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The state of human rights in mining communities in Ghana: The Commission on Human Rights and Administrative Justice's role in promoting socio-economic rights in Ghana

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Abstract

Ghana's development agenda is normatively guided by international human rights standards and principles. The economic and social objectives of the State as espoused in the Directive Principles of State Policy (DPSP) in the Constitution provide a broad framework that should inform government's development policies. To accomplish the DPSP, development policy makers must be abreast with human rights principles and standards. In particular, they must implement the policies with a view to protecting the well-being of vulnerable groups. Whilst it cannot be denied that economic development is the panacea for the enjoyment of human rights, it is not without its own attendant problems, including egregious violations of human rights. In the pursuit of the right to development, serious human rights abuses are sometimes committed. In this article, I review the monitoring role of the Commission on Human Rights and Administrative Justice (CHRAJ) in promoting the human rights of communities impacted by mining operations in Ghana. The review is based on the CHRAJ report on the State of Human Rights in Mining Communities in Ghana. The report, which paints a gloomy picture of the debilitating effects of mining operations in Ghana recommended legislative reforms in the entire mining industry.

Keywords: Development; Directive Principles of State Policy and Human Rights.

1. Introduction

Ghana's development agenda is normatively guided by international human rights standards and principles. The economic and social objectives of the State as espoused in the Directive Principles of State Policy (DPSP) in chapter six of the 1992 constitution provide a broad framework that should inform government's development policies. All organs of state are obliged to use this framework in all public policy and decision-making (Republic of Ghana, 1992). The DPSP require the State to mainstream human rights into development processes. The government has a duty to ensure that all necessary steps are taken to establish a sound and healthy economy based on 'the recognition that the most secure democracy is the one that assures the basic necessities of life for its people as a fundamental duty' (Republic of Ghana 1992). Policy makers are to ensure that prevention of human rights violations is given high priority in their policies, projects and in the implementation of all programmes.

To accomplish the DPSP, development policy makers must be abreast with human rights principles and standards. In particular, development policies must be implemented with the view to protecting the well-being of vulnerable groups (UN Doc E/CN.4/Sub 2/1999/11). The linkages between poverty, human rights and development have been underscored by several institutions, including the World Bank (Myanmar, 1999). Whilst it cannot be denied that economic development is the panacea for the enjoyment of human rights, it is not without its own attendant problems, including egregious violations of human rights. In the pursuit of the right to development, serious human rights abuses are sometimes committed. Evidence abounds of the egregious violations of human rights by Transnational Corporations (TNCs) and Other Business Enterprises in poor developing countries. This accounted for the establishment of international standards and norms to regulate the activities of TNCs (Economic and Social Council, 2003).

Various initiatives have been made to impose on companies and other business enterprises the same range of human rights duties that states have accepted for themselves under human rights treaties. The academic community in particular, has engaged in a discourse about the appropriate legal framework that may be deployed to ensure that TNCs are confined within a defined scope of international human rights obligations (Ezeudu, 2011). To effectively address concerns regarding human rights violations by TNCs, the framework has been on the adoption of corporate social responsibility initiatives, both internationally and nationally. These initiatives include declarations by international organizations

such as the International Labour Organization (ILO), the Organization for Economic Co-operation and Development (OECD), the European Union (EU), the International Monetary Fund (IMF), Codes of Conduct in national legislations of various states, as well as those adopted by TNCs themselves and several initiatives of NGOs and Employer Associations.

Other initiatives at the international level include the Maastricht Principles and the Limburg Guidelines on Economic, Social and Cultural Rights. By far, the most effective attempts to regulate the activities of companies and other business enterprises within the framework of human rights are the John Ruggie Guiding Principles on Business and Human Rights (UN, 2005), the Maastricht Principles on Extra-Territorial Obligations of States in the Area of Economic, Social and Cultural Rights, and the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights. The Ruggie Principles initiated by the UN established a framework which rests on three pillars. The first is the state's duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulations, and adjudication. The second is the corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved. The third is the need for greater access by victims to effective remedy, both judicial and non-judicial. Although states have the primary responsibility to promote, fulfil, respect, and protect human rights, TNCs and other business enterprises are also responsible for promoting and securing the human rights set forth in the Universal Declaration on Human Rights (UDHR).

Despite these salutary standard-setting developments, there is yet to be established a single international regime of human rights law directly applicable to the operations of TNCs and other business enterprises. The current strategies, principles and guidelines are at best soft law. Despite egregious human rights abuses by non-state actors, in particular TNCs, international human rights law is still undergoing the conceptual and structural evolution required to address their accountability (Kinley & Tadaki, 2004). It is on account of this that some scholars are calling for the establishment of a World Court of Human Rights that can hold non-state actors accountable for human rights violations (Kosma, Nwak & Scheinin, 2010).

It is against this backdrop that I examine the monitoring role of the Ghana Commission on Human Rights and Administrative Justice (CHRAJ) in

promoting the human rights of communities impacted by mining operations in Ghana. The examination is based on the CHRAJ report on the State of Human Rights in Mining Communities in Ghana (CHRAJ, 2008). The report did not only draw the attention of Government to the negative impact of mining activities in the country, but also recommended legislative reforms in the entire mining industry. The report paints a gloomy picture of the debilitating effects of mining activities on local populations.

Whilst some of the mining companies undertake a number of corporate social responsibility initiatives such as building of schools, hospitals and the provision of bore holes, these initiatives do not adequately compensate for the atrocious human rights violations committed by them on the local population. Not only do mining operations in Ghana breach the Ghanaian Constitution, they also violate several international human rights instruments, including the African Charter on Human and Peoples' Rights (ACHPR), particularly the right to development and a healthy environment.

The mining industry in Ghana is a major contributor and player in the national development of Ghana. Yet it is also in this industry that we witness serious and systemic violations of human rights. Large scale surface mining activities are responsible for widespread poverty and social and environmental degradation in the country (CHRAJ, 2008). In recent times, environmental and human rights concerns within the gold mining industry has attracted critical debates, particularly with the influx of Chinese businessmen in the country. The clamp down on surface mining popularly known as 'galamsey' has put many people out of jobs.

2. State of human rights in mining communities in Ghana – The CHRAJ Report

In 2006, following several complaints of human rights violations in some mining communities in Ghana, the CHRAJ organized public hearings in selected districts in the country where mining activities take place. Following these public hearings, a team of investigators from the Commission undertook a verification mission to the selected mining communities. The team confirmed the reports of widespread human rights abuses by mining companies. Based on the findings, the Commission decided to conduct a nation-wide investigation 'to determine in a systematic manner the nature and causes of these violations' (CHRAJ, 2008). According to the CHRAJ, the investigations 'sought to examine the broad trends of the human rights situation in mining communities

and the underlying reasons for the increasing reports of human rights violations in mining areas in the country' (CHRAJ, 2008).

The investigations revealed there was widespread pollution of communities' water sources, deprivation and loss of livelihoods, inadequate compensation for destroyed properties, unacceptable alternative livelihood projects, and health problems attributable to mining, reckless spillage of cyanide, child labour and unfulfilled promises of employment (CHRAJ, 2008). The investigations further revealed that state institutions with regulatory and monitoring responsibility for the mining sector, particularly the Environmental Protection Agency (EPA) did not perform optimally due to capacity constraints. The report further revealed that access to water is a problem in many mining communities. The report noted in particular, that:

Widespread complaints of destruction of streams and water bodies traditionally relied upon by communities were commonplace. Almost all communities visited named several rivers and streams that have been destroyed by companies undertaking large-scale mining in their localities. The investigators found a total of 82 of such streams and rivers have dried up, polluted, destroyed or diverted for company use (CHRAJ, 2008).

Although the report showed that some mining companies provided alternative sources of water such as standpipes, boreholes and hand-dug wells for some communities, the maintenance or replacement of these facilities is left to the communities who are not able to bear the financial cost. More revealing was the finding that tests conducted on water sampled from water sources in 22 out of 28 mining communities showed that, at least, two water quality parameters with health implications were present and in concentrations significantly higher than the World Health Organization (WHO) maximum allowable limits for drinking water (CHRAJ, 2008).

The Commission in its recommendations stressed the need for a thorough investigation of all water bodies impacted by mining to be conducted by the Water Resources Commission and the EPA, with the view to identifying highly polluted ones for possible clean up and also to keep populations away from such polluted water bodies (CHRAJ, 2008). The investigations further revealed widespread complaints about dust and noise pollution from mining activities. In communities around Obuasi and Prestea, the report revealed that blasting activities of mining companies have damaged many houses. The report noted that the right to a healthy environment in mining communities would require

an urgent need of substantive environmental standards to regularise activities of companies undertaking large-scale surface mining that cause pollution and environmental degradation.

On the issue of compensation and resettlement, the report showed that most communities were dissatisfied with the compensation paid by mining companies for destroyed farms and crops. The communities alleged that the process used to determine the value of their crops was unfair. The *Minerals and Mining Act, 2006 (Act 703)* provides that companies should negotiate directly with communities on matters regarding compensation. However, given the disadvantaged position of the farmers in these community's vis-a vis the companies, the former are in a weak bargaining position. The companies have taken undue advantage of this and have paid compensations not commensurate with the value of farms and crops destroyed by mining companies. The report concluded that mining activities in Ghana have serious social, economic and political consequences (CHRAJ, 2008). A key recommendation by the CHRAJ was the call on government to urgently set up an independent Committee to undertake a cost benefit analysis of the mining industry to the economy. This, in the view of the CHRAJ, was to guide the nation to position the mining industry well for the industry to make a more realistic contribution to national development vis-à-vis the agricultural sector.

In response to the CHRAJ's recommendations, the government set up under the auspices of the Ministry of Environment, Science and Technology (MEST), a six-member Committee to study the report and advise the government on the implementation of the CHRAJ report (MEST Report, 2011). The MEST Committee confirmed the findings of the CHRAJ's report and advised on legislative review of the Mining and Minerals Act.

3. The legal framework

Article 36(8) of the 1992 Constitution expressly provides that:

> '[T]he State shall recognise that ownership and possession of land carry a social obligation to serve the larger community and, in particular, the State shall recognise that managers of public, stool, skin and family lands are fiduciaries charged with the obligation to discharge their functions for the benefit respectively of the people of Ghana, of stool, skin, or family concerned and are accountable as fiduciaries in this regard.'

The Constitution has created the Office of the Administrator of Stool Lands (OASL) with the responsibility for the establishment of a Stool land account for each stool into which shall be paid all rents, dues, royalties, revenues or other payments. The OASL is assigned the responsibility of collecting all such rents, dues, royalties and revenues. The CHRAJ'S report revealed that it is the chiefs, and not the OASL, who collect royalties paid in respect of stool lands by concessionaires. In most cases the subjects do not benefit from the payment of the royalties. The Commission recommended a review of the process of collection and disbursement of royalties, with a view to ensuring transparency and making the communities derive direct benefits from mining in their communities.

Section 17 of the *Minerals and Mining Act, 2006 (Act 703)* allows a holder of a mineral right (a mining company), the power to obtain, divert, impound, convey and use water from a river, stream, underground reservoir or water course within its catchment area of operation. This means that land, which is the subject of a mining lease in which a water body exists, is liable to be drained of its water for the use of the holder of the mining right to the detriment of the various communities within the concession area. A law which grants a mining company the right to divert a river from its natural course and thereby deprive a mining community of its traditional access to water is clearly a violation of the socio-economic rights of the people living in these communities. It is grossly unfair to vest in a mining company the right to transfer a community's control over its water body. The law appears to be in conflict with the Rivers Act, 1903 (CAP 226), which regulates mining operations that affect certain rivers in the country. CAP 226 prohibits any person from diverting water from a river and carrying out dredging activities on rivers or their tributaries without a licence from the Minister. Although some mining companies provide boreholes to replace the communities' diverted water, the available evidence disclosed that the affected communities cannot bear the cost of maintenance of the boreholes on a sustainable basis.

On the issue of payment of royalties, the MEST report found that the current level of three per cent (3%) which is the minimum permitted by the Act 703 was rather too low. It is far below the levels set by previous mining legislations, which had fixed a rate of between six per cent (6%) to twelve per cent (12%). In the view of the MEST Committee, the reduction from 12% to 6% in the *Minerals and Mining Act, 2006 (Act 703)* as the maximum rate was an unwarranted concession to the Mining industry, especially when the

world market price of gold had skyrocketed before and after the promulgation of the Act. The amount paid as royalty is a percentage of the total revenue of the minerals obtained by the holder of the concession. The distribution of the royalties is done according to the following formula: (i) Eighty Per Cent (80%) to the State Consolidated Fund; (ii) Ten Per Cent (10%) to the Mineral Development Fund and (iii) Ten Per Cent (10%) shared among the District Assembly, the Traditional Council and the Stool that owns the land within the concession area.

From the above formula, it is clear that the communities that suffer the brunt of mining activities receive an insignificant share of the royalties. The share that goes to the traditional council and the stool end up in the private purse of the chiefs, leaving the people who are the actual beneficiaries in abject poverty.

A key finding of the MEST Committee report was that the mining companies had the practice of under declaring their profits by employing various accounting methods to conceal profits. According to the report, 'by engaging in high capital expenditure, payment of loans and the amortization of start-up capital provided by foreign majority shareholder companies, mining companies are able to declare low profits and sometimes losses.' The report further observed that mining companies usually engage high profile accounting firms, mainly local branches or affiliates of foreign Accounting Firms to lend credibility to their financial statements. The financial statements are slavishly endorsed by Auditors who usually provide a disclaimer, by citing provisions in the Companies Code that says that Directors are responsible for the preparation and fair presentation of these financial statements.

The MEST Report further noted that as a result of these fraudulent accounting methods, a 2008 profit of $34 million became a deficit of $44 million. This practice, according to the report, defeats the national interest in maximizing the benefit the people of Ghana are to derive from the exploitation and extraction of their natural mineral resources by private local and foreign mining companies. The MEST Committee recommended to the Government of Ghana to increase the royalty payment to fifteen per cent (15%) of gross revenue or total income as a maximum and twelve per cent (12%) as a minimum forthwith. As the Committee puts it; '… this will enable the beneficiaries of the royalties "to catch the tailwind of the industry's sky high market prices to achieve the objective of satisfying the mining communities demands for development and to achieve good governance [*sic*]."

On the issue of payment of compensation, section 73 of Act 703 provides that the holder of the mineral right or the mining company should compensate the landowner for the loss of his land. The guiding principles for the payment of compensation are set out in section 74 of the Act. The amount of compensation is determined by mutual agreement between the parties and if that fails, by the Minister in consultation with the Lands Commission. The section lists compensation principles which include deprivation of the use of the land, loss or damage to immovable property, loss of earnings for land under cultivation and loss of income from crops on the land. The law does not make provision for the loss of occupation of land that is vacant or not in use by the landowner. Given the unequal bargaining powers between the parties, it is not surprising that the landowners are under paid compensation. The principles do not provide for a mechanism for determining the market value of the land. It must be appreciated that most of the landowners are illiterate and will require technical assistance in striking a good bargain.

Section 74 of the Act provides that in lieu of financial recompense, the landowner may be resettled by the holder of a mineral right. Endorsing the recommendation of the CHRAJ report for a review of the Act, the MEST Committee suggested that Section 74 of the Act be amended to allow for financial compensation in addition to resettlement. The Committee further recommended that valuation method that gives the highest value be used and the market value which reflects future potential value be the major factor in determining the compensation to be paid landowners for compulsory acquisition by the state for transfer to mining companies.

The mining companies, under the law, have no direct power of acquisition of the land. It is the government that grants the mining licence by virtue of which the companies are able to take over the land. One would have expected that since it is the state that grants the concession to the companies, it should pay the appropriate compensation to the landowner and not the company. In Ghana, all minerals are held as property of the state and the President may acquire any land for the development or utilization of a mineral resource. Section 2 of Act 703 provides that '[W]here land is required to secure the development or utilization of a mineral resource the President may acquire the land or authorize its occupation and use under an applicable enactment for the time being in force.' Thus, once a mineral is discovered on land, the landowner risks losing his right to the land to the state, who will in turn give it to a mining company, yet the law does not make provision for the payment by the state of

compensation to the landowner. Article 20 of the Constitution on compulsory acquisition by the State provides that:

> '(2) Compulsory acquisition of property by the state shall only be made under a law that makes provision for -
> a) the prompt payment of fair and adequate compensation; and
> b) a right of access to the High Court by any person who has an interest in or right over the property whether direct or on appeal from any other authority for the determination of his interest or right and the amount of compensation to which he is entitled.'

Act 703 clearly purports to subvert the constitutional requirement of prompt payment of fair and adequate compensation by the state to the landowner. The law purports to transfer the state's obligation to pay compensation for land compulsorily acquired to the holder of a mining license. The valuation method for determining the value of property, including land compulsorily acquired by the state pursuant to article 20 of the Constitution and the relevant legislation on compulsory acquisition set clear basis for determining the value of the land. As rightly noted by the MEST Committee it is strange that the State who acquired the land in the first place is not obliged by the Act to pay any compensation. Act 703 is clearly in conflict with Article 36 of the Constitution on the DPSP, which outline the economic objective of the state.

Article 21 of the *African Charter on Human and Peoples' Rights* (The African Charter) provides for the right of people to freely dispose of their wealth and natural resources, which rights are to be exercised in the exclusive interest of the people. The article further provides that states parties shall undertake to eliminate all forms of foreign economic exploitation, particularly those practiced by international monopolies, so as to enable their people to fully benefit from the advantages derived from their natural resources.

Article 24 of the *African Charter* provides that all people shall have the right to a generally satisfactory environment favourable to their development. The African Commission, in the case *Social and Economic Rights Action Centre (SERAC) and another v Nigeria* held the government of Nigeria to have violated articles 2, 4, 14, 16, 18(1), 21, and 24 of the *African Charter* under similar circumstances as prevail in Ghana. The Commission underscored the importance of a clean environment and its causal link to economic and social rights and concluded that living in an environment degraded by pollution was a violation of the rights of the people. The Nigerian government was held to be in breach of its duty to protect.

The amenability of TNCs before international human rights judicial and quasi-judicial tribunals remains one of the greatest challenges to the implementation of the international human rights project. The SERAC case illustrates how weak Third World host states of TNCs are when it comes to controlling the operations of the TNCs. The emerging accountability frameworks for transnational human rights violations must be vigorously pursued and translated into legal frameworks with teeth that can bite. National courts and national human rights institutions have their inherent limitations in cases where the government is indirectly culpable. Even in the case of Nigeria, where the African Charter has been domesticated, the jurisprudence shows that, at best, the courts can only give declaratory judgments on such matters.

Land is the economic life wire of the people of Ghana as more than 70% of the population depends on it for their livelihood. To deny a person of his right to land amounts to a denial of the right to livelihood. In recent times, land in the Greater Accra region that were compulsorily acquired by the government some years ago were sold to government officials and political party members, without giving the original owners the first option to re-acquire the land. As a result of compulsory acquisition by the State, the Gas, the traditional people of Accra, have lost virtually all their land holdings to the government. Given the social and economic importance of land, it is important that constitutional safeguards are in place to forestall the arbitrary acquisition of land under the guise of *public interest*.

4. Conclusion

By carrying out an in-depth investigation into how mining activities impact on the socio-economic life of people living in mining communities, the CHRAJ has demonstrated that it is up to the task of promoting and protecting human rights in Ghana. By drawing the government's attention to the socio-economic consequences of mining activities and recommending a review of the Minerals and Mining Act, the CHRAJ has discharged its oversight role of monitoring government's compliance with the constitution and international human rights instruments. The MEST report, which endorsed the CHRAJ recommendations, made a passionate recommendation for government to immediately amend the Minerals and Mining Act.

Regardless of their legal status and composition, national human rights institutions have a common mandate to monitor the human rights situation in

a country and monitor states' compliance with their international human rights obligations. In order to assess their effectiveness, one will have to assess them in the context of their mandates as laid down in their constitutive instrument as well as the modus operandi employed by them in carrying out their mandate.

Biographical Notes

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