

**GOVERNMENT'S COMPULSORY LAND ACQUISITION AND THE RIGHT TO  
PROPERTY: the Case of Mining Communities in Ghana**



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## **Dedication**

This work is dedicated to my parents, Paul Kwame Asamoah and Grace Sarpong for their support during my entire education.

For my brothers Opoku Asamoah, Asomaning Asamoah, my late brother Amponsah Asamoah and my sister Rejoice Akyaa-Asamoah for their contribution toward my education carrier.

Finally, to all my friends and love ones who through their encouragement was able to reach this goal.

You are all special to me and may God bless.

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## **Abstract**

The study examined the nature of compulsory land acquisition and compensation, the right to property within Ghanaian context from human rights perspectives. This study is to find out whether the conditions that are required before interference with peoples' rights to property in compulsory land acquisition are satisfied in the protection of their rights since the constitution guarantees protection of property rights. It further seek to find out whether the legal framework on compulsory land acquisition contradict with relevant sections of mining act (Act 703) which might facilitate human right violation. In addition, its seek to find how best the laws can cohere and harmonised with international human rights law to bring protection of peoples' rights to property

A case study from rural mining communities was analyse based on the legal framework in Ghana simply because of ambiguity within the laws when it comes to compulsory land acquisition and issues of compensation in such communities in which much preference is given mining companies than property owners. The analysis draw inference from international human rights on how best a fair balance can be determined among competing interest in ensuring protection of rights of vulnerable within mining communities.

## ***Abbreviations***

<i>ACHR</i>	<i>American Convention on Human Rights</i>
<i>AfCHPR</i>	<i>African Charter on Human and Peoples' Rights</i>
<i>CCPR</i>	<i>Covenant on Civil and Political Rights</i>
<i>CESCR</i>	<i>Covenant on Economic, Social and Cultural Rights</i>
<i>CERD</i>	<i>Convention on the Elimination of Racial Discrimination</i>
<i>CEDAW</i>	<i>Convention on the Elimination of All Forms of Discrimination against Women</i>
<i>CEPIL</i>	<i>Center for Public Interest Law</i>
<i>CSO</i>	<i>Civil Society Organisation</i>
<i>DISEC</i>	<i>District Security Council</i>
<i>ECHR</i>	<i>European Convention on Human Rights</i>
<i>EPA</i>	<i>Environmental Protection Agency</i>
<i>FAO</i>	<i>Food and Agriculture Organisation</i>
<i>GAG</i>	<i>Ghana Australia Goldfield</i>
<i>ILO</i>	<i>International Labour Organisation</i>
<i>LVB</i>	<i>Land Valuation Board</i>
<i>MC</i>	<i>Minerals Commission</i>
<i>NGO</i>	<i>Non-governmental Organisation</i>
<i>PNDCL</i>	<i>Provisional National Defence Council Law</i>
<i>SERAC</i>	<i>Social and Economic Rights Action Center</i>
<i>TWN</i>	<i>Third World Network</i>
<i>UDHR</i>	<i>Universal Declaration of Human Rights</i>
<i>UN</i>	<i>United Nations</i>
<i>WACAM</i>	<i>Wassa Association of Communities Affected by Mining</i>



## Chapter One

### 1.1 Introductory Background

The issue of land rights and compensation generated a lot of debate and contradiction under the laws of Ghana. Ghana's constitution guarantees private ownership of land and government has compulsory land acquisition power for socio-economic development subject to the prompt payment of fair and adequate compensation. However the exercised of such power has not come without controversy especially in the mining communities which is mostly affected in the sense that government day in and out has been criticise for only having interest in making money in the Mining industry and disregarding the plight of mine affected people.

Mineral wealth in Ghana is considered as great asset which enhance economic growth and development. In spite of the significant role mining has played which is rated second after South Africa in terms of gold production on the African Continent<sup>1</sup> the sector leaves behind a lot of challenges as will be explain in chapter three. The challenges allow many communities to become poorer with little access to resources especially when communities are not larger beneficiaries and the law served to give more preference to the mining companies. This assertion is further corroborated by Korsah-Brown when he was discussing the case of Ashanti Goldfields vs. The People of Akrofoam in his article,<sup>2</sup> where the community's water bodies were destroyed until persistence confrontation with authorities before the communities where given alternative source without proper compensation.

Considering the legal framework of Ghana, which will be discuss in chapter three, in principle land rights are not taken away by the mining companies since is lease for certain number of years but looking at the law in practice that is what is done. The 2009 Ghana Mining Report noted "injustice against the mining communities and lack of proper compensation to affected communities in Ghana is an everyday affair that usually passes unnoticed."<sup>3</sup> The report noted the inefficiencies and loopholes in the law and further recommended that issues of regulation over compensation ought to be updated and that the current price levels for valuing crops, livestock and landed property for compensation should be reviewed to help improve the living conditions of mine affected persons.

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<sup>1</sup>Akabzaa & Darimani (2001) page 4

<sup>2</sup>Korsah-Brown (2002) Environment, human rights and mining conflicts in Ghana

<sup>3</sup>Koranteng (2009)

Ghana Mining Report in 2009 criticised government for interested in making money from the industry to the disregard of the plight of the affected people making mining firms exploiting legal loopholes in the law given preference to multinational companies to the detriment of ordinary Ghanaian.<sup>4</sup> This has prompted human right Non-governmental Organisations (NGO's) on the need for government to review the laws regulating mining industries to ensure proper recognition and protection of people's rights.

The important role land plays in the lives of people is enormous, therefore improper management of the acquisition process as a result of not following due process of the law have great impact on the social and economic activities and in effect violates human rights such as property rights, housing, food and basic standard of living. In order to understand the extent and nature of compulsory land acquisition and right to property unleashed in communities whose lands are acquired, a case from the mining communities will be analyse from the law and how improper management of the process leads to human rights violation.

In international human right law, there is no codification of land as a specific right that form part of fundamental rights. However "land constitutes the main asset, from which rural poor are able to derive a livelihood [...], millions of families, though they toil on their land, do not enjoy ownership rights over it and are considered landless."<sup>5</sup> In Quan<sup>6</sup> article she explain the importance of land and how access to land provides the primary means in poverty eradication especially in sub-Saharan Africa, therefore the need for security of land rights and reforms as a way in helping the rural poor in income generation in sustaining their livelihoods. Huggins<sup>7</sup> in his article made mention of the fact that, the lack of attention to land right in international agreement has led some experts to claim that land tenure rights, and their administration, are largely unaffected by international law. However, whiles land right are not directly addressed in international treaties such as the ICESCR, international law does place a number of important restriction on the ways in which States can deal with the land rights of their citizens. For example international law outlaws the arbitrary infringements of property rights. The denial of access to land in several ways affect other rights that must be enjoy such as food, water, etc. Thus had provides the means of people or a community an adequate standard of living which must not be discriminated upon.

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<sup>4</sup>Koranteng (2009)

<sup>5</sup>Kothari (2008) report on special rapporteur on adequate housing

<sup>6</sup>Quan (2000) p. 31-49

<sup>7</sup>Huggins (2011) p. 3

## 1.2 Relevance of the topic

In Ghana the discourse on compensation and government's compulsory land acquisition power are causing alarming concern with the destructions of people's sources of livelihoods and causing a lot of human rights violations as a result of people's interest and best practices are not followed per the law. Compulsory land acquisition process by States has been an eminent issue in Ghana since the colonial era. Although the Constitution of Ghana grants individual citizens the right to property in Article 18, Article 20(2)<sup>8</sup> of the Constitution has vested in the government the legitimate power to compulsorily acquired lands from individuals or communities based on satisfaction of conditions of lawful, public interest and payment of compensation. However the constitution demands that prompt and adequate compensation shall be paid to individuals whose lands are compulsorily taken.

However, in cases where compensations are paid, the time and magnitude of the payment do not commensurate with the lands acquired as argued by Menezes.<sup>9</sup> There are several instances where payment are effected for crops on the lands and not the land itself a common practice in mining communities which leads to the abuse of property rights. This is corroborated in the article by Fleberg<sup>10</sup> when she posit that particularly if they are cash crops like cocoa, which has a life span of 20years, Akabzaa said "Landowners are given the value of one year's crops only". In most countries the issues of compulsory acquisition comes with conflict and human rights violations, often causing most vulnerable people to lose their homes, lands and livelihoods. Not following due process of law can mean that project of genuine local benefit are resented than welcome. However, when the need for compulsory acquisition arises, there should be a fair balance and mutual understanding of agreement among competing interest. More often the benefit is tilted in favour of those with more power or influence which do not followed the right based approached leading to violations of various rights.

Under international human rights law, the issue of land rights has been a major problem when it comes to lands as property rights. This is as a result of not internationally recognised and properly structural process to follow especially in developing countries and is on the basis of this that in the article by Feder and Feeny posited that "in order to consider the role of

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<sup>8</sup>The Constitution of the Republic of Ghana, 1992

<sup>9</sup>Menezes (1991), page 2467

<sup>10</sup>Fleberg (2010) this assertion was held in a new report during review of Ghana's gold mines in Ghana rife with abuse, land grabs, pollution by human rights team at the University of Texas School of Law

property rights in general and land rights in particular, it is important to place these rights in the context of the overall institutional structure of the society and economy”.<sup>11</sup> Compulsory acquisition of lands becomes a matter of relevance since it falls under right to property. Article 17 of UDHR<sup>12</sup> provides that “everyone has the right to own property alone as well as in association with others and no one shall be arbitrarily deprived of his property”. Regional treaty bodies on human rights also protect right to property such as European Convention on human rights and fundamental freedom it’s first Protocol<sup>13</sup> American Convention on human rights<sup>14</sup> and the Article 14 of the African Charter on human and Peoples Rights<sup>15</sup> and other human right treaties.

However, this research examine the case of Ghana mining communities people’s right to property, the nature of compulsory acquisition powers and compensation and to find out whether the conditions or legitimate aims that must be satisfied before acquisition contradicts which might led to right abuses when it comes to rights to property and compensation. Case of land acquisition will be review from the mining community whether compulsory land acquisition amount to violation of property rights or not. It examines the legal framework whether best practices were followed with regard to the law or not, what human rights violations it has inflicted on the Communities within the Ghanaian context. It also seeks to further to find out whether payment of compensation should be negotiated by a third party on behalf of individuals or communities than government or companies who acquired lands in order to strike a fair balance. Therefore this topic becomes a matter of relevance for research since rights to property is an eminent issue in international human rights discourse.

### **1.3 Overview of Land Tenure in Ghana**

In Ghana, land tenure system is typically of West African countries where land is predominantly owned and managed by customary traditional authorities such as stool, skins, clans and families’, meaning is a custodian of the community or paramount chief of the

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<sup>11</sup>Feder and Feeny (1991) see p. 136

<sup>12</sup>The Universal Declaration of Human Rights (UDHR), 12 December 1948, Adopted by UN General Assembly Resolution 217(III) refer to article 17

<sup>13</sup>The Protocol to the European Convention on Human Rights, 20 March 1952, entered into force; 18 May 1954, Refer to Article 1

<sup>14</sup>The American Convention on Human Rights (ACHR), 22 November 1969, entered into force 18 September 1978, Refer to Article 21

<sup>15</sup>The Africa Charter on Human and Peoples Rights (AfCHPR), 27 June 1981, entered into force 21 October 1986, Refer to Article 14

community which is further divided among families or clans. This goes to serve that property rights such as land are often relatively well-defined by customary systems of the various traditions in both rural and urban areas. The Constitution of Ghana recognises the concept of trusteeship in landholding to the extent that those responsible for managing lands must act in the wider interest of their communities.<sup>16</sup> It provides the economic basis for political power and also has serious social and religious implications.

Land has an influence on the concepts of kinship, the family system and the entire field of social relationship. There is the belief that land is an ancestral trust committed to the living for the benefit of themselves and the unborn generation yet to come. Traditional land rights are seen as being closely related, not just with economic factors but also political, social as well as religious factors. It is an egalitarian system in the sense that the system is characterised by belief in equality in the sharing of lands to community or families and as such its underlying principle is more of equity, fairness and security for members of the community than economic efficiency in the use of land.<sup>17</sup> Under the customary system, land is placed under a group of people or the community especially with the community head or chiefs having the authority on how such lands can be distributed among themselves couple with some cultural and behavioural values, while under the private, individuals are accorded that right to take care of its own property to used for any intended purpose while the state falls under the management of institutions of state to play such a role.

In sub-Saharan Africa and for that matter Ghana specifically as the area of focus. Land rights has been vested in government by the constitution, therefore, though people or communities owes lands, they are held in trustee for the State, given the government of the day the ultimate authority for acquisition of lands for public or private interest for development, where governments acts under compulsory acquisition powers.

The management of the complex nature of the land laws in Ghana to ensure tenure security for all levels of society has been a formidable challenge to Ghana's legal system as asserted by Sarpong.<sup>18</sup> Sarpong further posited that the plurality of the system has often presented a much difficult situation with the more vulnerable, including the women and rural poor denying access to the enjoyment of their land rights even where those rights are guarantee

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<sup>16</sup>Kasanga K & Kotey N A (2001), it discusses the statutory tenure and state land management extensively with the relevant references in the constitution of Ghana.

<sup>17</sup>Larbi (2008) Page 2

<sup>18</sup>Sarpong (2006) page 2

under the law. Though aware of the complex mix of the system, my field of interest is as a result of allocating community lands as a whole to mining companies by government.

#### **1.4 Objectives of the study**

1. To find out how States laws can cohere to bring protection of property rights in mining communities.
2. To find how contradiction of the laws can facilitate human rights violations in the case of mining communities.
3. How best States laws can harmonised with international human rights law to ensure protection of right to property and other human rights in the case of mining communities.

#### **1.5 Research Question**

To answer the research objective of the thesis, the questions below will be investigated;

1. Does compulsory acquisition of lands by government's amount to violation of right to property within the Ghanaian context?
2. To what extent does Article 18 and 20 of Ghana's Constitution contradict Mining Act when it comes to compensation?
3. Does the contradiction facilitate human rights violation by the State Institutions and Multinational Companies in mining communities in Ghana?

#### **1.6 Methodology**

I will approach the issues from an inter-disciplinary angle combining international human rights law with social science and will be based on simply library and internet based research methodology adopted for the thesis. This will be limited to the use of available resources such as books, articles, journals, international human rights instruments and case law as well as internet materials thus drawing on sources from various academic disciplines performing a desk review.

It analysis the case of Nana Kofi Karikari and 44 others vs. Ghana Australia Goldfield (GAG) Limited base on the legal framework of Ghana whether the relevant laws of Ghana contradict or not and the way forward to ensure people's rights to property are not violated. The above

case was chosen as a result of human rights issues that emanate from the case with respect to the subject matter and whether the relevant laws contradict or not. This particular case helps to bring out detail analysis of sometimes what is seen in the mining communities since most case law talks about environmental issues cause by mining companies than fundamental human rights affecting people.

The major sources of law considered will include the following; international human rights instruments, the Constitution of Ghana, Act of Parliament, subsidiary legislation and case law. The challenges confronted as a result of these studies is accessing relevant case law from Courts in Ghana since there are no proper database but had to search for the particular Courts in assessing cases which takes long in getting them.

### **1.7 Structure of the thesis**

The thesis is organised into four chapters; chapter one as presented above involves the introductory background, relevance of the topic, overview of land tenure system in Ghana, the objectives of the research, research question, methodology employed in achieving the result and propose structure. The second chapter covers right to property in international and regional human rights treaties with similarities and differences in the documents, literature review on compulsory land acquisition and compensation, determination of compensation, socio-economic implications and end with concluding remarks. Chapter three reviews the case of compulsory acquisition and right to property with Ghana as case studies focusing on the rural mining communities based on the legal framework, legitimate aims for acquiring lands, the role of land valuation board, basic principles in property valuation, state obligations and whether the law serves to contradict to violate people's rights to property within the Ghanaian context. It will further seek to analyse the case from human rights perspectives as per the required laws and implication on the livelihoods of people, ending with concluding remarks and in the final chapter conclusion is drawn with some suggested recommendation made.

## Chapter Two

### The Right to Property

#### 2.1 Introduction

The right to property spanned a long history as noted by Waldron<sup>19</sup> “the declaration of the right of man and citizens in which it was asserted: ‘the end in view of political association is the preservation of the natural and imprescriptibly right of man. These rights are liberty, property, security and resistance to oppression.’” This goes further to explain the importance of everyone having the right to own private property without much interference or discrimination. Therefore “owning property contributes immensely to the ethical development of individual person.”<sup>20</sup>

However, throughout the world a lot of people have not enjoyed the rights to property as part of their human rights due to non-recognition and the lack of attention of the rights in international human rights instruments especially the international bill of rights which is legally binding on states. The cause of such non-recognition as posited by Banning was as result of no consensus reached during the period of contestation and debates leading to the adoptions of article 17 on right to property in the Universal Declaration of Human Rights (UDHR). As a starting point for understanding the background and content for inclusion of right to property in various human rights instruments, this chapter seek to discuss the background and content as well as debate leading to the adoption of rights to property in UDHR, the regional instruments and other international human rights treaties.

The second part of the discourse seeks to discuss existing literature on the general argument on compulsory land acquisition and compensation, socio-economic impact of land on the basis of right to property and end with concluding remarks.

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<sup>19</sup>Waldron (1988) p. 16

<sup>20</sup>Waldron (1988) p. 3



## 2.2 Background and Content of Right to Property

“Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property”<sup>21</sup> The right to property which is enshrined under article 17 of UDHR, has not been internationally protected human rights in the sense that the UDHR has not become a legal binding document on States and unlike the United Nations Human Rights Covenants of 1966<sup>22</sup> which is legally binding instruments on all States make no recognition of the right to property that is the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic Social and Cultural Rights (ICESCR). “The major reason for this non-inclusion was the absence of international agreement as to the exact content of property rights at the time of the drafting of these instruments.”<sup>23</sup> The argument was that the right to property will come in conflicts with common article 1(2) of both ICCPR and ICESCR.<sup>24</sup> As pointed out by Ikdahl<sup>25</sup> “the principle of sovereignty was commonly referred to as a justification for such deprivation of private property rights.” Whiles some form of compensation could be given this was subject to national law and jurisdiction.

The non-inclusion of the right to property in the international covenants according to Krause and Alfredsson<sup>26</sup> does not make it achieving its status as universal human right. His argument is not always the case in the sense that, the fact that is not explicitly stated in the covenants does not negate it as a right that needs to be enjoy by people. On the contrary this argument also fails to take into account that the international protection of human rights is not only based on treaty law but also on general international law. On the hand, other treaty collections and regional human rights instruments reference to property right and its case law especially in ECHR has help in achieving its universal status. Since property right is not explicitly mention in the covenant like ICESCR, therefore attention of such rights has been on other rights such as livelihood and housing. This has placed a lot of restriction on the ways in which most States deals with land rights of their citizens under the term of compulsory acquisition.

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<sup>21</sup>UDHR Article 17

<sup>22</sup>ICCPR and ICESCR of 1966

<sup>23</sup>Banning (2002) p. 5

<sup>24</sup>Banning (2002) p. 43

<sup>25</sup>Ikdahl (2009) p. 42

<sup>26</sup>Krause and Alfredsson (1999) p.365

### 2.2.1 Debate Leading to Adopting the Content of UDHR

However, before the adoption of the UDHR, a lot of contestations were ongoing during the drafting process. Several proposals were made among States leading to host of controversy and debates surrounding the adoption of article 17 of UDHR. A legal scholar Banning<sup>27</sup> posit that during the process of the ongoing debate and discussion, the drafting committee which was established by the commission prepared 46 Articles of which article 19<sup>28</sup> made provision on the issue of right to property , whereby every person has the right to own property and also just compensation to be paid when taken.

Prior to the adoption of the text, the initial drafting committee came with “Everyone has the right to own personal property. No one shall be deprived of his property except for public welfare and with just compensation. The state may determine those things, rights and enterprises that are susceptible of private appropriation and regulate the acquisition and use of such property.”<sup>29</sup> However, upon the final draft, the requirement for just compensation was omitted and replaces with the prohibition of arbitrary deprivation of property. The requirement that property may only be taken in the interest of public welfare was also omitted.<sup>30</sup> Several proposals and revise versions on right to property was submitted by States during the period of contestations which finally led to the adoption of article 17 of UDHR and where “according some commentators without much substance.”<sup>31</sup> As posited by Cassin in Banning,<sup>32</sup> this came as a result of existence of two groups of countries where one group saw the right to property as a right inherent in human dignity, necessary for individual independence whereas the other group considered the social implication to the larger extent whereby property is sometimes attributed to individuals and collectivities depending on its social function.

In addition to the above, it is further argued that the way the right to property has been shaped and formulated has largely influenced the ways it’s been interpreted in international human rights law. The right is not formulated as a general right of everyone to a minimum amount of property, but as a specific right which protect the institution of private property and acquired

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<sup>27</sup>Banning (2002) p. 36

<sup>28</sup>Banning (2002) p 36-37

<sup>29</sup>Banning (2002)

<sup>30</sup>Krause and Alfredsson (1999) p.362

<sup>31</sup>Banning (2002) p. 41

<sup>32</sup>Banning (2002) p. 42

rights.<sup>33</sup> The article by Krause and Alfredsson further argues that the right to property having not achieved as internationally standards on property has resulted from the fact it is not an absolute right, therefore in so doing the right to property comes with a lot of permissible limitation bases on the legal system of every jurisdiction or national law system. This permissible limitation lacking coherence has generated a lot of controversies which has resulted in conflicts of the right to property with other social and cultural rights especially to people who such right are been deny or discriminates upon thereby infringing on their human right which provide them with certain basic sustenance for living. The lack of attention given to the way the right to property has been shapes in international instruments has generated a lot of discrimination in which properties is acquired since there is no standardise way or procedure to follow.<sup>34</sup>

However, based on reaching consensus on the view of the right to property which should be enjoy by all then, another area of contention when it comes to private property is the issue of compensation. If private property is seen as a right that everyone should be entitled the argument of “immunities against expropriation”<sup>35</sup> should be critically considered in the sense that whoever is deprived of his or her property should be given some sort of just compensation. As cited by Waldron<sup>36</sup> “since property is an inviolable and sacred right, no individual may be deprived of it unless some public necessity, legally certified as such, clearly requires it; and subject always to a just and previously determined compensation.” This was a matter which was included during the initial drafting process but was later omitted in the final draft living such determination of awards of compensation to various jurisdictions especially to persons whose property are acquired for public or commercial purpose. However, since there are no clear rules to determine whether compensation paid is just or adequate leaves the argument vague and in the end rather violates the rights of vulnerable groups. Whereas for instance developing countries has been inclined to prefer a more flexibility when it comes to appropriate standard for compensation, the question then bordering is what quantum constitute a just and adequate and how is the prompt often interpreted leaves more room for further deliberations.

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<sup>33</sup>Krause and Alfredsson (1999) p.359

<sup>34</sup>Krause and Alfredsson (1999) p 361

<sup>35</sup>Waldron (1988) p. 16

<sup>36</sup>Waldron (1988) p. 16

In spite of the several controversies surrounding the right to property as human right from initial contestations leading to its final consensus on the agreement on the adoption of article 17 of UDHR has provided some decorum on the right in human rights circles couples with further elaboration of the regional instruments has served to give more meaning to the right to property based on several case law especially in the European Court of Human Right.

Apart from the UDHR, the human right to property has been includes in other treaties such as International Convention on the Elimination of All Forms of Racial Discrimination (CERD) and Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). With respect to the regional systems, the right to property has been clearly expressed is such regional instruments such as the European Convention, Inter-American and the African Charter of Human and Peoples Rights. Therefore, having seen how the right to property is been couched in the Universal Declaration and the processes which led to its adoption, the focus now is the regional systems in which according to scholars has contributed to the clarification of the substance of right to property based on its numerous case law especially in ECHR.

### **2.3 The Right to Property in Regional Human Rights Instruments**

In the process of the drafting UDHR article 17, associated with enormous contestation on ideological grounds; Ikdahl posited that “reaching agreement on binding provisions proved easier at the regional level.”<sup>37</sup> For instance the 1948 American Declaration of the Rights and Duties of Man article 23 holds that “every person has a right to own such private property as meets the essentials needs of decent living and helps to maintain the dignity of the individual and the home.”<sup>38</sup> However emphasis will be base on the American Convention rather than the 1948 Declaration.

Legal pundit like Banning<sup>39</sup> is of the view that the right to property under the regional system has contributed a lot especially the European Convention has provided explanation due to its much accorded attention it has received based on its case law. Apart from the European Convention, other regional system such as American Convention and Banjul Charter provides some insight on the right to property which will be discussed below.

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<sup>37</sup>Ikdahl (2009) p. 38

<sup>38</sup>The American Declaration of the Rights and Duties of Man, adopted 2nd Mary 1948

<sup>39</sup>Banning (2002) p. 64-76

### 2.3.1 European Convention on Human Rights (ECHR)

After seeing the light in article 17 of the UDHR, with its ensuing controversy through its adoption, the ECHR placed more emphasis on the right to property though not included under the main Convention. As noted by Krause and Alfredsson,<sup>40</sup> attempts by the Council of Europe to include the right to property in the ECHR when it was adopted failed, simply because in the process of drafting the Convention, the States were unable to reach a consensus. However, the process and discussion leading to the adoption has been given vivid and detailed analysis by Banning in his book on the right to property in the section on European Convention on human rights.<sup>41</sup> However it rather appears in Protocol No. 1 of ECHR.<sup>42</sup> Article one of the Protocols guarantees the right to peaceful enjoyment of possession and spells out the necessary conditions for permissible interference. Article one provides protection of property in paragraph one,<sup>43</sup> it goes further to provide the State right in the process of the enjoyment of the right which is stated in paragraph two<sup>44</sup> which allows States the power to interfere in the right to property.

Banning<sup>45</sup> posit that interference is tested and justifiable on three counts such as lawfulness meaning is allowed only if is prescribe by law, is in the public or general interest and is necessary for democratic society where the issue of proportionality including compensation ensure a fair balance. This goes to served that the enjoyment of property rights is not absolute due to some permissible restriction emanating from the three themes. However, it application vary from case to case and the court also allowed the state margin of appreciation in the payment of compensation with proportionality tested meaning whether a fair balance is strike between the general interest of the community and the requirements of protection of individual's fundamental rights, however there are other case law where ECHR does not leave compensation to national jurisdiction alone. In the lot of property cases before the court, proportionality test has always been applied because is on the basis of proportionality that fair balance is determined among competing interest in the payment of compensation.

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<sup>40</sup>Krause and Alfredsson (1999) p. 366

<sup>41</sup>Banning (2002) p. 64-76

<sup>42</sup>Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, enacted 20th march, 1952 and entered into force 18th may, 1954

<sup>43</sup>ECHR Protocol No. 1 § one

<sup>44</sup>ECHR Protocol No. 1 § two

<sup>45</sup>Banning (2002) p 93-101

### **2.3.2 American Convention on Human Rights (ACHR)**

The American Convention on Human Rights places its emphasis on right to property in article 21<sup>46</sup> which states “Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law. Usury and any other form of exploitation of man by man shall be prohibited by law.” As noted by Krause and Alfredsson<sup>47</sup> the article 21 of ACHR is very similar to article 1 of Protocol No. 1 of the ECHR, the main difference being that the legal entity the ECHR makes references to when it comes to interference of the right to property. Considering the three conditions on interference set out in the ECHR similarities arises out of both texts mentioning public interest, law but the different is the proportionality test used by ECHR in determining compensation. In the American Convention, compensation is explicitly mentioned in the article thereby granting or awarding a just compensation to individuals whose property has been taken ‘for reasons of public utility or social interest’, while in the other instruments it has been left at the discretion of the States based on proportionality arising out of the competing interest but case law has also shown that compensation is not always left to national laws as shown in the Nigeria vs. SERAC case discussed under the Banjul Charter and other case law under ECHR.

### **2.3.3 African Charter on Human and Peoples` Rights (Banjul Charter)**

Most of the academic literatures on Banjul Charter has failed to make reference to or analyse property rights and the adoption of the right to property in the Banjul Charter came at the time that most States have emerged from decolonisation. This right became a matter of relevance in the sense that the continent to a large extent depended on natural resources such as land and minerals as a way of generating incomes. As noted by Banning<sup>48</sup> in Africa property relationship is often in the form of customary and common property whereby for instance in some countries property like land are traditionally held in common.

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<sup>46</sup>American Convention on Human Rights (ACHR), enacted 22nd November, 1969 and entered into force 18th July, 1978

<sup>47</sup>Krause and Alfredsson (1999) p. 370

<sup>48</sup>Banning (2002) p. 61

Banjul Charter provides in article 14 “the right to property shall be guaranteed. It may only be encroached upon in the interest of public needs or in the general interest of the community and in accordance with the provisions of appropriate laws.” However in reference to the three conditions on interference in the ECHR, similarities appears on the used public interest and the law as means of interference but what is missing is the proportionality test which helping in striking a balance between interested parties when compensation is paid.

As posited by Ouguergouz<sup>49</sup> Article 14 “tolerates infringements of the right to property of a natural or legal person” but there must be justification on the basis of lawful, public or general interest where general interest takes precedence over individual interest when they come in conflict. As noted by Gittleman<sup>50</sup> “under this provision individuals have a right to property; however, eminent domain subrogates the right in the interest of public needs on in the general interest of the community” in attempt to balance the relationship between property ownership and eminent domain.

In the case law of Banjul Charter, very limited cases have established violation of article 14 but with that of SERAC vs. Nigeria case.<sup>51</sup> In the above case Nigeria government fail to protect the Ogoni people from the activities of Oil Companies operating in the Niger Delta in contrasts to fulfilling its state obligation under International Human Right Law to respect, protect, promote and fulfil these rights to ensure progressive realisation of the rights of people. The Commission declared that the people of Ogoniland right to property were violated and therefore appeal to the Nigerian government to ensure that adequate compensation are paid to the victims. In the case of Malawi African Association vs. Mauritania<sup>52</sup> the Commission found violation of article 14 among black Mauritians.

Apart from article 14, article 13(3)<sup>53</sup> also provides some form of enjoyment of property whereby every individual is provided an equal right to public property, “however, there is no known case law or literature in connection with this article” as posited by Banning.<sup>54</sup> This becomes a matter of relevance as pointed out by Ankumah in Banning that “in some

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<sup>49</sup>Ouguergouz (2003) p.153

<sup>50</sup>Gittleman (1982) p.699

<sup>51</sup>SERAC vs. Nigeria, Communication No. 155/96 (2001) § 44-47,57

<sup>52</sup>Communication No. 54/91, 61/91, 98/93, 164/97, 196/97, 210/98, § 128

<sup>53</sup>Article 13(3) reads ‘Every individual shall have the right to access to public property and services in strict equality of all person before the law’

<sup>54</sup>Banning (2002) p. 61

countries, public property is only to be enjoyed by those loyal to the ruling president,”<sup>55</sup> making a clear discrimination to the less and vulnerable groups in the countries of which human rights is simply against such discrimination.

Another article which also made reference to property is article 21<sup>56</sup> which provides details standard on wealth and natural resources. According to Banning “the article is considered one of six so-called Peoples` rights.”<sup>57</sup> Article 21(2) further provides that “in case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.” However, with respect to compensation, “the African Charter provides no such protection and leaves the question of compensation to each individual State, except in reference to a protected peoples right”<sup>58</sup> as compared to the Inter-American system but case law has shown that is not always the case since they sometimes comments on the amount of compensation that needs to be paid.

### **2.3.4 Similarities and Differences among the Regional Instruments**

In spite of the regional documents contribution to understanding of the right to property, there are similarities as well as differences within the documents. All documents made mention of public or general interest with respect to acquiring property. ACHR is similar to ECHR but only to persons or individuals, ECHR makes references to legal entity when it comes to interference of the right to property. However, compensation is explicitly mentioned in the ACHR but not seen in the Banjul Charter or ECHR where compensation is sometimes subordinates to national laws but not always the case because there are case law where ECHR made pronouncement on compensation. There is clear supervision mechanism in ECHR whiles Banjul Charter is limited by obligation of confidentiality as laid down in Article 59 with ACHR having a number of resolutions and reports in which right to property play a substantial role.<sup>59</sup> ECHR provides a universal standard base on its numerous case laws on property as human rights emanating from the European Court different from ACHR and Banjul Charter.<sup>60</sup>

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<sup>55</sup>Banning (2002) p.63

<sup>56</sup>Refer to article 21 of the Banjul Charter

<sup>57</sup>Banning (2002) p.63

<sup>58</sup>Gittleman (1982) p. 33

<sup>59</sup>Banning (2002) p. 80-81

<sup>60</sup>Banning (2002) p.63



## **2.4 Other Human Rights Instruments**

Other human rights instruments apart from the UDHR and the regional systems of human rights which property rights are included are International Convention on the Elimination of All Forms of Racial Discrimination (CERD),<sup>61</sup> Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).<sup>62</sup> In addition the ILO Convention 169<sup>63</sup> deals with the collective and individual rights of indigenous and tribal Peoples to ownership of land and natural resources.

The above instruments will not be the main focus in the sense that my focal area is not about looking at discrimination in property rights and with respect to ILO Convention 169, Ghana has not ratify it, therefore much cannot be said on that.

## **2.5 Compulsory Land Acquisition Powers and Compensation**

### **2.5.1 Introduction**

Land plays a crucial role in every countries development. This has led the “discourse on socio-economic development in many part of the world and in Sub-Saharan Africa place a lot of attention on the important of land in development and the contribution that land rights, access to security of tenure can make to economic development, sustainable livelihoods and poverty alleviation in these countries”<sup>64</sup> much to the neglect of the various human rights issues that are affected. For such a sustainable development of every economy to be effective through the provision of facilities and infrastructure for instance the construction of new roads, schools, health facilities and so on, the acquisition of appropriate lands by government becomes objective matter of importance as a step in achieving such sustainable development. It has been said that “compulsory purchase is one of the harshest imposition by the State upon its citizens.”<sup>65</sup> Ian and Wilson article made mention of the view of some commentators about

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<sup>61</sup>The International Convention on the Elimination of All Forms of Racial Discrimination (CERD) enacted 21st December, 1965 and entered into force 4th January, 1969. CERD article 5(d) obligates the state to guarantee everyone equal enjoyment of the right to own property alone as well as in association with others, as well as the right to inherit. See also note 5 p. 40

<sup>62</sup>The Convention on the Elimination of Discrimination against Women (CEDAW) enacted 18th December, 1979 and entered in force 3rd September, 1981. See in particular CEDAW article 15(2) on equality before the law on concluding of contracts and administering of property, article 16(1h) with respect to ownership, acquisition, management, administer, enjoyment and disposition of property.

<sup>63</sup>Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, enacted 27th June, 1989 and entered into force 5th September, 1991 devotes several articles to land rights, see article 7 and 13-17.

<sup>64</sup>Larbi et al (2004) p.115

<sup>65</sup>Ian & Wilson (2001) p. 17

the widespread dissatisfaction associated with compulsory acquisition process is as result of long number of years that are taken before compensation is paid and the objectives of such acquisition.<sup>66</sup> In the process of acquiring land depending on when and where such parcel of land is needed, government have the power of compulsory acquisition of land which is provided for by the respective legal framework for a specific purpose. Though land acquired for development purposes brings enormous benefits to society, on other hand it's seen as disadvantage to the people or communities whose land serves as a source of livelihood and a network of social relations especially when due process are not follow and the issue of compensation flouted. This has not come without controversy with respect to right to land and the State power to compulsorily acquired lands.

Several authors have written extensively on compulsory land acquisition powers and the challenges it poses to development. This section provides an overview on existing literatures on compulsory land acquisition powers, compensation and socio-economic implication, in the face of rapid growth and the increasing demand for lands by society. This section provides the ambiguity surrounding compulsory land acquisition result from the issues of compensation through procedural problems, competing interest such as public versus individual interest, among others.

### **2.5.2 General Argument on Compulsory Land Acquisition and Compensation**

The key arguments constituting compulsory land acquisition has been the aim posited in land taking and how compensations are paid to owners of lands as a result of competing interest at stake. The argument below provides a general overview of the process.

There has always been a general arguments posited by government in taking property such as lands for the provision of basic needs to its citizenry. These arguments have given the power in acquiring lands for developmental projects and place such acquisition within the domain of public purpose, use or interest. Therefore the intended public purposes which always get its legal backing base on constitutions has not been so contentious but the ambiguity of such taking result from the issues of compensation and what constitutes fair, prompt and adequate compensation. The conditions given is similar to the three human rights conditions of lawfulness, public interest and proportionality though human rights issues are not explicitly mention in compulsory acquisition, similarities makes human rights issues completely

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<sup>66</sup>Ian & Wilson (2001) p. 17

embedded. Looking at how lands constitutes enormous benefits to its user or owner, depriving them of such assets poses a great threat to their livelihoods especially when all the ensuing procedural problems which arises out of such taking are not greatly dealt with. This argument is supported by Mandelker when he posited that “No Constitutional problem has proved more contentious in land use regulation than the taking issue”<sup>67</sup> in his article during discussion of the issue of compensation for land taking in the USA.

However, in terms of developmental and infrastructural needs of communities based on the constitutional order as posited above, government takes lands in order to provide such facilities to its citizenry but the ambiguity arises when such lands are taken for corporate organisation for investment purposes whereby in principle the benefit should inure to the community but in practice is not always the case. Hence, the power granted by constitution of most States especially under compulsory acquisition, for the larger entity without due diligence taken into consideration which often lead to the dispossession of the most vulnerable in the communities who often rely on such lands for sustenance especially in areas or community where such lands are acquired.

In the studies conducted by FAO on land tenure<sup>68</sup> “compulsory acquisition is the power of governments to acquire private rights in land without the willing consent of its owner or occupant in order to benefit society.” It is further argued that in compulsory acquisition, there is the need for balance between what the public needs for land, the provision of land tenure security and the protection of private property rights. In providing for such a balance has led to limitation on the part of government in compulsorily acquiring land to compensate individuals on one side while the public also takes lands. In striking such a balance especially in human rights instruments is where the ECHR brings in the principle of proportionality in compensation which implies a fair balance between the general interest of the community and requirements of protection of the individual’s fundamental rights.<sup>69</sup> More so similar to ACHR where compensation is explicitly stated in providing such balance as well as the case of Nigeria vs. SERAC showing that compensation has to be paid to those whose properties deprived on such conditions.

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<sup>67</sup>Mandelker (1981) p.2

<sup>68</sup>FAO land tenure studies 10 (2008), p.5

<sup>69</sup>Banning (2002) p 97

The limitations to compulsory acquisition of land are enshrined in most countries constitution. The constitution set out the limit on how such acquisition should take and the limit has been on lawfulness, public interest and compensation as seen in human rights three conditions intended to protect against arbitrary interference to ensure good processes are followed. In the above studies it is realised that the general basis for compulsory acquisition revolved around public purpose. However, the ambiguity arises as a result of the rationale behind such taking are not clearly specified in the sense that such intended public purpose used in taking the lands will later be reverted to private companies under the aegis and the justification that the benefit served the general public. The controversy surrounding such change of hands becomes contentious when competing interest at stake are not satisfied with an alternative measures provided and issues of compensation not paid.

According to Knetsch, cited in the article by Larbi et al<sup>70</sup> argue that there is almost universal agreement that in economies where private property ownership is permitted, the State have the power to compulsorily acquire the private property of the individuals in the public interest or for the public goods subject to the payment of prompt, fair and adequate compensations though he fail to mention the lawful aspect which satisfy the conditions for acquisition, this has been the general argument on compulsory acquisition and compensation. With compensation which always becomes the issue of contention, the legal framework of most countries makes provision for access to court for persons who think their interest are not represented and feel cheated in the demand for compensation. He further posits that payment of compensation is not only just but it is equitable and serves to further efficiency and other goals of the land owning communities. In my view compulsory acquisition power of lands has led to generally unanswered questions especially with respect to compensation. In Menezes general argument supporting the issue of compulsory acquisition and compensation made mention of the fact that case where compensation are paid, the time and magnitude of the payment do not commensurate with the lands acquired resulting from resources constraints and the challenges on the use of open market price of property valuation.<sup>71</sup>

In spite of guarding against such disparity, “the consequences of land acquisition can be enormous. The impact on displaces households can be far-reaching and long lasting. Income reduction, loss of means of living support and the breakdown of social network are the most

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<sup>70</sup>Larbi (2004), page 115

<sup>71</sup>Menezes (1991), page 2467

identifiable adverse effects on displaced households.”<sup>72</sup> A major controversy however arises when the lay down rules and regulations regarding such acquisition and compensation are flout with ambiguity. In this sense, compulsory acquisition and compensation whether pursue in the lawful manner may tend to be disruptive, disadvantaging the most vulnerable. As outlined in the FAO land tenure studies,<sup>73</sup> compulsory acquisition if not managed well may led to problems such as reduce tenure security, reduced investment in the economy, weakened land markets, opportunities created for corruption and the abuse of power, delayed projects as well as inadequate compensation paid to owners and occupants.

In the introductory remarks by Ding<sup>74</sup> he posits that lands has been in the focus of policy debates among scholars, politicians, policymakers, and urban managers in developing countries partly because it is a particular good and partly because there is increasing scarcity in land due to fast population growth and rapid urbanisation and also been the most important assets that can be of principal source of wealth and power. Some are of the view that land acquisition has been used as a policy instruments to correct market failures in urban development, to achieve environmental and social goals or to help to implement land use plans. Therefore in market economy especially in developed countries where compensation is based on market values of land taken, land acquisition is justified on the basis that mispricing of infrastructure and profit-driven private markets often result in urban development patterns that have inadequate provision of public and urban basic services, restrictions on the ways land can be used in terms of type and intensity help to achieve social, environmental and cultural goals and objectives among others.

In my view there seems to be a universal agreement on compulsory acquisition if it’s intended to satisfy the conditions of lawfulness, public interest with the major difficulties arising out of compensation. The management of the process is of great consequences to those whose lands are acquired and depending on the legitimate aim of such acquisition and its used can be advantage or disadvantage to the welfare of communities. Knetsch and Borderding<sup>75</sup> using Canadian legal policy argue that the nature and degree of these impact seem particularly sensitive to compensation policies, whiles there is in practice great

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<sup>72</sup>Ding (2007) p 3

<sup>73</sup>Larbi et al (2004) p.6 for an in-depth explanation of the some of the problems that arises as a result of compulsory acquisition

<sup>74</sup>Ding (2007), Pages 1-13

<sup>75</sup>Knetsch and Borchering (1979), Pages 237-252

uniformity in determining individual payment, a disparity remains not only in the legal basis for compensation but more generally in what are deemed to be desirable principles governing the awards. They further argue on the distinction between the values to the owner and market value used in determining the compensation by basing their argument on case law which comes with such disparity. However, their proposal for alternative measures in dealing with compensation such as free exchange and full payment of compensation also comes with a lot of critique.

### **2.5.3 Determination of Compensation**

Determination of compensation has been the most controversial point when it comes to compulsory acquisition power. Observation from the general argument shows that in most countries, there are of no clear laws regulating the regime of compulsory acquisition with respect to compensation. The ambiguity revolves around what constitutes just, fair or adequate compensation and the criteria use when properties such as lands are acquired by government for developmental purposes. This has lead to different norms on compensation of how, when and where such compensation should take and who should pay.

However, international human rights law which has led to the protection of peoples right does not provide an explicit answer to what is required in compensation but the three human rights conditions such as lawfulness, public interest and necessary for democratic society with proportionality including compensation has provided some answers in the sense that it helps to strike a fair balance among competing interest. Sometimes the regional instruments left the issues of compensation to the respective national law and jurisdiction but not always the case since case law from ECHR and that of SERAC case has shown.

As noted by Bigham<sup>76</sup> “fair market value constitutes the only fair and workable measure of damages for landowners whose real property has been taken for public use.” If fair market value is the accepted basis for compensation, legislation providing for such process should be clearly explained to all interested parties about how market value will be assessed and determined. Lack of clarity in the systems explains such contradiction with respect to compensation.

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<sup>76</sup>Bigham (1971), page 63

As noted in the FAO studies<sup>77</sup> compensation whether in financial form or as replacement land or structures is at the heart of compulsory acquisition, ineffective management of the process leads to loss of homes, land and means of livelihood. It was further argued that in the payment of compensation, there is the need for ensuring equity and equivalence which provides for flexibility, balancing of interest, fairness and transparency.

## **2.6 Socio-economic implication of Compulsory Land Acquisition**

As posited by Ding “the consequences of land acquisition can be enormous. The impacts on displaced households can be far-reaching and long lasting; income reduction, loss of means (lands) of living support and breakdown of social network are the most identifiable adverse effects on displaced households.”<sup>78</sup> In taking the cost and benefit analysis of lands acquisition into consideration, the negative implication for lands on the livelihood of the people is far reaching than the positive impacts of promoting economic, industrial and infrastructural development which always form the basis by government of the day in acquiring lands.

Lands play a vital role in the lives of people, depriving people of their access to their lands which serves as the main conduit for their livelihood as a result of agriculture produce through their farming activities. The resources generated from their agricultural produce is huge to the extent that monetary compensation for lands acquired does not commensurate the number of years the lands can be cultivated for basic sustenance. The impacts can be huge in mining communities as noted by Awudi “the huge scale of excavation has led to a complete change of land form suitable for agricultural and any other livelihood activity.”<sup>79</sup> For instance in mining communities low levels of compensation payments exacerbate the problem of poverty as noted by Owusu-Koranteng<sup>80</sup> in the sense that sometimes the valuation that are places on cash crops like cocoa which has a life span over 20 years is nothing to write home about. This is further collaborated by the 2009 Ghana Mining Report about the injustice against mining communities which leads to foreign companies abusing the human rights of people by exploiting the legal loopholes in the law to the detriment of humanity.

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<sup>77</sup>FAO land tenure studies 10 (2008), p.23

<sup>78</sup>Ding (2007) p. 3

<sup>79</sup>Awudi (2002) p. 7

<sup>80</sup>Owusu-Koranteng (2005) p. 5

“Monetary compensation commonly quickly spent, leaving everyone worse off than before with no land or money left for them again,”<sup>81</sup> such situation leads to negative social vices such as prostitution in the community which is well documented in literatures<sup>82</sup> because their source of revenue generating from their farm produce has been deprived of them and lack of employment among the youth. Though there is lack of skilled labour in such communities, members of the communities hardly get employment in such multinational companies which made them to engage in any menial work just to make a living simply because they have been deprived of their source of living.

Another implication arising out of land acquisition is as a result of displacement of the community. The people’s community sense of social life and bonds are displaced because of breakdown of social network. People becomes internally displaced person within their community to the extent that the provision of social amenities that enhances the general living standards of people and sense of belongingness is lost because of the displacement that comes with such improperly following due process of the law in the protection of the people. In principle infrastructural development which sometimes form the basis of compulsory land acquisition for foreign investors rather becomes a disadvantage to such community or people’s since companies interest are placed above community interest in practices however in principle that is not the situation.

## **2.7 Concluding Remarks**

It is seen from above discourse leading to the adoption on the right to property in international treaty collection did not received the needed attention in the protection of the right of people. The non-recognition of the right to property was as a result of long debate based on the fact of what should be included in the main text but with further expatiation on the said right in the regional human rights instruments provided some sort of protection based on its numerous case law especially from the ECHR resulting from the abuse of right to property leading to affect other rights.

However, on the general argument on compulsory acquisition upon satisfying the conditions of lawfulness and public interest, the ambiguity and constraints was revolving around the issues of what constitutes a just compensation in the acquisition power of government

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<sup>81</sup>Richards (2008)

<sup>82</sup>Akabzaa & Darimani (2001) pages 44-45, Gibson & Klinck (2005) page 125



granted by the legal framework in acquiring properties such as land. Observation from above shows that in most countries, the issues arises from the fact that there is no properly constituted procedure in awarding such compensation resulting from ambiguity surrounding the process. Though international human rights law does not provide an explicit answer however there are some useful answers to be found in the regional documents based on case law especially the ECHR.

## Chapter Three

### 3.1 Introduction

The observation from above discourse leads to the discussion of Ghana as case study with special focus on the rural mining communities where the laws which intend to protect the ordinary masses are sometimes flouted as result of them being voiceless and unable to stand to defend their right to property based on the laws, the basic principle used in property valuation as well as the role of state institutions responsible for managing properties such as land.

### 3.2 The case of Ghana

The Constitution of Ghana grants government, the powers to compulsorily acquired lands for developmental projects if its satisfy the conditions of lawful, compensation, public interest and other commercial purpose such as attracting foreign direct investments in other sectors of the economy. However, this does not come without a lot of contestations from the people or communities whose lands are acquired for any purpose when such conditions are not fairly balance. The most affected areas are the rural mining communities where insecurity of land tenure is at high which in the end might leads to deprivation of basic right to sustenance of living. As a result of neglect and lukewarm attitude of states taken proactive steps in fulfilling its obligations in such rural mining communities which contribute a lot to the growth of the country's economy, has prompted a number of NGO's for instance Third World Network (TWN)<sup>83</sup> and Wassa Association of Communities Affected by Mining (WACAM)<sup>84</sup> to focus much attention in such places by bringing to the doorsteps of government, how such multinational mining companies are violating the right of such communities.

The basic policy for compulsory land acquisition in Ghana has been base on the argument for public interests and purpose with legal backing for the infrastructural and developmental needs of the general public since colonial time. The general argument espoused above has been the same argument in the position of Ghana and this has been formalised by given its legal backing from the Constitution irrespective of the right to property. For every country to develop, lands plays a crucial role for infrastructural development to take off and this provide

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<sup>83</sup>Publication in Africa fights back to control its minerals, in the publication Ghana civil society rally support for government to continue the needed reforms in the mining sector in order to make ordinary citizens benefit from the industry, [http://downloads.twnafrica.org/Agenda\\_15.1.pdf](http://downloads.twnafrica.org/Agenda_15.1.pdf) page 15

<sup>84</sup>Owusu-Koranteng (2001), a presentation on human rights issues in mining areas.

the needs for government to acquired lands for such project for onwards benefit to society. As noted by Larbi<sup>85</sup> the critical challenges emanating from the regime of compulsory acquisition is as a result of the management of the process due to lack of strategic development programme, inefficient management of acquired lands and non-payment of compensation.

The right and interests eligible for compensation and procedures for claiming compensation were all highlighted in Larbi's article.<sup>86</sup> In the payment of compensation the Land Valuation Board (LVB) plays important role because is the institution mandated by state to evaluate the properties acquired but this does not come without constraints.

Therefore, using Ghana as case study for analysis the area of mining communities deserved a lot of attention in the sense that this is where the laws are mostly flouted in the name of attracting foreign direct and economic investments and to analyse whether the relevant laws served to contradict each other or help in the protection of right to property. As posited by Ikdahl<sup>87</sup> 'the respect for the right to own property' resolutions referred to UDHR Article 17, arguing that the right to own property was "of particular significance in fostering widespread enjoyment of other human rights and contributes to securing the goals of economic and social development". In fostering such enjoyment there is the need to look at how the relevant laws served to protect, provide and facilitate under the aegis of the appropriate authorities who have such mandates or how such laws tend to contradict living the people at a disadvantage.

### **3.3 Legal framework for Compulsory Land Acquisition and Compensation**

The 1992 Constitution of Ghana guarantees private ownership of property. Article 18(1&2) provides that "Every person has the right to own property either alone or in association with others. No person shall be subjected to interference with the privacy of his home, property, correspondence or communication except in accordance with law and as may be necessary in a free and democratic society for public safety or the economic well-being of the country, for the protection of health or morals, for the prevention of disorder or crime or for the protection of the rights or freedoms of others." The basic policy for compulsory acquisition is provided by the Constitution Article 20(1) which states that "no property of any description or interest in or right over any property shall be compulsorily taken possession of acquired by the state" and the article 20(2a&b) states that "compulsory acquisition of property by the State shall

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<sup>85</sup>Larbi et al (2004) p 122-125

<sup>86</sup>Larbi (2008) p 12-15

<sup>87</sup>Ikdahl (2009) p 46

only be made under a law which makes provision for – the prompt payment of fair and adequate compensation; and a right of access to the high court by any person who has an interest in or right over property whether direct or on appeal from any other authority, for the determination of his interest or right and the amount of compensation to which he is entitled.”

“The cumulative effective of the exercise of compulsory acquisition powers over the years has been increasing resentment against state,”<sup>88</sup> especially rural mining communities where insecurity of tenure is high. The law regulating the mining regime serves to give much preference to investors than landowners and in the end such owners lose their access to lands or even when compensated is insufficient to how such lands could have benefited them. The inefficiency in the system tends to put women more at a disproportionate advantage in the sense that in the “rural areas and among the urban poor, women tend to be almost entirely dependent on the land for their livelihood and have the fewest options when deprived of their lands.”<sup>89</sup>

As noted by Sarpong “Ghanaian law does not recognise usufructuary interest in lands as compensable interests,”<sup>90</sup> meaning usufruct holders are only entitled to be paid for the values of crops on lands since the lands are lease to them for a period of time. However when lands are acquired by the state for projects like schools, compensation is effected for lands acquired but not the same for rural mining communities. Apart from the constitution which provides the basis for land acquisition, other legislative framework also served to compliment it since the main focal point of analysis been the rural mining communities with respect to right to property and compensation also deserved attention.

### **3.3.1 Sections of Law Regulating Mining and Minerals Regime**

As mention above the Constitution grants everyone the right to property, however government power to acquire them upon satisfying the conditions for acquisition. The same goes for the mineral right in Ghana; the State controls all natural resources in Ghana. The statutory body responsible for the regulation and management of mineral resources in Ghana and for the co-ordination of policies in relation to them is the Minerals Commission (Commission) established by Minerals Commission Act.<sup>91</sup> The benefit that can inure to the

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<sup>88</sup>Larbi et al (2004) p. 125

<sup>89</sup>Sarpong (2006) p. 14

<sup>90</sup>Sarpong (2006) p. 16

<sup>91</sup>Minerals Commission Act, 1993 (Act 450) see section 2.

country at large in such natural resources like minerals is enormous to the extent that, the need for a legislative framework to regulate such an economically viable venture. This leads to the minerals and mining Act, hereinafter referred to Act 703<sup>92</sup> and of particular relevant to the discourse is Section 73 – 75. Section 73 of the Act spells out compensation for disturbance of owner's surface rights and reads; *(1) the owner or lawful occupier of any land subject to a mineral right is entitled to and may claim from the holder of the mineral right compensation for the disturbance of the rights of the owner or occupier, in accordance with section 74.*

*(3) The amount of compensation payable under subsection (1) shall be determined by agreement between the parties but if the parties are unable to reach an agreement as to the amount of compensation, the matter shall be referred by either party to the Minister who shall, in consultation with the Government agency responsible for land valuation and subject to this Act, determine the compensation payable by the holder of the mineral right.*

*(4) The Minister shall ensure that inhabitants who prefer to be compensated by way of resettlement as a result of being displaced by a proposed mineral operation are settled on suitable alternate land, with due regard to their economic well being and social and cultural value, and the resettlement is carried out in accordance with the relevant town planning laws.*

*(5) The cost of resettlement under subsection (4) shall be borne by the holder of the mineral right, (a) As agreed by the holder and the owner or occupier as provided under subsection (3) or by separate agreement with the Minister, or (b) In accordance with a determination by the Minister, except that where the holder elects to delay or abandon the proposed mineral operation which will necessitate resettlement, the obligation to bear the cost of resettlement shall only arise upon the holder actually proceeding with the mineral operation.*

*(6) Subject to this section, the Minister and a person authorized by the Minister may take the necessary action to give effect to a resettlement agreement or determination*

Section 74 provides compensation principles and states; *(1) the compensation to which an owner or lawful occupier may be entitled, may include compensation for, (a) Deprivation of the use or a particular use of the natural surface of the land or prior of the land, (b) loss of*

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<sup>92</sup>Ghana's Minerals and Mining Act 703 (2006), an amendment to Minerals and Mining Law 1986 (PNDC Law 153) and Mining Amendment Act, 1993 (Act 475)

*or damage to immovable properties, (c) in the case of land under cultivation, loss of earnings or sustenance suffered by the owner or lawful occupier, having due regard to the nature of their interest in the land, (d) loss of expected income, depending on the nature of crops on the land and their life expectancy, but no claim for compensation lies, whether under this Act or otherwise (e) in consideration for permitting entry to the land for mineral operations, (f) in respect of the value of a mineral in, on or under the surface of the land, or (g) For loss or damage for which compensation cannot be assessed according to legal principles in monetary terms. (2) In making a determination under section 73(3), the Minister shall observe the provisions of article 20(2) of the Constitution which states that, in the case of compulsory acquisition of property, prompt payment of fair and adequate compensation shall be made.*

Finally Section 75 providing access to the court in respect of compensation by stating clearly; *The owner or lawful occupier of land affected by a mineral right shall not apply to the High Court for determination of compensation to which the person is entitled unless the person is dissatisfied with the terms of compensation offered by the holder of the mineral right or as determined by the Minister ... (3) In proceedings brought before the High Court [for a review of a determination by the Minister], the High Court shall be exercising its supervisory jurisdiction as well as Article 257(6)<sup>93</sup> of the Constitution.*

However, some of the criticism level against Act 703 during review of the mining law has been particularly section 2 where the law provides for the compulsory acquisition of land, stating “where land is required to secure the development or utilization of a mineral resource, the President may acquire the land or authorise its occupation and use under an applicable enactment for the time being in force” and 46 which address compulsory acquisition of land and rights conferred by mining lease as been hostile to mining communities on the basis that the law impoverishes already the poor and vulnerable mining communities but enriches already prosperous and powerful multinational mining companies. The above legislative framework will set the basis for analysis with the case law. However, before proceeding to the discourse there is the need to look at the legitimate aims of compulsory acquisition of lands against the will of owners whose properties are acquired.

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<sup>93</sup>Article 257(6) reads “Every mineral in its natural in, under or upon any land in Ghana, rivers, streams, water courses throughout Ghana, the exclusive economic zone and any area covered by the territorial sea or continental shelf is the property of the Republic of Ghana and shall be vested in the President on behalf of, and in trust for the people of Ghana.”

### 3.4 Legitimate Aims of Acquiring Lands

Within the purview of the Constitution, the government main purpose of compulsory acquiring lands and the necessary conditions that must be satisfied in Article 20(1&2) as a result of the taking of possession or acquisition should be in the interest of defence, public safety, public order, public morality, public health, town and country planning of the development or utilization of property in such a manner as to promote public benefit; and the necessity for the acquisition is clearly stated and is such as to provide reasonable justification for causing any hardship that may result to any person who has an interest in or right over the property.

In addition to the above, in the article by Larbi et al<sup>94</sup> they highlighted some sound theoretical reasons why government may acquire lands compulsorily. Among some of the reasons are as a result of the public needs for basic social and economic amenities, the existence of perceived social and economic efficiencies in private market operations which drive a search for greater efficiency in the productions of goods and services and to ensure greater equity and social justice in the distribution of land. This serves to explain that governments day in day out always used the social and economic benefits that citizenry enjoy as basis in land acquisition without much consideration on the cost and benefits analysis of the whole issue especially the human rights of the people that needs protection from governments.

The ambiguity of the process which is beset with legal, economic, social, moral, and organisational and management difficulties. This is further collaborated by Larbi's article where he assert that the process is a top-down approach with expropriated owners excluded from the decision making process. An approach to policy making and implementation which Platteau asserts has failed miserably all over Africa as posited by Larbi et al<sup>95</sup> simply because in sub-Saharan Africa land matters and more specifically tenure rights are embedded in socio-cultural systems that are not easily bypassed.

Kotey cited in the article by Larbi et al<sup>96</sup> argues that acquisition in the public interest in Ghana on the other hand could mean acquisition by government for public bodies and statutory corporations but also for private companies and individuals, for purposes which although they may contribute to public welfare, confer a direct benefit including project on

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<sup>94</sup>Larbi et al (2004) p.116

<sup>95</sup>Larbi et al (2004) p.125

<sup>96</sup>Larbi et al (2004) p.117

the user. In this sense for instance, the Nkwantakrom in the case of Nana Kofi Karikari and 44 others whose lands were acquired by the government for multinational mining company can be argued falls under such category. Thus this goes to confirm that government does not compulsorily acquired for only public interest but also for commercial purpose which brings a lot of economic benefit to the people but major problem arises as a result of fair balance among competing interest. In reference to the regional documents, there are no specific and legitimate aims listed for land acquisition meaning the aims are subject to national jurisdiction or each country of each country but must satisfy three human rights conditions of lawfulness, public interest and necessary for democratic society and on such basis that proportionality including compensation to strike a fair balance.

### **3.5 The Role of Land Valuation Board**

The constitution mandated institutions of government to carry out the valuation of property that are acquired for the necessary compensation to be paid to the beneficiaries. In Ghana, the institution mandated by government to collate research, manage and record all data on properties in helping to carry out property valuation is the Land Valuation Board (LVB) which falls under the Lands Commission. This was form as a result to manage the inefficiencies within the system during the reforms of land administration. In carry out their functions has not happen without challenges as posited by Larbi et al<sup>97</sup> “Public agencies responsible for the management of compulsory acquired lands may operate within constraints imposed by law and legislation, making them inflexible and insensitive to unforeseen and changing demands”. They face enormous challenges to effectively and efficiently carry out their mandate which may also result from lack of budget constraints leading to the delay in the payment of compensation which can take several years.

In spite of the challenges, according to Kassanga<sup>98</sup> the board is charged with the functions of government valuer including; determining all matters of compensation for lands acquired by government, any organ of government or public corporation, preparing valuation lists for property rating purposes, valuation of interests in land for the death duties, determining values for government rented premises, providing advisory services to the lands commission and the forestry commission on royalty payments on forestry holding and products as well as

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<sup>97</sup>Larbi et al (2004) p. 116

<sup>98</sup>Kassanga (2001), p. 58



advising all organs of government on all matters of valuation of interests in immovable property.

Reference to Act 703, shows that LVB plays important role in the act. Section 73(3) of the Act mandate LVB to be consulted in the process of the determination of compensation when parties are unable to reach an agreement, in addition much can be said of section 74(2) which made reference to prompt payment of fair and adequate compensation in the case of compulsory acquisition of property.

Apart from the role play by the government institutions, other corporations or companies who are also beneficiaries of the acquired lands by government to carry out their businesses have also instituted their scheme for payment of compensation to the affected people or communities. However, such mandate is carry out with all stakeholders on board involving the negotiation for the effect of payment. For instance lands acquired by government for multinational mining companies such as Newmont Ghana Gold<sup>99</sup> for exploration purposes and temporary access activities until there is a properly developed plan to mine a specific area design has outline the process through which compensations are paid. In the end communities whose lands are acquired and compensation paid out does not inure to their benefit. The reasons as enumerated by the guide to compensation by Newmont Ghana gold, it is realised that people or communities does get compensated for the crops and products but only to their disadvantage as a result of valuations of the products.

This is as a result of flaws in Act 703 that could be describe as ‘holes’ according to legal consultant of WACAM<sup>100</sup> in essence given much preference to companies to the detriment of landowners with respect to compensation due to the weak protection of the law. Land has become a source of generation of wealth and the benefits that the land could have accrued to them for years and the enjoyment of such inadequate compensation rather makes them vulnerable thereby violating their right to property. The impact on such a community becomes huge in the sense that it affects other sectors of life because the cost and benefit analysis and their rights were not properly considered during the process of what goes into the valuation process.

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<sup>99</sup>Newmont Ghana Gold (2005), pages 11-17

<sup>100</sup>Asiamah (2010), an article written during the review of mining law in Ghana

### 3.6 Basic Principles in Property Valuation

Scholars are of the view that in most democratic states or economies, the most often use in assessing the value of lands acquired by government for public or commercial use under compulsory acquisition power is the use of fair market value or open market value whereby the valuation of property such as lands is based on the market conditions prevailing at the time of acquisition. As posited by Bigham<sup>101</sup> “fair market value constitutes the only fair and workable measure of damages for landowners whose real property has been taken for public use”.

In Ghana property valuation is carried for various reasons such for insurance, payment of compensation for lands acquired by states, taxation, and rent or leasing, among many others. However, in carrying out any property valuation, a number of factors are taken into consideration including its purpose, use, location, physical state, tenure and time.<sup>102</sup> Mends posit that open market value is “the estimated amount for which a property should exchange on the date of valuation between a willing buyer and a willing seller in an arm’s-length transaction after proper marketing wherein the parties has each acted knowledgeably, prudently and without compulsion.”<sup>103</sup> However, this approach might be acceptable in most industrialised economies, though there may be some public dissatisfaction as to the procedure used. In developing economies like Ghana where there is insecurity of tenure especially in rural lands as compare to lands in urban areas, the used of open market value leaves a major deficit because valuations that may be place on rural lands especially by the valuer for investments by business entities will disadvantage them as compare to the value that will be place on lands in urban areas.

Based on the above reasons for property valuation, section 74 of Act 703 clearly shows that lands acquired by government in the case of compulsory acquisition for mining purposes including its products on the lands also fall in line with properties that are meant for valuation purpose to be carried out.

In addition, since “fair market value’ assumes valuation based on the highest and best use”<sup>104</sup> will further leads to exploitation of the rural poor of which the law is to protect. Sometimes

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<sup>101</sup>Bigham (1971), p 63

<sup>102</sup>Mends (2006), p 2

<sup>103</sup>Kassanga (2001), p. 2

<sup>104</sup>Bigham (1971), p.68

the value of product on the lands and compensation paid is always not commensurable. As a result of the inefficiencies in the system of property market where there is lack of credible property data for valuation become constraints on the use of the open market value in property valuation. This inefficiency within the system has not benefited property owners as they are supposed to get rather do not inure to their interest, by making them exploited simply because there are ambiguity as a result of unrealistic and properly constituted laws to curb the menace. The question then is how does this constraint in the valuation process leads to contradictions as against the legitimate aims or conditions that must be satisfy before acquiring lands without proper analysis of how that will affect the livelihood of its people.

### **3.7 The Case Study**

#### **Nana Kofi Karikari and 44 others vs. Ghana Australia Goldfield (GAG) Limited**

##### **3.7.1 Introduction**

There are several case laws from rural mining communities in Ghana with much focus on environmental and other issues such as Cepil vs. EPA, MC & Bonte Gold Mines with suit number A (EN) 1/2005, Robert Abban vs. Goldfield Ghana ltd with suit number CS 47/97 inter alia to the neglect of human rights issues of those whose lands are acquired. This section seeks to explore the case of Nana Kofi Karikari and 44 others vs. Ghana Australia Goldfield (GAG) Limited. This case was chosen from the others as a result of the numerous human rights issues that arise from the case which expose weak protection of the law which served to protect people. It will further seek to analyse the case from international human right standards as per the required laws based on the legal framework of Ghana governing compulsory acquisition and right to property using the background, fact of the case and the outcome of court decision whether the best practices are followed to protect to property.

##### **3.7.2 Background**

The case of Nana Kofi Karikari and 44 ors v GAG Ltd dates as far back as 1997. In the case, forty-five plaintiffs who felt they had a common grievance against the defendant company as a result of unlawful demolition of their unnumbered properties at Nkwantakrom a village near Tarkwa in the Western Region of the Republic of Ghana. The demolition exercise carried out by the defendant company has rendered the plaintiffs homeless affecting their

source of livelihood and made them internally displaced persons within their own community.

However, upon fruitless effort in contact with the appropriate authorities and the defendant company in demand for compensation as a result of demolition based on the legal framework of Ghana for not following due process of the law with specific reference to Act 703 filed a writ of summons on 8 December, 1997 against the defendant company with suit No LS 34/97.<sup>105</sup> The defendant company was given a mining lease or concession on the lands of the community which satisfy conditions under compulsory acquisition but lay the claims that the plaintiffs settle there with the aim of attracting compensation from the company but according to the company there were no settlers there when the concession right was given them, therefore their demands for compensation has no basis from the law.

The above case provide an interesting study base on the legal framework on right to property, compulsory acquisition and compensation issues which has been a major source of problem affecting people or communities whose lands are acquired especially in mining communities where there is insecurity of tenure.

### **3.7.3 The Fact of the Case**

The Plaintiffs being voiceless, vulnerable and unsatisfied by the non-cooperative nature of the appropriate authorities and the defendant company actions sought the interest of Center for Public Interest Law (CEPIL). They took the matter to court seeking compensation for the 45 residents of Nkwantakrom whose lands and several properties were destroyed unlawfully as a result of the mining operations of the defendant company. The basis for the Plaintiffs' arguments for the case was in reference to the legal framework of Ghana and the Banjul Charter which guarantees the right to own property and not to be deprived of their property without just compensation.

In the fact presented by the Plaintiffs, the defendant company who alleged to have been given a concession right on their lands carried out a demolition exercise on or around 27 June 1997 on their lands leading to the destruction of several properties. On countless occasion reported the matter to the authorities within the district but the lukewarm attitude of the authorities have rendered them internally displaced person within their own community, in essence has

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<sup>105</sup><http://www.cepil.org.gh/cases/mining-communities-human-rights-cases>

destroy their source of livelihood. From the law, they must be duly compensated for such an action and even observation from the judgement show that they were not duly informed in written before the demolition was carried out.

According to the judgement, the demolition was carried out by armed Policemen, thugs and District Security Council (DISEC) which were acting on behalf of the defendant company. However the defendant company deny such allegation that act by DISEC was done on their behalf. Evidence of the properties destroy were presented during the trial and more contentious, document proving that they are rightly owners of the land was showed with portions given to other residents for their farming activities.

In the argument put forward by the defendant, they lay the claims that the settlers of Nkwantakrom were unlawful residents of the community. They therefore settle there when Government of Ghana has granted them the mining concession on the community lands. They quickly moved to settle there with the aim to demand compensation for their acquired lands. They further argue that after serving notices of the acquisition of mining right in the community of Nkwantakrom, the people whose crops and properties were affected have already been evaluated and compensated for.

However evidence submitted by the defendant company was proven inconclusive to the extent that the several argument and exhibits submitted by the Plaintiff in support of their case was proven enough grounds that they were living there and original settlers prior to the arrival of the defendant company, therefore the lands belong to them.

Based on the fact of the case, five distinct legal and human rights issues were raised. The first was whether Nkwantakrom existed before the defendant obtained their licence, whether or not the defendant caused the demolition of the Plaintiffs' building, whether or not the demolition of the Plaintiffs buildings by the defendant company was unlawful, whether or not the allegedly unlawful demolition of the Plaintiffs building by the company caused any loss to the Plaintiffs and finally other issues arising from the pleadings.

On the basis of the above argument, that on 8 December 1997, the Plaintiff filed a writ of summons and a statement of claim against the defendant company seeking justice based on above legal framework of Ghana, Act 703 and the Banjul Charter with specific reference to

right to property and demands for just compensation when Peoples property are taken or acquired.

On 20 December, 2007 a final judgement was delivered in which the judgement went in favour of the Plaintiffs' aside general damages and an injunction they sought for. Unsatisfied by the judgement, the defendant filed a motion with the high court on the stay of execution for the orders within the judgement. However, this was dismissed and they were ordered to pay one-third of the cost to each Plaintiff prior to proceeding with an appeal.

### **3.7.4 Human Rights Violation from the Incident on Wider Perspectives**

A thorough analysis of the above case leads to the violation of fundamental human rights of the Plaintiffs by the defendant company actions. The legal framework of Ghana, the Banjul Charter and International Human Rights Instruments guarantees the protection of right of people.

It is seen from the case that, the right to housing which is embedded within the right to an adequate standard of living and is protected by both the UDHR article 25(1) and ICESCR article 11(1) is clearly violated by the unlawful action of the defendant company. The Plaintiffs' were forcedly evicted from their homes as a result of the demolition which amount to gross violation of their human rights under Section 2 of UN Resolution 1993/77. Irrespective of the fact that the right to housing is not an explicit right guarantee under the Constitution of Ghana, it is protected by article 33(5) which holds that constitution protects those fundamental rights and freedoms which are not contained in the constitution but are considered to be "inherent in a democracy and intended to secure the freedom and dignity of man."

In addition other rights which are violated as a result of unlawful act that is not explicitly mention in the judgment are the right to respect for human dignity and the right to be free from trespass from other persons. Article 15 of Ghana's Constitution guarantees the respect for human dignity. As stated "no person shall be subjected to any condition that detracts or is likely to detract from his dignity and worth as human being." The destruction of their property and their community tarnished their human dignity and sense of worth, freedom of association. This is demonstrated by the manner in which the demolition exercise was carried out.

The way the demolition was carried out resulted in trespass to some of the Plaintiffs. The forceful removal from their properties and as such they suffered injuries to their bodies amount to inhumane and degrading treatment which is a clear violation of their right. The protections of human rights which the law serve to protect were largely gloss over in the judgement.

If the plaintiff rights to property were respected such as their houses, schools, place of worship, damages to their properties, other rights could not have been violated in the unlawful actions of the defendant company.

### **3.7.5 Outcome of Court Decision**

This section provides summary of the decision of the judgement. The evidence adduces shows that the plaintiffs have *locus standi* to bring a suit against the defendant company. Therefore judgement was issue largely in favour of the plaintiffs simply because the judge held that there was consistency in their argument as a result of conflicting argument raised by the dependant company. The plaintiffs were compensated for their lost goods, damages and allowance for relocation. Though a number of issues were raised in the above case, the judge had to rule depending on the issues and adducing fact supporting it. With respect to the existence of Nkwantakrom, the judge had to rely on the photographs submitted by the plaintiffs in their argument which was showing a devastated village and also with some tall coconut trees indicating that Nkwantakrom existed before the defendant company was given a concession right. Having established the existence of the village, the judge concluded that the demolition which is a violation of their fundamental human rights under the 1992 Constitution and under international law was cause by the defendant company in an acting capacity.

With references to past cases the judge held that anybody who authorises or procures a tort to be committed by another person is responsible for the tort if he had committed it himself. The due process not properly followed by the defendant in the demolition exercise was read together with Section 49(1)<sup>106</sup> of the Local Government Act 1993, Act 462. However, in explaining what constitutes ‘sufficient’ notice to be given to the plaintiffs, the judge made references to the case of Moses Armah vs. Wassa West District Assembly to conclude that

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<sup>106</sup>Act 462 (1993) Section 49(1) reads “A physical development shall not be carried out in a district without prior approval in the form of a written permit granted by the district planning authority”

there should be a written notice or notice provided at public forum, but the mere print or electronic media proved inadequate.

Another issue raised was about the unlawful demolition by the defendant company has cause any loss to the plaintiff. The judge was of the view that the act of the defendant has cause them a grave inconvenience since the demolition affected their houses, community school and place of worship. In addition, the letters purported to have been issue to the inhabitants of Nkwantakrom was rather not the case but the said letters were issues to the neighbouring areas but not the residents of Nkwantakrom. Failure on the part of the defendant company to give sufficient notice to the residents of Nkwantakrom, the judge held that they have violated the PNDCL 153 now the Mineral and Mining Act as well as the Local Government Act leading to the abuse of mineral holding right which subsequently affect the right of the people to livelihood.

However, with respect to the general damages that the plaintiff were seeking as a result of the unlawful demolition, the judge was of the view that such damages could not be recover for the demolition of their houses and the destruction that has cause to their crops. The judge was of the opinion that from the law, entering the plaintiff land was not an illegal by the defendant in the sense that the defendant has a legal right or authority and a license to enter the land. The judge made reference to Gliksten's case<sup>107</sup> concerning general damages and he posit that "act done in pursuance of the authority or license cannot be the subject for general damages in trespass, it is for this reason that the entry or disturbance of the owners surface right is held not to be a trespass."

In addition to the above, the counsel for the plaintiffs seeking for special damages for the demolition of their property and relocation allowance, the judges held that special damages need to be proved conclusively. However since the destruction of their property have affected such items for proper valuation, the judge based his valuation on the list of inventory which was submitted by the plaintiffs during their cross-examination, to represent the amount of items that were lost in such demolition exercise that was carried out by the defendant company. The total value of property and case stolen was pegged at GH¢2647.5 which include ten percent of interest per annum from 27th June 1997 to the date of the final payment. The PNDCL 153 governs compensation however, the inability of the appropriate

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<sup>107</sup>Nana K Karikari & 44 ors vs. GAG Page 15



body to assist in such compensation proved futile. As per the law, the judge held that the plaintiffs should be restored to their position prior to the demolition.

The trial judge awarded GH¢13,000.00 to each plaintiff as cash compensation for replacement cost method and using inflation rate at the time and GH¢2,000.00 as relocation allowance in the sense that such an amount would be appropriate to provide the plaintiff with a durable self-contained flat that can withstand the activities of the defendant operation during their mining activities. The judge also ordered that GH¢2,000.00 should be paid to the founders of the church, mosque and the first plaintiff as well as for the reconstruction of the community school. However, in determining such amount to be compensated because of the difficulty and non-cooperation from the appropriate authorities, the judge follow the example of 1911 English judge who said that the measure of damages “is to be dealt with in rough doing the best one cannot attempting or professing to be minutely accurate [...], such matters should be dealt with broadly and as best as we can as much of common sense.”<sup>108</sup>

Finally, the plaintiffs claim for perpetual injunction against the defendant was however dismissed by the judge since they were permitted by law to operate on the concession.

### **3.7.6 General Lessons from the Case**

The above case provides some interesting general lessons that can be learn from including the weakness and inconsistency as a result of flaws in Act 703 posited by Yaw Opoku a legal consultant to WACAM during review of the Mining Law.<sup>109</sup> It is evident from the judgement that the Plaintiffs were vulnerable and the defendant company fully resource took advantage of their situation and in collaboration with district authorities exploited them.

It is evident in the case that in spite of the vulnerability of Plaintiffs, Civil Society Organisations (CSO's) or NGO's are at the call of such vulnerable in helping to propagate their needs and rights when state authorities with such responsibilities does not act in assisting it people in the protection of their fundamental human rights. This is sometimes seen as prevalent in the rural mining communities where there is high risk of tenure security. Authorities are influence by such companies leading to the violation of rights as a result of being voiceless in such local communities.

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<sup>108</sup>Nana K Karikari & 44 ors vs. GAG Page 20

<sup>109</sup>Asiamah (2010), an article written during the review of mining law in Ghana

In addition, another general lessons emanating from the case is based on the weakness of the law in highlighting explicitly human rights issues. The silence nature of the law on human rights issues which was evident in the judgement lead to non-recognition of a lot of human rights violation by the defendant company. This has lead to criticism of Act 703 by Civil Society Groups in Ghana as primarily faction to attract investors therefore lacking protection for local communities.

Finally, it was evident in the case that there has not been enough legal education to communities affected by the act of the defendant company. There was the need for more education for the communities to be abreast with the relevant portions of the law through provision of enough information to communities prior to the activities of any mining companies. Interpretation of the law in local dialects for easy understanding of what the law provides for them becomes necessary for such communities to understand their rights.

### **3.8 Analysis from Human Rights Perspectives**

#### **3.8.1 Introduction**

Ghana been signatory to a number of international human rights treaties is committed to abiding by the rules and regulations emanating from such in the protection of human rights of its people. Before proceeding to analyse the judgement from human rights perspective, this section seeks to structure the argument into two, based on the state obligation as a duty bearer under international human rights law and whether the interference were as a result of lawful or unlawful incident of defendant company in the protection of human rights by the duty bearer on the basis of legitimate aims or satisfying three human rights conditions such as lawful, public interest and proportionality including compensation.

#### **3.8.2 State Obligations**

Internationally accepted norms of the various obligations mentioned by human rights indicated that all rights generate at least some duties for a state that undertakes to adhere to a rights regime. In human right law, the state is the duty bearer whiles individuals are the right holders.<sup>110</sup> The distinction between human rights treaties from other international treaties

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<sup>110</sup>With the exception of regional instruments like the African Charter and American Convention which also make references to duties of individuals.

stems from the fact that, they regulate the relationship between states and individuals rather than between states.

As posited by Eide, there rest three obligation of action on states to respect, protect and fulfil which also rest on two-fold that is to ‘provide and facilitate’ in international human rights. This goes further to explain that the obligation to respect means that states must prohibits public officials from committing human rights violation and provide effective remedy for those whose right are trample upon. Obligation to protect also means that states must prevent non-actors from interfering with human rights. The obligation to fulfil “requires the state to take the necessary measures to ensure for each person within its jurisdiction opportunities to obtain satisfaction of those needs, recognised in the human rights instruments which cannot be served by personal efforts.”<sup>111</sup> This is further explained in General Comment 3<sup>112</sup> on CESCR Art.2 (1)<sup>113</sup> on the nature of state parties’ obligation.

The right to property which falls under UDHR and not the Covenants which is legally binding on states parties, however with the “UDHR regarded as an authoritative interpretation of the UN Charter and has attained the status of customary international law” as noted by legal scholar Mertus<sup>114</sup> couples with numerous case law on right to property from the regional instruments make its binding on state parties to protect the right of people and article 25<sup>115</sup> of African Charter clearly explains such duties that member states has in protecting human rights. Therefore states bear responsibility for the development that takes place within its territory and unless it can absolve itself from such responsibility. On the above that the analysis will be structure based on whether the incident was lawful or unlawful.

### **3.8.3 The Loss as a Result of Unlawful Incident**

As noted earlier, from the legal framework and the legitimate aims of land acquisition and the right to property. Persons whose lands are acquired which fall within the above must be compensated for and the criteria for such compensation should be just, prompt payment of fair and adequate. From the above case study, the government legally acquired lands for the

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<sup>111</sup>Eide (1987) § 66-69

<sup>112</sup>General Comment 3 (1990)

<sup>113</sup>Reads Article 2(1) of CESCR

<sup>114</sup>Mertus (2008), the UDHR at 60, P 7

<sup>115</sup>See Article 25 of Banjul Charter

mining company for their activities and section 2, 46 and 74 of Act 703 clearly spelt out what should be compensated for under such circumstance and is evident in the judgement that the people were owners of the lands before the company was given a concession right. In my view, it is realised that the law does not support full protection in the sense that the state which is the duty bearer under human right law instead of enforcing the law were rather helping in violating it. General argument from the case shows that DISEC aided in the demolition which were acting in state capacity. The law clearly state who and how compensation should be paid when acquisition is done for public purpose and with the above case compensation was to be paid by the defendant company with the state playing a supervisory role in making sure that the due process are followed.

The law provides for compensation for houses, crops and economic trees to be affected by the mining operation after the concession rights has been given to the mining investors as noted by Sarpong<sup>116</sup> due to the insecurity of tenure in the rural mining communities. Under state obligations in human rights law, the state is responsible for providing effective remedy for those whose right are trample upon. However, the state is seen in violation of this responsibility in the sense that compensation paid is not fairly balance to provide effective remedy in the protection of the rights of the plaintiffs because they got compensated for some but not all. The Constitution of Ghana contradicts Act 703 showing weakness in the Act in the sense that compensation under Act 703 hardly mention for lands but rather houses, crops etc. In the end landowners or communities lose access to land which serves as source of livelihood and other purposes.

In the above case, the determination of just compensation was largely problematic. This was as a result of non-cooperative nature of the appropriate authorities such as the Land Valuation Board with an oversight responsibility of the Minister of State. The inability of LVB to assist resulted in the judge difficulty in determination of the right amount. Under state obligations, the state is responsible in ensuring that public officials respect the rights of people in order not to violate their rights. However, LVB as public institution in providing assistance in determination of compensation violated the rights of the people by not respecting the rights of the communities. This resulted in the judges using his discretion in determining compensation though under the African Charter with respect property right and compensation, much is left at the discretion of the state parties in determination of

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<sup>116</sup>Sarpong (2006) p. 14

compensation. Therefore, the judge using his own discretion in determining the valuation of the property without proper valuer can be seen as applying minimum standard in the application of the law in the protection of human rights base on the law where there was no fair balance in such determination. Despite the difficulties as a result of definitive evidence of property and lost items, the judge was able to use the provisions of the law in awarding compensation to the plaintiffs. This clearly violates state obligation in providing effective remedy for those whose right are trample upon.

Another area from the judgement which does not reflect true recognition of the protection of the plaintiff's human rights is whether the interference by state in the demolition of the properties was lawful. In human right law the state is oblige to protect such occurrence but is evident in the judgement that the state rather violated the law in the sense that the demolition was carried out by DISEC, armed Policemen and thugs who are all agents of the state acting on behalf of the defendant company when all conditions of interference were not satisfied. Under obligation to fulfil, the state is requires to take all necessary measures to ensure that each person within its jurisdiction obtain satisfaction of its needs recognised under human rights instruments. This goes further to buttress the point that the legislative framework does not guarantees full protection to property right though the domestic laws are use in tandem with internationally recognised human rights treaties in which Ghana is a party to. Government responsibility is providing protection and respecting the law to the latter was rather seen as collaborative effort of the non-state actor in violating the rights of its citizenry.

A thorough analysis of the law which served to provide protection of fundamental human rights of people rather becomes disadvantage to them. It is seen that Act 703 is too shallow in the sense that the when companies are given concession right to mine of a particular lands acquired by the state, the company has the right entry into the said lands without any claims for compensation. In human right law, state obligation to respect the rights of people are violated in the sense that entering people's property without prior notice violate their rights to property which state are oblige to provide and facilitate all necessary means in providing respect for their citizenry, amounting to interference of people's human rights. On the basis of this that when the plaintiffs claiming for general damages were merely gloss over by the judge basing his decision on the minerals owners' right of which the defendant company had such right rather than the surface owner's right. Given the right to enter people's lands and their product destroy without compensation clearly violates their rights. For instance, as per

the laws if any other person destroys ones homes or crops, he or she can seek damages in contrast to concessionaires which are not seen as tortfeasors and therefore receive protection under Act 703. This is clearly seen as violation of the fundamental right of the people of Nkwantakrom.

Another area of the law not fully protecting people's rights stems from the fact that when the plaintiff requested for perpetual injunction on the activities of the defendant company until the due process are followed was rejected by the judge on the law that the defendant company have a license so the needed right to carry out their activities. State obligation to fulfil requires that all necessary measures are ensure to obtain maximum satisfaction of the needs of the people but was clearly violated. This is as a result of continuation of work by Defendant Company whiles all necessary conditions for interference have not been put in place in protecting the right of the community people. In a way the people became internally displaced person within their own locality, their sense of belongingness were destroyed.

In addition, the lukewarm attitude of state authorities in making sure that the law was apply to the latter lead to some unlawful incident perpetuated by the defendant company. The state violated their obligation to protect which must prevent non-actors from interfering with human rights. The activities of the security agencies acting on behalf of the defendant company during the demolition lead to the destruction of several properties of the plaintiffs such as their place of abode, source of community livelihood and the inhumane treatment meted out to them constitute torture which is prohibited in human rights law clearly violating obligations of state under human rights law.

Finally, the Police which rather was to protect and prevent such incident happening until the due process are followed were rather the perpetrators of the unlawful incident, violating their obligation to protect. The unlawful demolition of the plaintiff buildings violate their property right such as housing and constituted force eviction which is prohibited under the laws of Ghana. In CESCR General Comment 7<sup>117</sup> was clearly violated in the sense that appropriate procedure and due process which are all essential aspects of all human rights were not followed. When such wrongful act is committed the affected people need to be compensated for but is realised the judge gave much preference to the concession rights of the defendant company and gloss over the issues of compensation for such unlawful incidence.

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<sup>117</sup>CESCR General Comment 7 (1997), *on the right to adequate housing* (Art.11.1) : *force eviction* read § 15

### **3.9 Concluding Remarks**

Following from the above case, it is realised that the judgement were primarily based on the minerals and mining laws and did not fully incorporate recognition of fundamental human rights. Based on the fact given and analysis, it's recognised that international human rights issues are embedded with the domestic case, indirectly affirming the fundamental rights to property which is protected under Article 18 of 1992 Constitution, Article 14 of the African Charter on Human and Peoples Rights. These are rights which guarantee everyone to owe property and the right to be compensated for if their properties are acquired whether in the public interest or any other interest authorised by law. The judgement served as a victory for right to property which has receive much recognition in the international arena base on numerous case law from the regional instruments and rural poor who are often vulnerable as a result of been voiceless and powerless in seeking to protect their rights.

Finally, it can be observed from the judgement that a lot of human rights were further violated which were not properly recognise during the judgement or were simply gloss over. This will compliment the discourse of acquiring people's property under compulsory acquisition powers without properly satisfying the conditions of interference and how it's impact on the lives of people.

## **Chapter Four**

### **Conclusion and Recommendation**

This chapter presents the synthesis of the entire study by drawing the conclusion and suggested recommendation.

#### **4.1 Conclusion**

The study shows that the impact of compulsory land acquisition power and compensation in the rural mining communities has glaring effect on property right of people. Though the legal framework of Ghana grants government the power to acquired lands, with conditions for interference been lawful, public interest and necessary for democratic society subject to payment of compensation, however analysis from case study shows that in rural mining communities not all conditions are fully satisfied in order to ensure fair balance between public interest and that of the individuals or community interest which in the end violates their rights to property. Therefore there the need for proper harmonisation of the Article 20 of Ghana's Constitution and Sections 74 of Act 703 together with international human right law which has provides some useful answers in ensuring proportionality where a fair balance is determined among competing interest in the protection of their property rights.

Article 20 of Ghana's Constitution which grants government the power to compulsorily acquired lands with payment of fair, adequate and just compensation however poses a contradiction with Section 74 of Act 703 which also made mention of compulsory acquisition power. The above study has shown that though compensation are mention in both documents, acquisition of lands for mining companies makes room for only crops or other properties on the lands to be compensated and not the lands itself as compare to acquiring lands for other infrastructural projects. Such contradiction of the law can aid in violating human rights in rural mining communities in the sense that valuation that is place on products or properties is not proportionally balance as compare to the benefits enjoyed by property owners which in the end affect their source of livelihood.

The study shows that another area of constraints was as a result of the role of LVB inability to determine proper valuation of property due to resource constraints as well as playing its supervisory role on other valuation methods develop by the mining companies. The constraints were clearly evident in the judge inability in awarding compensations to the



plaintiffs. Though the law clearly mandate LVB as valuer of property however beneficiary companies has also instituted their own valuation scheme based on agreement between parties for onwards payment of compensation. However this does not come without resentment because companies gain much preference from their compensation scheme to the detriment of property owners which eventually affect their rights to property. The constraints poses a great challenge to landowners in the sense that landowners are deprived of their access to lands since there are no properly constituted compensation formulas in determining what constitutes just compensation which further complicate their source of livelihood and housing.

The case study has shown that the conditions of lawfulness, public interest and necessary for democratic society or legitimate aims for acquisition if not properly balance to ensure proportionality including compensation among competing interest can contribute to human rights violation by governments or multinational companies. In ensuring protection of rights to property which is guarantee under Article 18 of Ghana's Constitution and Article 14 of Banjul Charter, the legal framework on compulsory acquisition and Acts 703 must cohere to international human rights law with some useful lessons drawn from the regional documents.

Finally, the above study has shown that state obligation under international human rights law are often flouted in the name of economic investments leading to the violation of human rights by states authorities to their citizenry whom the law is served in providing protection for them. State must abide by their obligations under international human rights law in ensuring the protection of its citizenry.

#### **4.2 Suggested Recommendation**

This section offers some suggested recommendation that authorities and investors should embark on to ensure efficient protection of the right of the people in order to enhance their sources of livelihood. Although there are several cases with specific reference to the introduction of the case study, the case under analysis shows true reflection of what sometimes persist in rural mining communities in Ghana.

It is evident in the study that the law does not provides enough education to such communities what they are entitle to in the process of land acquisition for private investors.

Therefore, there is the need for people to be educated on such grounds about their entitlement or possible alternatives available to them.

There should be properly constituted law on compensations with all interest represented and criteria used in awarding such compensation clearly specified so that affected people are not disadvantage at the end.

In addition, communities should be further educated on their fundamental human rights by governing authorities so that when their rights are been trample upon, they can seek the appropriate channel in presenting their petition. Human right education has become important in the sense that such communities always record low levels of education because they can barely understand issues which are contained in the law if proper education is not given to them.

Finally, communities should be accessible to relevant information and the law. Relevant portions of the law should be properly harmonised in tandem with international human rights law in order to ensure fair balance among competing interest.

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ACHR American Convention on Human Right, enacted 22 November 1969, entered into force 18 September 1978

AfCHPR Africa Charter on Human and Peoples Rights, enacted 27 June 1981, entered into force 21 October 1986

ECHR European Convention on Human Rights (ECHR), Amended by Protocol No.11, entered into force; 1 November 1998

CERD Convention on the Elimination of Racial Discrimination, enacted 21 December 1965, entered into force 4 January 1969

CEDAW Convention on the Elimination of All Forms of Discrimination against Women, enacted 18 December 1979, entered into force 3 March 1981

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- ICESCR International Covenant on Economic, Social and Cultural Rights, 16 December 1966, by UN General Assembly resolution 2200A (XXI), entered into force; 3 January 1976, in accordance with Article 27
- UDHR Universal Declaration of Human Rights, 12 December 1948, Adopted by UN General Assembly Resolution 217(III)
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