

 <p><b>University of Roehampton</b> London</p>	 <p>UNIVERSITY OF GOTHENBURG</p>	

# **MULTINATIONAL MINING CORPORATIONS, STATE REGULATION AND HUMAN RIGHTS PROTECTION IN TANZANIA:**

**Invoking Command and Control Instruments towards Effective  
Corporate Social Responsibility**

**By**

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**Declaration Form**

The work I have submitted is my own effort. I certify that all the material in the Dissertation which is not my own work has been identified and acknowledged. No materials are included for which a degree has been previous conferred upon me.

**Signed: Dunford George Mpelumbe**

**Date: 22<sup>nd</sup> May 2012.**

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## **Abstract**

This study examines the role of the state in the protection of human rights in the context of multinational mining corporations and globalization in Tanzania. The main argument of the study is that the state is the single most important actor for the protection of human rights and for the regulation of multinational mining corporations that operate within its jurisdiction based on its various relevant laws, policies, regulations and other institutional regulatory frameworks.

The study relied on relevant policies, legislation and international legal instruments to which Tanzania is committed for the promotion, protection and realization of human rights. Qualitative content analysis was used to examine the various dimensions of the policies and laws of Tanzania creating corporate social responsibility .The study also used the main documents of the government of the United Republic of Tanzania which are available in the public domain.

The Findings from the review of the various legal and policy documents that regulate the activities of multinational mining corporations indicate that the government of Tanzania has taken some measures to regulate the operation of multinational corporations in general but that it still lacks effective policies and laws that would make multinational mining corporations accountable for violating human rights when they operate ,there are needs therefore to adopt more effective and stringent legal and policy measures with a view to protecting the rights of the people against potential violations by multinational corporations. I argue in this paper that the most effective means of ensuring corporate social responsibility is through the use of command and control legislation in order to protect the rights of the people in the areas where mining operations are taking place.

**Key words: multinational corporations, human Rights, globalization, corporate social responsibility and command and control regulation.**

## **Abbreviations and Acronyms**

APPP	Africa Power and Politics Programme
BAAC	Business Action Against Corruption
CHRGG	Commission for Human Rights and Good Governance
CSR	Corporate Social Responsibility
CSRE	Corporate Social Responsibility Empowerment
EIA	Environmental Impact Assessment
FDI	Foreign Direct Investment
GDP	Gross Domestic Product
H.E	His Excellency
HURIDETSA	Human Rights and Development Trust of Southern Africa
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICHRP	International Council on Human Rights Policy
ILO	International Labour Organisation
LEAT	Lawyers Environmental Action Team
MNC	Multinational Corporations
MNE	Multinational Enterprises
NCP	National Contact Point
NEMC	National Environmental Management Council
NMD	Minières du Nord
OECD	Organization for Economic Co-operation and Development
PCCB	Prevention and Combating of Corruption Bureau
R.E	Revised Edition
UN	United Nations
UNCTC	United Nations Center For Transnational Corporations

UNCTAD United Nations Conference on Trade and Development

STAMICO State Mining Corporation

TNC Transnational Corporations

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## Chapter 1: Introduction

### 1.1 General research introduction

Human rights as a discipline is one of the social science areas which have enjoyed rich academic scholarship and its significance has increased especially after the adoption of the widely acclaimed universal declaration for human rights in 1948 and the subsequent adoption of other internationally binding human rights legal instruments such as the international covenant on civil and political rights and the international covenant on the economic, social and cultural rights in 1966<sup>1</sup>. Research on Human rights has been growing along with the changes that the world witnessed. In the aftermath of the universal declaration on human rights most of the research on human rights was focused on the civil and political rights and considered the state as the main actor for the protection and promotion of human rights. Fifty years after the adoption of the universal declaration a lot of water has passed under the bridge and research on human rights has had to take another path to accommodate sweeping global changes and forces emerging all over the world. These new global changes expanded the focus of human rights research from civil and political rights to the economic, social and cultural rights front and later on embraced what is now called 'Third Generation Rights' which include *the rights to development and to a good and clean environment*. Emerging and now established concepts such as *globalization, multinational corporations, development and corporate social responsibility* constitute common terms in the contemporary human rights debate and non-state actors such as transnational corporations have become the center of human rights discourse. What is their legal status? What is the scope of their liability as legal persons with respect to serious abuse of human rights and gross human rights violations and how can they be regulated? These are some of the questions that have featured prominently in the current human rights discourse relating to multinational corporations, globalization and corporate social responsibility. Against this background, I have undertaken to conduct this research to provide answers to the research questions raised below.

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<sup>1</sup> These three instruments are also known as the international bill of rights

## 1.2 Aim of the study

This study aims at examining the role of the state in the regulation of multinational mining corporations that operate within its jurisdiction using *command and control approach*. One of the key arguments in contemporary human rights discourse is that multinational corporations do not have the primary responsibility to protect and promote the rights of the people where they operate. This argument is based on the premise that the state is the single most important actor for the protection and promotion of the rights of its people. Against this background, the study explores the various legislative, policy and institutional mechanisms against which multinational corporations can be regulated by the state in the conduct of their activities.

## 1.3 Research Questions

Two research questions inform this study;

1. How has the state in Tanzania regulated the operations of multinational mining corporations with a view to protecting human rights?
2. To what extent is Tanzania implementing Article 2(1) of the international covenant on the economic, social and cultural rights in relation to corporate social responsibility?

These two research questions have formed the backbone of this study and in an attempt to answer them I will limit my analysis to the various legal, policy and institutional regulatory mechanisms obtaining in Tanzania, international co-operation efforts and other international binding instruments to which Tanzania is a party.

## 1.4 Statement of the problem

While it is possible to convict natural persons when they violate human rights, it has been more difficult to do the same with legal persons. This is because, legally speaking, it is difficult to convict legal persons of criminal liability. *Mens rea*<sup>2</sup>, an important element in establishing criminal liability, cannot be established with legal persons. The problem is worsened by the nature of multinational

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<sup>2</sup> *Mens rea* is a Latin phrase for 'guilty mind'.

corporations that not only are legal persons but also operate in different jurisdictions with different legal systems. Therefore how to regulate these companies is currently one of the central issues in human rights protection debates and this research study attempts to answer this question.

### **1.5 Importance of the study**

Human rights, globalization, multinational corporations and corporate social responsibility are now ever growing themes of social sciences research. However, regulation of multinational corporations for years has remained a topical concern that has not enjoyed rich scholarship both in law and social sciences. This study aims at filling this gap and increasing the scope of understanding among legal and social science scholars in this area. The study will therefore be of importance to law students, economists, researchers and other scholars interested in the regulation of multinational corporations especially in developing countries.<sup>3</sup>

### **1.6 Delimitation**

Human rights, multinational corporations, globalization and corporate social responsibility are all broad topics in themselves. In my study I will limit the concepts to the role of the state in protecting human rights through effective regulation of multinational corporations. I will build my arguments based on the Tanzania laws, policies and institutions as they stand now with respect to how each of the above is used as an instrument to regulate the activities and operations of multinational corporations and how they have contributed to raising the standards, accountability and corporate social responsibility in the mining sector. I will also discuss other laws such as the Companies Acts, the Labor Acts and Environmental Acts which are also relevant in the discussion of state regulation of multinational corporations in Tanzania. It should be understood from the beginning of this research that I have no intention whatsoever of showing the extent to which multinational corporations in Tanzania have violated human rights. Rather my objective is to show the extent to which the state, as the primary agent for the protection and promotion of human rights, is committed to regulating the

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<sup>3</sup> One of the leading authorities in this area is professor Peter Muchlinski whose masterpiece *Multinational Enterprises and the Law*(2007) provides a deep insight into the regulation of multinational corporations among other things.

activities of multinational corporations whose activities may cause potential hazards and danger to the people in the neighborhood.

### **1.7 Analytical Framework**

In trying to understand the best approach to ensure corporate social responsibility, a lot of theories have been put forward. These theories have also suggested various mechanisms through which the activities and operations of transnational corporations can be regulated (Kinley et al, 2003:52-68; Muchlinski, 2003:33-51; Muchlinski, 2007:104-121; Dine, 2005:222-249; ICHRP, 2002 and Freeman, 2002:153-160) . Because the state is the most important actor for the protection and promotion of human rights I argue in this study that the command and control approach is the most convenient way of ensuring corporate social responsibility. Against this background, I have based my analysis on the command and control theory of regulation by the state in which the state invokes it's legal, policy and other institutional frameworks to regulate multinational corporations. This theory is tested against the relevant international legal instruments to which Tanzania is party<sup>4</sup>. Also tested against this theory are the various legislative, policy- making and institution- setting efforts that the state in Tanzania has adopted to ensure that multinational corporations well respect their corporate social accountability.

Since multinational corporations operate within different jurisdictions and often with subsidiaries in several states outside the parent state, it is the host state where the multinational corporation operates through a subsidiary that is best suited to invoke relevant laws and policies. This will be the best way of checking the operations of transnational corporations through the lens of corporate social responsibility.

### **1.8 Content of the chapters**

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<sup>4</sup> This is in line with *Pacta Sondi Servanda*, an established International customary law in which a state is bound by a treaty in which it is party.

This manuscript has seven chapters. Chapter one gives the general research background and framework. After introducing the topic it will clarify the aim of study, research questions, statement of the problem, and importance of the study, delimitation of the study and the general framework of the research. Chapter two deals with analysis of the key terms and concepts as used in the context of this research. Chapter three covers methodological issues such as research methods used, ethical issues and the limitations of the study. Chapter four examines corporate social responsibility as an emerging area of study and the dominant theories that concerning this. It shows the different approaches used to the analysis of the terms and different regulatory frameworks used to ensure corporate social responsibility. Chapter five deals with multinational mining corporations in Tanzania and how the state regulates them through various command and control approaches. Chapter 6 offers the findings and analysis of the research and the last chapter concludes with the final remarks and recommendations.

## Chapter 2: General Research Background and Conceptualization

### 2.1 Initial research interest

I took the first interest to study multinational corporations and corporate social responsibility issues when I started to take courses in this European Erasmus Mundus master's program in human rights policy and practice. This was after I completed a bachelor of laws program at the University of Dar es Salaam, Tanzania. I later on in January 2009 joined Malmö University, Sweden where I took courses on globalization, human rights and international relations. This culminated in the desire to write more about this and study how states can enforce social, economic and cultural rights within their jurisdictions. My point of departure came from Article 2(1) of the international covenant on the economic, social and cultural rights which commits signatory states to take steps individually and through international assistance and co-operation to ensure that, among other things, there is progressively full realization of such rights by all appropriate means including particularly the adoption of legislative measures. Beyond all shadows of doubts the letter and spirit of this Article reveals two clear things in relation to corporate social responsibility debate; **firstly** the state, in this context, signatory states to the covenant, have the primary duty of ensuring that all the economic, social and cultural rights are progressively fully realized by all appropriate means through its resources and **secondly**, adoption of legislative measures is important in ensuring that there is such realization. This Article therefore reveals a two-fold analysis in my study which forms the central idea of my argument that is, the state is the most important agent for the protection of the rights of the people through command and control instruments and, in the same line of thinking, states can employ its various command and control instruments to enforce corporate social responsibility standards and bring multinational corporations which operate within their jurisdictions to task.

Against this background, the part that follows below attempts to clear the dust in the air by making it clear what I mean when I use such terms such as human rights, globalization, corporate social responsibility and command and control approach within the context of this paper. Each of the above terms has attracted endless debates about their meanings and definitions and it is equally



important from the beginning to conceptualize them within the context of my study for the sake of clarity and limitations each term bears.

For the purposes of this study the term **conceptualization** is used to mean the art of giving meanings to ideas as they are used in different contexts and instances. As a general rule, for example, there is no universally agreed definition of globalization. As a concept globalization has been construed to mean a lot of things in a wide range of contexts and I intend in this part to give a short but down to earth introduction of what each of these terms means.

### **2.1.1 Multinational corporations**

What does the term 'multinational corporations' mean has been central to the studies on corporate social responsibility. For the purpose of this study multinational corporations refer to corporations which have their home in one country but which operate and live under the laws and customs of other countries as well. (Muchlinski 2007:5). Sometimes the term multinational corporation (MNCs) is used interchangeably with multinational enterprises (MNEs). One other term that is frequently used to refer to either multinational corporations or multinational enterprises is transnational corporations (TNCs). The single most important characteristic of all these is that the parent corporation is registered in one state and it has operations in other host states where it has subsidiaries. Sarah Joseph (2003:2) argues that MNCs may promote economic development on one hand and can perpetrate human rights abuses on the other hand by mistreating and exploiting their work forces hence breaching labour rights.

John Dunning (1993:1) defines multinational enterprises to mean those enterprises that own or control value – added activities in two or more countries.

### **2.1.2 Human rights**

Generally speaking human rights are those rights that belong to human beings. They are a special kind of rights. Donnelly argues that human rights are the rights one has simply because one is a human being. (Donnelly 1985a:1). Freeman argues that human rights are rights of exceptional importance, designed to protect morally valid and fundamental human interests in particular against the abuse of political power. (Freeman, 2002:61). For the purpose of this study I refer to those rights that are recognized by international instruments. Such instruments include but are not limited to the universal declaration of human rights, the international covenant on civil and political rights and the international covenant on the economic, social and cultural rights. Included in this study are other third generation human rights that are not yet legally codified. Therefore by all standards one can argue that human rights are those rights which are inherent in human beings and which one is entitled to by virtue of being human.

### **2.1.3 Corporate social responsibility**

This is one of the most contested concepts in the age of globalization. Some scholars have concluded that there is no definition of this concept. (Henderson, 2001:17). This is mainly because of the vagueness and breadth of the formulations of the meaning of the term given at the international, regional and national level.

According to the United Nations global compact<sup>5</sup>, corporate social responsibility encompasses four major areas; human rights, labour, environment and anti-corruption. These four areas are further enumerated into ten principles laid down for the protection and promotion of human rights to which corporations are supposed to be voluntarily committed. These principles include protection of human rights within their spheres of influence, avoidance of human rights violations and abuses elimination of all forms of forced labour, child labour and discrimination, taking a precautionary approach to environmental challenges, promotion of greater environmental responsibility, development of environmentally friendly technologies and taking anti-corruption efforts at all forms.

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<sup>5</sup> <http://www.unglobalcompact.org/aboutthegc/thetenprinciples/index.html>

For the purpose of this work I refer corporate social responsibility to a form of business regulation in which a company takes initiatives to promote internationally agreed human rights standards within its sphere of operations.

#### **2.1.4 Globalization**

Tom Palmer defines globalization as the diminution or elimination of state-enforced restrictions on exchanges across borders and the increasingly integrated and complex global system of production and exchange that has emerged as a result. (Palmer, 2002:1-8).

According to Takis Fotopoulos, economic globalization is the opening and deregulation of commodity, capital and labour markets which led to the present neo liberal globalization. He further defines political globalization to mean the emergence of a transnational elite and the phasing out of the nation state. According to him cultural globalization is the worldwide homogenization of culture and that globalization may include other dimensions such as ideological, technological and social globalization. **(Fotopoulos, 2001:233-280).**

The International Monetary Fund in 2000 outlined four main areas of globalization namely trade and transactions, capital and investment movements, migration and movement of people and dissemination of knowledge and technology. (The IMF team, 2000).

For the purposes of this research work I refer globalization to the global movement of people, capital and technology that has resulted into the integration of national economic and state system into the international economic structures within the context of the international state system. This eventually affects the extent to which the state can control and regulate the activities and operations of the multinational business corporations which operate in more than one jurisdiction to the detriment of the peoples' rights in the host states.

#### **2.1.5 Command and control approach**

This is one of the approaches that have been widely used in the enactment of environmental Acts, policies and regulations in a number of jurisdictions. It is a deliberate action of the state to make laws, policies and regulations against any acts or conduct of private actors or people that may

infringe on the rights of its people. In the context of Mining and Environmental Laws for example it may include passing of relevant Acts of parliament, making of relevant policies, regulations, standards of operations and control mechanisms such as creation of regulatory institutions geared towards effective regulation of such activities.

According to the Philippines Institute of Development Studies command and control approach is an approach where political authorities mandate people, by enacting a law, to bring about a behavior and use an enforcement machinery to get people to obey the law. (PIDS December 2001). The approach is used to set standards of operations especially in environmental policy making. It is one of the most important tools governments use to demand compliance by and from other actors within their jurisdictions.

In the same vein, in this study I refer command and control approach to different legal, policy, institutional and other regulatory mechanisms states use to impose obligations and demand compliance by different actors who operate within their jurisdictions against several standards of conduct in a number of settings.

### 3. Chapter 3: Methodology

To answer the research questions above, I have taken the international and comparative legal perspective in this study<sup>6</sup>. The research therefore employed documentary research methods<sup>7</sup> in which various international legal instruments, in particular those which relate to economic and social rights, were examined and tested against corresponding national instruments in Tanzania to establish the extent to which Tanzania has been able to integrate those international instruments within her municipal laws; with a view to protecting the rights of the people and regulating transnational corporations to meet their corporate social accountability standards.

A comparative legal approach<sup>8</sup> was used to examine what other countries are doing in enforcing corporate social responsibility. Reference was made to the OECD countries to examine how they implement the OECD guidelines for multinational corporations. A comparison was made to examine the difference between the United Nations Global Compact principles, the United Nations guiding principles on business and human rights on one hand and the OECD guidelines on multinational corporations. The aim here was to examine how each of these guidelines addresses the issue of corporate social responsibility as an emerging concept. Special reference was made to Norway as a member state to the OECD in her efforts to implement the guidelines through her policy document on corporate social responsibility.

Different analytical tools were employed in the conduct of this study. Qualitative content analysis<sup>9</sup> was used to examine the various international and national legal and statutory instruments where corporate social responsibility is expressly or impliedly provided. In the review of these documents a special emphasis was put on the substantive provisions on corporate social responsibility which

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<sup>6</sup> Mike McConville and Wing Hong Chui, 2007, *Research Methods for Law*, pp 6-7

<sup>7</sup> Bryman Allan, (2008), *Social Research Methods*, pp 514-533

<sup>8</sup> *Ibid*, footnote no.6

<sup>9</sup> Bryman, *supra*, page 529

include human rights, labor rights and environmental rights. Corporate social responsibility was used a guiding theme in the review of these documents.

Discourse analysis<sup>10</sup> was used to examine how the media especially in Tanzania have addressed corporate social responsibility. Some sections of the media in Tanzania were used as a sample to reflect on the media coverage on corporate social responsibility in Tanzania.

A total of five interviews were conducted in the course of this study. Three of them were conducted in the city of Oslo, Norway and two were mobile phone interviews with two respondents in Tanzania. One was a structured interview in which questions were prepared and sent in by e-mail to the respondent and the interview was conducted in a very formal way in which the respondent was given the freedom to respond to the questions and give recommendations on the research issues. Four interviews were unstructured and respondents enjoyed the flexibility of responding to questions and issues they developed from the interview. Purposive sampling<sup>11</sup> was used to select the respondents (Alder and Clark, 2008). The selection of the respondents was based on their academic merits, work experience and expertise in law, human rights and international relations issues. One respondent is a government official working with the ministry of Foreign Affairs in Norway, one of them is a senior official of the Tanzania Chamber of Commerce, Industry and Agriculture, another one is an established businessman in Tanzania who is also the executive chairman of one of the local mining firms in Tanzania. This respondent came to Oslo in May this year to receive a special award from the Oslo based Business for Peace Foundation for his exemplary leadership in corporate social responsibility in Tanzania. Two respondents were academic lawyers from Tanzania. One of them is the immediate dean of the faculty of law, university of Dar es Salaam, Tanzania and a distinguished professor of law and expert in human rights and environmental law. He was at the faculty of law, university of Oslo as a visiting scholar in May 2012. The other law respondent is working as an assistant law lecturer at one of the private universities in Tanzania and he is an expert in international trade and investment law. The last respondent is a mining engineer working with a

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<sup>10</sup> Ibid, page 499-511

<sup>11</sup> This is when a researcher selects his respondents from the list he has.

Canadian multinational corporation called Barrick gold mine in Tanzania. Two interviews lasted for an hour and the rest of them lasted for almost 15 minutes each. The respondents were asked to reflect on corporate social responsibility in their specific contexts and give out their recommendations. The interviews were conducted in an informal way and there was flexibility in the way questions and issues were raised and responded to. However an interview with a government official working with the ministry of Foreign affairs was a formal one in which a meeting was arranged at the government building and interview questions were sent by mail in advance. All the interviewees were informed of the nature and objective of the research and consented to the interviews. Some of the information given by some respondents could not be included in the findings of this research because of their sensitivity and the names of some of the respondents are not disclosed for ethical considerations.

Ethical issues have been thoroughly observed in the conduct of this research. All respondents were informed of the nature and objective of the research and were willing to participate and give their recommendations. However for ethical purposes some of the names of the respondents are not disclosed in the research as they preferred anonymity. All the references have been thoroughly acknowledged and no plagiarism was used. All the documents used were the primary and official documents of the government of the United Republic of Tanzania released into the public domain through official websites. All the international instruments used were obtained from the official websites of the relevant international organizations.

This study however is not exempt from limitations. Qualitative research methodology is prone to generalizations(Green, 2005).It is hard in practice to generalize the findings of this research to other legal systems especially in the liberal economies where command and control regulations may not work as effectively as they may work in other legal systems. A comparative analysis of two countries or two regulatory frameworks is not enough to render the research findings valid as compared to a broad area of other legal and regional systems in the world. The time and space of conducting and writing this research was not enough to include every finding. I am of the view that research of this kind may need more time and resources to deliver the desired results. I also conducted this research

from Oslo, Norway where I am currently based. It would have made a big difference if i conducted the interviews in Tanzania. However I corrected this anomaly by making sure that the choice of my respondents reflects a composition of people with different academic background, experience and expertise in corporate social responsibility issues.



## **Chapter Four: Corporate Social Responsibility: Main Regulation Theories**

### **4.1 Introduction**

Understanding the best way of making multinational corporations accountable has been one of the central issues in contemporary human rights discourses. This is because non-state actors like transnational corporations are presumed to be responsible for the promotion and protection of human rights; a task which is widely agreed to be the role of the state. Even where there are mechanisms put in place making transnational corporations accountable for their acts; the question remains the same; are they going to regulate their corporate social responsibility standards by themselves or is it rather the state or entities are going to do that?. The following section will explain the different approaches that have featured in corporate social responsibility by focusing on the national, regional and international level. Attention will also be given to the *Self-regulation theory* which is one of the most contested theories of corporate social responsibility.

### **4.2 Main Theories**

As noted before, this study proceeds from the premise that the state is the primary actor for the promotion and protection of the human rights of its people. The point of departure for this line of thinking is Article 2(1) of the International covenant on the Economic, Social and Cultural Rights of 1966 which expressly provides that state parties to the covenant shall take all appropriate measures to progressively achieve the full realization of human rights inside by adopting legislative measures. I argue therefore that this provision makes the state the primary agent for the protection and promotion of human rights by all standards. This line of thinking is shared by other scholars as well. (Dine 2005:168-169, Muchlinski 2003, Frans Paul et al 2003:82-91 and Muchlinski, 2007:114).In the following part I attempt to give the main regulatory theories that have evolved in the study of CSR.

#### 4.2.1 Self-regulation

This theory assumes that corporate social responsibility will successfully deliver when multinational corporations are given the freedom to develop their own guidelines by adopting codes of ethics such as business, labour, environmental, health and human rights standards<sup>12</sup>. Most host governments in the developing world resort to this approach as incentives for MNCs to invest in their countries and to contribute to the economies. In this context the role of the state would be ensuring oversight when MNCs operate. Another reason why states appreciate self-regulation is because most MNCs operate in more than one territory which creates legal challenges when it comes to extra territorial jurisdiction between the host nation and the parent nation<sup>13</sup>. There are however several critics of this approach who argue that this does not work. (Friends of the Earth 2002:12).

#### 4.2.2 Regulation by the State

This is probably the most convenient and most effective way of regulating transnational corporations. Since the activities of TNCs are subject to the laws of states then it would be easier for states to impose standards of conduct on the TNCs, and require them to observe human rights obligations the state is required to ensure or promote.

Peter Muchlinski in his widely read masterpiece on multinational corporations ***Multinational Enterprises and the Law***<sup>14</sup> argues that national regulation remains to be the most significant way of regulating their activities. He argues that emergent regional and multilateral regulatory orders remain insufficiently developed to replace the nation state as the principal actors for the regulation of MNEs since informal regulation by non-state actors is likely to be selective and SELF serving. )<sup>15</sup>

The only key challenge to regulation by the state is the fact most TNCs operate in many jurisdiction and this may cause some jurisdictional problems when it comes to the issue of compliance to the laws and policies of states in a multiple state setting. In this kind of context a state may be forced or

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<sup>12</sup> For more insight see Peter Muchlinski(2007), *Multinational Enterprises and the Law*, page 113

<sup>13</sup> See more about this in *Beyond Voluntarism: human rights and the developing international legal obligations of companies*,2002,International Council on Human Rights Policy,Versoix,Switzerland,p 11-12.See also Muchlinski (2007:115).

<sup>14</sup> Ibid page 114

<sup>15</sup> Ibid

may wish to extend the operation of its laws outside its territorial jurisdiction and apply them extraterritorially. (Muchlinski Ibid page 115).

#### **4.2.3 Regulation by Non-Governmental Organizations.**

There is also what is called *civil regulation*, which is an informal way of regulation in which non-governmental organizations puts pressure on the MNCs to observe human rights. Sometimes Non-Governmental Organizations enter into partnership agreements with MNCs to put pressure on the latter to observe human rights. At the international level there are established international non-governmental organizations such as Amnesty International and Human Rights Watch that have been working together with a number of multinational corporations to forge alliances with them for the cause of human rights protection and promotion. (Freeman, 2002:142-147).

#### **4.2.4 Regulation by the International Community**

There have been several efforts within the international community to regulate to regulate TNCs with a view to protecting human rights. Some of these efforts have taken place at the United Nations and others have followed suits at the regional and other multinational levels. However there is so far no binding international legal instrument on CSR. This part will attempt to provide, albeit in a nutshell, the current international framework on CSR as required in the area of business and human rights.

According to the UN guiding principles on business and human rights released in March 2011, regulation of TNCs is approached on a 'Protect, Respect and Remedy' framework in which both states and business enterprises are called upon to play their roles in the protection and promotion of human rights.<sup>16</sup> This framework rests on three pillars; firstly it is the state duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation and adjudication. Secondly, it is the corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights

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<sup>16</sup> Guiding principles on business and human rights: implementing the United Nations 'Protect, Respect and Remedy' framework, United Nations Human Rights Council, 2011.

of others and to address adverse impacts with which they are involved. Thirdly, there is need for greater access by victims for effective remedy, both judicial and non-judicial.

Apart from this framework, there is also the United Nations Global Compact. This is a strategic policy initiative by the United Nations that requires businesses to align their operations and strategies with universally accepted principles in the areas of human rights, labour, environment and anti-corruption.<sup>17</sup> In this initiative businesses are required to promote and respect human rights, uphold freedom of association and the right to collective bargaining eliminate all forms of compulsory and child labour, support a precautionary approach to environmental challenges, promote greater environmental responsibility, promote environmentally friendly technologies and work against all forms of corruption including extortion and bribery.<sup>18</sup> However both the framework above and the global compact are not binding and are based on voluntary reporting obligations.

Apart from the United Nations initiatives, another international organization that has formulated its own set of guidelines for multinational corporations is the Organization for Economic Co-operation and Development (OECD). OECD has 34 member countries mainly from Europe, United States, Canada, South America and other countries such as India, Egypt and Morocco.<sup>19</sup> It has developed its own framework officially called OECD Guidelines for Multinational Enterprises. These guidelines provide non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognized standards.<sup>20</sup> One peculiar feature of these guidelines is that each member state is required to establish a National Contact Point (NCP) who is responsible for the promotion and implementation of the guidelines within that state. The NCP also provides a mediation and conciliation platform for resolving practical issues that may arise.<sup>21</sup> These guidelines as well are not binding. They include a broad range of universally accepted human rights including labour rights, environmental rights, anti-corruption and consumer interests.

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<sup>17</sup> <http://www.unglobalcompact.org/AboutTheGC/index.html>

<sup>18</sup> Ibid.

<sup>19</sup> [http://www.oecd.org/pages/0,3417,en\\_36734052\\_36761800\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/pages/0,3417,en_36734052_36761800_1_1_1_1_1,00.html)

<sup>20</sup> OECD(2011), OECD Guidelines for Multinational Enterprises, OECD publishing, pp 3

<sup>21</sup> Ibid

#### 4.3 Corporate Social Responsibility: Ethical and Doctrinal Considerations

Arguments for and against CSR are not yet over. This, in my views, is a big war between *the haves* and *have nots*; between businesses and human rights activism and between economics and the need to value mankind. That is why contemporary CSR and human rights debates are endless. In this part I attempt to show some of the main arguments for and against corporate social responsibility.

While businesses strive to make profits, they are not exempt from their obligations to respect mankind. Ethical concerns are at the core of the dispute concerning global labour practices. MNCs are charged with inhumane and unjust treatment of workers in developing world. (Anorid, 2003:69). At the same time Economists retort that satisfying the demands of such charges will result in fewer jobs in developing nations, thereby reducing social welfare.<sup>22</sup> Sullivan (2003:14) argues that the intersection between human rights and business is chaotic and contested; in the sense that there are those who see companies as 'the source of all evil' and those who believe that companies are the driving force towards economic growth and human development. Held et al (1999) share a more or less similar view by arguing that it is always wrong to assume that the impact of MNCs is always harmful to human rights, for they may create jobs and wealth although they have sometimes been involved in serious human rights violations.<sup>23</sup> Some scholars have however rejected the term corporate social responsibility calling it a misguided virtue. (Henderson 2001). Henderson argues that CSR is liable to hold back the development of poor countries through the suppression of employment opportunities within them. (Henderson 2001:17).

However, the most common issue in most scholarly arguments is how to enforce CSR. Should it be voluntary or through stringent national legislation? This has attracted a lot of debate. (International Council on Human Rights, 2002:7-8, Freeman, 2002:155-156, Dine, 2005:225, Horrigan, 2010:131-132, and Muchlinski, 2007:114 ).

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<sup>22</sup> Ibid.

<sup>23</sup> This part is taken from Freeman (2002:157)

I beg to submit, in my considered opinion that CSR is set to grow as long as businesses grow beyond horizons. When the UN global compact principles were adopted with CSR in mind, there were only 9 principles and over the years corruption became a major threat in the operations of MNCs hence the adoption of Anti-corruption as one of the ten principles of the UN global compact as they stand today.

## **Chapter Five: Multinational Mining Corporations and State Regulation in Tanzania**

### **5.1 General Introduction**

Tanzania is a country located in East Africa. It has a population of approximately 44 million people and it is 947,300 sq. kms in size. Tanzania is a union of two countries, Tanganyika and Zanzibar that united in 1964 to form the United Republic of Tanzania. The president of the United Republic of Tanzania is the head of the state and commander in chief of the armed forces. It is a developing economy and one of the poorest countries in the world.<sup>24</sup>

Tanzania is a mineral- rich country and it is the third largest gold producer in Africa after South Africa and Ghana<sup>25</sup>. This attracts huge investments by different multinational corporations through foreign direct investments. The country has about 12 active gold exploration and mining projects. This has created the necessity for the government to step in to regulate the growing mineral sector. State regulation in the mining sector is therefore important in making sure that the rights of the people are promoted and protected from potential human rights violations by the multinational corporations. Multinational corporations have been engaged in mineral exploration and exploitation for many years in Tanzania and there have been several cases of human rights violations in the mining sector.<sup>26</sup> There are several front line non-governmental organizations that have taken an active part in human rights advocacy and litigation against such violations.<sup>27</sup>

The following section will show how the government of Tanzania has been regulating the activities of multinational corporations through the adoption of command and control instruments. Emphasis will be made to the laws and policies in which corporate social responsibility is implied<sup>28</sup> and in the part that follows later I will limit my analysis to the Mining Law and policies which regulate the mineral sector.

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<sup>24</sup> <https://www.cia.gov/library/publications/the-world-factbook/geos/tz.html>

<sup>25</sup> Africa Power and Politics Programme, 2011

<sup>26</sup> Curtis, Mark and Tundu Lissu, 2008. A Golden opportunity? How Tanzania is failing to benefit from gold mining. Christian Council of Tanzania, Second edition.

<sup>27</sup> LEAT, Lawyers Environmental Action Team, is one of the leading human rights advocacy and public interest litigation organizations in Tanzania. More information can be found on the website [www.lead.org](http://www.lead.org).

<sup>28</sup> I use the verb "Implied" to mean that currently there is no specific statute or express provision on CSR in Tanzania.

## 5.2 An Overview of the Mining Sector in Tanzania

Mining industry in Tanzania is the second fastest growing sector after Tourism. Its contribution to the GDP has increased from 2 percent in 1998 to 3.5 percent in 2005. Over the past 12 years this sector has experienced a boom in mineral exploration and mining in which large scale gold mines namely Nzega, Geita, Bulyanhulu, North Mara, Buhemba and Tulawaka have been given mineral rights to carry out mining operations.<sup>29</sup> After 1994 there are more than 50 multinational companies that have been carrying mineral exploration and 250 local companies that have also been engaged in mineral exploration. Some of the most active multinational corporations in the exploration and extraction of minerals in Tanzania include Barrick gold corporation, AngloGold Ashanti, Minieres du Nord (NMD), IAM Gold and Randgold.<sup>30</sup>

The mineral sector initially was state- led especially in the aftermath of Tanzania's political independence in 1961. The state mining corporation (STAMICO) was established in 1974. With the introduction of liberal trade policies mining industry became privatized and multinational corporations started coming in.<sup>31</sup>

## 5.3 State Legislative and Policy Regulation

Tanzania has the duty to regulate the activities of multinational corporations that operate within its jurisdiction. In his recently published book on **Corporate Social Responsibility, Human Rights and the Law: Multinational Corporations in developing countries** (Amao, 2011) Olufemi Amao argues that the primary responsibility to protect and promote human rights lies with the state. According to him states are obliged to regulate and control the activities and operations of MNCs operating in their jurisdictions using legislative and other regulatory frameworks. He argues further that multinational corporations are subject to the laws of the state where they are registered and operate and the state where they operate may impose human rights -related standards on them. This view, though hotly contested, is shared by many scholars as well. Dine (2005:168), for example, argues that a state

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<sup>29</sup> Ministry of Energy and Minerals Tanzania, 2010

<sup>30</sup> Ibid

<sup>31</sup> Ibid



has a duty to control the operations of the companies operating within their jurisdictions and/or subsidiaries operating abroad over which a resident company exercises control. She emphasizes that states have the primary obligation to ensure human rights responsibilities. In her views there is a duty of international co-operation which is spelt out in Article 1(2) of the international covenant of the economic, social and cultural rights. This obligation implies ensuring that there are no violations by companies abroad which are controlled by resident parents. (Dine 2005:169).

Tanzania has shown strong commitment and political will for the protection and promotion of human rights both in Tanzania and at the international level. It is a state party to the 1966 covenant on the economic, social and cultural rights and she has taken legislative and policy measures to ensure the progressive realization of those rights in Tanzania by adopting laws, policies and creating institutions building that will promote those rights. For the purpose of this study the focus will be only on the social and economic rights of the covenant as they relate to the activities of multinational corporations and corporate social responsibility in Tanzania.

As said above, Tanzania ratified the United Nations economic, social and cultural rights in 1976 and thereafter took several legislative measures to codify provisions of this covenant in its municipal laws. Some of the laws that directly touch on the corporate social responsibility debate include The Environmental Management Act<sup>32</sup> and supplementary regulations, The Employment and Industrial Relations Act<sup>33</sup>, The Labour Institutions Act<sup>34</sup>, the Companies Act of 2002<sup>35</sup>, the Mining Act 2010 and its supplementary regulations.

Apart from these legislative measures, Tanzania has also established institutions that oversee the implementation of various social and economic rights such as the Ministry of Health and Social Welfare, Labour and Employment, Justice and Constitutional Affairs, the Minister of Environment who is under the Vice president's office.<sup>36</sup>

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<sup>32</sup> Act no 20 of 2004

<sup>33</sup> Act no 6 of 2004

<sup>34</sup> Act no 7 of 2004

<sup>35</sup> Act no 12 of 2002

<sup>36</sup> Article 36 of the constitution of Tanzania

## **5.4 Delimitation**

Although Tanzania is obliged to promote all the rights under the international covenant on the economic, social and cultural rights to which Tanzania is party, this study will be concerned mainly on those rights in the covenant that constitute the CSR discourse especially labour rights and environmental rights and I will show how these rights have been codified in the relevant Tanzanian legislation. I will also analysis to the Environmental and Mining Laws and their different statutory regulations to show the extent to which multinational corporations are being regulated with a view to protecting human rights and strengthening corporate social responsibility.

## **5.5 Command and Control Instruments used to regulate Multinational Corporations in Tanzania**

Peter Muchlinski identifies three key areas that constitute corporate social responsibility namely human rights, labour and the environment. (Muchlinski 2007:473-574). However, apart from these, another key dimension identified by the United Nations global Compact is anti-Corruption. In this fourth dimension businesses, including multinational enterprises, are requested to work against corruption in all its forms including bribery and extortion.

Over the years in Tanzania the government has taken practical legislative measures and other institution building initiatives to regulate multinational corporations with a view not only to benefitting from them but to protecting the rights of the people and this part attempts to show such measures in greater details.

### **5.5.1. Signing, Accession and Ratification of Binding International Instruments**

Tanzania also is party to a number of international legal instruments relevant for the social and economic rights such as the ILO conventions<sup>37</sup> and the international covenant on the economic, social and cultural rights to which she is party. It has also ratified the United Nations convention on corruption in 2005 and is committed to several international anti-corruption initiatives.

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<sup>37</sup> Tanzania is a member of ILO since 1962 and has ratified all 8 ILO conventions which cover forced labour, child labour, discrimination and freedom of association and the right to collective bargaining.

### **5.5.2. The Constitution of the United Republic of Tanzania**

Social and economic rights are enshrined in the 1977 Constitution of the United Republic of Tanzania. Although they are not justiciable in the courts of law the government is committed to their progressive realization<sup>38</sup>. Such rights include the right to work and educational pursuits. Environmental rights are not specifically provided for under the Tanzania constitution though they have been impliedly included in the constitutional provision for the right to life which according to the jurisprudence of the Tanzanian High court includes a healthy and clean environment. The first landmark case in which this right was invoked was the case of Festo Balegele and 794 others (Applicants) versus Dar es Salaam city council (Respondents<sup>39</sup>) in which the high court was called upon to by the applicants to issue a court order to stop the decision of the respondents to dump refuse at their residential area which infringed on their rights to life. The court made a groundbreaking decision in this case that the right to life includes a clean and healthy environment and decided in favour of the applicants.<sup>40</sup>Tanzania however has ratified the African charter on human and Peoples rights which recognizes the right to a general satisfactory environment favorable to development.<sup>41</sup>

### **5.5.3. The Relevant social and economic rights legislation in Tanzania**

The government in Tanzania has legislated a number of laws which are relevant to social and economic rights protection in the context of multinational corporations. In this part I will attempt to give a brief outline of such laws and show the extent to which they protect human social and economic Rights.

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<sup>38</sup> Article 7(2) of the constitution of Tanzania

<sup>39</sup> Miscellaneous civil cause no 90 of 1991

<sup>40</sup> [http://www.ecolex.org/ecolex/ledge/view/RecordDetails;document\\_Festo%20Balegele](http://www.ecolex.org/ecolex/ledge/view/RecordDetails;document_Festo%20Balegele)

<sup>41</sup> Article 24 of the charter

### **5.5.3.1 The Employment and Labour Relations Act 2004**

This law was enacted by the parliament to provide for core Labour rights and basic employment standards among other things. It outlaws all forms of forced labour and discrimination.<sup>42</sup> It also provides for the freedom of association and the right to collective bargaining.<sup>43</sup>

### **5.5.3.2 The Environmental Management Act 2004**

This law provides for the legal and institutional framework for sustainable management of environment, the principles of environmental management, impact and risks assessments, prevention and control of pollution. It is aimed at giving effect to the implementation of international instruments relating to environment. This law is one of the most important laws in regulating the activities of multinational mining corporations in Tanzania. Under this law multinational corporations are required to conduct environmental impact assessment before they undertake any mining project<sup>44</sup>. The minister is empowered to cancel the application to undertake the project if he is not satisfied with the assessment<sup>45</sup>. The law is also relevant in the sense that it empowers the minister in charge to make supplementary statutory regulations for environmental protection and management<sup>46</sup>. It is in this law where the right to a clean and safe environment is expressly provided for<sup>47</sup>. The law also establishes the National Environmental Management Council and other authorities relevant for the management of the environment in Tanzania.<sup>48</sup>

### **5.5.3.3 The Mining Act 2010**

This is the principal legislation in Tanzania that deals with all mining and mineral issues in Tanzania from exploration to extraction. It regulates all issues related to mineral prospecting, processing and other issues such as payment of royalties to the government by the mining companies. Apart from other provisions on the regulation of the mining sector such as mineral rights and payment of

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<sup>42</sup> Sections 5,6,7 and 8 of the Act

<sup>43</sup> Sections 9,10 and 11 of the Act

<sup>44</sup> Part vi of the Act provides for EIA and related procedures

<sup>45</sup> Ibid, Section 92

<sup>46</sup> Ibid, section 82

<sup>47</sup> Section 4(1)

<sup>48</sup> Part 2 of the Act

royalties to the government<sup>49</sup> the law is silent on the operations of multinational corporations. The law however empowers the minister in charge of minerals to make supplementary regulations which may affect the implementation of this Act. Several regulations have been made by the minister which include the Mining (Environmental Protection for Small Scale Mining) Regulations 2010 and the Mining (Safe Working and Occupational Health) Regulations 2010 which are relevant for the regulation of multinational corporations.

#### **5.5.3.4 The Prevention and Combating of Corruption Act 2007**

This Law was enacted to prevent and combat any acts of corruption in the United Republic of Tanzania. Multinational corporations conducting their businesses in Tanzania are subject to this law. This law is in line with the United Nations global compact principle on anti-corruption and aims at, among other things, combating all forms of bribery and extortion.<sup>50</sup>

#### **5.5.3.5 The Labour Institutions Act of 2004**

This law was enacted by the parliament of Tanzania to establish some Labour Institutions and to determine their functions, duties and powers. The spirit behind this law is to provide a conducive regulatory environment through which all the labour rights and standards in Tanzania can be easily exercised with regular administrative checks and balances. Other laws that might be relevant are the Companies Act of 2002, the Investment Act of 1997 and the Business Activities Registration Act of 2005<sup>51</sup> which generally regulate all the technical business issues of these companies.

### **5.6 Statutory Institutions**

Apart from such legislation which constitutes part of the command and control instruments, most governments establish regulatory institutions to oversee some sectors of the economy. The government of Tanzania has established some institutions within its government machinery to ensure that the mining sector is well run and managed to promote the interests of the country and its citizens. Some of these bodies oversee the activities of multinational corporations and make sure

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<sup>49</sup> Section 7 and part vi of the Act respectively

<sup>50</sup> Introduced recently, this principle brings to 10 the number of principles laid down by the United Nations Global Compact

<sup>51</sup> Act no 14 of 2007

that corporate social responsibility is well honored without violating human rights. This following part will outline a few most relevant institutions that regulate the mining sector and all other sectors of the economy relevant for the promotion of social and economic rights.

### **5.6.1 Ministry of Energy and Minerals**

This ministry is the focal point where all matters related to mining and minerals are dealt with. It is formed under the constitutional powers vested in the president of the United Republic of Tanzania. While the legislature makes laws that regulate the mining sector in Tanzania such as the Mining Act of 2010, the key role of the ministry as a regulatory institution, among other things, is to oversee the implementation of such laws by adopting policies and regulations for other issues and areas that are not expressly covered by the laws. For example, the adoption of the 2009 Mineral policy of Tanzania and other mining regulations. Some of the most relevant mining regulations adopted by the Ministry of Energy and Minerals in Tanzania under the auspices of the Mining Act 2010 include *The Mining (Environmental Protection for Small Scale Mining) Regulations 2010* and *The Mining (Safe Working and Occupational Health) Regulations 2010*. Such regulations are adopted with a view to making supplementary regulatory provisions on some specific areas that are not expressly provided for within the law but they constitute an important part of the spirit of the law such as issues of occupational health and safety.<sup>52</sup>

Under the Ministry of Energy and Minerals in Tanzania there is a special unit called Environmental Management Unit. This unit was established to manage all the environmental affairs of the ministry which relate to energy and mineral exploration and exploitation. This unit was formed under the auspices of the Environmental Management Act that requires each sector within the government to form a special unit that would co-ordinate all environment related matters.<sup>53</sup>

### **5.6.2 Environmental Minister**

This is a special portfolio that falls under the vice president's office of the United Republic of Tanzania. The office of the vice president in Tanzania is vested with, among other things, the

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<sup>52</sup> You can read more about the ministry through its official website <http://www.mem.go.tz/>

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

mandate to regulate all national environmental matters as a whole which includes, among other things, an oversight in the enforcement of environmental legislation and making of relevant policies and regulations.<sup>54</sup>

### **5.6.3 Ministry of Labour and Employment**

This is the ministry that deals with all labour related matters. When it comes to corporate social responsibility, it oversees all labour laws and rights in Tanzania. Its obligations include an oversight in the enforcement of all labour legislation and subsequent adoption of labour policies and regulations in the country. In this way the ministry becomes an important actor for the promotion and protection of human rights in the mining sector including those which relate to occupational health and safety.

### **5.6.4 Ministry of Justice and Constitutional Affairs**

This ministry coordinates and regulates all matters pertaining to the dispensation of justice and human rights promotion. The Law reform commission, the Judiciary and the judicial services commission are some of the institutions that fall under the ministry<sup>55</sup>. The ministry also oversees the enactment<sup>56</sup> of all the laws of Tanzania and has therefore an important role to play in the protection and promotion of human rights and justice in Tanzania through legislative action which it oversees. A Under this ministry there is the department of constitutional and human rights Affairs. This department is important in the protection of human rights within the mining sector and areas affected by multinational corporations and can all prepare key legislative action towards corporate social responsibility in Tanzania.

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<sup>54</sup> <http://www.tanzania.go.tz/vpoffice.htm>

<sup>55</sup> <http://www.tanzania.go.tz/government/justice.htm>

<sup>56</sup> 'I use enactment here' to refer to all the legislative processes done by the ministry including the drafting of the bill before it is sent to the parliament. In theory it is the parliament which makes the laws but in practice most parliaments are used as rubber stamping organs to endorse the laws already made by the executive.

### **5.6.5 The National Environmental Management Council**

This is a statutory body that is created under the National Environmental Management Act<sup>57</sup>. It is mandated, among things, to coordinate and manage all matters related to the protection and management of the environment in Tanzania through policy and regulation making. Also known as NEMC has a broad mandate to ensure and enforce compliance with national environmental quality standards, to review environmental impact statements and conduct environmental auditing and monitoring of projects and facilities, conduct environmental impact assessment and ensure that there is compliance to all environmental quality principles<sup>58</sup>. NEMC is therefore a very important government agent in relation to mining and multinational corporation's issues as it provides an all - round regulatory checks and balances system for the activities of multinational mining corporations in the field of mineral exploration and exploitation.

### **5.6.6 The National Labour, Economic and Social Council**

This is a statutory body established under the Labour Institutions Act of 2004<sup>59</sup>.The council is an advisory body that advises the Minister for Labour and the government on all matters related to the promotion of economic growth and equity in Tanzania and all labour related policies.

### **5.6.7 The Commission for Human Rights and Good Governance in Tanzania**

This is a constitutional creature created under Article 129 of the constitution of the United Republic of Tanzania. It is mandated to ensure that there is human rights promotion and protection in the country and it has powers as well to hear human rights complaints from different people and groups of people in the country.

### **5.6.8 The Occupational Health and Safety Authority**

This is a statutory body created under the Occupational Health and Safety Act of 2003<sup>60</sup>. It is a government agency that is mandated to ensuring that all workers are protected from occupational hazards and dangers and enjoy a good working environment. It also ensures the observation of the

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<sup>57</sup> Ibid.

<sup>58</sup> <http://www.nemc.or.tz/>

<sup>59</sup> Section 3(1) of the Act

<sup>60</sup> Act number 5 of 2003,also established under the Executive Agencies Act no 30 of 1997



minimum standards in work places. In the context of multinational corporations' workers in the mining sector this is an important agency that is empowered to make sure that the health rights and safety of mining workers are protected and ensured by their employers.

## **5.7. Policies and Regulations**

Apart from relevant laws and statutory bodies established to regulate the different aspects of human rights promotion and protection in the context of mining sector and other human rights- related areas like the environment and work places; policies and regulations<sup>61</sup> made by the government agencies have always addressed some specific areas of compliance where, for example, multinational mining corporations are brought to task in the light of corporate social responsibility standards. This part therefore attempts to highlight on a few most relevant policies and regulations where corporate social responsibility is being implied and I will focus specifically on the environmental, labour and mining regulations.

### **5.7.1. Environmental Impact Assessment and Audit Regulations 2005**

These regulations are adopted under section 82(1) and section 230(2), (h) and (q) of the National Environmental Management Act. Most large scale environmental projects, mining projects inclusive, involve a wide range of environmental exploitation and this may seriously affect the right of the people to a clean and safe environment and the right to life which includes the attainment of the highest attainable standard of health. This was the spirit behind the making of these regulations; to provide a regulatory framework for the conduct of multinational corporations to the best interest of the people. One main requirement of these regulations is the obligation that businesses are supposed to conduct an environmental impact assessment before they launch their operations. After they begin operations they are also supposed to have an environmental audit to verify whether their activities have been reflecting their commitment to the laid down environmental standards and whether they have taken adequate measures to mitigate any environmental impact that has resulted from their activities.

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<sup>61</sup> Regulations are also known as Statutory Instruments

### **5.7.2 Occupational Health and Safety Regulations**

These are made under the ministry of Labour and Employment with close co-operation with the ministry of Health and Social welfare. Their primary aim is to make sure that workers enjoy decent and safe working environment.

### **5.7.3 The Mineral Policy of Tanzania, 2009**

This is the guiding document that drives and regulates the mining sector in Tanzania under the ministry of Energy and Minerals. The role of the government in this policy document is multidimensional; the government is shown to be the facilitator, the investor, the service provider and the regulator<sup>62</sup>. As a regulator it makes sure that the companies abide with the policies and follow all the laid down principles in the conduct of their operations. As a facilitator the government ensures that there are good relations between the surrounding communities and the multinational companies where they conduct their activities. In this role as a regulator the government comes in as the key actor for the protection and promotion of the rights of its people.

### **5.7.4 Mining Regulations**

The ministry of Energy and Minerals in Tanzania has issued several supplementary regulations to regulate the sector as stated above. The two most important relevant for multinational corporations and corporate social responsibility are the Environmental Protection for Small Scale Mining Regulations and the Safe Working and Occupational Health) Regulations both from 2010. These regulations are very important as they are concerned with the promotion and protection of the rights of the people to have a safe and clean environment and decent working environment. This also relates to their right to life which includes the attainment of highest attainable standards of health<sup>63</sup>.

### **5.7.5 The National Environmental Policy of 1997**

This policy document regulates and guides all aspects of environmental protection and management in Tanzania. The policy clearly outlines that environmental impact assessment and precautionary

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<sup>62</sup> Part 7.0-7.4 of the Policy Document

<sup>63</sup> You can read more about the ministry on the ministry website [www.mem.go.tz](http://www.mem.go.tz)

principles to environmental protection are some of the most important instruments the government shall use to protect the environment. In the context of mining sector this is very important because of the massive land use during both the exploration and exploitation phases of the mining. Both the land and the people need to be protected and precautionary principle needs to be applied.<sup>64</sup>

This part has attempted to give an outline of the main laws, policies, statutory instruments and institutions established with a view to promoting and protecting the economic and social rights of the people of Tanzania in relation to corporate social responsibility. I understand that the list is not exhaustive and time and space would not allow to include everything in this study. The part that follows gives an analysis of the study and presents the findings that the study has been able to draw from the review of the laws, regulations and policies of Tanzania in relation to corporate social responsibility.

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<sup>64</sup> National Environmental Policy, 1997.

## Chapter 6: Findings and Analysis

In implementing Article 2(1) of the CESR Tanzania government has shown a strong commitment to the progressive realization of those rights. This is in line with **'the duty to protect'** as established in the UN guiding principles on Multinational corporations. The laws, policies, regulations and institutions established by the government have all been important command and control forces in regulating the activities of MNCs. This duty of the state to promote the rights of its people is further enumerated in the United Nations charter of economic rights and duties of states<sup>65</sup>, United Nations declaration on the right to development<sup>66</sup>, the United Nations declaration on social progress and development<sup>67</sup>. In each of these instruments the duty of the state is crystal clear; formulating appropriate policies and laws with the aim of promoting the rights of the people and ensuring their development. Tanzania, being a United Nations member, has endorsed all these UN General Assembly resolutions through ratification.

Mining is a sensitive area that has captured the attention of the international community. The United Nations recognizes the right of the peoples and nations to permanent sovereignty over their natural wealth and resources.<sup>68</sup> In this right the exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities. In my considered opinion, this is where the role of the state to protect and promote the rights of the people comes in. According to the United Nations charter on Economic rights and duties of states, each state has the right to regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities.<sup>69</sup> Specifically on transnational corporations the charter provides " **...to regulate and**

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<sup>65</sup> Article 7

<sup>66</sup> Article 2(3)

<sup>67</sup> Article 8

<sup>68</sup> UNGA reso 1803(XVII) of 1962

<sup>69</sup> Article 2(2) of the charter.

***supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies***'.<sup>70</sup>This expressly shows that transnational corporations, if not regulated by the host state, may become a blessing in disguise.

The problem, however, is that Tanzania has weak legal and ineffective regulatory frameworks to monitor MNCs activities. There is no law or policy for example specifically enacted to address CSR obligations. In the OECD member countries each member state has a National Contact Point (NCP) which is the office established to implement the OECD guidelines on multinational enterprises. Some countries like Norway, China and India have special policy documents on multinational corporations.<sup>71</sup>In Norway this policy document is called the Norwegian white paper on Corporate Social Responsibility.

Corporate social responsibility issues in Tanzania are coordinated in a very loose framework. The laws, regulations and policies reviewed above have only made some general provisions of rights and responsibilities to MNCs as required of other natural persons. For example the Employment and Labour Relations Act of 2004 only outlaws forced labour, child labour and discrimination and provides for the right to collective bargaining and freedom of association<sup>72</sup>.The Labour Institutions Act only establishes some labour institutions with a view to facilitating implementation of the laws such as the Economic and Social Council and the mediation bodies. The Environmental Management Act 2004 did not for see the activities of MNCs when drafted especially on the environmental impact of mining by TNCs.It does not have any provision on MNCs except that one which gives the minister in charge of the environment to make regulations to supplement the Act<sup>73</sup>. By virtue of this power regulations such as those relating to environmental impact assessment have been adopted by the government in Tanzania to require EIA statement from MNCs before they launch their mining projects and those which relate to environmental audit are in force. The Mining Act 2010 and its

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<sup>70</sup> Ibid

<sup>71</sup> Interview with a member of the Norwegian NCP to the OECD revealed this.(18.05.2012)

<sup>72</sup> Ibid

<sup>73</sup> Section 112 of the Act

various instruments lack strong provisions on CSR except the power granted to the minister to make regulations under the Act and using this power there are only two regulations that relate with the mining sector; regulations on the protection for small scale mining and regulations on safe working and occupational health of 2010. So all the substantive laws in Tanzania which otherwise were to include strong legislative requirements for CSR do not have such provisions. One respondent said legislation is the only way Tanzania to make corporate responsibility a reality.<sup>74</sup> A similar opinion is shared by one respondent in Norway.<sup>75</sup>

In an attempt to make CSR a reality the president of Tanzania H.E Jakaya Kikwete in March this year officially launched the first Presidential award on the Extractive Industry Corporate Social Responsibility and Empowerment Programme (CSRE).<sup>76</sup> ***“It is disappointing to see some mining investors want to benefit alone...leaving the government, surrounding communities with nothing”*** the president was quoted as saying.<sup>77</sup> This award was designed as a bargaining approach to motivate multinational mining corporations honor their CSR commitments. The programme wants all the mining companies, among other things, to help the local communities where they operate, support social and economic growth through employment and technological support to the small scale miners in the country and protect the environment. The aim of this programme according to President Kikwete is to arrive at a win-win position between the investors, the people and the government. I had the privilege a few days ago to interview Dr.Reginald Mengi, a Tanzanian businessman and executive chairman of the IPP Group of companies awarded recently in Oslo, Norway for his CSR initiatives and i wanted to know his views about the role of business enterprises in achieving corporate social responsibility especially in developing economies. In response to this

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<sup>74</sup> Interview with a prominent environmental law professor in Tanzania(09.05.2012)

<sup>75</sup> Interview with a member of the OECD NCP secretariat in Oslo.(18.05.2012)

<sup>76</sup> Judica, Tarimo, *The Guardian*, 1st March 2012, Dar es Salaam.

<sup>77</sup> Ibid

question, he said, among other things, businesses owe a lot to the community as they get their wealth from the community<sup>78</sup>.

In what was considered to be a move by the government of Tanzania and the private sector to foster corporate social responsibility, Tanzania Responsible Business Network was established in August 2011 under the initiative called BAAC (Business Action Against Corruption)<sup>79</sup>. This initiative was taken jointly by the government through its Prevention and Combating of Corruption Bureau (PCCB), Human Rights and Development Trust of Southern Africa (HURIDETSA), the Common Wealth Business Council and the Tanzania Private Sector Foundation. This effort by the government of Tanzania reflects its commitment to the United Nations global compact principle on anti-corruption in which businesses are called upon to work against corruption in all its forms. One senior official of the Tanzania chamber of commerce, industry and agriculture was quoted as saying recently that corruption is a major stumbling block in business.<sup>80</sup> One respondent, a senior official who accompanied Dr. Mengi to the award giving ceremony in Oslo, said that the problem with most multinational corporations in Tanzania is their lack of compliance to the laws and he attributed this to the weak and ineffective legal and enforcement mechanisms in the country.<sup>81</sup>

One of the key efforts that Tanzania has made is the introduction of some key regulatory institutions that oversee the enforcement of some of the specific human rights components that constitute corporate social responsibility. As said in chapter 5 above such institutions include the establishment of the Business, Economic and Social Commission under the 2004 Labour Institutions Act, the National Environmental Management Council under the National Environmental Management Act of 2004, the Occupational Safety and Health Authority under the Occupational Safety and Health Act of

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<sup>78</sup> You can read more about this award on <http://businessforpeace.no/2012-honourees/> (Accessed on 17.05.2012).

<sup>79</sup> More than 40 companies expressed their desire to be part of this network and fight corruption in the conduct of their business. For more information you can visit his online page <http://in2eastafrika.net/tanzanian-companies-launch-business-network/>

<sup>80</sup> Devota, Mwachanga (2012), 'Corruption raises cost of doing business' - TCCIA, *The Guardian*, 21.05. 2012, Dar es Salaam.

<sup>81</sup> Interview with Mr. David Machemba, executive director of the Tanzania Chamber of Commerce, Industry and Agriculture. (07.05.2012).

2003, the Human Rights and Good Governance Commission under the Human Rights and Good Governance Act of 2001 and finally the Prevention and Combating of Corruption Bureau under the Prevention and Combating of Corruption Act of 2007. One clear incident in which the power of these regulatory institutions was invoked in favour of the poor Tanzanian masses was an interim injunction order issued by the Human Rights and Good Governance Commission of Tanzania in November 2003 against the Africa Mashariki Gold Mine, a subsidiary of a Canadian multinational Placer Dome and three government officials of Tarime district in Tanzania. The order sought to prevent the company from carrying out a campaign to force Nyangoto village residents in Nyabirama area to accept inadequate compensation from the two companies. The order also stopped the district commissioner, district land valuation officer and the company's public relations officer to carry out this campaign.<sup>82</sup> The order was issued after the villagers filed the complaint to the commission against unlawful eviction from their areas and inadequate compensation that was to be given by the company. If carried out, this eviction would have infringed on their rights to life, livelihood, housing, work and other fundamental guarantees under the constitution of Tanzania and various international instruments<sup>83</sup>. In my views, this was the first case where the Human Rights Commission in Tanzania showed its powers to bite. One respondent, a mining engineer working with a multinational corporation in Tanzania admitted to have seen cases of human rights abuse and violations in the mining zones and further said that sometimes they even see human corpses because of such violations.<sup>84</sup>

However the main challenge in enforcing CSR in Tanzania is the weak legal and enforcement mechanism that the state has so far. Almost all respondents were of the view that strong legislation should be in place for CSR responsibility to work. One respondent, an established investment lawyer in Tanzania, said that the law in Tanzania is too weak to address emerging global issues such as CSR and that the state has to make more stringent laws to regulate multinational corporations. He

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<sup>82</sup> The commission has these powers under section 25(d) of the Human Rights and Good Governance Act, 2001

<sup>83</sup> This case is available online <http://www.lead.or.tz/about/pr/2003.07.29.afrika.mashariki.php> (Accessed on 07.05.2012)

<sup>84</sup> A telephone interview with the respondent conducted on 10th May 2012.



advocated for more public-private partnerships in which both the government and the private sector can work together for the common good<sup>85</sup>. I am also of the view that Tanzania needs to strengthen its legal and enforcement mechanisms so that CSR will be a legal obligation to which compliance is required. In this way only will the MNCs feel the obligation to honor their human rights obligations.

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<sup>85</sup> Interview(11.05.2012)

## Chapter 7: Conclusions and Recommendations

Corporate social responsibility is an emerging global issue and every state has to react to it in a positive way that will safeguard the interests of its people. From the UN guiding principles on business and human rights '*Protect, Respect and Remedy*' to the 10 United Nations Global Compact principles we continue to see more elements forming part of the CSR debate. The OECD guidelines on multinational corporations have gone further to include other issues such as consumer interests, science and technology, competition and taxation. This is a major departure from the first CSR debate which included human rights, labour and environmental rights. It was until recently when anti-corruption was added to the 9 principles of the UN global compact to make 10 the number of principles that businesses have to adhere under the UN global compact. The list by the OECD guidelines indicates that the CSR debate is ever-growing and may include as many things as possible. This means that nation states have to integrate most of these principles in their jurisdictions with the primary aim of protecting the rights of their people and it is in this duty that the state is supposed to invoke its legislative and policy-making power to ensure that multinational corporations are regulated.

One main area that Tanzania has to work on is to have *a National Contact Point* that will coordinate all MNCs issues as the practice is in the OECD countries. This however may require other regional and international efforts in the African context. However Tanzania as a sovereign state has the power to establish offices and can do that with a view to systematically coordinating all CSR issues. One area where CSR could become a reality is by making express legal provisions or enactment of specific statutes that demand CSR compliance by the MNCs. It is in this way only that MNCs will feel their CSR obligations and comply with the law. I am of the considered opinion that voluntary approaches to CSR requirements cannot effectively deliver in a developing country like Tanzania where the legal and enforcement systems are too weak and ineffective to ensure CSR and observance to human rights standards and obligations by multinational corporations. It is high time Tanzania considered taking unprecedented and uncompromising legislative moves to make CSR a legal obligation. United

States of America is one of the few countries to enact laws that bind its multinationals to be sued in the United States of America for human rights violations committed abroad.<sup>86</sup> There are other countries like Australia that attempted in vain to enact corporate social responsibility.<sup>87</sup>

Apart from the direct role of the government in regulating multinational corporations, I am of the view that civil regulation through NGOs, the media and other forms of human rights activism are very important in raising awareness both to the general public and decision makers within the government and the private sector on corporate social responsibility. In this research it has been shown that some sections of the media have taken a leading role in raising awareness to the public on corporate social responsibility.<sup>88</sup> LEAT and the Legal and Human Rights Centre have been the two most active human rights NGOs in Tanzania and through their activism they have been able to challenge the activities of multinational corporations through court actions and influencing the government to take action against human rights violations by multinationals.<sup>89</sup>

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<sup>86</sup> The Alien Tort Claims Act of 1789.

<sup>87</sup> Australia presented a bill to the parliament on corporate social responsibility which never became a law.

<sup>88</sup> In particular *The Guardian* daily newspaper in Tanzania which is under the IPP Media Group.

<sup>89</sup> You can read more about cases filed by LEAT on their official website (Accessed on 12<sup>th</sup> May 2012)

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**NB:** I had multiple entries to these sites in the course of writing this research for gathering all relevant information and getting access to various documents relevant to my research which are available in public domain for research and reference purposes. The access date only represents the first entry while doing this research to each of the sites shown above)