



GOOD CORPORATE CITIZENSHIP

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Introduction

Investing in, and doing business in South Africa, takes place in a human rights context. The term 'human rights context' is a shorthand description for the relatively complex sets of laws, codes, approaches and lived experience which inform doing business in South Africa. Business is part of society, not apart from it, and as such it needs to be seen as part of the solution to social obstacles. The social responsibility of business is thus not optional but mandatory.

The overarching framework for the human rights context is the South African Constitution Act, No. 108 of 1996, the highest applicable law in South Africa. All other laws and best practice guidelines must adhere to it. The Constitution guarantees a number of rights, relevant within the environment of doing business, including inter alia the right to:

- equality (section 9);
- human dignity (section 10);
- life (section 11);
- freedom and security of the person (section 12);
- not be subjected to slavery, servitude and forced labour (section 13);
- privacy (section 14);
- freedom of religion, belief and opinion (section 15);
- freedom of expression (section 16);
- peaceful assembly, demonstration, picket and petition (section 17);
- association (section 18);
- fair labour practices (section 23);
- an environment that is not harmful to health or well-being (section 24);
- property (section 25);
- adequate housing (section 26);
- water and health (section 27); and
- access to information (section 32).

Moreover, the Constitution recognises that corporations, as juridical persons, are bound by fundamental rights.

Various laws contain detailed provisions on these constitutional rights and there is also legislation that governs corporate social responsibility. Additionally, the King Code of Corporate Governance, which integrates governance, strategy and sustainability, reflects a value system based on the social responsibility of business, and for example is included as a listing requirement of the Johannesburg Stock Exchange.

It is against this background that the relevance of the Guiding Principles on Business and Human Rights must be understood in the South African context. While the Guiding Principles provide guidelines for both states and business, the focus here is on the guidelines pertaining to business. The Guiding Principles for the first time provide a language and analytic framework to understand the scope of business responsibility for human rights as distinct from the state responsibility for rights.

Legislation and other Codes

The Guiding Principles on Business and Human Rights (Guiding Principles), (Human Rights Council, 'Human Rights and Transnational Corporations and Other Business Enterprises', A/HRC/Res./17/4) endorsed by the United Nations (UN) Human Rights Council on June 16 2011 is the first global set of guidelines on business and human rights. The Guiding Principles provide an important framework for corporations, states, civil society and others as they work to strengthen their respective approaches to the issue of business and human rights.

Developed by former UN Special Representative of the Secretary General on Business and Human Rights, John Ruggie, the Guiding Principles highlight steps states can take to encourage business respect for human rights, provide a blueprint for companies to demonstrate respect for human rights and minimise the risk of harm to people and constitute a set of benchmarks for stakeholders to assess businesses respect for human rights. The principles are organised under a three-pillar framework:

- protect: states have a duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulations and adjudication;
- respect: businesses have a responsibility to respect human rights, including acting with due diligence to avoid infringing on the rights of others and addressing adverse impacts with which they are involved; and
- remedy: there is a need for greater access to remedy for victims of business-related abuse, both judicial and non-judicial.

The Guiding Principles go beyond the plethora of voluntary initiatives, often sector specific, that went before. Finalised through a lengthy process of principled pragmatism, the Guiding Principles are now an aspect of the business landscape. They have been widely endorsed by business organisations, international and domestic groups, in inter-governmental settings and by standard setting bodies. Already, the Guiding Principles have been reflected in several sets of international guidelines. Their substance has been integrated into ISO 26000 (the Corporate Social Responsibility standard promulgated by the International Organisation for Standardisation), the revised Organisation for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises, and the updated Performance Standards of the International Finance Corporation (IFC). In addition, the Protect, Respect and Remedy Framework has been applied in government policies, business practices, corporate law firm memos, multi-stakeholder initiatives, investor benchmarks and NGO advocacy.

The core responsibility of business under the Guiding Principles is to respect human rights (more fully described in Guiding Principles 11 to 24). It means that companies must not infringe upon human rights and must address adverse human rights impacts with which they are involved, both through their own activities and through their business relationships. It requires businesses to know and show - through policies, processes and systems - that they are preventing and addressing negative human rights impacts.

In their efforts to respect and support human rights when operating in emerging economies, corporations are likely to face one or more of the following common dilemmas:

- access to water;
- child labour;
- community relocation;
- conflict minerals;
- corruption;
- cumulative impacts;
- customary rights;
- doing business in conflict-affected countries;
- ethnic minorities;
- forced labour;
- free prior and informed consent (FPIC);
- freedom of association;
- freedom of religion;
- freedom of speech;
- gender equality;
- health and safety;
- HIV/AIDS;
- housing;
- human trafficking;
- indigenous peoples' rights;
- living wage;

- migrant workers;
- privacy;
- product misuse;
- security forces;
- stabilisation clauses;
- working hours; and
- working with state-owned enterprises.

Guiding Principle 14 provides that the responsibility of businesses to respect human rights applies to all businesses “regardless of their size, sector, operational context, ownership and structure”. Yet it does add that the means through which a business meets its responsibility to respect human rights will be proportional to, among other factors, its size.

While state responsibility is absolute and defined by jurisdiction, business responsibility is context sensitive and defined by causal links: “Business enterprises should respect human rights. This means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved” (Guiding Principle 11).

The Guiding Principles constitute an authoritative normative standard, based on a global consensus, regarding the steps that business should take to respect internationally-recognised human rights. There are a number of things that the business responsibility to respect human rights is not:

- it is not a passive duty, but a proactive one, requiring the business to take proactive steps to adopt and embed a policy commitment, to engage in a human rights due diligence process and to participate in processes to remedy negative impacts it has caused or contributed to;
- it is not limited by the laws of individual countries, and applies whether or not the country where the business is conducted has laws that protect human rights. Yet the responsibility of corporations to respect human rights does not exist in a law-free zone, since it is reflected in legislation that corresponds to international human rights standards (eg workplace standards in accordance with ILO Conventions), and various laws that outlaw discrimination of various forms;
- it is not a discretionary and market-driven standard, to be applied only where the business will likely gain maximum reputational benefit, but is a minimum global standard that applies wherever and however the business actually or potentially affects human rights;
- it is not a voluntary sign-up standard. Businesses are judged by their lack of respect for human rights whether or not they have elected to follow the steps outlined in the Guiding Principles;
- it is not corporate social investment. Respecting human rights is not achieved by doing good charitable deeds; and
- it does not entail the application of subjective moral judgments, but is grounded in internationally-recognised human rights, as expressed in the International Bill of Human Rights and the principles set out in the ILO’s Declaration on Fundamental Principles and Rights at Work.

Status or standing of the Guiding Principles

The ‘Protect, Respect and Remedy’ Framework which informs the Guiding Principles, was adopted by the Human Rights Council in 2008 (Human Rights Council, ‘Protect, Respect and Remedy: a Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises’, A/HRC/Res/8/5 (7 April 2008)). South Africa was of the view that the ‘Protect, Respect and Remedy’ Framework did not go far enough and expressed its discontent at the adoption stage.

As its moniker suggests, the Guiding Principles are presented as non-binding and voluntary principles, available as a road map to both states and businesses for protecting and respecting the human rights of those who are or may be affected by certain business practices and for remedying any violations of human rights which may have been caused by such business practices. However, the Guiding Principles are legally significant, firstly because they define “business respect for human rights”, which was previously a vague concept. This definition, with its widespread acceptance by public and private players, as previously noted, allow the Guiding Principles to make their appearance in adjudications. The widespread endorsement of the Guiding Principles is creating a new principle of ‘transnational public policy’, of consequence in business disputes. Predating the Guiding Principles, but not less insightful, is the international arbitration between World Duty Free and Kenya, in which the tribunal accepted Kenya’s claim that World Duty Free had obtained the contract through bribery of the Kenyan President which amounted to a breach of “international public policy” and it held that “claims based on... contracts obtained by corruption cannot be upheld”. [*World Duty Free v Kenya, ICSID Case No. ARB/00/7, Award (4 October 2006) at 157*]

Further, the wording of Guiding Principle 23 is noteworthy. To quote in full, 23. In all contexts, business enterprises should:

- (a) Comply with all applicable laws and respect internationally recognised human rights, wherever they operate;
- (b) Seek ways to honour the principles of internationally recognised human rights when faced with conflicting requirements; and
- (c) Treat the risk of causing or contributing to gross human rights abuses **as a legal compliance issue wherever they operate.**

Businesses should treat the risk of being complicit in gross human rights violations as a legal compliance issue, given the expanding web of potential corporate legal liability arising from extraterritorial civil claims and from the incorporation of the provisions of the Rome Statute of the International Criminal Court in jurisdictions that provide for corporate criminal responsibility. In addition, corporate directors, officers and employees may be subject to individual liability for acts that amount to gross human rights abuses. In other words, a company should act on the prudent assumption that it may be held legally liable if it causes or contributes to these abuses, and take robust measures to prevent them from occurring.

Another persuasive view is that while the Guiding Principles are not law and are not likely to be part of customary international law, they are inherently legal in both content and consequence. They are built on three intrinsically legal concepts: human rights (businesses are to respect all human rights), causation (the range of rights any business should address is informed by causal links to business operations), and proportionality (the range of actions any business should take is proportional to the nature of the business and its impact on human rights). Precisely defining rights and the scope of business responsibility is not a corporate social responsibility exercise, but a legal one.

While not referring directly to the Guiding Principles, the June 2014 ruling by the London High Court against Shell Nigeria, is informative. It was argued that under the Nigerian Oil Pipelines Act, anyone who suffered damage can claim if they can show that Shell was guilty of neglect in failing to ‘protect, maintain or repair’ the pipeline. The company’s argument that they are only legally liable for oil spills caused by the operational failure of their pipelines was overruled by the court’s finding that the relevant legislation imposes on the company “a general shielding and caring obligation”, and that if it failed to take reasonable steps to protect its infrastructure against the illegal hacking into pipelines by criminal gangs, it could have potential liability for the mass pollution of the Delta River caused by the oil spills resulting from the illegal hacking.

Issues to note

Due diligence

The Guiding Principles introduced the concept of ‘corporate human rights due diligence’, a process to help companies avoid infringing human rights or ‘becoming complicit’ with others who infringe such rights. As there are no human rights that businesses cannot infringe upon, the scope of the responsibility to respect covers all internationally recognised human rights. The responsibility to respect requires businesses to know and show that they are respecting human rights through a process of due diligence.

Human rights due diligence is not a once-off act, but only of real worth when it is ongoing, dynamic, iterative and draws upon established concepts of corporate governance and risk management. It requires the assessment of company impacts on human rights, not only from the perspective of the company, but from the perspective of external stakeholders.

Looking at the negative impact on human rights solely from the company's perspective assumes, incorrectly, that potential victims have the same tolerance for negative human rights consequences as a business. In addition, Guiding Principle 24 specifies that businesses should prioritise human risks on the basis of severity of harm. The dangers of the failure to prioritise highly severe but seemingly low-likelihood risks to human rights, are illustrated by some recent international corporate disasters: the global liquidity crisis of 2008, the Deepwater Horizon pipeline leak in Mexico in 2010, and the Fukushima nuclear power plant accident in 2011.

Grievance mechanisms

The third pillars in the three-pillar framework are access to remedy, and speak to both states as well as businesses. In the context of the Guiding Principles, a grievance is understood to be a perceived injustice invoking an individual's or group's sense of entitlement, which may be based on law, contract, explicit or implicit promises, customary practice, or general notions of fairness of aggrieved communities. The term 'grievance mechanism' is used to indicate any routinised, state-based or non-state-based, judicial or non-judicial process through which grievances concerning business-related human rights abuses can be raised and remedy sought.

Guiding Principle 30 provides that industry, multi-stakeholder and other collaborative initiatives that are based on respect for human rights-related standards should ensure that effective grievance mechanisms are available. In turn, Guiding Principle 31 describes in detail the effectiveness criteria for non-judicial grievance mechanisms: legitimate, accessible, predictable, equitable, transparent, rights-compatible and a source of continuous learning.

In addition, operational-level mechanisms that businesses help administer should for their design and performance consult the stakeholder groups for whose use they are intended, and should focus on dialogue as the means to address and resolve grievances. A grievance mechanism can only serve its purpose if the people it is intended to serve know about it, trust it and are able to use it.

Costs of non-compliance

One of the costs of non-compliance that businesses sometimes don't fully take into consideration, is the cost of conflict with local communities arising from exploration and production activities. In order to provide an illustration, the international example of Newmont Mining Company may be considered. Newmont Mining Company, the majority owner of the USD 4.8 billion Conga gold mine project in northern Peru, recently calculated a USD 2.1 million per day initial cost resulting from the project's suspension due to protests about water pollution by local residents in November 2011. There are other examples. Costs to extractive companies arising from community conflict, which could be avoided by a proper implementation of the Guiding Principles, include but are not limited to: lost opportunity costs such as the inability to pursue future projects; the need for additional staff time to respond to community conflict; and delayed production with the concomitant costs for wages and idle machinery.

Voluntary versus compulsory

The South African Government is in support of the Guiding Principles becoming a binding treaty and was the co-sponsor of a Human Rights Council resolution adopted on 26 June 2014 (*Human Rights Council, 'Elaboration of an internationally binding instrument on transnational corporations and other business enterprises with respect to human rights, A/HRC/Res./26/9*).

The adoption of this Resolution began a process of elaborating an international legally-binding instrument to regulate, in international human rights law, the activities of corporations. The Resolution mandates an open-ended intergovernmental working group with this task. Speaking on behalf of South Africa, ambassador Abdul Samad Minty noted that the Government of South Africa accords special priority to issues concerning multinationals, business and human rights. He highlighted that the South African Government holds a strong view that multinationals, which are the drivers of globalisation, cannot operate in a void. Ambassador Minty stressed that a universal regulatory framework in the form of a binding instrument to provide legal protections, effective remedies, as well as a range of other measures in a quest for protection of victims, is desirable and imperative.

This resolution is supported by many civil society organisations which call for human rights due diligence to be made mandatory through policies and regulations that make it a precondition for government procurement contracts, export credit licences and stock exchange listings among others, as well as through the inclusion of human rights obligations of investors in bilateral investment treaties and in the investor-state dispute resolution clauses of those treaties.

However, some are concerned that focusing on a binding treaty distracts from the full implementation of the Guiding Principles and that there is no time limitation as the working group's mandate is open-ended. The expected treaty, when eventually finalised, would be the first international human rights agreement to specifically and explicitly regulate the activities of corporations with regard to individuals' and communities' fundamental rights.

Conclusion

In conclusion, four points must be noted. Firstly, the Guiding Principles do not eliminate the need for stakeholder engagements, but rather when engaging, business should do so in a systematic way, informed by legal concepts and potential legal risks. Secondly, the corporate responsibility to respect human rights establishes a globally authoritative process standard on how companies should manage their business with respect to human rights. If it is regarded as soft law, it is one with hard consequences. Thirdly, the rules of the game have changed and the implementation of the Guiding Principles is a business imperative. Fourthly, it is necessary to develop business practices which not only mitigate human rights risks, but rather create human rights opportunities. While the language of the Guiding Principles is that of 'human rights risks' and 'adverse human rights aspects', incorporating the Guiding Principles in the DNA of businesses intentionally will turn risks into opportunities. Understanding, implementing and embracing the Guiding Principles is a human rights opportunity for business.