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**SELF-REGULATION OF MINE SECURITY VERSUS HOST COMMUNITY
RIGHTS: A SIMPLISTIC SOLUTION TO A COMPLEX PROBLEM**

BY: JOSHUA MIREGWA OPANDE

STUDENT NO: 17259950

SUPERVISOR: ADV L J (LEON) GERBER

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DEDICATION

I dedicate this mini-dissertation to my late father, Peter Opande.

*Your wise counsel and love for scholarly academic work inspired me greatly to pursue
this course.*

*I cherish our memories with this mini dissertation and I will forever celebrate you as
my greatest hero.*

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LIST OF INTERNATIONAL AND DOMESTIC LAW DOCUMENTS

- Basic Principles on the Use of Force and Firearms by Law Enforcement Officials Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 112 (1990).
- Equator Principles, June 2003
- Kimberly Process Certification Scheme, 2000
- Principles, Voluntary. "Voluntary Principles on Security and Human Rights." (2000).
- Standard, Performance. "4: Community Health, Safety and Security." (4).
- UN Code of Conduct for Law Enforcement Officials, Adopted by UNGA Resolution 34/169 (1979)
- United Nations. Human Rights Committee. Guiding Principles on Business and Human Rights: Implementing the United Nations" Protect, Respect and Remedy" Framework. Human Rights Committee, 2012.
- US Alien Tort Claims Act, 1789, 28 U.S. Code § 1350

LIST OF CASES

- International Criminal Tribunal for former Yugoslavia
- International Criminal Tribunal for Rwanda
- Nuremberg Trials
- United States vs. Goering

LIST OF ABBREVIATIONS

ATCA	US Alien Tort Claims Act
BP	British Petroleum
CSR	Corporate Social Responsibility
EP	Equator Principles
IFC	International Finance Corporation
ILO	International Labour Organization's
KP	Kimberly Process
MNC	Multi-National Corporation
MSIs	Multi-Stakeholder Initiatives
NGOs	Non-Governmental Organisations
OECD Development	Organisation for Economic Co-operation and Development
SS	Schutzstaffel
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGPs	UN Guiding Principles on Business and Human Rights
VPs	Voluntary principles on Security and Human Rights

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CHAPTER ONE: INTRODUCTION

1.1 Background

The extractives industry in developing countries face major security concerns that necessitate formulation of an efficacious and responsive framework for reducing the detrimental impact of mining activities on the host communities in mining areas.¹ These concerns are premised on lack of binding contract on operation of various stakeholders.² However, stakeholders unanimously recognize that the extractive process imposes social and environmental impact on the host communities that are detrimental to the host communities' development.³ Critically, these shortcomings outweigh the benefits that these host communities draw from the mining activities as mine security effects, affect the current and even the future generations.

The security concerns in the mining operations are rampant in areas with weak governance superstructures and areas vulnerable to communal conflicts. These security concerns are catalysed and intensified by contestations on property rights and ownership claims in areas where minerals have been discovered.⁴

The mining operations in developing countries are conducted by international mining companies that are majorly owned and operated by foreign investors. The goal of these companies, like any other business investment, is to get the maximum output from their inputs. In order to peacefully and properly conduct their operations, these companies usually seek to establish a foothold in these environments charged with social, economic, and political contestations.⁵ However, incidences of human rights violation by these companies or local governments that

¹ Australian Human Rights Commission. "The Australian Mining and Resource Sector and Human Rights." (2009).

² Faruque, Abdullah Al, and Md Zakir Hossain. "Regulation vs self regulation in extractive industries: a level playing field." *Macquarie J. Int'l & Comp. Envtl. L.* 3 (2006): 52-53.

³ 'Addictive Economies: Extractive Industries and Vulnerable Localities in a Changing World Economy1 - Freudenburg - 1992 - Rural Sociology - Wiley Online Library' <<https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1549-0831.1992.tb00467.x>> accessed 1 November 2018.

⁴ *Supra*, n1.

⁵ *Ibid.*

support mining operations has led to tensions between the host communities and the mining companies that usually culminate into security deterioration thus endangering lives of the workers of these mining companies who work in these areas.⁶

It is economically and logically factual that mining companies are limited in area of operation to the locality where minerals are found. Operating in these contested areas forces these companies to evaluate their relationship with various political and social actors operating in the region.⁷ Moreover, some host communities contend that the mining companies owe host communities an obligation to reduce and, or eliminate human right violations within their sphere of influence.⁸ Since most governments go out of their way to create a conducive working environment for the extractive industry as a way of ensuring steady revenue generation from taxes and other revenue sharing agreements, NGOs operating in the governance sector argue that mining companies should deploy their significant political capital to push local actors towards more humane conduct that respects and upholds the rights of the host communities.⁹

Mining companies need to strike a balance between their responsibility to maximize the shareholder's equity provided during the mining operations vis-à-vis the need to engage in some corporate social responsibility activities that take care of the needs of the host communities.¹⁰ This calls for the binding guidelines among states on the effective and efficient *modus operandi* that need to be adopted by these companies.

However, measures to promote a more holistic and universal framework on how mining companies attain this balance have been hampered by the lack of a binding

⁶ Stiftung, Heinrich Böll. "Natural Resource and Conflict." (2012).

⁷ Amoco, BP. "Environment and Social Report." (1998): 3-8.

⁸ Tinto, Rio. "Social and Environment Report." (1999).

⁹ *Supra*, n1.

¹⁰ International Council on Human Rights Policy. "Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies." 2002; Stiglitz, Joseph E. "Multinational corporations: Balancing rights and responsibilities." *Proceedings of the ASIL Annual Meeting*. Vol. 101. Cambridge University Press, 2007.

international regulatory regime on the conduct of mining companies.¹¹ Several guidelines and principles have been advanced by international organizations and consortiums to fill the void, but such measures are non-binding and unenforceable against the mining companies. For large multinational concerns, the fear of negative publicity and political sanctions forces them to abide by these principles.¹² However, the smaller mining companies and domestic players who play a significant role in the extractive sector disregard such guidelines as they perceive them as added costs that lack any direct benefit to the companies.¹³

The high competition and need to attract foreign investors has rendered local governments of most developing countries with no incentive for them to develop or enforce any stringent mining regulations governing Multi-National Corporation (MNC). Seemingly, these governments have bought the narrative that imposing stringent regulations or attempting to enforce them to MNC will scare and drive them away thus cutting off injections of capital and technical expertise necessary for the exploitation of the mineral resources. With capital and skilled labour flows having attained global dynamisms, any domestic attempt at regulating multinationals only serves to herald their migration to other countries that lack the regulations or are unwilling to enforce them.

Within such an environment, where governments are unable and unwilling to regulate the conduct of the extractive industries, companies' decisions are influenced by the need to acquire acceptance and support of the local communities in their operations. Such an outcome, the social license to operate, is due to the recognition that failure to solicit and maintain local host community cooperation for the mining companies tend to create a hostile working environment that drives up costs while growing awareness amongst shareholders on the need to operate reputable operations has also influenced the corporate decision making.¹⁴

¹¹ *Supra*, n1.

¹² Olson, Danielle. "Corporate complicity in human rights violations under international criminal law." *International Human Rights Law Journal* 1.1 (2015): 3-4.

¹³ *Ibid.*

¹⁴ *Supra*, n1.

Thus, this mini-dissertation seeks to provide a contextual background for examining security concerns and related issues that arise as mining companies operate in contested spaces across developing countries and their attempts at responding to fluid situations to secure their investments and boost their returns. Specifically: the use of security companies to protect operations; the rights of host communities in the areas of mining operations; issues of conflict revolving around labour rights, especially the rights to organize; issues of pariah (or failing) states which are human rights abusers; security and human rights abuses are the most clearly defined set of issues where there are relations with state or private security forces. The broader set of corporate relationships in connection with security and human rights include the company's relation and interaction with the community and with issues of land rights, labour, access to resources, and revenue benefits to the community (as distinct from the regional and national government).

1.2 Study Objectives

This research seeks to evaluate the extent to which corporate self-regulation within the extractive industry can minimize the detrimental impact of security challenges to their mining operations. The mining industry has been heavily criticized due to their poor human rights record in its operations, environmental concerns and social issues attendant to the extractive industry when operating in less developed countries that have inadequate regulations or have weak institutions unable to enforce the existing regulations.

To further advance discourse in the area, this research briefly canvasses whether there are any international or domestic regulations currently in operation that proffer remedies in case of violations. Further, this research also considers the current mosaic of voluntary policies and mechanisms to examine their utility in adequately regulating the arena of mining operations.

1.3 Presumptions and Limitations of Study

Fundamentally, this research and its implications are limited to developing countries and the extractive processes that occur within such countries as they have distinct,

unique, and comparable ecosystem that are strikingly similar both in the cause and effect. It is only by limiting the scope of the paper to a small subset of the extractives industry that the study can be developed and offer a measure of critical appreciation of existing literature.

Moreover, this research does not claim to be revolutionary or a ground breaking attempt at examining the operations of mining companies in developing countries as there exists a plethora of academic and industry publications touching on the area. What this study seeks is to consolidate the academic thoughts and offer a measure of new and alternative take on existing literature.

As a desktop research, this study is fundamentally and quantitatively limited to data and information published prior to December 2017 when the research commenced in earnest. Any subsequent updated data or research on materials sourced for this research may not be reflected.

Additionally, this research is limited to a surface-deep exploration of the issues and contested debates swirling within the extractive industry by focusing on the predominant factors and issues that have cross-sectional applicability. No in-depth examination of the issues is sought unless it is undertaken as an attempt to provide clarity or further advance subsequent arguments made in the paper.

1.4 Research Methodology

The research utilizes a non-empirical research methodology to advance its exploration of the research concerns by evaluating primary data from the mining industry and secondary data provided by international organizations and local governments on the industry. Additionally, this research is desktop based with no field work undertaken.

1.4.1 Framework for Analysis

The framework for analysis of this mini-dissertation includes Equator Principles (EP); Ruggie Framework; Voluntary Principles on Security and Human Rights and IFC Performance Standards in establishing the efficacy of self-regulation on mine

security. These frameworks are discussed in brief herein below and in detail in chapter three.

a) Equator Principles

The EP refer to a set of guidelines and risk management approach adopted by Equator Principles Financial institutions in evaluating the financing requests for new projects undertaken across the globe.¹⁵ EP measures are compulsory for companies seeking financing from the financial institutions that have signed up to the principles which include mining MNCs.¹⁶

b) Ruggie Framework

The UN Guiding Principles on Business and Human Rights (UNGPs) “the Ruggie Framework”,¹⁷ was commissioned by the UN, and developed and named after John Ruggie, Professor in Human Rights and International Affairs at the Kennedy School of Government at Harvard University.¹⁸ They were unanimously passed by the United Nations Human Rights Council on June 16, 2011. They address effective protection of individuals and host communities against human rights violations by transnational companies.¹⁹

c) Voluntary Framework for Security and Human Rights

The Voluntary Principles on Security and Human Rights was jointly established in 2000 by US and UK.²⁰ The objective of this framework was to tackle the problem of violation of fundamental human rights by powerful companies such as the mining

¹⁵ Principles, Equator. "The Equator Principles, A financial industry benchmark for determining, assessing and managing environmental and social risk in projects." (2013): 2.

¹⁶ *Supra* n15, p. 6.

¹⁷ United Nations. Human Rights Committee. Guiding Principles on Business and Human Rights: Implementing the United Nations" Protect, Respect and Remedy" Framework. Human Rights Committee, 2012.

¹⁸ Wilshaw, Rachel, Bryony Timms, and Sophie Niven. "Business And Human Rights: An Oxfam perspective on the UN Guiding Principles." (2013): 2.

¹⁹ *Ibid.*

²⁰ Principles, Voluntary. "Voluntary Principles on Security and Human Rights." (2000).

MNCs operating in remote areas where local governments are unwilling or unable to protect human rights.²¹

d) IFC Performance Standards

The **IFC Performance Standards**²² is an international benchmark for identifying and managing environmental and social risk and has been adopted by organizations that seek funding in the extractive industry.²³ The *Performance Standard 4 on Community Health, Safety, and Security* address security issues.²⁴

1.5 Research Questions

1.5.1 Primary Question

The primary question of this mini-dissertation is to establish to what extent corporate self-regulation has been effective in the prevention of negative social impact as a consequence of security in mining operations in developing countries.

1.5.2 Secondary Questions

The secondary questions of this mini-dissertation are:

1. To establish the role and responsibility of a mining company in ensuring security within a host community
2. To analyse existing regulatory framework on mine security.
3. To assess the impact of self-regulations particularly whether self-regulations on mine security has met external expectations

1.6 Chapter Overview

This mini-dissertation entails five chapters namely:

²¹ Mining in Partnership, <http://mininginpartnership.org/Rights/Security.html> [Accesses October 28, 2018].

²² Standard, Performance. "4: Community Health, Safety and Security." (4).

²³ International Financial Corporation. "Update of IFC's Policy and Performance Standards on Environmental and Social Sustainability, and Access to Information Policy International Finance Corporation April 14, 2011." 7-8.

²⁴ *Supra*, n 22.

Chapter One, introduction: This chapter sets out the background of the study, identify the research problem and questions, and outline the research methodology.

Chapter Two, Role and Responsibility of a Mining Company in Ensuring Security within a Host Community. This chapter provides a critically analysis on how the mining companies can balance between their business objectives and ensure security within a host community.

Chapter Three, Regulatory Framework of Mine Security. This chapter looks at both international and national levels of regulatory frameworks and delves into the voluntary initiatives that directly affect mine security.

Chapter Four, Impact of Self-Regulation: Has Self-Regulation Met External Expectations. This chapter is a critique on voluntary initiatives of MNC in mining to examine their weaknesses and propose appropriate solutions.

Chapter Five, Conclusion: Provides a summary and prognosis of the dissertation.

CHAPTER TWO:
ROLE AND RESPONSIBILITY OF A MINING COMPANY IN ENSURING
SECURITY WITHIN A HOST COMMUNITY

2.1 Introduction

As the human rights-centric agenda continues to garner a foothold across the globe, the initial focus on the role and place of the state in the upholding and protection of human rights has broadened to include the role and place of other private stakeholders. Such a shift now demands that all entities that significantly impact on the ability, capacity, accessibility, and availability of human development adopt a framework that allows them to mitigate the adverse impact of their activities on local communities while incrementally advancing human rights of the communities they interact with on a daily basis.²⁵

For the extractive industry, human rights concerns are based on the understanding that the extractive industry adversely affects local communities within their sphere of activities socially, economically, and culturally.²⁶ From the outset, every extractive process inadvertently affects the environment of surrounding communities either through a combination of noise, soil, air, light, or water pollution. Moreover, the human population shift as migrant labourers move towards the mining operations and the local community is displaced to give way for the mining town, the problems and challenges of localization are imported into a previously culturally and politically homogenous community.²⁷

A growing area of debate and controversy has been the determination of the extent to which the mining operation is responsible for the upstream and downstream ripple effect of their operations on the local community.²⁸ While their role within the

²⁵ Faruque, Abdullah Al, and Md Zakir Hossain. "Regulation vs self regulation in extractive industries: a level playing field." *Macquarie J. Int'l & Comp. Envtl. L.* 3 (2006): 52-53.

²⁶ *Ibid.*

²⁷ Australian Human Rights Commission. "The Australian Mining and Resource Sector and Human Rights." (2009).

²⁸ JA Vásquez and others, 'The Ecological Effects of Mining Discharges on Subtidal Habitats Dominated by Macroalgae in Northern Chile: Population and Community Level Studies' in Joanna M

site of activities is direct and recognized by all, the role, place, and position of the mining company in development of public policy to address the resultant challenges within the host community and other players in the operation remains contested ground.²⁹ The mining companies are primarily profit driven entities and would wish to narrow down their responsibilities to reduce their obligations to local community that may have a financial impact with minimal improvement in profitability. To human rights advocates, however, mining companies ought to bear a significant responsibility in advancing and promoting the development of human rights in their areas of operations given that they derive their profits from the exploitation and expropriation of local community's mineral wealth.³⁰

2.2 Localization and Location of Mining Operations

Like other economic ventures, the primary concern of the mining industry is the generation of high returns for their investors while minimizing the costs of production within acceptable limits. Until recently, such an understanding of corporate operations was the predominant view as mining concerns were located in developed countries that promulgated a concise regulatory framework that prescribed the acceptable limits to be adhered to by mining companies in their operations.³¹ As minerals in developed countries slowly got exhausted, the extractive industry has begun to focus on developing economies across Africa and Asia where large mineral deposits have been recently discovered. Attempting to export similar *modus operandi* has increasingly become contested by various stakeholders as developing countries have unique challenges that degrade the exploration space and tend to raise non-economic concerns for the extractive industry.³²

Kain, Murray T Brown and Marc Lahaye (eds), Sixteenth International Seaweed Symposium (Springer Netherlands 1999).

²⁹ Olson, Danielle. "Corporate complicity in human rights violations under international criminal law." *International Human Rights Law Journal* 1.1 (2015): 3-4.

³⁰ *Ibid.*

³¹ Mineral, Wealth and Progress, <https://www.crcpress.com/downloads/SW5095/Chapter1.pdf> [Accessed October 28, 2018].

³² 'Addictive Economies: Extractive Industries and Vulnerable Localities in a Changing World Economy1 - Freudenburg - 1992 - Rural Sociology - Wiley Online Library' (n 3).

Within such contested spaces, the unique feature of the extractive industry come into play which further intensifies the debate on responsibility and liability of mining companies for the state of human rights within the sphere of operations. Firstly, mining companies are unable to merely relocate their operations to more developed countries in terms of legal, political, and human rights when faced with human rights challenges in the localities where mineral wealth is found.³³

This is unlike other contemporary sectors of economic productivity, like manufacturing or processing, that have developed intricate logistical networks to facilitate just-in-time production enabling them to relocate to areas with favourable operational environment, extractive industries operate within a more constricted plane of operations due to the overriding need for close proximity to locations where minerals are found.³⁴ In other words, while the manufacturing and processing industry can simply move to avoid any hostile working environment, the mining industry lack geographic mobility as their activities are constrained to proximity to the source of raw materials.³⁵

An informative comparison is found within the electronic industry in North America, where Canada, America, and Mexico have developed an intricate web of dependent supply chains to allow electronic industries in America to source for materials from both Canada and Mexico through just-in-time logistics allowing them to take advantage of cheap labour in Mexico, cheap steel and aluminium in Canada, and the technical expertise and automation of America.³⁶ Within such an outlay, corporations merely need to develop robust logistical network with their areas of operation widely dispersed to leverage on the benefits enjoyed in various locations. When the cost of labour in North America became a burden to operational costs, the

³³ 'Environmental Effects of Mining - Earle A. Ripley, Robert E. Redmann - Google Books' <https://books.google.co.ke/books?hl=en&lr=&id=5au3aSUYH04C&oi=fnd&pg=PA1&dq=effects+of+mining+in+a+community&ots=IRyEwgRG8j&sig=xZlQastTTkYTjrT4VSmWDTR-RC0&redir_esc=y#v=onepage&q=effects%20of%20mining%20in%20a%20community&f=false> accessed 1 November 2018.

³⁴ Mineral, Wealth and Progress, <https://www.crcpress.com/downloads/SW5095/Chapter1.pdf> [Accessed October 28, 2018].

³⁵ *Supra*, n34.

³⁶ Handelsman, Simon D. "Human rights in the minerals industry." *Glob. Envtl. L. Ann.* (2002): 106.

companies simply shifted their production facilities overseas to Asia and continued developing specialized components in North America that required precision machinery while the bulk of assembly and production of low tech materials is done was Asia.³⁷

In contrast, the extractive industry is forced to locate their operations as close as to the source of minerals as possible to bring down cost of production while taking advantage of a variety of benefits extended by host countries to domestically operating companies.³⁸ Consequently, mining operations find themselves operating in highly contested spaces like conflict zones in developing countries, areas with poor human rights records within failed states, or in other instances operating in jurisdictions lacking regulatory framework to govern their operations within failing states or least developed countries that lack the technical expertise to regulate highly specialized sectors of the economy.³⁹

Secondly, mining companies tend to have large economic resources that dwarf the resources of their host countries, both quantitatively and qualitatively. As mining operations move into communities that were previously located at the periphery of development and capitalism, they are increasingly located in underdeveloped regions of the world occupied by indigenous communities who are reliant on subsistence living.⁴⁰ Such communities easily become mineral dependent and are extremely vulnerable to the detrimental impact of mining on their social and economic fabric. Pollution and urbanization have outsized impact on such communities who stand to lose the most once commercial expropriation of minerals picks up pace consigning them into mere spectators in their ancestral homelands.⁴¹

Moreover, once mining activities pick up pace, the mining company becomes the major employer to surrounding communities due to their comparably higher salaries

³⁷ *Ibid.*

³⁸ Stiftung, Heinrich Böll. "Natural Resource and Conflict." (2012).

³⁹ *Ibid.*

⁴⁰ Olson, Danielle. "Corporate complicity in human rights violations under international criminal law." *International Human Rights Law Journal* 1.1 (2015): 3-4.

⁴¹ *Ibid.*

and the more formalized nature of employment on offer. Also, mining companies generate huge wealth from their financial investment while leaving the local communities with minimal economic benefit from the project. As the local community watches, the mining company reports increasingly higher and higher profits, while merely providing token social amenities like hospitals, schools, and clean water to the surrounding communities.⁴² While the debate on equitable benefit sharing may occur at the national level, the local community remains isolated from it and increasingly begin to perceive the mining company as a parasite that economically benefits from them without correspondingly developing their economic or social capacity.⁴³

Furthermore, the capital intensive nature of mining operations lends the industry a multinational and international dimensions as the major players tend to be MNCs sensitive to maintain good reputation, publicity, and susceptible to hostage taking by local communities threats of tarnishing their reputation through local agitation for better terms.⁴⁴ While there may coexist a number of players upstream and downstream of the actual mining activity, the MNC that exploits the mineral remains the sole target of the ire of local communities, even when the complained acts were undertaken by one of its subcontractors in contravention of the mining company express regulations and terms of reference.⁴⁵

Consequently, as the mining industry rolls through underdeveloped regions and broadens their activities in developing countries, they have to balance a set of expectations that arise amongst the local community, the local government, national governments, non-governmental organizations, and international human rights advocacy groups that seek to exercise oversight over their activities.⁴⁶ This chapter seeks to expound on how these expectations arise, the nature of these expectations,

⁴² Handelsman, Simon D. "Human rights in the minerals industry." *Glob. Envtl. L. Ann.* (2002): 106.

⁴³ Colin Filer and Martha Macintyre, 'Grass Roots and Deep Holes: Community Responses to Mining in Melanesia' (2006) 18 *The Contemporary Pacific* 215.

⁴⁴ Börzel, Tanja, and Jana Hönke. "From compliance to practice: mining companies and the voluntary principles on security and human rights in the Democratic Republic of Congo." (2010): 7-30.

⁴⁵ *Supra*, n43.

⁴⁶ *Ibid.*

how they are met, and what are the implications for the broader mining industry where the expectations are unmet or unfulfilled.⁴⁷

2.3 Expectations in Mining Operations in Operational Management

At the outset is the recognition that the issues facing mining operations differ from one region to the other depending on the level of development, the robustness and dynamism of the state and its institutions, and the level of exposure of the host community to globalization and urbanization.⁴⁸ In developed regions with high level of exposure to modernity and globalization, the expectations of the host community tend to revolve around environmental conservation, provision of employment opportunities, and closer integration of mining operations into the local economy through contribution of local content into the mining operations.⁴⁹ For underdeveloped regions with minimal exposure to urbanization and globalization, higher expectations arise as the mining operation is perceived as the social, economic, and political boost necessary to push the regions development trajectory into the 21st century.⁵⁰

As the mining company begins operations in underdeveloped region, it needs to solicit for support both from the local government and the host community. Through a comprehensive benefit sharing agreement, the support of the local and national governments can be easily secured leaving the company to face the arduous challenge of suborning the host community to support them.⁵¹ In some instance, the proposed development may be hotly contested amongst a fragmented society with various sides reluctant to support the initiative due to the anticipated disruptions or due to perceived inequitable sharing of benefits between the company and the local community.⁵²

⁴⁷ International Financial Corporation. "Update of IFC's Policy and Performance Standards on Environmental and Social Sustainability, and Access to Information Policy International Finance Corporation April 14, 2011." 7-8.

⁴⁸*Ibid.*

⁴⁹ Handelsman, Simon D. "Human rights in the minerals industry." *Glob. Envtl. L. Ann.* (2002): 106.

⁵⁰*Ibid.*

⁵¹ International Council on Human Rights Policy. "Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies." 2002

⁵² *Ibid.*

Resolving such intricacies call for the mining company to develop an interactive framework where the local community gets space to interact with the company, air their concerns and grievances, while the company continuously communicates its handling of various issues.⁵³ An efficacious framework needs to allow the sharing of ideas, ensure the free flow of information, provide continuous communication, ensure inclusivity of all stakeholders, and provide the mining company with timely information to anticipate and resolve conflicts before they arise.⁵⁴

2.4 Regulatory Environment and Creation of Expectations

As multinational concerns with a number of competing domiciles and residencies depending on the framework for determining domicile and residency in various countries, mining companies regularly have to determine the applicable regulatory environment governing their operations across a broad vista of activities.⁵⁵ The business unit must determine whether only the host country regulations apply to the local unit or if the regulations of the parent company home country apply across the company. Such regulatory challenges underpin the foundations of the mining venture as the standards to be met during operations, the obligations of the various players, and the responsibilities of the stakeholders are promulgated by the regulations.⁵⁶

Moreover, given the binding or non-binding nature of the regulatory environment on corporations, the expectations created by regulations are crucial as companies cannot derogate from them or fail to faithfully execute their responsibilities. To most host communities, however, mere adherence to regulations tends to be inadequate due to a poorly developed sense of rule of law and inadequate comprehension of the regulatory climate.⁵⁷ Companies need not only adhere to the law, but also meet the host community's perception of what conduct is permissible over a set of situations

⁵³ *Supra*, n6.

⁵⁴ *Ibid.*

⁵⁵ Richardson, Paula. *Corporate Crime in a Globalized Economy: An Examination of the Corporate Legal Conundrum and Positive Prospects for Peace*. NPSIA/CIFP, Carleton University, 2003.

⁵⁶ *Ibid.*

⁵⁷ *Supra*, n51.

in their daily-operations to ensure the continuity and sustainability of the company's social license to operate in a tolerable climate.⁵⁸

With reference to human rights, companies may be forced to develop their in-house codes of conduct that mirror international best practices when operating in developing economies. As governments bend-over backwards to accommodate a mining concern, their main concern rests on the financial benefits available through revenue, the employment opportunities, and in rare cases the diplomatic relations between the host country and the country of domicile for the mining company.⁵⁹ It is left up to the mining company to formulate and implement a framework that allows it to observe the social-cultural restrictions imposed by the host community's level of development, international best practices in labour relations, human rights, and environmental conservation.⁶⁰

From a mining company perspective, the proscriptive legal regime in developing countries tend to provide a barebones framework on environmental and fiscal areas of regulations, leaving the mining company to formulate a framework that allows it to promote best practices in labour relations, human rights promotion, preservation of host community culture, and the physical operational security of the company.⁶¹ Critically, irrespective of the local regulatory climate the onus rests on the mining company to leverage on its international experience to develop a responsive and efficacious corporate policy that addresses any lacuna that may subsist in the host country.⁶²

When operating in a developing country, the mining company has to remain keenly aware of the unique contentions that exist regarding the cost of development to local communities as more often than not, a vocal minority may oppose any development measures due to marginalization, environmental concerns over mining, or desire to

⁵⁸ *Ibid.*

⁵⁹ Richardson, Paula. *Corporate Crime in a Globalized Economy: An Examination of the Corporate Legal Conundrum and Positive Prospects for Peace*. NPSIA/CIFP, Carleton University, 2003.

⁶⁰ *Ibid.*

⁶¹ 'Environmental Effects of Mining - Earle A. Ripley, Robert E. Redmann - Google Books' (n 33).

⁶² *Ibid.*

safeguard and protect local cultures.⁶³ Such concerns may be politically divisive locally and may have failed to be canvassed in the regulatory arrangement entered into between the company and the national government, leaving the company isolated to handle concerns as they arise.⁶⁴

Consequently, mining companies have to develop a framework that responds to these issues to ensure they do not spill over into confrontations that adversely affect their ability to operate and as a corporate gambit to secure their investment and reputation, locally and internationally.⁶⁵ While it may be difficult to quantify the value of a corporate framework that protects host community culture, is responsive to local human rights and labour concerns, and balances the various competing claims on the company, the potential impact on the social license to operate is a significant motivator for the company locally.

Internationally, bad press in the host country may harm the reputation of a multinational corporation resulting in significant loss of value to shareholders, may restrict access to finance as international financial institutions become averse to lending to corporations with questionable operational modalities, and it may even impact on future prospects of the company as other mineral rich areas refuse or withdraw the operational licenses issued to the company and its subsidiaries due to concerns over its operations in developing countries.⁶⁶

2.5 Security Dimensions for Mining Companies

For a mining company in developing countries, they occupy a unique position due to their revenue generation activities that may have security dimensions unintended and unforeseen during the life of the mining operation. While the issue of physical protection of the mining company resources and facilities may be expressly agreed upon, some unintended consequences may arise as the company's operations

⁶³ Tamás Hámor, 'Sustainable Mining in the European Union: The Legislative Aspect' (2004) 33 *Environmental Management* 252.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ Daniel Bradlow, 'International Law and the Operations of the International Financial Institutions' (Social Science Research Network 2010) SSRN Scholarly Paper ID 1851849 <<https://papers.ssrn.com/abstract=1851849>> accessed 1 November 2018.

proceed, even if the company thinks its acting within its operational mandate.⁶⁷ A number of case studies reiterate the dynamic nature of the relationship that exists between the mining company and the local community, the security nuances of their operations, and the tendency of a company's innocent actions to become conflated with pre-existing local contentions.⁶⁸

In Indonesia, a mining company offered financing for a football club as part of its corporate social responsibility to the host community, an innocent seeming venture. However, local dimensions in football had created an environment where clubs were identified by various ethnic communities, with football matches serving as an outlet for ethnic pride and aggression amongst the local communities. During a match between the company's backed football team and a local rival, the police who were perceived as partisan supporters of the company club used excessive force in crowd control, resulting in ethnic tensions with the company caught in the middle due to its financing of one of the teams.⁶⁹ In another instance in Indonesia, an energy company constructed schools across the area it operated to benefit the local community development agenda. However, the schools were subsequently used by the military as outposts for torturing perceived government rebels, creating tensions squarely aimed at the energy company as it was perceived to be an accessory to the government's acts due to its "innocent" support towards local education. When the army requested for excavators for purportedly farming, the company provided them only later to learn they were used for digging of graves for rebels who had died from torture.⁷⁰

Away from the relationship between the mining company and state security apparatus, concerns have been raised about the nature and scope of the relationship

⁶⁷ International Council on Mining & Metals. *Good practice guide: Indigenous peoples and mining*. 2010: 43-46.

⁶⁸ *Ibid.*

⁶⁹ *Supra*, n42.

⁷⁰ "'CORPORATE SECURITY BEGINS IN THE COMMUNITY": Mining, the Corporate Social Responsibility Industry, and Environmental Advocacy in Indonesia - WELKER - 2009 - Cultural Anthropology - Wiley Online Library' <<https://anthrosource.onlinelibrary.wiley.com/doi/abs/10.1111/j.1548-1360.2009.00029.x>> accessed 1 November 2018.

between mining companies and private security contractors. Either as agents of the state or the mining company, private security contractors plays a multi-faceted and dynamic role in mining operations across developing regions. Where institutional failures have occurred due to the presence of a weak state or marginalization of a given area, private security companies may be engaged to either support local policing agencies as private military contractors. In other instances, local regulations may prohibit mining companies from maintaining a security arm forcing them to turn to private security providers to secure and guard their physical facilities.⁷¹

While these corporate relationships seem benign, mining companies are often associated and held responsible by local communities for the atrocities that may be committed by private corporate security firms in their employment. To the locals, there exists no discernible distinction between the security company and the mining company, irrespective of the legal nature of their relationship. Hence, where the contracted security firms conduct falls below the socially or legally acceptable threshold, the mining company is left isolated to face the repercussions.⁷² From the *Sandline Affair*⁷³ of 1997 in Papua New Guinea when the state contracted mercenaries to complement its local security agencies, the numerous instances of human rights violations in Sierra Leone by private security companies allegedly working at the behest of the extractive industry, to the current situation in Democratic Republic of Congo mining industry, the extractives industry is replete with instances of private security companies violations have been attributable to mining companies and the subsequent repercussions that arise from such attribution.⁷⁴

While these occurrences tend to be limited to developing countries with weak institutional, regulatory, or enforcement mechanisms, their repercussions have been sufficiently significant to result in the development of international best practices to

⁷¹*Supra*, n67.

⁷² *Supra* n42, p. 47.

⁷³ It refers to the \$46 million contract between then UK PM Sir Julius Chan and Sandline International to provide mercenaries and sophisticated military equipment to spearhead a military operation against separatists on the island of Bougainville and repossess the giant Panguna mine.

⁷⁴ *Ibid.*

guide corporate activities in the extractive industries.⁷⁵ Pushed by the predominantly industrialized nations, the best practices seek to formulate a comprehensive framework that offers companies guidance on how to operate by canvassing various contested areas of operations and their interrelation within a dynamic setting. However, as guiding principles where observance and enforcement is left to private entities, the efficacy and utility of such best practices is questionable at best.⁷⁶

2.6 Relationship between the Mining Company and Host Community

The concept of sphere of influence is founded on the realistic appreciation of the influence that every company wields within its area of operation, whether it's in incrementally influencing or dictating the applicable public policy position adopted by the host government.⁷⁷ Every company, irrespective of its size, is in a position to push for the adoption of a favourable regulatory climate and public policy due to the subtle threat of withdrawing business, an outcome that could detrimentally impact public financing and employment at a given locale. Hence, the concept of sphere of influence contends that mining companies have a sphere of influence in their area of operation, particularly in developing countries where they may be a significant source of employment and government revenue, both directly and indirectly.⁷⁸

The obligations that flow from a sphere of influence conceptualization tend to be moral, ethical, or social as the legal fiction in place holds the government as the principal actor in its jurisdiction with the mining company as a mere spectator. The legal environment will create direct obligations by imposing requirements to preserve environment, avoid harm, and the precautionary principle from the company's operations.⁷⁹ Subsequently, ethical constraints, moral obligations that arise from dependency syndrome and the underpinning social contract between the

⁷⁵ *Supra* n42, p. 24-25.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ *Supra* n42, p. 26-36.

company and local communities in the social license to operate will subtend new obligations and vest them upon the company.⁸⁰

Within a company's sphere of influence revolve various stakeholders with varying degree of relationship to the company, governments, local authorities, host communities, employees, contractors and subcontractors, suppliers, local trade unions, and its clients. In most instances, companies are not only held socially and politically liable for their actions but also of the activities that occur within its sphere of influence that it authorizes, tolerates, or ignores.⁸¹ Where a company; assists in the commission of human rights violations whether directly or indirectly by ignoring such violations; actively partners with a government that the company knows or ought to know of its deplorable human rights record.⁸² where the company stands to benefit from human rights violations perpetrated by other stakeholders, usually government or private security contractors; or where the company chooses to ignore or isolate itself from human rights violations perpetrated within its sphere of influence, the company will be held socially, ethically or morally liable by the local community and some stakeholders given the subsisting dependency between the company and the host community.⁸³

2.7 Conclusion

This chapter examined the role and responsibility of mining companies in ensuring security within a host community. From the above, it is clear that the mining company plays a great role in ensuring there is peaceful co-existence with the host community. Any form of strife between the two actors becomes a security threat and may hinder the achievement of the desired goal.

⁸⁰ 'Corporate Social Responsibility and the Mining Industry: Conflicts and Constructs - Jenkins - 2004 - Corporate Social Responsibility and Environmental Management - Wiley Online Library' <<https://onlinelibrary.wiley.com/doi/abs/10.1002/csr.50>> accessed 1 November 2018.

⁸¹ Paul Kapelus, 'Mining, Corporate Social Responsibility and the "Community": The Case of Rio Tinto, Richards Bay Minerals and the Mbonambi' (2002) 39 *Journal of Business Ethics* 275.

⁸² *Ibid.*

⁸³ Lynda Cheshire, 'A Corporate Responsibility? The Constitution of Fly-in, Fly-out Mining Companies as Governance Partners in Remote, Mine-Affected Localities' (2010) 26 *Journal of Rural Studies* 12.

In such a dynamic environment, a unique relationship is formed between the host community, the mining company, the local and national governments, and a variety of other actors that play a direct or peripheral role in the extraction of minerals from the earth. Key to this relationship is the nature of the state and the efficacy of the regulatory environment that subsists in the host country. At a comparative level, developed countries tend to formulate a broad and comprehensive regulatory approach that speaks to all aspects of the mining company operations to ensure a balance is struck between public interests and the corporate interests through an active framework of engagement and compromises between all the stakeholders. However, developing states tend to have fragmentary governance, weak institutions, and inadequate technical and legal capacity to regulate the mining company, bequeathing it broad discretion in its operations.

In such an environment, there arises a set of quasi-legal, social, and ethical obligations imposed upon the corporation to balance public interest, host community needs, and its strictly speaking legal obligations as per the agreement with the host nation in its operations. Given that corporations overriding interest is the improvement of investor equity, these obligations imposed on the corporation tend to be treated differently by companies depending on the region of operations and their internal policies. Internal codes, inevitably, tend to be outward looking and are informed by international practices in other comparable jurisdictions.⁸⁴ Given the dearth of any binding and instructive international regime, corporations have been forced to turn to international best practices, guidelines propounded by major financial institutions underwriting their operations, and other private sector initiatives that seek to bridge the regulatory and legal gap in developing countries.

After considering the role played by the mining company, it is important to look at the regulatory framework within the mines security. Chapter three of this study critically examines the same.

⁸⁴ *Ibid.*

CHAPTER THREE: REGULATORY FRAMEWORK ON MINE SECURITY

3.1 Introduction

Accountability in mining, as a concept, has evolved to ensure that mining companies do not exploit their influence over public policy development to the detriment of public interest while exclusively promoting the corporations selfish interest.⁸⁵ Accountability mechanisms have developed a framework allowing stakeholders access to information about the corporation, promoting consultative decision making and implementation, demanding local content in mining operations to ensure they benefit host communities, and extending control of some areas of corporate operations perceived as vulnerable to exploitation and rent-seeking conduct.⁸⁶ These issues are taken into serious consideration because they attach mine security concerns hence cannot be disregarded.

In contemporary times, accountability of MNCs has become multifaceted; either local host government may formulate a regulatory framework on obligations, rights, and responsibilities for the MNC or international law may intervene where domestic environment is inadequate to impose direct corporate liability to constrain a company's operations.⁸⁷ At both levels, regulators seek to promote self-regulation and compliance by the MNCs as a way of reducing cost of enforcing the regulation and as a tool for ensuring minimal disruption of mining activities through external checks by regulatory agencies endowed with oversight over the sector.⁸⁸ Here, the MNCs responsibilities, obligations, rights, and liabilities are easily discernible and it's easy for MNCs to meet local expectations. However, such an outcome only arises

⁸⁵ Dimitrieva, Natalia. "The Accountability of Multinational Corporations for Human Rights Violations: A Comparative Analysis of Legal Redress under the US Alien Tort Claims Act." *rapport* 2010 (2010): 15.

⁸⁶ 'Corporations and Human Rights: A Theory of Legal Responsibility | Human Rights and Corporations | Taylor & Francis Group'
<<https://www.taylorfrancis.com/books/9781315252964/chapters/10.4324%2F9781315252964-8>>
accessed 1 November 2018.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

in developed countries with requisite technical and legal capacity to govern the extractive industry.⁸⁹

For the developing countries, where mining increasingly occurs, weak institutions, co-opted regulators, and the desire to create a favourable climate for corporations tend to provide for disjointed regulations that make it difficult to determine the scope and role of MNCs.⁹⁰ Moreover, developing countries engage in a race-to-the-bottom as they seek to attract investors and retain existing operations, resulting in concerted deregulation that further hampers any attempt at evaluating the position of MNCs vis-à-vis various stakeholders.⁹¹

Domestically within the host nation, consensus can be easily built through a carrot-and-stick approach utilized by the national government to bring together conflicting stakeholders and compel them to agree to an amenable position. However, at the international level consensus building is a tedious process that demands *quid pro quo* comprises, which may not always be obtainable. Various failed measures and initiatives at the international level stand witness to the challenges and opposition that may stand in the way of building consensus over a given approach.⁹²

3.2 Dimensions of Corporate Accountability on Mine Security

MNCs are responsible for illegal mine security acts under domestic legal regimes. However, the controversy arises once host country legislations are inadequate or non-existent and MNCs engage in acts that amount to violation of generally acceptable standards of corporate conduct.⁹³ The non-binding nature of international guidelines and best practices, the extent of corporate compliance to such standards, and the inherent vulnerabilities of a self-imposed compliance threatens to leave the international regime a mere “paper-tiger” in practice.⁹⁴ Within these competing

⁸⁹ *Ibid.*

⁹⁰ Faruque, Abdullah Al, and Md Zakir Hossain. “Regulation vs self regulation in extractive industries: a level playing field.” *Macquarie J. Int'l & Comp. Envtl. L.* 3 (2006): 52-53.

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ Adeyeye, Adefolake. “Corporate responsibility in international law: Which way to go.” *SYBIL* 11 (2007): 141.

⁹⁴ *Ibid.*

legal norms and institutional infrastructures, competing claims on the efficacy of self-regulation, government enforcement, and how to promote corporate compliance tends to render the debate murkier.

Despite various and repeated claims of human rights violations against MNCs, these corporations remain isolated from any coercive sanctions as they continue to inhabit a legal grey area.⁹⁵ The significance influence of MNCs, the aforementioned weaknesses of domestic and international law legal regimes, and the complex nature of MNCs are at the core of continued human rights violations attributable to corporations in developing economies.⁹⁶ On the complexity of MNCs, best MNCs are a warren of subsidiaries, holding companies, and sub-contractors whose ownership and control is difficult to discern rendering it difficult to apportion blame and hold accountable when violations occur.⁹⁷

Moreover, in this intricate web of interrelated and connected companies comes the concept of domicile-shopping as corporations utilize a variety of conflicting state laws to claim residency and domicile in numerous states further compounding any attempt at holding them accountable outside the host country where their operations occur.⁹⁸ While concerns in developed countries continue to grow over human rights violations perpetrated by companies headquartered in Western capitals, their intricate ownership structure and competing residency claims serve to stymie most efforts at enforcing extraterritorial legislation regarding the overseas conduct of mining companies.⁹⁹

3.3 Jurisprudence on Corporate Responsibility for Human Rights Violations

The modern jurisprudence on the extent and degree of liability that attaches to a corporation for human rights violations committed within its sphere of influence is

⁹⁵ Adeyeye, Adefolake. "Corporate responsibility in international law: Which way to go." *SYBIL* 11 (2007): 141.

⁹⁶ *Ibid.*

⁹⁷ Chris Ballard and Glenn Banks, 'Resource Wars: The Anthropology of Mining' (2003) 32 *Annual Review of Anthropology* 287.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

founded on the *Nuremberg Trials* after the fall of the Nazi Germany regime.¹⁰⁰ After the end of the Second World War, the Allies sought to hold corporations liable for their active participation in human rights violation undertaken in concert with the Nazi regime or for their silence and indirect complicity through facilitation in the commission of various human rights abuses and crimes against humanity.¹⁰¹

In one instance, Bruno Tesch was tried before the Nuremberg tribunal for providing commercial assistance to the Nazi regime by procuring and selling to the regime the gas used in euthanizing Jewish civilians in concentration camps. In such an instance, the tribunals finding advanced the argument that a commercial entity that supplied a commodity with knowledge of its intended use was complicit in the subsequent violations.¹⁰² In another instance, Friedrich Flick an industrialist who heavily benefited from the use of slave labour in his industrial complex was found to have financially assisted in the commission of war crimes and crimes against humanity. By organizing various fundraisers for the S.S. and subsequently hiring slave labourers and paying the S.S. for their continued service, he was liable for commercially assisting in the commission of human rights and crimes against humanity violations.¹⁰³

Such Jurisprudence crystallized in *United States vs. Goering* when the Nuremberg Tribunal argued that corporations and individuals also bore responsibility for heinous crimes committed with the financial, material, or in kind support provided with the knowledge of its intended use or reasonable apprehension of the intended use of such support.¹⁰⁴ Such a position overturned prior legal jurisprudence that corporations could not be held legally liable for criminal acts, since the prior legal

¹⁰⁰ *Supra*, n12.

¹⁰¹ *Ibid.*

¹⁰² 'Corporations and Human Rights: A Theory of Legal Responsibility | Human Rights and Corporations | Taylor & Francis Group' (n 98).

¹⁰³ *Ibid.*

¹⁰⁴ '1946.10.01_United_States_v_Goering.Pdf' <http://www.worldcourts.com/imt/eng/decisions/1946.10.01_United_States_v_Goering.pdf> accessed 1 November 2018.

position was to focus on individual personal responsibility for acts that had been sanctioned or authorized by individuals within a corporation.¹⁰⁵

While there has been no subsequent criminal litigation of corporations before international tribunal, the jurisprudence established by the Nuremberg Trails indicates that corporations can be held responsible for violations undertaken with their knowledge, within their sphere of influence, with material or in kind support, or even in instances where corporations indirectly benefit from the commission of violations by third parties.¹⁰⁶ Additionally, under the International Criminal Court and the various *ad hoc* tribunals empanelled for addressing war crimes in Rwanda and Yugoslavia, individual criminal responsibility can be attributed to persons who aid, abet, facilitate, or offer support to entities engaged in war crimes and human rights violations.¹⁰⁷ As such, even if corporations avoid criminal responsibility its officers, agents, and decision makers can be held liable for any support or facilitation extended to other entities that subsequently engage in criminal acts in various jurisdictions.¹⁰⁸

Given the negative publicity and inevitable civil litigation that would be initiated against a company whose officials were found criminally liable for human rights, war crimes, or other violations, it is apposite that corporations actively seek to determine what amounts to complicity in commission of various violations within domestic and international law. Such an endeavour would inform the development of corporate policies and practice guidelines that would forestall mining companies from undertaking projects that could potentially trigger accusations, litigations, and opprobrium against the company.¹⁰⁹

This move to pre-empt and regulate the conduct of a corporation internally in the absence of a legal regime may be perceived as a form of self-regulation. For mining

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ Robert McCorquodale and Penelope Simons, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70 *The Modern Law Review* 598.

¹⁰⁸ *Ibid.*

¹⁰⁹ Jernej Letnar Cernic, 'Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational Enterprises' (2008) 4 *Hanse Law Review* 71.

companies, self-regulation demands that they canvass international best practices, voluntary principles, guidelines issued by international financial institutions, and various Reports and Resolution of the United Nations General Assembly. At the core of such self-regulation is the desire to raise and maintain high standards of operation within the extractive industry applicable to all corporations engaged in mining with a high degree of compliance since they are self-enforced by the MNCs.¹¹⁰

3.4 Regulatory Framework on Mine Security

There is no binding international law instrument on regulation of the conduct of MNCs in their overseas operations. However, notwithstanding such absence of regulation there has grown a number of international principles and voluntary measures propounded by various stakeholders that seek to provide a uniform set of principles that MNCs ought to conform to in their operations. The violation of such principles and best practices do not attract coercive sanctions but may expose MNCs to civil litigation, may leave the MNCs board vulnerable to shareholder's angst for bad publicity, and may result in their isolation from the international funding organizations that would be unwilling to engage with such companies.¹¹¹ These voluntary measures include;

3.4.1 The Equator Principles

EP refers to a set of guidelines and risk management approach adopted by EP Financial institutions in evaluating the financing requests for new projects undertaken across the globe.¹¹² Launched in June 2003, these principles are currently adopted by ninety-four financial institutions in their decision-making models and seek to ensure that companies seeking funding engage in socially, environmentally, and financially prudent projects.¹¹³ The EP are perceived as the minimum precondition that companies seeking financing must meet to indicate the social and fiscal maturity of their projects to ensure that they meet the due diligence conditions

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² Principles, Equator. "The Equator Principles, A financial industry benchmark for determining, assessing and managing environmental and social risk in projects." (2013): 2.

¹¹³ The Equator Principles, <http://equator-principles.com/about> [Accesses October 27, 2018].

for the financing institutions.¹¹⁴ As private sector measures adopted at the international level, compliance with these measures is only compulsory for companies seeking financing from the financial institutions that have signed up to the principles. Moreover, the financial institutions retain some discretion on the methodology they utilize to ensure that companies have satisfied the Principles when they seek for financial support.¹¹⁵

Despite such limitations, the EP have had significant influence in MNC's conduct in the mining sector due to two major factors; mining as a capital intensive industry demands companies seek loans to finance their activities and such loans are only available from established financial institutions, whose most members have signed up to the principles.¹¹⁶ As such, mining companies seeking capital injection to invest in a new operation are forced to meet the requirements to access cheap financing across the globe resulting in high compliance levels to the EP in the extractive sector.¹¹⁷

In their formulation and application, the EP are modelled after the environmental and social policy framework previously utilized by the International Finance Corporation (IFC) and have been subsequently updated to reflect changes in the IFC framework.¹¹⁸ Currently, the EP are applicable to all sectors of the economy with specific focus by the most recent edition on financial advisory services offered to third parties, financing of projects, provision of corporate loan for specific projects, and provision of temporary financial credit to corporations.

The current edition of the EP, EPIII, comprises of ten principles. Relevant Principles on mine security include: Principle 5 on stakeholder engagement; Principle 6 on grievance resolution mechanism and Principle 10 on reporting and transparency measures to ensure continued compliance with the standards.

¹¹⁴ *Supra*, n112

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ *Supra*, n113, p. 18.

¹¹⁸ *Ibid.*

3.4.2 Kimberley Process Certification Scheme

The Kimberly Process (KP) Certification Scheme denotes an attempt by the UN General Assembly in 2000 to control the sale and trade in conflict diamonds through Resolution 55/56.¹¹⁹ Prior to passage of the Resolution, there had been growing international concern that most conflicts in Africa occurred within the backdrop of struggle for the control of the continents rich and diverse mineral wealth. As such, when evidence was exhibited showing that the 1990s conflict in Angola was spurred by a struggle for control of the country's diamonds, the UN commissioned the Fowler Report as a technical evaluation of the role and place of diamonds in advancing conflict and the options for curbing such outcomes.¹²⁰ the Fowler Report was delivered in 2000 urging the UN to develop a framework for discerning diamonds mined in conflict areas or diamonds whose sale facilitated continued conflict, so called "blood diamonds" to stop their trade as a means of cutting off financing for conflicts.¹²¹

Upon the delivery of the report, the United Nations adopted it by passing Resolution 55/56 that established a certification program for uncut diamonds with minimum requirements that dealers in rough diamonds had to meet to prove the origin of their diamonds. Dealers in diamond finance the Certification program within the doctrine of burden-sharing that allows private entities and governments to pitch in to cater for the costs. However, while the process is broadly accepted by international players, it does not amount to a legally enforceable treaty and relies on self-compliance limiting its enforcement and binding capacity amongst diamond mining companies.¹²²

¹¹⁹ UN General Assembly. "The role of diamonds in fuelling conflict: breaking the link between the illicit transaction of rough diamonds and armed conflict as a contribution to prevention and settlement of conflicts." (2001) A/RES/55/56.

¹²⁰ International Council on Human Rights Policy. "Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies." 2002; Stiglitz, Joseph E. "Multinational corporations: Balancing rights and responsibilities." *Proceedings of the ASIL Annual Meeting*. Vol. 101. Cambridge University Press, 2007.

¹²¹ Virginia Haufler, 'The Kimberley Process Certification Scheme: An Innovation in Global Governance and Conflict Prevention' (2009) 89 *Journal of Business Ethics* 403.

¹²² 'Tackling Conflict Diamonds: The Kimberley Process Certification Scheme: International Peacekeeping: Vol 11, No 4'

The KP is open to all countries that are willing and able to implement its requirements. Since August 2013, the KP has 54 participants, representing 81 countries, with the European Union and its 28 Member States counting as a single participant, represented by the European Commission. KP members account for approximately 99.8% of the global production of rough diamonds.¹²³

3.4.3 *The Voluntary Principles on Security and Human Rights*

In response to the growing direct and indirect role played by mining companies in human rights violations as they sought to protect their operations, the Voluntary principles on Security and Human Rights (VPs) were established in 2000 as a tripartite endeavour between governments, non-governmental organizations, and mining companies' initiative to guide mining companies in the maintenance of the security and safety of their operations while respecting human rights.¹²⁴ As American and Anglo-British oil companies expanded their operations in developing countries into politically unstable regions, various incidences of human rights violations were reported bringing into limelight the excessive use of force, forced displacement, and numerous other human rights violations executed by security companies and state agencies that sought to protect mining operations within turbulent regions.¹²⁵ As more and more violations were unearthed, the British, American, and Dutch governments were compelled by public pressure to act to ensure the overseas activities of their corporations aligned with their publicly stated position of advancing human rights across the globe.¹²⁶

While initially accepted by a small circle of companies and countries, activist Non-Governmental Organizations have pushed more countries to acknowledge them and more companies to adopt and bind themselves to them. Fundamentally, all companies' signatory to the VPs hold themselves legally bound to adhere to their

<<https://www.tandfonline.com/doi/abs/10.1080/1353331042000248731>> accessed 1 November 2018.

¹²³ Kimberly Process, <https://www.kimberleyprocess.com/en/participants>, [Accessed 28,2018].

¹²⁴ *Supra*, n20; *Supra*, n21.

¹²⁵ Multilateral Investment Guarantee Agency. "The Voluntary Principles on Security and Human Rights: An Implementation Toolkit for Major Project Sites." 2008: ii.

¹²⁶ *Ibid.*

requirement for continuous active engagement with local communities in their operational activities to ensure effective representation of host community in decision making and implementation. However, under the VPs such consultation is restricted to security issues and matters of concerns that have the propensity of having a security dimension later down the road.¹²⁷ Such principles are further expected to be implemented in all subsidiaries where a signatory company is a majority shareholder or in instances where a signatory company provides security equipment and other facilitation to government security forces within their sphere of influence.¹²⁸

At a conceptual level, the fundamental provisions of the VPs begin from the express recognition by their signatories of the role that companies have to promote and advocate for better human rights mechanism and rule of law framework within the areas where they operate. The introductory notes also recognize the constructive role of companies in advancing such measures and the role of dialogues between companies, governments, and local communities to ensure the safety and security of the company while promoting respect for human rights.¹²⁹

Additionally, the VPs then proceed to provide for guidelines for companies in Risk Assessment, interactions between companies and public security agencies, and the interactions between companies and private security providers.¹³⁰ Running through these three thematic areas of concerns, is the need for companies to imbue all their activities with human rights concerns and formulation of policies that recognize the need to minimize the impact of corporate acts on host communities.¹³¹ Regular engagement with local communities on security issues would strive to reduce potential for violence while allowing for peaceful resolution of any contentious issues while requiring companies to ensure their interactions with security forces

¹²⁷ *Ibid.*

¹²⁸ *Supra*, n20.

¹²⁹ David Kinley and Junko Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law' (2003) 44 *Virginia Journal of International Law* 931.

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

abide by the UN Principles on the Use of Force¹³² and Firearms by Law Enforcement Agencies¹³³ would minimize the risk of corporate complicity in state abuse of human rights. The VPs further require companies to develop reporting and investigation mechanism for ensuring any alleged violations by company officials or local public security officers are thoroughly, impartially, and promptly investigated to avoid escalation or complicity by omission in some violations.¹³⁴

3.4.4 *The United Nations Guiding Principles on Business and Human Rights*

The United Nations Guiding Principles on Business and Human Rights (“UN Guiding Principles”) denotes the codification of the John Ruggie Report that explored the human rights perspectives in relation to corporate activities by attempting to share responsibility and obligations between states, corporations, and other social actors.¹³⁵ While it did commission a report from John Ruggie, the report largely adhered to a framework calling for the mainstreaming of the principles of Protect, Respect, and Remedy as established in international human rights as a mechanism for allowing the progressive realization of human rights and their entrenchment within domestic frameworks of various countries.¹³⁶ Moreover, the UN Guiding Principles sought to adopt established jurisprudence on human rights by borrowing heavily from the International Bill of Human Rights and the International Labor Organization’s Declaration on Fundamental Principles and Rights at Work.¹³⁷

¹³² UN Code of Conduct for Law Enforcement Officials, Adopted by UNGA Resolution 34/169 (1979)- provides principles and prerequisites for law enforcement officials to perform their duties while respecting and protecting human dignity and human rights.

¹³³ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 112 (1990)- establishes principles on use of force by law enforcement officials and calls for governments and law enforcement agencies to incorporate these within their national legislation and practice.

¹³⁴ *Ibid.*

¹³⁵ Wilshaw, Rachel, Bryony Timms, and Sophie Niven. "Business And Human Rights: An Oxfam perspective on the UN Guiding Principles." (2013): 2.

¹³⁶ *Ibid.*

¹³⁷ International Council on Human Rights Policy. “*Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies.*” 2002; Stiglitz, Joseph E. "Multinational corporations: Balancing rights and responsibilities." *Proceedings of the ASIL Annual Meeting*. Vol. 101. Cambridge University Press, 2007.

Such an approach ensured that the UN Guiding principles would garner widespread support and would be seen as conservative attempts at advancing human rights to ensure corporations did not feel threatened by the imposition of a new and radical framework on a variety of issues.¹³⁸ It also ensured that companies would willingly comply and uphold with them internally with minimal fuss as shareholders perceived them to be benign expression of established legal doctrines on the mode of carrying out business in highly charged and dynamic environment that exists in developing economies.¹³⁹

Consisting of thirty-one principles, the UN Guiding Principles seek to provide for a tripartite set of obligations on how states and MNCs ought to engage in their activities with an eye to upholding human rights by states acknowledging their mandate to protect human rights, corporations being responsible actors who seek to respect human rights, and both states and corporations supporting and facilitating the development of a remedy mechanism accessible to victims of business-related abuses.¹⁴⁰

On the first pillar of state duty to protect human rights, states have an obligation to develop regulations and policies that seek to provide for the widest protection of human rights while developing an investigatory and enforcement mechanism that ensures any violations are promptly and impartially investigated and redress provided to victims.¹⁴¹ Such an understanding sought to mirror the Universal Declaration of Human Rights by enshrining the obligations in the Declaration within the context of commercial activities. The pillar goes further to recognize that there exist unique circumstances in conflict zones, and Principle 7 endeavours to canvass what amounts to conflict affected areas and gross abuses, further provides for a

¹³⁸ *Ibid.*

¹³⁹ Standard, Performance. "4: Community Health, Safety and Security." (4).

¹⁴⁰ *Supra*, p. 6.

¹⁴¹ *Ibid.*

framework for ensuring state seeks to bring such conflict areas under government control to ensure elimination of gross abuses.¹⁴²

The second pillar on corporate obligation to respect and promote human rights demands that corporations undertake thorough due diligence prior to commencing their extractive operations in a given area. Such due diligence ensures corporations recognize human rights dimensions to their work and develop astute policies that avoid the potential of infringing on various rights and interests that may pre-exist the corporate activities.¹⁴³ Corporations are further required to undertake a Human Rights Impact Assessment to ensure they are fully aware of potential and actual human rights violations that occur in the course of their operations.¹⁴⁴

The final pillar seeks to ensure that state responsibility is further extended to the development, facilitation, and support of an enforcement mechanism that provides remedy for aggrieved citizens and corporations through judicial, administrative and legislative measures within their jurisdiction.¹⁴⁵ Such remedy avenues must be efficacious and efficiently deliver outcomes that ensure all the stakeholders fulfil their obligations and advance the rule of law in corporate operations.¹⁴⁶

3.4.5 IFC's Sustainability Framework and Security Issues: Performance Standard 4

The IFC Sustainability Framework was conceived in 2006 and it denotes a strategic commitment by the largest and most significant financier of capital intensive projects in the international community that arose as recognition that the financial sector had a critical role to play in ensuring the protection and promotion of human rights.¹⁴⁷ According to the IFC, corporations need to ensure they undertake their projects in a manner that supports social and economic progress of their local communities to

¹⁴² Australian Human Rights Commission. "The Australian Mining and Resource Sector and Human Rights." (2009).

¹⁴³ *Ibid.*

¹⁴⁴ Kinley and Tadaki (n 156).

¹⁴⁵ *Ibid.*

¹⁴⁶ International Council on Human Rights Policy. "*Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies.*" 2002; Stiglitz, Joseph E. "Multinational corporations: Balancing rights and responsibilities." *Proceedings of the ASIL Annual Meeting*. Vol. 101. Cambridge University Press, 2007

¹⁴⁷ *Supra*, n23.

ensure the sustainability and long-term viability of their commercial ventures.¹⁴⁸ The Sustainability Framework includes the Performance Standards that provide for the scope of the client's responsibilities for managing their environmental and social risks within various dynamic working environments that corporations may face in their project implementation.¹⁴⁹ In particular, Performance Standard 4 is the most relevant to mine security.

The IFC's *Performance Standard 4 on Community Health, Safety, and Security*, which require companies to assess the security risk their operations may have or could create for communities; develop ways to manage and mitigate these risks; manage private security responsibly; engage with public security; and consider and investigate allegations of unlawful acts by security personnel. Performance Standard 4 applies to companies of any size and in any country or sector. In addition to Performance Standard 4, it is important for companies to be aware of other international standards related to security. If a company is considering engaging a private security provider who references compliance with the Voluntary Principles, works for a member of the Voluntary Principles, or belongs to the International Code of Conduct Association, this does suggest a level of awareness of and commitment to international standards and good practice. However, it does not replace the company's responsibility to undertake due diligence in accordance with Performance Standard 4.¹⁵⁰

Mining MNCs usually hire or contract security personnel to protect their employees, facilities, assets, and operations, ranging from a single night watchman to a large contingent of private security guards, or even deployment of public security forces. While many companies already assess the types and likelihood of security threats posed by their operating environment, they are increasingly being called upon to consider the impacts their security arrangements might have on local communities.

¹⁴⁸ International Financial Corporation. "Update of IFC's Policy and Performance Standards on Environmental and Social Sustainability, and Access to Information Policy International Finance Corporation April 14, 2011." 7-8.

¹⁴⁹ *Ibid.*

¹⁵⁰ Surya Deva, 'Human Rights Violations by Multinational Corporations and International Law: Where from Here' (2003) 19 Connecticut Journal of International Law 1.

Good practice regarding use of security forces is based on the concept that providing security and respecting human rights can and should be consistent.¹⁵¹

This translates into implementation of policies and practices that ensure security provision is carried out responsibly, with any response being proportional to the threat. Proactive communication, community engagement, and grievance redress are central to this approach, often through collaboration between security and community relations departments.¹⁵² Gender considerations are also important, as women often have different experiences and interactions with security personnel. Companies have a responsibility to ensure proper hiring, training, rules of conduct, and supervision of private security personnel.¹⁵³ They should also encourage public security personnel to use proper restraint when responding to situations related to the project.¹⁵⁴

3.4.6 US Alien Tort Claims Act

The US Alien Tort Claims Act (ATCA) is only applicable to the US based companies that have committed human rights violations in foreign jurisdictions.¹⁵⁵ It provides for those violated an opportunity to prosecute those companies in the US.¹⁵⁶ This development has brought serious allegations against several of the world's largest corporations. Some of the allegations concern severe infringements of human rights such as mass murder, rape and genocide, while other cases address freedom of speech and expression.¹⁵⁷ The Act provides civil remedies and distinguishes from legislation in other parts of the world. There are important procedural hurdles to impose litigation; nonetheless the Act has instigated a debate on the risks involved with transnational corporate activities. While several cases have been dismissed and

¹⁵¹ International Financial Corporation. Good Practice Handbook Use of Security Forces: Assessing and Managing Risks and Impacts Guidance for the Private Sector in Emerging Markets. 2017: ii, 12.

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

¹⁵⁴ *Supra*, p. ii.

¹⁵⁵ US Alien Tort Claims Act, 1789, 28 U.S. Code § 1350; *Supra*, n91.

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.*

other settled, corporate aiding and abetting is the most prosecuted field of the litigation under the Act.¹⁵⁸

The ATCA derives its support from international law and thus both domestic as well as international law is imperative for its interpretation. For the ATCA to be applicable, personal jurisdiction over the defendant corporation is required. The federal courts of the US interpret the Act as providing jurisdiction over enterprises either incorporated in the US or having a continuous business relationship with the US. The US courts cannot obtain jurisdiction over an individual or corporation that is not within the borders of the US and do not have sufficient links to the country. Victims and foreigners can seek damages to violations of international law, either by those who have committed the violations or are complicit in such actions. For a parent company to be held liable it is required that they are either a direct participant in the violations or subject to vicarious liability.¹⁵⁹

3.5 Conclusion

This chapter has clearly stipulated the regulatory framework within the mine security. While domestic regulation of corporations engaged in projects within their jurisdiction is the most effective and efficient means of policing a sector, the lack of sufficient regulatory capacity and technical ability by many developing countries has forced them to turn to international best practices, guidelines, and principles to further develop their domestic capacity. For corporations, a domestic regulation provides clarity and certainty on the scope and extent of obligations, rights, and liabilities affecting a company's operations and is most desirable form of regulation. However, as both states and MNCs recognize the deficiencies of domestic regulations in developing countries, they have turned to the international fora to borrow and adopt best practices that ensure corporations act in accordance with the highest standards that promote and advance human rights.

¹⁵⁸ International Financial Corporation. Good Practice Handbook Use of Security Forces: Assessing and Managing Risks and Impacts Guidance for the Private Sector in Emerging Markets. 2017: ii, 12.

¹⁵⁹ McCorquodale and Simons (n 125).

Such an approach, however, is inadequate due to the lack of a coercive enforcement mechanism leaving companies to adopt self-regulation approaches that seek to ensure corporations internally develop and enforce policies that align to international best practices. The following chapter canvasses self-regulation to determine its strengths, weakness, and areas for reform that would allow the mainstreaming of international expectations on corporate acts into their internal framework.

The next chapter will look at the impact of self-regulation in depth. It will interrogate whether self-regulation has met external expectations and whether it will help address the relationship and interaction between the mining companies and the host communities.

CHAPTER FOUR
IMPACT OF SELF-REGULATIONS: HAS SELF-REGULATIONS MET
EXTERNAL EXPECTATIONS?

4.1 Introduction

This chapter addresses effectiveness of corporate self-regulation of mine security in extractive industries in the prevention of negative social impact and human rights abuses by extractive corporations. It also addresses the problems of regulation of extractive corporations under national and international law and proceeds to analyse the practices of corporate self-regulation in extractive industries, highlighting a number of weaknesses. Finally, it suggests proposals that if fully and properly implemented can significantly improve social and human rights performance of extractive corporations involving security.

4.2 Corporate Self-Regulation on Mine Security

Various mining companies have developed codes of conduct on issues such as human rights, labour rights and environmental protection in attempts of improving the manner in which the industry operates especially in preventing possible mine security threats. These codes of conduct are fundamental as they define the minimum standards of corporate behaviour. They also reflect a corporate societal view and are used as a device for corporations' efforts to increase public approval for their actions.¹⁶⁰

The contexts underlying the establishment and adoption of voluntary codes vary depending upon the circumstances.¹⁶¹ For instance, there are two particular circumstances. Firstly, some are adopted in response to a particularly damaging event and can be seen as a means of preventing the occurrence of similar events. For instance, in 1995, the Dutch-Shell, an oil company, wanted to get rid of the

¹⁶⁰ Sullivan, Rory, and Peter Frankental. "Corporate citizenship and the mining industry: defining and implementing human rights norms." *The Journal of Corporate Citizenship* (2002): 87.

¹⁶¹ *Supra*, n2.

redundant 14,500-tonne Brent Spar by sinking it in the deep sea.¹⁶² This led to a campaign by Greenpeace that accused the Dutch-Shell of massive violations of environmental rights and thus wanted the Dutch-Shell to cancel its planned disposal of Brent Spar in the Atlantic. The Brent Spar incident attracted massive publicity and in response to the fierce criticism and public condemnation of its complicity in human rights abuses in Nigeria, the Dutch-Shell was forced to review its business strategy. It introduced changes in corporate management by undertaking various steps to mitigate the impacts of its actions, including a public consultation process, the adoption of a voluntary code of conduct for respecting human rights obligations and making an explicit commitment in its mission statement to sustainable development and the promotion of human rights in the sphere of its operations. Dutch-Shell also formulated a comprehensive guideline on Social Impact Assessment in June 1996. The guideline not only deals with the management of social risks in the petroleum industry, it was also intended to raise managers' awareness of the potential social impacts of the operation that attract massive security concerns.

Secondly, sometimes MNCs have adopted codes of conduct in regards to mine security¹⁶³ because of their commercial importance in setting out guidelines for staff and, in particular management, as to how to respond to situations not covered by existing policies.¹⁶⁴ For example, British Petroleum (BP) has made explicit reference to human rights in its business principles. Its health, safety and environmental performance policy places particular emphasis on consultation with local communities and public interest groups.¹⁶⁵ Rio Tinto sets out a community's policy in its Social and Environmental Report of 1998 which is premised on good relationships with neighbouring communities as fundamental to its long-term success. Good neighbourliness between mining MNCs and host communities offers good opportunity for communication and clarification of issues of concern thus

¹⁶² Bowen, M. "Shell in Nigeria: Corporate Social Responsibility and the Ogoni Crisis." *New York: Carnegie Council on Ethics and International Affairs* (n.d.): 1-11.

¹⁶³ Bregman, Eric, and Arthur Jacobson. "Environmental performance review: Self-regulation in environmental law." *Cardozo L. Rev.* 16 (1994): 469.

¹⁶⁴ *Supra*, n2.

¹⁶⁵ *Supra*, n7.

averting possible security concerns such as attacks of officials and workers of mining MNCs by the host community in expressing their displeasure.¹⁶⁶

4.2.1 *Justifications of Corporate Self-Regulation on Mine Security*

Self-regulation on mine security is justified mainly on three bases: economic, political and social. The economic goal of self-regulation is efficiency as it reduces the cost of regulation. The political goal of self-regulation is concerned with citizen participation in government. The social goal of self-regulation is that it coordinates economic goals with social and political goals.¹⁶⁷

The corporate response to social and human rights issues has largely been driven by mounting pressure from the community and civil society (including NGOs) on corporations to discharge social obligations, fear of publicity of human rights abuses, and the desire to improve their image in the public sphere.¹⁶⁸ Many corporations now consider socially responsible behaviour as an essential element of good business practice and a means to fulfil societal expectations of the corporation, which can eventually enhance the prospects of gaining access to new licences for exploration of mineral resources.¹⁶⁹

These codes can also provide an opportunity to develop an internal human rights and best practice culture within the corporation.¹⁷⁰ A good voluntary code is useful in several ways: first, it communicates to management, employees, and the public that the corporation intends to obey both national and international law. Second, it encourages those employees inclined to 'do the right thing' to intervene or report violations. Finally, it helps in goodwill and discourages some litigation.¹⁷¹ The adoption of self-regulation can facilitate shareholder activism within shareholder companies through influencing corporate policies by means of shareholder

¹⁶⁶ *Supra*, n8.

¹⁶⁷ *Supra*, n2.

¹⁶⁸ *Ibid.*

¹⁶⁹ *Supra*, n2.

¹⁷⁰ C Baez, M Dearing, M Delatour, C Dixon. "Multinational Enterprises and Human Rights." *U. Miami Int'l & Comp. L. Rev.* 8 (1999): 183.

¹⁷¹ *Ibid.*

resolutions at corporate meetings.¹⁷² Such shareholder activism can ultimately promote CSR as adoption of a voluntary code of conduct may require the Board of Directors to inform and respond to issues raised by shareholders at annual meetings.¹⁷³

4.2.2 *Advantages of Corporate Self-Regulation on Mine Security*

The main advantage of corporate self-regulation on mine security is that it is a flexible device which can respond to the dynamic commercial needs of the market and to the size of the corporation.¹⁷⁴ This means that compared to command and control regulation that entails the practice where the designated authority establishes, directs, coordinates and controls regulatory measures, self-regulation recognises that different corporations need different regulatory frameworks.¹⁷⁵

Although the codes of conduct for corporate self-regulation are not legally binding, they are not entirely devoid of legal significance. Widespread practice of corporate self-regulation can lay the foundation for international standards in the area of CSR.¹⁷⁶

Moreover, self-regulation is a useful and flexible tool that allows standards to be coupled with each corporation. MNCs tend to prefer such an approach as it can benefit the corporate structure and promote marketing efforts as well as the utilization of codes of conduct.¹⁷⁷ MNC may have intricate corporate structures where one single approach may not be feasible. Therefore, the levels to which self-regulation is implemented can be adaptable to each industry sector and area of business and provide an internal alternative to legally binding instruments.

¹⁷² *Ibid.*

¹⁷³ Feyter, Koen De. “*World Development Law: Sharing Responsibility for Development.*” *Antwerpen : Intersentia*, (2001): 201-202.

¹⁷⁴ Miles, Giles, Proctor and Lilian. “*Corporate Governance.*” (Cavendish Pub., 2002): 78.

¹⁷⁵ *Ibid.*

¹⁷⁶ *Supra*, n10.

¹⁷⁷ *Supra*, n91.

However, consideration must be given to whether self-regulation is an efficient tool as corporate codes often have no monitoring or enforcement mechanism.¹⁷⁸

4.2.3 *Weaknesses and Limitations of Corporate Self-Regulation and Voluntary Initiatives on Mine Security*

The UN Sub-Commission on the Promotion and Protection of Human Rights notes an increase in the tendency of adoption of corporate self-regulation.¹⁷⁹ The function and effectiveness of self-regulation is limited. This is because each corporation develops a code of self-regulation according to its specific needs which necessarily do not accommodate the interests of the host communities.¹⁸⁰ These corporations usually adopt these codes to respond to criticisms levelled against them or when their reputation is at stake through litigation or consumer boycotts.¹⁸¹ Besides, these codes lack uniformity as to the level of obligations imposed. This is because some contain high standards while others entail extremely low standards especially in poor areas. Besides, self-regulation has no enforcement mechanisms and there is no sanction for non-compliance. This is because monitoring of compliance with self-regulation rests with the corporation, and is not subject to external verification.¹⁸²

Voluntary approaches have several inherent weaknesses and operational difficulties. First, corporate codes are purely voluntary and non-binding instruments. Thus, no corporation can be held legally accountable for violating them.¹⁸³ The responsibility to implement the code rests entirely on the corporation. At best, corporations can be forced to implement codes only through moral persuasion and public pressure. Due to lack of enforcement mechanisms, transnational corporations usually adopt voluntary approaches for public relations purposes.

¹⁷⁸ *Ibid.*

¹⁷⁹ UN Sub-Commission on the Promotion and Protection of Human Rights. "Sessional working group on the working methods and activities of transnational corporations, Transnational Corporation and Other Business Enterprises."

¹⁸⁰ Rory Sullivan. *Moving Forwards' in Rory Sullivan (ed), Business and Human Rights: Dilemmas and Solutions.* (Routledge, 2003): 18.

¹⁸¹ *Ibid.*

¹⁸² *Ibid.*

¹⁸³ Teeple, Gary. *Relations of global power: Neoliberal order and disorder.* (University of Toronto Press, 2011): 67.

Second, despite being in existence for many years, the number of companies adopting such codes is still relatively small.

Third, many codes are still not universally binding on all the operations of a company, including its contractors, subsidiaries, suppliers, agents, and franchisees. Codes rarely encompass the workers in the informal sector, who could well be an important part of a company's supply chain. Further, a company may implement only one type of code, for instance, an environmental one, while neglecting other important codes related to labour protection, and health and safety.

Fourth, corporate codes are limited in scope and often set standards that are lower than existing national regulations. For instance, labour codes recognize the right to freedom of association but do not provide the right to strike. In many countries, such as India, the right to strike is a legally recognized instrument.

Fifth, the mushrooming of voluntary codes in an era of deregulated business raises serious doubts about their efficacy. There is an increasing concern that corporate codes are being misused to deflect public criticism of corporate activities and to reduce the demand for state regulation of corporations. In some cases, codes have actually worsened working conditions and the bargaining power of labour unions. Moreover, increasing numbers of NGO-business partnerships established through corporate codes and CSR measures have created and widened divisions within the NGO community and sharpened differences between NGOs and labour unions such as the International Federation of Chemical, Energy, Mine and General Workers' Unions for workers in these sectors. Voluntary codes of conduct can never substitute for state laws. Nor can they substitute for labour and community rights. At best, voluntary codes can complement state regulations and provide an opportunity to raise environmental, health, labour, and other public interest issues since all these issues give rise to mine security concerns.

4.3 Implementation challenges

The actual implementation and monitoring of corporate codes is largely problematic. The information about codes is generally not available to workers and consumers.

Labour codes have often been introduced in companies without the prior knowledge or consent of the workers for whom they are intended.¹⁸⁴ A key issue regarding the implementation process is the independence of the monitoring body. Since large auditing and consultancy firms usually carry out the monitoring of company codes with little transparency or public participation, whether the codes are actually being implemented or not remain a closely guarded secret. Besides, auditing firms may not reveal damaging information since they get paid by the company being audited.

Recent voluntary initiatives, such as Multi-Stakeholder Initiatives (MSIs), are considered more credible because NGOs and labour unions are involved as external monitors. But the authenticity of such monitoring cannot be guaranteed by the mere involvement of NGOs and civil society. The development of standards by some MSIs has taken place in a top-down manner without the involvement of host community especially on the mine security issues. If recent experience is any guide, the struggle to implement codes could be frustrating, time-consuming, and ultimately futile. It dissipates any enthusiasm to struggle for regulatory controls on MNCs.

4.4 Recommendations

The credibility of the mine industry in the area of human rights and the environment has been undermined by the manner in which it has participated in debates around regulation. Despite the industry's stated commitments to sustainable development, diametrically opposed positions appear to be adopted in public policy debates around codifying the industry's responsibility for environmental or human rights protection.¹⁸⁵ In many recent public policy debates, the mining industry has strongly opposed any efforts to define responsibilities for the industry or to include human rights or environmental targets into legislation. These have been seen in international debates (e.g. opposition to the Kyoto Protocol on global warming, ensuring that the OECD Guidelines on Multinational Enterprises were maintained as voluntary guidelines with no legal effect) as well as in national debates.¹⁸⁶ For

¹⁸⁴ *Supra*, p. 68.

¹⁸⁵ Peter Frankental, Sullivan and Rory, "Corporate Citizenship and the Mining Industry: Defining and Implementing Human Rights Norms." *Journal of Corporate Citizenship* 7 (2002): 89.

¹⁸⁶ *Ibid.*

example, in Australia, the industry has strongly opposed the Code of Conduct Bill, mandatory environmental reporting under the Corporations Act and various National Environmental Protection Measures as well as various state initiatives (e.g. load-based licensing). The effect has been to undermine public trust in the ability of the industry to regulate itself.¹⁸⁷

As evident in the above analysis, the industry is regulated by voluntary initiatives. By definition, voluntary initiatives apply only to those who accept them. A company might accept a code of conduct because of genuine commitment to the principles or because its reputation is at stake. Even where there is genuine commitment, voluntary codes may not be respected if their principles clash with other, more powerful commercial interests.¹⁸⁸ Thus, there is need to build an international consensus around binding regulation as an important method of enforcement. This necessitates the establishment of a binding legal instrument on regulation of mining MNCs especially on the mine security.

This legal instrument should entail responsibilities of the business unit to avert crises and conflicts before they begin. The business unit should be obligated to ensure that its employees and the local community are aware of the policies and that there is an adequate procedure to ensure that issues are aired and given consideration. Once business units have acknowledged a responsibility for human rights, they should be obligated to provide human rights training for their employees, and establish responsibility and authority for human rights performance and ensure there is regular monitoring and reporting. Mechanisms should be provided for the establishment of an independent audit and review process appropriate provision for remedial action and accountability for any deficiencies.

The binding legal instrument will be fundamental as it will ensure that a mining company statements or codes are based on internationally recognized standards.¹⁸⁹

¹⁸⁷ *Ibid.*

¹⁸⁸ International Council on Human Rights Policy. *"Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies."* 2002; Stiglitz, Joseph E. "Multinational corporations: Balancing rights and responsibilities." *Proceedings of the ASIL Annual Meeting*. Vol. 101. Cambridge University Press, 2007.

¹⁸⁹ *Ibid.*

This will provide these companies statements or codes with clarity and transparency and ensure that they are designed to foster CSR.

This legal instrument should establish minimum guidelines to help party states to ensure that host mining companies educate their employees in codes of conduct on various issues including, respect for human rights, rules about and sexual harassment, conditions of work and wages and development opportunities. The legal instrument should also ensure that weak government institutions are properly trained in monitoring and inspection tasks. Beside, NGOs should be trained in the areas of establishing benchmarks, monitoring and verifying compliance. Some NGOs train local groups to combat human rights violations and provide human rights training programs with instruction on gaining access to international legal mechanisms and the media.¹⁹⁰

The legal binding instrument should entail mechanisms for the establishment of an industry-funded advisory service to assist smaller companies to handle complex environmental and social issues when they arise.¹⁹¹ It should also entail a framework on strategies that the industry could use to promote improved practices amongst the underperformers and non-players. Besides, there should be mechanisms for cooperation with national and international agencies and NGOs to extend their scope and coverage of certification schemes so that there is an added incentive for poorly performing companies to improve their practices.¹⁹²

The binding legal framework should also establish conditions for big companies to partner with junior companies that the latter comply with minimum social and environmental performance standards set down in industry codes. The larger companies in the industry can make an important contribution to promoting improved corporate practices in less developed economies by: articulating clear policies about the basis on which they will do business in these countries; ensuring that they have appropriate governance controls in place for promoting site level

¹⁹⁰ *Ibid.*

¹⁹¹ Brereton, David. "The role of self-regulation in improving corporate social performance: the case of the mining industry." *Proceedings the Current issues in regulation: Enforcement and compliance conference, Australian In-Food Safety and the Role of the Government: Implications for CSR Policies in China*. 2002.

¹⁹² *Ibid.*

compliance with the policies that have been articulated; and applying the same standards to project partners and local contractors and suppliers.¹⁹³ Some companies have already made substantial progress in this direction, as discussed above, but there is scope for others to do considerably more.

The framework should also advocate for the establishment of a 'sustainable mining facility', funded by donors and industry to: build capacity among those of clients who are junior and medium-sized mining firms and who do not have the skills and experience necessary to manage the increasingly complex social, environmental and economic impact of mining operations in emerging markets.

Another worthwhile measure would be for the industry to adopt some form of complaints mechanism, along the lines of the Mining Ombudsman concept developed by Oxfam Community Aid Abroad. This would provide a forum in which individuals and communities in developing countries who claim to have been negatively affected by the activities of mining companies could have their claims tested and resolved by an independent person.

4.5 Conclusion

The above study has shown how the mining sector has taken some significant steps in recent years at both the company and industry level to improve its corporate social performance. This has involved the development of a variety of self-regulatory mechanisms at the industry, firm and inter-firm levels. The performance of the industry is now subject to increasingly close scrutiny from a range of other influential players, such as national governments, the NGO sector, international agencies and financial institutions. The cumulative effect of these developments has been to ensure that returning to the old ways of doing business is no longer an option for the mining sector. The issue is no longer the direction of change, but the pace at which it occurs and the extent to which it will be driven internally or externally. The paper has shown that self-regulatory mechanisms have played an important role in getting the industry to where it is at now. Despite general trend

¹⁹³ *Ibid.*

being towards tighter and more comprehensive internal controls, there are still significant gaps and weaknesses. The next chapter entails the conclusion of this study setting out the prognosis of this mini-dissertation.

CHAPTER FIVE

CONCLUSION

This mini-dissertation addresses the extent to which corporate self-regulation in extractive industries has been effective in preventing negative social impact and human rights abuses by extractive corporations as a result of securing its mining operations. It underscores the importance of the MNC to put in place measures that ensure non-violation of the human rights of the host communities to enhance mine security. This often gives a MNC a social licence to operate within its area of operation.

As shown in chapter two, there is an inherent link between extraction operations of mining MNCs, human rights of the host communities such as environmental rights and the right to life generally, and the mine security.¹⁹⁴ The mine security responsibility to the host communities is twofold. Firstly, mine security responsibility extends to internal stakeholders such as shareholders, employees, financial partners, customers and suppliers.¹⁹⁵ This means a corporation must ensure mine security in its own operations. Secondly, corporations have broad mine security responsibilities towards the host communities, and other social groups who may be affected by their actions.¹⁹⁶ This responsibility is a logical extension of the notion of CSR. The mining corporations should ensure that the operations of their affiliates and subcontractors enhance mine security.¹⁹⁷ All these is realised through corporate responsibility.

Corporate self-regulation has emerged as an important way to fulfil CSR. As shown in chapter four, the recent wave of corporate self-regulation through various voluntary codes is articulated partly in response to growing concerns of negative impact of mine security from MNCs' extractive operations and partly in response to

¹⁹⁴ *Supra*, n2.

¹⁹⁵ *ibid*.

¹⁹⁶ Schierbeck, Jens. "Operational measures for identifying and implementing human rights issues in corporate operations." *Human Rights and the Oil Industry, Antwerpen: Intersentia* (2000): 167-168.

¹⁹⁷ *Ibid*.

the demands of civil society including NGOs and stakeholders.¹⁹⁸ Self-regulation is expediency based and specific to a particular context and accordingly such codes are flexible to adapt to particular context. However, the efficacy of these regulations is very limited in many respects. As indicated in chapter three, voluntary codes cannot effectively bar extractive corporations from environmental wrongs and human rights abuses because the performance standards are not subject to external verification and often lack credible compliance monitoring mechanisms. Further, these codes do not impose legal obligations upon a corporation to comply with human rights and environmental treaties. They are implemented by corporations as a means of protecting themselves from civil and criminal liability.

The inadequacies of self-regulation on mine security literally suggest that the best way to regulate mine security is through a binding international law legal framework. However, this mini-dissertation establishes that currently, there is no binding international legal framework codifying any consistent rules and regulations on mine security. This is because it is difficult to obtain consensus on the international level due to different interests, economic and developmental levels of states. This justifies the reason why some international measures have failed or fallen short due to lack of consensus while self-regulation has prevailed.

Corporate accountability on mine security is very much at a formative stage of development. The prospects of promoting good corporate conduct are subject to how States choose to govern corporate responsibility and corporations choose to apply self-regulation. The international level can promote uniform corporate standards, which is essential to assert good corporate conduct. Thus, both an approach on the international level as well as through the act of States is required in order to address mine security issues of mining corporations.¹⁹⁹ Both levels have positive and negative aspects. The distinction between legally binding and voluntary measures should not be strictly drawn since self-regulation and codes of conduct are

¹⁹⁸ *Supra*, n2.

¹⁹⁹ *Ibid*.

essential to promote good corporate governance and particularly in the long term legal remedies may be invoked from these same codes and practices.

Thus, binding regulation and voluntary standards should be established as complementary to the other. This mini–dissertation proposes that a blend of both binding regulation and voluntary standards can ensure the realisation of social responsibility of extractive corporations.²⁰⁰ Preventive measures such as the integration of social and environmental concerns into extractive projects through impact assessment, stakeholder consultation and addressing human rights issues and social provisioning in the affected area can mitigate security risk factors in the extractive industry and can fill gaps in the framework of corporate self-regulation on mine security and regulation by a host State. The myriad of issues that mining companies must factor to ensure security, not just for their employees and investments are indeed complex, there is no quick fix solution to the challenges that mine security raises. This has resulted in an attempt by the industry to resolve by creating self-regulatory mechanisms to ameliorate the difficult issues that security can bring about; short of a binding international legal instrument they appear to be a simplistic solution to the conundrum that is mine security.

²⁰⁰ *Ibid.*

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