

# Human Rights, Mineral Rights and Corporate Social Responsibility in Ghana: Legal and Policy Analyses\*

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## Abstract

The worth or success of a business company is conventionally defined or measured in terms of its business performance; that is, whether the company is operating as a financially viable going concern by making expected returns. But in addition to its business performance, the efficiency of a company is measured based on its alignment of business operations with human rights and other non-financial concerns. This view of the company is often described under the concept of corporate social responsibility. This Paper assesses the nature of corporate social responsibility in Ghana primarily focusing on the mining industry. The Paper outlines the various human rights and mineral rights in Ghana and the effects of mining on human rights. It establishes that although the Constitution of Ghana guarantees social, economic, cultural and other human rights, mining operations continue to affect human rights as if these laws did not exist. The Paper attributes this, in part, to incoherent institutional and legal frameworks in the mining and environmental sectors and the lack of a comprehensive corporate social responsibility policy in Ghana. The Paper suggests that to resolve this dilemma there is the need for a corporate social responsibility policy and legal framework peculiar to the mining industry. It is also asserted that it is the primary role of the State to ensure that human rights as guaranteed are truly enjoyed. But the Paper also recognises that business and human rights challenges require direct participation of businesses and, therefore, suggests that businesses should incorporate and integrate specific human rights challenges in their business operations prior to commencement of operations and that the grant of mineral rights should be conditioned upon satisfactory evidence of companies' actual commitment to respect and uphold human rights. The Paper suggests that since mining operations are inherently risky in view of associated risks such as environmental degradation, chemical pollution and human rights violations, mining companies in Ghana must be held absolutely liable for inherent risks associated with their operations.

## 1 Introduction

Companies limited by shares and unlimited companies incorporated or registered under the Companies Act, 1963 (Act 179) of Ghana, and most other companies the world over, formed for the purpose of doing business primarily seek to advance business motives, namely to carry on business for the purpose of making profits. So in the past and even in present times, the merit or success of a company formed for the purpose of carrying on business was and is still measured in terms of business performance; that is, whether the company is operating as a financially viable going concern. Thus the financial paradigm of the corporation sees the corporation as an investment vehicle whose success is measured almost exclusively with reference to its returns to shareholders (Peer Zumbansen, 2009).

However, in recent times the focus of the measurement of the merit and image of a company goes beyond its business performance. In addition to its business performance, the efficiency and viability of a company are measured based on the company's alignment of its business operations with social, environmental and other non-financial concerns. Thus, corporate social responsibility ("CRS" herein) requires that companies integrate the interests of stake-

holders into their business policies and actions. Therefore, companies are expected to perform well in non-financial areas involving human rights, business ethics, environmental policies, corporate contributions, community development and workplace issues. This view of the corporation is often described under the organizational-industrial paradigm of the corporation. This paradigm views the company as a battle-field of differing concepts of market intervention on the one hand and of the conflict over the appropriate role of business enterprises and the scope of legal regulation of business in the larger social context (Peer Zumbansen, 2009).

There is no universally accepted defining of CRS. But Professor Doreen McBarnet's definition or explanation of CRS provides a good starting point for the purpose of this Paper. Professor Doreen McBarnet (2009: p. 1) defines corporate social responsibility as follows:

Corporate social responsibility . . . has now become a routine element in business and regulatory debate. CRS involves a shift in the focus of corporate responsibility from profit maximisation for shareholders within the obligation of the law to responsibility to a broader range of stakeholders including communal concerns such as protection of the environment,

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and accountability on ethical as well as legal obligations . . . These broader concerns are not necessarily seen as in conflict with shareholder interest but as protecting them long-term. CRS is not philanthropy, contributing gifts from profits, but involves the exercise of social responsibility in how profits are made.

Corporate operations can, therefore, affect human society in a variety of ways depending on the area of operation of the company: labour exploitations, human rights violations, environmental degradation, settlement patterns, health, farming and community livelihood. Writing on the subject of corporate social responsibility and market-based remedies for international human rights violations, Eric Engle (2004: pp. 1 & 2) succinctly stated the way multinational companies' operations affect human rights in the developing world thus:

The problem of poverty presents the opportunity of labour exploitation. Opportunities to profit out of the misery of others occur in a variety of trades, including flowers, textiles, oil, and diamonds. Multinational companies can make a killing on their investments-literally. Often, as in the case of conflict diamonds, the source of the commodity resulting from exploitation cannot be traced.

Not only are labour exploitation patterns recurrent in several industries, human rights violations occur throughout the third world in places as diverse as Saipan [Spain], Ecuador, Papua New Guinea, Indonesia, Myanmar . . . and Nigeria, and often implicate first-world multinational corporations. The violations of human rights are just as wide-ranging. Indentured servitude, child labour, and slave labour are typical violations; however, even charges of murder or genocide are sometimes alleged. Quite simply the fact is that consumers want cheap goods, and third-world labour, particularly child and slave labour, is cheap. Companies exploit third-world labour because exploitation is profitable.

It is, therefore, certain that corporate operations in the mining industry can greatly affect the human rights of the people in the communities in which these companies operate. This is particularly so in the case of mining companies the operations of which have direct environmental, social, health and indeed economic implications to citizens of mining communities. Therefore, there is the need for governments, including the Government of Ghana, to commit themselves to controlling corporate behaviour but without compromising corporate objective to make profit. In other words, there is the need to strike a balance between promoting business operations and protecting human rights violations likely to occur as a result of corporate operations. There are a number of ways of controlling corporate behaviour. These include internal self-regulation (codes of conduct), through nonbinding codes of conduct such as the Ghana Business Code, shareholder resolutions,

and proxy contests (Engle, 2004). Corporate behaviour can also be controlled through policy and legislation.

This Paper will assess how the legal framework governing businesses, especially mining businesses, protect human rights in Ghana. Currently, there is no public policy framework and legislation directly regulating corporate social responsibility to check the operations of companies in Ghana. Should there be such policy and legal framework specific to corporate social responsibility in Ghana? Answering this question requires an assessment of the current legal frameworks regulating business activities in Ghana, particularly in the mining industry, and their adequacy in curbing abuses of human rights. As observed by Professor Doreen McBarnet, the adoption of CSR policies is no longer a matter of voluntary practice on the part of business. In addition to been a response to market pressures and reputation risks, CRS is also subject to legal pressure and legal framework. This may be in the form of conventional state regulation, direct state pressure and through the use of private law by private actors (Doreen McBarnet, 2009). This being so, it becomes necessary to find out how CRS can be regulated through both conventional and unconventional use of the law in Ghana. This Paper, therefore, seeks to assess the legal and regulatory environments granting mineral rights to companies in Ghana. Is the legal framework governing mineral rights such that it can promote both business objectives and the protection of human rights in Ghana? Are there any conflicts in the laws granting mineral rights and those protecting human rights in Ghana? If so what is the way going forward? How do the activities of companies in exercising their mineral rights affect the human rights of the people in the communities in which these companies operate? And what is the position of the Companies Act of Ghana as far as corporate social responsibility is concerned? In answering these questions, the Paper will evaluate the legal provisions of laws dealing with human rights and those granting mineral rights. The Paper will also assess how in practice mining has affected human rights in Ghana. Appropriate recommendations would for both legal reform and for improved corporate social responsibility practices in Ghana will be made. In order to properly carry out this task, it is important to ask: What are the human rights Ghana has committed herself to guarantee and protect? How has mining and the exercise of mineral rights affected these rights.

## 2 Research Methods

Library and internet based research method was adopted for the Paper. This involved a review and interpretive and descriptive analysis of both domestic legislation and literature and academic and scholarly writing and international instruments on human rights and corporate social responsibility. Thus legis-

lation on human rights such as the Constitution of the Republic of Ghana, 1992 and international human rights instruments and existing literature on the impact of mining on human rights in Ghana provided useful information for the study.

### 3 Human Rights in Ghana

To properly situate a case for policy and legislation on corporate social responsibility in Ghana it is important to look at the nature of the legal duty to respect and uphold human rights in Ghana. Various laws including the Constitution of the Republic of Ghana, 1992 guarantee and protect human rights in Ghana. Human rights as provided for under the Constitution, 1992 are for the enjoyment of every person, natural and legal, in Ghana. These fundamental human rights and freedoms by virtue of article 12(1) of the Constitution, 1992, are to be respected and upheld by the Executive, Legislature and Judiciary, all organs of government and its agencies, and more important in the context of this Paper, by all natural and legal persons in Ghana, including mining companies. It becomes important, therefore, in discussing human rights and mineral rights to outline the scope of human rights in Ghana. In other words, in postulating that mining companies have a legal obligation to respect and uphold human rights, exactly what are these rights? To answer this question, the Paper will outline the various human rights protected in Ghana both under international human rights instruments and the Constitution, 1992. It will equally look at the state and corporate duties to protect and respect human rights.

#### 3.1 International Human Rights Law

Under Article 75 of the Constitution, 1992, the President may execute or cause to be executed treaties, agreements or conventions in the name of Ghana. By article 75(1) of the Constitution, a treaty, agreement or convention executed by or under the authority of the President is subject to ratification by an Act of Parliament; or a resolution of Parliament supported by the votes of more than one-half of all the members of Parliament. This provision, in the view of this Paper, means that once these constitutional requirements are followed and there is also compliance with the formalities in the particular treaties, conventions and agreements, then the treaties, conventions and agreements that are executed in the name of Ghana thereof become valid laws of Ghana which may protect rights and impose duties and obligations. There is no indication from this provision that anything beyond the formalities required by this provision need be done for the validity of a treaty, convention or agreement executed thereof to be effected and for such convention, treaty and agreement to have effect in Ghana.

The Constitution, 1992 equally provides for in article 1(2) that the Constitution is the supreme law of Ghana and any other law found to be inconsistent with any provision of the Constitution is to the extent of the inconsistency void. This provision read together with the previous one, in so far as human rights are concerned, mean that all international instruments for the protection of human rights which are duly executed in accordance with the Constitution, 1992 form part of the laws of Ghana. Claims may, therefore, be asserted under such instruments so long as they are consistent with the provisions of the Constitution, 1992. So defined, the protection of human rights in Ghana encompasses the Government of Ghana's obligations to protect human rights both as provided for in the Constitution, 1992 and as provided for under international conventions, treaties and agreements which have been duly executed in accordance with the constitutional requirements and any other requirements as contained in the particular international instrument.

In this connection, it is pertinent to begin the discussion with the Universal Declaration of Human Rights of 1948. As noted by Adjetey (1993/1995: p. 185), this Declaration contains basic civil and political rights as well as fundamental economic, social and cultural rights to be enjoyed by all human beings. The Declaration contains the right to life; liberty and security of person; equality before the law; freedom of movement and residence; freedom from torture or cruel inhuman or degrading treatment or punishment; the right to seek in other countries asylum from persecution; freedom of thought, conscience and religion; the right to vote and participate in government; the right to education; the right to work and to form and join trade unions; the right to an adequate standard of living; the right to health protection; and the right to participate fully in cultural life.

An examination of the Declaration and of two main covenants which are offshoots of the Declaration: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, shows that the rights which are declared by the Declaration are of two main categories: civil and political rights and economic, social and cultural rights. Adjetey (1993/1995: p. 186) succinctly encapsulated these rights as follows:

The rights which can strictly speaking be considered as individual human rights are those subsumed in the provisions of the International Covenant on Civil and Political Rights on the one hand and the International Covenant on Economic, Social and Cultural Rights on the other. Economic, social and cultural rights include the right to work, the right to an adequate standard of living, the right to social security, the right to education, the right to the highest attain-

able health care standards, the right to form and join trade unions and the right to participate in the cultural life of the community. The other rights—such as the right to life, freedom from torture or cruel or inhuman or degrading treatment, freedom from slavery, freedom of movement, freedom from arbitrary expulsion, equality before the law, the right to privacy, freedom of thought and religion, the right to peaceful assembly, freedom of association including freedom to form and join trade unions, the right to take part in the conduct of public affairs including the right to vote at elections, the right to liberty and freedom of expression — are conceived as political and civil rights.

All of these international human rights instruments including the African Charter for Human and Peoples' Rights are frameworks that are either binding on Ghana or provide a context where rights may be claimed and enforced or recognized in Ghana. The scope of the protection of human rights and the legislative framework thereof in Ghana, are very broad.

#### **4 The Constitution and Human Rights**

The protection of human rights is provided for in Chapter Five of the Constitution entitled "Fundamental Human Rights and Freedoms." These rights include: the right to life; the right to personal liberty; the right to human dignity which includes freedom from any condition that detracts or is likely to detract from a person's dignity and worth as a human being; freedom from slavery or forced labour; equality before the law and freedom from discrimination; the right to privacy of home and other property; the right to a fair trial; the right to property and freedom from deprivation of property; general and fundamental freedoms including freedom of speech and expression, freedom of the press and other media, freedom of thought, conscience and belief, academic freedom, freedom of religion, freedom to assemble, freedom of association, the right to information and freedom of movement, the right and freedom to form and join political parties and to participate in political activities and the right of a person whose freedom has been restricted by the order of a court to have his case reviewed by that court. The rest of the fundamental human rights under the Constitution, 1992 include: property rights of spouses; the right to a fair and reasonable conduct of one's case by administrative bodies and officials; economic rights; social and educational rights; cultural rights and practices; women's rights; children's rights; the rights of disabled persons; and the rights of the sick. Article 33 confers jurisdiction on the High Court of in relation to alleged violations of the fundamental human rights and freedoms contained in the Constitution, 1992.

Related to these rights are the Directive Principles of State Policy provided for in Chapter 6 of the Consti-

tution, 1992. These principles, by virtue of article 34 (1) of the Constitution are to serve a standard or framework by which all citizens, parliamentarians, the President, the Judiciary, the Council of State, the Cabinet, political parties and all other persons and bodies are to be guided by in applying or interpreting the Constitution, 1992 or any other law, and in undertaking and implementing any policy decisions for the establishment of a just and free society. One significant provision in this regard is article 41(d) of the Constitution which states that the exercise and enjoyment of rights and freedoms is inseparable from the performance of duties and obligations and that it is the duty of every citizen to respect the rights, freedoms and legitimate interests of others, and generally to refrain from doing acts detrimental to the welfare of other persons. This provision is significant in the context of this Paper because it suggests that no right is absolute and call for the need to strike a balance between the protecting of human rights and mining rights as provided for under the law.

These fundamental human rights and freedoms by article 12(1) of the Constitution, 1992, are to be respected and upheld by all natural and legal persons in Ghana including mining and other business companies. The legal obligation to respect human rights means acting with due diligence to avoid infringing on the rights of others. Therefore, businesses are enjoined to avoid all acts and inactions that will result in breach of the provisions protecting human rights under the Constitution, 1992. But the Constitution only positively guarantees and protects the various human rights outlined above. It does not, however, directly impose a duty on businesses and other legal persons that are required to respect and uphold these human rights to take measures that will bring about the respect and preservation of these rights. If businesses and other legal persons are really to live up to their constitutional obligations to respect and uphold the fundamental human rights protected under the Constitution, then they cannot do or operate without instituting or putting in place mechanisms that will ensure that they can fulfill their constitutional duty to respect and uphold human rights. The interpretive view of this Paper, therefore, is that by necessary and reasonable construction of article 12(1) of the Constitution, 1992, mining companies and other business are required by implication to take positive steps in their business operations to ensure that human rights are protected and preserved and that their operations do not violate human rights in Ghana. In the case of mining companies, this means that these companies must institute policies involving a commitment to protect human rights, the environment, water and water bodies, fairness to suppliers, customers and employees, and even opposition to bribery and corruption (Doreen McBarnet, 2009: p. 1). Therefore, putting in place such mechanism is necessary not just as an act of

charity, but even more important, to comply with legal requirements. Where the duty or obligation to take positive steps to ensure respect for or to protect human rights cannot be implied, the duty to respect and uphold these rights remains intact nevertheless.

The basic argument to advance from this study of domestic and international human rights instruments is that there is an obligation on government to put in place measures that will ensure the realization of these various human rights including putting policy and legislation on corporate conduct and corporate social responsibility. Equally, there is an obligation on companies to put in measure that will ensure that human rights are protected against their operations that might result in human rights violations.

## 5 Mineral Rights in Ghana

The legislative framework for mining in Ghana is the Minerals and Mining Act 2006, (Act 703). Under section 9(1) of the Minerals and Mining Act, mining activities require the grant of mineral rights. Thus even though a person may have rights or title to land in, upon or under which minerals are situated, the person cannot conduct activities on or over land in Ghana for the search, reconnaissance, prospecting, exploration or mining for a mineral unless the person has been granted a mineral right. This so because article 257(6) of the Constitution, 1992 and section 1 of the Minerals and Mining Act provide that minerals in their natural state still in, under or upon land in Ghana, rivers, streams, water-courses, the exclusive economic zone and the territorial sea or continental shelf are the property of Ghana and are accordingly vested in the President in trust for the people of Ghana. Mineral rights are legally defined under section 111 of the Minerals and Mining Act to include the rights to reconnoiter, prospect for, and mine minerals. A mineral right is also defined not only to include the right to search for, develop, and remove minerals from land or to receive a royalty based on the production of minerals (Garner, 2004). These mineral rights by virtue of section 10 of Act 703 may be granted mainly to a body corporate such as a company or a partnership. The effect of this provision is that except as may be specified by law, an individual human being is not entitled to be granted the right to mine minerals. By virtue of section 5 of the Minerals and Mining Act, the Minister responsible for mining has the responsibility of negotiating, granting revoking suspending or renewing mineral rights in accordance with Act 703 on the recommendation of the Minerals Commission. The Minister undertakes any of these on behalf of the President in whom minerals in their natural state are vested.

There are a variety of ways that the grant of mineral rights can affect the human rights of people living in

communities subject to mineral rights. One obvious effect is the need for relocation of the people living on or around land subject to mineral rights. Where land is found to contain mineral rights, this is most likely to require compulsory acquisition of land. Thus under section 2 of the Minerals and Mining Act, where land is required to secure the development or utilization of a mineral resource, the President may acquire the land or authorise its occupation and use under an applicable enactment for the time being in force. One such applicable law is the Constitution, 1992 which in article 20 allows for compulsory acquisition of land and the prompt payment of fair and adequate compensation upon such acquisition.

There is also the likelihood of water availability and consumption of the communities concerned being affected. In this regard, it is significant to note that under section 17 of the Minerals and Mining Act, a holder of mineral right may obtain the requisite approvals or licences under the Water Resources Commission Act 1996 (Act 522) to obtain, divert, impound, convey and use water from a river, stream, underground reservoir or watercourse within the land which is the subject of the mineral right. Where such right is exercised by the mineral owner, there is no doubt that the water supply system in the communities will be greatly affected. In such a case, what shall a lawful occupier of the land do?

The framers of the Minerals and Mining Act recognized these issues and sought to protect surface rights, a surface right being every right in real property other than the mineral interest (Garner, 2004). Thus under section 72 of the Minerals and Mining Act, the holder of a mineral right is required to exercise the rights subject to limitations that relate to surface rights that apply under an enactment and further limitations reasonably determined by the Minister. These surface rights include the right retained in the lawful occupier of land within an area subject to a mineral right “to graze livestock upon or to cultivate the surface of the land if the grazing or cultivation does not interfere with the mineral operations in the area, (emphasis added). It is submitted that surface rights also include the right to use water in rivers and other streams within the area subject to mineral right.

The striking thing to note is that a surface right is not absolute. Thus where the exercise of surface right will affect mineral operations in the area, then the mineral rights and the operations of minerals take precedence over surface rights. Section 72(4) of the Minerals and Mining Act specifically states that in the case of a mining area, the owner or lawful occupier of the land within the mining area cannot erect a building or a structure without the consent of the holder of the mining lease. However, if the con-

sent of the mineral right holder is unreasonably withheld, then consent of the Minister responsible for the mining sector is required for erection of a building or structure in a mining area.

All of these demonstrate that although the law seeks to protect occupiers of land subject to mineral rights, the occupiers remain extremely vulnerable. In order to deal with this situation, the owner of a mining lease is required to carry out a survey of the crops and produce a crop identification map for compensation in the event that mining activities are extended to the areas. Further, for forestry and environmental protection purposes, before undertaking an activity or operation under a mineral right, the holder of the mineral right must obtain the necessary approvals and permits required from the Forestry Commission and the Environmental Protection Agency for the protection of natural resources, public health and the environment. Mining companies are required to conduct and submit environmental impact studies and to plan their operations to minimize environmental damage.

## 6 Principles for Compensation

Under section 74 of the Minerals and Mining Act, the compensation to which an owner or lawful occupier may be entitled, may include compensation for:

- deprivation of the use or a particular use of the natural surface of the land or part of the land,
- loss of or damage to immovable properties,
- in the case of land under cultivation, loss of earnings or sustenance suffered by the owner or lawful occupier, having due regard to the nature of their interest in the land,
- loss of expected income, depending on the nature of crops on the land and their life expectancy

However, no claim for compensation lies, whether under the Minerals and Mining Act or otherwise in consideration for permitting entry to the land for mineral operations:

- in respect of the value of a mineral in, on or under the surface of the land
- for loss or damage for which compensation cannot be assessed according to legal principles in monetary terms.

It does appear from the preceding analysis that there are checks to deal with or to prevent abuses or the likelihood of abuses of human rights as a result of mining and other incidental activities in the mining industry with guidelines for compensation where mining actually affects human rights. And in this sense, it may be said that no conflict exists between laws regulating the mining industry and those protecting human rights in Ghana. But what have been the effects of mining on human rights in Ghana?

## 7 Mining and Human Rights in Ghana

It has seen from the above various rights that are protected under the Constitution of the Republic of Ghana and under the various international human rights instruments to which Ghana is a party. These rights include the right to life, security of person, freedom of residence, the right to health protection and the right to participate in cultural life. Equally, it has emerged from the above outline that a mineral right gives the right holder the right to reconnoiter, prospect for, and mine minerals. The framers of the Minerals and Mining Act recognised that mining can have serious effects on the rights of inhabitants of mining communities and therefore made provisions to protect these rights. In practice are inhabitants of mining areas really protected against human rights violations? If not what is the way going forward? What roles should mining companies play in the protection of human rights? In this section, therefore, the Paper will look at the practical effects of mining on human rights in Ghana.

Available research shows that mining has led to locally severe deforestation, erosion, and water pollution (Coakley, 2005). The multinational mining companies in Ghana are said to have spilled large quantities of cyanide into rivers that serve the needs of mining communities. Findings have also been made to the effect that effluents which contain cyanide and heavy metals from the Tailings Storage Facilities of mining companies that seep into surface and ground water occur unnoticed for a long time. The seepage from the tailings storage facility of Anglogold Ashanti Iduapriem Limited, for example, necessitated the closure of two such facilities by the Environmental Protection Agency in February 2010.

Writing on mining, sustainable development and health, Yelapaala, (2004: pp. 18, 20) noted that that mining activities in Akwatia have incurred a significant negative impact on the environment. The author also observed that despite Ghana Consolidated Diamonds' reclamation efforts, the environmental degradation caused by mining activities in Akwatia was still significant, and contributed to unsustainable land depletion and environmental burden. Akabzaa and Darimani (2001) also writing on the impact of mining on Tarkwa found that in most parts of Tarkwa, the environment was undergoing rapid degradation and its immense economic value was diminishing due mainly to the heavy concentration of mining activities in the area. According to these authors, land, water and air were severely impacted by mining operations. Findings from Akabzaa and Darimani (2001) also show that the concentration of mining operations in Tarkwa has had a seriously adverse impact on the social organisation and cultural values of the people. They noted that in the course of their research inhabitants of Tarkwa expressed concerns about inadequate housing, youth unemployment,

family disorganisation, school drop out rates, prostitution and drug abuse which could in part be attributed to mining and related activities. Atuguba and Dowuona-Hammond (2006) also observed that in some cases, farmers whose lands have been taken over have usually been given cash compensation for their crops and the loss of their livelihood, instead of similar land and the means to continue farming.

Further, the law as it is now, for instance section 73 of the Minerals and Mining Act leaves marginalized communities to deal directly with mining companies on complex and technical issues of compensations payment and resettlement. This can lead to companies taking advantage of mining communities in the payment of compensations that may not restore livelihood. This could contribute to worsen poverty of people in mining communities. To address this situation, it is suggested the Minerals Commission should take up responsibility of negotiating on behalf people affected mining operations with mining companies.

The point to be made from this brief outline is that in spite of the various legal frameworks that protect and guarantee human rights in Ghana, the human rights of people in mining areas are being seriously undermined: their right to health is being affected by water pollution as a result of mining and as a result of other dangerous chemicals for mining people are exposed to; mining affects community livelihood since mining competes with the communities for agricultural land; mining affects employment and labour rights and security of the person among others. There must therefore be something missing resulting in this situation. What could this be?

## **8 The Way Forward: Recommendations**

### **8.1 The Duty of the State to Protect Human Rights**

It can be said that human rights violations are prevalent in the mining sector in spite of numerous legislation because there is no enforcement of existing laws and no comprehensive corporate social responsibility policy or law in Ghana. As observed by the learned Atuguba and Dowuona-Hammond (2006), business organizations in Ghana are formed for varied reasons. Therefore, the rules that regulate the operations of these business organizations vary from one sector or industry to the other and as such there are a number of regulatory bodies in Ghana established by different laws each working towards the protection of consumers, the environment and all stakeholders in the relevant sector. Because of this lack of comprehensive policy and legislative frameworks on corporate social responsibility in Ghana, business organizations and individuals are likely to perceive corporate social responsibility as an act of charity.

Similarly, some of the basic underlying reasons for the inability of states to adequately protect human rights abuses by companies were very well articulated by Professor John Ruggie the Special Representative of the Secretary-General of the United Nations on the issue of human rights and transnational corporations and other business enterprises in Paragraphs 33 to 35 thus:

The adverse effects of domestic policy incoherence were repeatedly raised at a recent consultation held by the Special Representative: “vertical” incoherence, where governments take on human rights commitments without regard to implementation; and “horizontal” incoherence, where departments - such as trade, investment promotion, development, foreign affairs - work at cross purposes with the State’s human rights obligations and the agencies charged with implementing them. Consider two instances of this latter pattern: the first from host States, the second from home States.

To attract foreign investment, host States offer protection through bilateral investment treaties and host government agreements. They promise to treat investors fairly, equitably, and without discrimination, and to make no unilateral changes to investment conditions. But investor protections have expanded with little regard to States’ duties to protect, skewing the balance between the two. Consequently, host States can find it difficult to strengthen domestic social and environmental standards, including those related to human rights, without fear of foreign investor challenge, which can take place under binding international arbitration.

This imbalance creates potential difficulties for all types of countries. Agreements between host governments and companies sometimes include promises to “freeze” the existing regulatory regime for the project’s duration, which can be a half-century for major infrastructure and extractive industries projects. During the investment’s lifetime, even social and environmental regulatory changes that are applied equally to domestic companies can be challenged by foreign investors claiming exemption or compensation.

There is therefore the need for a serious paradigm shift in the way corporate social responsibility is seen and regulated in Ghana. This requires that the laws regulating minerals and mining activities that have the effect of promoting corporate social responsibility in Ghana must be consolidated into one code to provide for a uniform system of law regulating corporate operations that affect human rights. This will make the law well-defined and easily accessible and this can equally facilitate administrative handling of corporate social responsibility issues. This approach means that there is the need to establish a department within the ministry responsible for mines

to specifically handle and regulate corporate social responsibility in Ghana. This could all be provided for in the Minerals and Mining Act instead of having provisions bearing on corporate social responsibility being scattered in various laws in Ghana.

In other words, mining is peculiar business endeavour that has a unique capacity to affect human rights in a boarder and far deeper manner than in other areas of business activity. For example mining activities can affect human settlement patterns and the social cohesion of the family, it can affect the water consumption, health and surface rights of people in mining areas. These effects which are undoubtedly directly associated with mining activity are not experienced in other areas of business operations such as in the banking and non-banking financial sector. This being so, there must be a devotion of a section of the Minerals and Mining Act that defines corporate social responsibility issues as they are peculiar to the ministry industry. In the alternative, there could be comprehensive corporate social responsibility policy and legislation on the environment and mining activities since in the main mining operations affect human rights and the environment. Or there is the need for a composite national policy and legislative frameworks on corporate social responsibility in Ghana which defines and provides mechanisms for regulating corporate social responsibility based on industry sector. In other words, corporate social responsibility cannot be defined and regulated out of context. It must be defined and regulated taking into cognizance the peculiar nature of industry sector business operations and how the nature of the operations affects non-core business issues of the society.

The grant of a mineral right and mining leases and the assignment of same must be conditioned upon satisfactory evidence of commitment to carry out mining in a socially responsible manner. This commitment must be in the form of a concrete policy document or guidelines by the company seeking the grant of the right showing how the company observes its obligations regarding corporate social responsibility. The terms governing the grant of mineral rights and mining leases and the assignment of same must be spelt out in the Minerals and Mining Act and must not be subject to the discretion of the Minister of Mines. It is the duty of the state to ensure that its citizens are well protected against abuses by mining companies. It is therefore within the responsibility of the Government to give effect to the above recommendations. To give effect to these recommendations, the Government of Ghana must balance investor interests and the needs of Ghana to discharge her human rights obligations.

## **8.2 The Duty of Companies to Respect and Uphold Human Rights**

Mining companies should also play a part in respecting human rights. As noted by Professor Ruggie,

meeting business and human rights challenges also requires the active participation of business directly. The following, as modified to suit this Paper, have been recommended by Professor Ruggie. This Paper associates itself with the said recommendations and recommends them for mining companies and other businesses because adherence to them will help in the respect and protection of human rights of people in mining communities in Ghana.

- Companies must comply with the laws of Ghana and respect human rights. Where there is no compliance with national laws and no respect for human rights, enforcement mechanisms including litigation must be used to achieve the desired results.
- To discharge the responsibility to respect requires due diligence. The process requires companies to highlight any specific human rights challenges their business operations may pose and put provide solutions in advance. In carrying out the due diligence, companies should look at the Constitution of Ghana and other local human rights instruments as well the international bill of human rights and the core conventions of the International Labour Organisation. The principles embodied in these legal frameworks comprise the benchmarks against which other social actors judge the human rights impacts of companies. If Companies take proactive steps to understand how existing and proposed activities may affect human rights the companies will be in a better position to take steps to avert these abuses.
- There is the need to integrate human rights policies throughout company existence and operations. It is essential to embed respect for human rights throughout a company to ensure consistency as well as capacity to respond appropriately when unforeseen situations arise.
- Companies must tract their performance to ensure that they are operating with due regard to their human rights obligations. This requires regular updates of human rights impact and performance.

The integration of corporate social responsibility into corporate policies and rules is particularly advocated in the case of Ghana because absent such express commitment on the part of companies, the Companies Act and the Regulations of companies might restrict the capacity of companies to meet social obligations. For instance, under section 204 of the Companies Act, directors cannot, without the approval of an ordinary resolution of the company, exceed the powers conferred upon them by the Act and the company's Regulations. Without such approval of an ordinary resolution of the company, directors cannot also exercise such powers for a purpose different from that for which such powers were conferred notwithstanding that the directors may

believe such exercise of their powers is in the best interests of the company. Strictly, therefore, companies in Ghana may not embark on action CRS purposes without the approval of shareholders except as provided in the Companies Act or the regulations of the companies.

### 8.3 Characteristic Risk Theory

Another way to promote corporate social responsibility in Ghana is through the application of the Characteristic Risk Theory of corporate liability. This theory is in sum to the effect that enterprises should be held liable for liability that arises out of the risk that they create, that is liability incidental to or characteristic of the enterprise. The theory says that if harm is foreseeable and likely to occur, even if the enterprise takes all reasonable measures, it is still liable. It does not appear that this theory has been applied in Ghana. This theory is of particular value when dealing with mining and oil operating companies the operations of which have associated risks involving water pollution, environmental degradation and related health issues. Because of the inherent risks associated with the operations of these companies in the industries concerned, mining companies and their likes cannot avoid liability as their liability is absolute.

A case which this theory was applied is the Indian case of *M. C. Mehta and Another v. Union of India and Others*. The facts are that Shriram Foods and Fertilizers Industries manufactured caustic soda and chlorine including its by-products and related products. There was an escape of oleum gas from one of the units of Shriram resulting in injuries to the neighbouring populace. Shriram was owned by Delhi Cloth Mills Ltd. The Delhi Legal Aid and Advice Board and the Delhi Bar Association then filed applications for award of compensation to the persons who had suffered harm on account of escape of oleum gas. The issue was whether compensation was available to the injured persons against Shriram a private company engaged in an activity which has the potential to affect the life and health of the people. The Court held per Bhagwati that an enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the industry and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of the activity of which it has undertaken. The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm and it

should be no answer to the enterprise to say that it had taken all measures reasonable care. In the opinion of the Court, if the enterprise is permitted to carry on the hazardous or inherently dangerous activity, for its profit, the law must presume that such permission is conditional on the enterprise absorbing the cost of any accident arising on account of such hazardous or inherently dangerous activity as an appropriate item of its overheads.

Application of this theory of corporate liability is appropriate in view of the position this Paper holds on the duty of companies to respect and uphold human rights in Ghana. As stated, article 12(1) of the Constitution, 1992 require all natural and legal persons in Ghana, including mining companies, to respect and uphold the various human rights enumerated above. The position of this Paper because the Constitution imposes this duty on companies, companies are necessarily required to take steps to avoid human rights violations that are foreseeable to result from the inherent nature of mining operations.

## 9 Transitional Matters

Until the above suggestions are taken into consideration, where they are currently not been implemented, it is important for institutions that regulate the mining sector to ensure that they enforce mining and environmental laws. The current state of institutional and legislative proliferation in the mining and environmental sectors may be contributing to low enforcement levels of these laws. Whatever, be the reason, there is the need for these institutions including the Ministry of Justice and Attorney-General's Department, the Minerals Commission and the Environmental Protection Agency to sit up as far as law enforcement is concerned.

There is the need for effective remedy systems such as the courts, non-judicial fora and company oriented mechanisms where complaints concerning human rights abuses from company operations can be handled. In the absence of an effective remedy system, human rights cannot be adequately protected.

## 10 Conclusion

Mining plays a central role in economic development of Ghana. For this reason, mining will always be carried out in Ghana as long as minerals are available underground. But in order to mine on a sustainable basis, it is very important human rights, environmental, cultural and other social concerns and the impact of mining on these are taken into consideration when companies are exercising their rights to prospect or to mine.

The analysis as presented above suggests that although there are many laws and regulations in min-

ing and environmental sectors that are meant to bring about respect for and protection of human rights, a lot of human rights violations are still going on in mining industry of Ghana. This has been explained to so because, there is no comprehensive and well-coordinated institutional and legal frameworks regulating the mining industry in Ghana and corporate social responsibilities attendant thereto. Violations of human rights are also still occurring in the mining sector in spite of the current laws and institutional arrangements because of weak enforcement mechanisms and the very uncoordinated manner in which these institutions and laws have to operate. It is also submitted that Ghana may have committed or restricted herself far too much in terms of protection of foreign investors which has made it difficult for the country to compel foreign companies to live up to their obligation to respect human rights of Ghanaians in mining communities.

There is therefore the need for specific policies and legal frameworks on corporate social responsibility relative to the mining industry considering the very peculiar nature of mining operations and its direct negative impact on human rights in Ghana. It is the primary responsibility of the state to take up this matter. Mining companies also have a role to play in the matter by ensuring that their operations are preceded by policies and rules on how such operations which will affect human rights will be handled. Beyond, these, there is the need for effective and readily available mechanisms for the settlement of disputes involving human rights abuses arising from corporate operations.

Thus, three core principles are being advocated here to improve the human rights situation in mining communities in Ghana. These involve: (1) the State duty to protect human rights through a comprehensive and coherent legal and institutional framework on corporate social responsibility specific to the mining industry; (2) the corporate social responsibility to respect human rights through advance planning and incorporation of human rights concerns in business operations and plans and (3) the need for access to appropriate remedies for human rights abuses at the state and company levels.

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