices on the global market, but it is not known exactly what benefits have accrued to Malawi or the local population due to the shroud of secrecy that cloaks the mine and its owners.

The Likudzi prospect has been sampled and the analytical results may justify trenching to bedrock. Historical result analysis seems to indicate a positive position for better grade gold mineralisation in an inclined shaft. Sampling results in old workings seem to be comparable with the historical values at the surface level. Further work will consist of drilling at least one drill hole to examine the setting of mineralization and to confirm the grade and thickness of mineralisation. Auger sampling will be carried out along strike from the old workings.

4. Mchenga Coal Mines Limited (MCML).

MCML is involved in coal extraction in the Chiweta mountain range (near Karonga) and plans to increase production of coal to some 5,000 tones a month with exploration for additional coal resources within the Livingstonia coalfield. The site is an eyesore and a health hazard. A thick coating of black coal dust is visible on all buildings, machinery and vegetation, and the local community complain of proliferating lung diseases with no school, hospital or service infrastructure to provide essential services.

5. Albidon Limited.

Albidon holds concessions for four areas comprising Mpemba Hill, Kapeni River in the southern region, and Linthipe and Katakwi in the central region in respect of nickel, copper and platinum group metals (PGM) exploration. Albidon and its joint venture partner Western Mining Corporation, both Australian companies, were involved in the interpretation of airborne geophysical data acquired over their licence area of the southern region.

6. Maravi Minerals Development Limited (MMDL).

MMDL is exploring the Thambani Mountains and Mzimba pegmatites for tantalite minerals, zircon and corundum, under EPLs 0118/2002 (Thambani) and RL 033/2002 (Mzimba).

7. Rare Earth Company.

Rare Earth is developing the Kangankunde Hill monazite and strontianite deposit under mining licence ML 0122/2003 and plans for full-scale operations are well under way.

8. Gondo Resources.

Gondo Resources is a new player in the field that seeks to exploit the bauxite reserves in Mulanje Mountain. The company's lack of experience, coupled with the complexity of extraction in a very delicate ecological environment that has been recognized as a World Heritage site, does not inspire much confidence. Further, it will be necessary to import huge amounts of electricity from Cabora Bassa in Mozambique to power the extractive process, resulting in outflows of revenue from Malawi. This is compounded by the fact that the ore will not be refined in Malawi but will be transported by rail to Mozambique, where processing plants are already in existence. This means that Malawi will merely export crude ore, with no value adding spin-off benefits that could make a huge difference in the revenues realized from this project. It is therefore unclear what benefits, if any, will accrue to Malawi and its people when compared to the potential ravages that could be wreaked on a unique and breathtakingly beautiful natural site that has great potential for eco-tourism.

9. Paladin Resources Limited.

Paladin Resources of Australia has conducted a bankable feasibility study and infill diamond core drilling on its Kayelekera uranium prospect under EPL 0070. This project is at an advanced stage and Paladin has signed an extraction agreement with the Government of Malawi and reached an out of court settlement with concerned civil society groups.

Appendix 2: Mineral reserves in Malawi

Deposit	Location	Delineated reserves Million tones/ grade.
Bauxite	Mulanje	28.8/43.9 Al ₂ O ₃
Uranium	Kayelekera Karonga/ Chitipa	2.4
Monzanite	Kangankunde – Balaka	11.0/8% Sr, and 2% REO
Strontianite/ Corundum	Chimwadzulu – Ntcheu	8.0/75.6 gm per m ³
Graphite	Katengedza – Dowa	2.7/5.8% C
Limestone	Malowa Hill – Bwanje	15/48% CaO, 1.2% MgO
Titanium Heavy	Salima – Chipoka	700/5.6% HMS
Mineral Sands	Mangochi (Makanjira)	680/6.0% HMS
Vermiculite	Feremu – Mwanza	2.5/4.9% (Med + Fine)
Coal	Mwabvi – Nsanje, Ngana – Karonga	4.7/30% ash
Phosphate	Tundulu – Phalombe	2/17% P ₂ O ₅
Limestone	Chenkumbi – Balaka	10/46.1% CaO 6.3% MgO
Pyrite	Chisepo – Dowa	34/8% S
Glass sands	Mchinji	1.6/97% SiO ₂
Dimension stone,	Chitipa, Mzimba Mangochi, Mchinji	Black and blue granite, pink granite, green granite

Gemstones	Mzimba, Nsanje, Chitipa, Chikwawa, Rumphu, Ntcheu	N/A
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Source: Government of Malawi, 'Malawi Annual Mining Economic Report', 2002.

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