

**Submission to the United Nations Human Rights Council
Universal Periodic Review Session 13: South Africa
November 2011**

In Resolution 17/4 of 6 July 2011, the United Nations Human Rights Council endorsed the Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, as annexed to the report of the Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises.ⁱ

This submission by the Institute for Human Rights and Business (IHRB), made in relation to South Africa’s Universal Periodic Review (UPR), seeks to encourage constructive dialogue at the Human Rights Council concerning the Government of South Africa’s implementation of the *UN Guiding Principles* in relation to the State duty to protect all human rights from abuses by, or involving, transnational corporations or other business enterprises, and the need to provide access to remedy. The submission is organised as follows:

Part I addresses the context of South Africa and relevant regulatory and policy provisions relating to business and human rights.

Part II describes a select number of key ongoing issues of relevance concerning business and human rights in South Africa.

Part III makes recommendations in particular areas of concern for follow-up action.

Part I: South Africa and relevant regulatory and policy provisions relating to business and human rights.

The Government of South Africa is party to a range of United Nations and International Labour Organisation treaties. At the level of domestic law, South Africa has enacted various statutes that protect human rights and that apply to juristic persons whose activities may impact on the enjoyment of human rights. Chief amongst these laws is the 1996 Constitution of the Republic of South Africa.ⁱⁱ It is South Africa’s supreme law and a central part of it is a Bill of Rightsⁱⁱⁱ, which is applicable to state organs as well as juristic persons or businesses.^{iv} It protects socio-economic rights, including housing, labour and environmental rights^v as well as civil and political rights like the right to access to information and freedoms, freedoms of association, assembly, picket and petition, and freedom against slavery, servitude and forced labour. Moreover, the Constitution places a requirement on the Government to give effect to the Bill of Rights through the enactment of relevant legislation. The Constitution also creates various institutions for the protection of South Africa’s constitutional democracy. These include the Office of the Public Protector, the Commission on Gender Equality, the Human Rights Commission and the Commission for the Protection of the rights of Cultural, Religious and Linguistic Communities.

It should be noted that domestic legislation enacted to date does not specifically use the language of business and human rights *per se* but does engage the Government in the regulation of companies through the promotion of business principles that enhance sustainable development. This is defined in the 2008 National Environmental Management Act (NEMA) as "the integration of social, economic and environmental factors into planning, implementation and decision-making so as to ensure that development serves present and future generations."^{vi} NEMA places a duty of care and remediation of environmental damage upon businesses, referred to as juristic persons, and vests the department of Environmental Affairs and Tourism with the power to compel businesses to remedy any negative environmental effects.^{vii} NEMA also reserves the right of workers to refuse to perform any environmentally hazardous work.^{viii} It also authorises anyone to approach a court for relief in respect of a breach of any of its provisions (including by a juristic person), on behalf of affected persons or the public.^{ix}

Other examples of legislation capable of mediating the relationship between business and human rights in South Africa include: the 2000 Promotion of Equality and Prevention of Unfair Discrimination Act, the 1996 National Education Policy Act, the 1996 South African Schools Act, the National Health Act, the 1997 National Housing Act, the 1998 Prevention of Illegal Eviction and Unlawful Occupation of Land Act, the 1994 Public Services Act, the Domestic Violence Act, the 1997 Extension of Security of Land Tenure Act, the 2005 Children's Act, the 2008 Child Justice Act, the 1997 Basic Conditions of Employment Act, the 1998 Employment Equity Act, the 1993 Occupational Health and Safety Act, the 1995 Labour Relations Act, the 1998 Competition Act, the 2000 Promotion of Administrative Justice Act, the 2000 Promotion of Access to Information Act, the 1965 Atmospheric Pollution Prevention Act, the 1996 Land Reform Act, the 2009 Films and Publications Act, the 2004 National Gambling Act, the 2003 Broad Based Black Economic Employment Act and the Prohibition of Mercenary Activities in Country of Armed Conflict Act.

In addition, the Kings III Code on Corporate Governance is an instrument of soft law, which encourages businesses to generate profits for their shareholders in a manner that takes social, environmental and governance issues into consideration. It gives effect to the 2008 Companies Act. Also of note in this context, Companies Regulations adopted in April 2011, include a chapter on "Enhanced Accountability and Transparency"^x, which, among other provisions, requires companies to establish social and ethics committees for the purpose of monitoring company activities, including with respect to the UN Global Compact principles, OECD recommendations concerning corruption and International Labour Organization standards, among others.

A recent private sector development, which should be also mentioned, is an initiative by the Institute for Directors Southern Africa, which launched earlier in 2011 a new code for responsible investment in South Africa (CRISA)^{xi}. The voluntary code, supported by the Financial Services Board and the Johannesburg Stock Exchange, provides guidance to institutional investors on investing according to sound governance and social and environmental principles.

These developments point to a growing culture of corporate responsibility and compliance with international instruments protecting human rights and the Constitution that has been fostered in South Africa. There are, however, some instances in which the Government of South Africa has been found wanting in its regulation of businesses as far as the respect for human rights is concerned. A select number of these issues are outlined in Part II.

Part II: Implementation and efficiency of framework - Notable practices in business and human rights in South Africa

Labour brokers

There is an ongoing debate in South Africa about the advantages and disadvantages of the use of Temporary Employment Services, commonly known as labour brokers by employers, for a fee. The Labour Relations Act allows employers to make use of labour brokers when recruiting and dismissing employees.^{xii} On one hand, employers state that labour brokers assist in alleviating unemployment by introducing employees into the job market, on a long term basis.^{xiii} On the other hand, trade unions in South Africa have been against labour brokers because they often terminate employment without notice and pay poor wages after receiving large payments from employers. They are also said to shield employers from any claims by employees based on poor working conditions and violations of labour rights. There are complaints that brokers also make it possible for employers to practice discriminatory and selective recruitment policies by excluding people from a particular race, sexual orientation, gender, religion and marital status from employment. Use of labour brokers may also result in employees being denied any opportunity to engage in wage-related collective bargaining with the employer. The Government needs to address these ongoing and complex issues by clarifying the rights and obligations that employees, labour-brokers and employers owe each other.

Farm workers in the Western Cape

Recent reports^{xiv} allege widespread abuses in relation to the fruit and wine making sector of the Western Cape. According to reports, farm labour tenants were given inadequate housing without sanitation or protection from the elements. They were also subject to forced eviction by employers, without notice. The spraying of pesticides also led to an unsafe and unhealthy working environment. Workers were also not allowed to form unions and were victimized by farmers if they did. Some farmers were paid in the form of wine under the illegal "dop" system which is illegal in South Africa but still being practiced in the Western Cape and often leads to alcohol induced social problems amongst the farm-workers. Reports suggest that pregnant workers were often either forced to go on un-paid leave early in their pregnancy or dismissed altogether. Responses from the industry^{xv} to reports of such abuses highlight the importance of the Government implementing enhanced programmes to monitor labour practices, mainly through labour inspectors, which to date have been viewed as being inadequate in addressing these issues.

Employee health and safety

The Union of Mineworkers in South Africa and the African National Congress Youth League (ANCYL) have both expressed concern at the lack of health and safety provision in the mining industry in South Africa. The ANCYL recently handed a Memorandum of Demands to the Chamber of Mines and the Government of South Africa demanding *inter alia*, the betterment of working conditions in mines to avoid further occupational fatalities and diseases; better salaries and wages for all mine workers and the full employment of contract workers; the involvement of mining companies in community infrastructure development including health facilities, schools and training and development colleges; the development of concrete social and labour development models and compensation of mining communities that suffer mining-related diseases.^{xvi}

Community rights

Recent cases concerning the awarding of mining rights without due regard for procedures prescribed in legislation have raised questions about appropriate forms of consultation with local

communities impacted by private sector activities. For example, the Constitutional Court of South Africa reviewed a case concerning lack of protection of community rights to procedural fairness, which is an important component of the right to just administrative action protected in the Constitution.^{xvii}

Mining developments in South Africa often require the acquisition of community land and the resettlement of households. Investigations^{xviii} by the South African Human Rights Commission have indicated that the regulatory regime does not, in itself, provide adequate protection against potential human rights abuses during land acquisition and resettlement. Communities are therefore reliant on discretionary actions by mining companies to ensure that their rights are fully respected. Reliance on such voluntary efforts is not sufficient to ensure human rights protection.

Acid mine drainage (AMD)

AMD is the process of underground and surface water contamination by an iron-rich sulphuric acid solution generated as a result of the cessation of mining activities. It can lead to seismic activity, pollution of agricultural water, negative ecological impacts and flooding in low-lying areas. First identified in South Africa in 2002 in the Mogale City/Randfontein area of the Western Basin, it is reported to currently be developing in the Johannesburg, Springs-Nigel, Klerksdorp, Orkney, Stilfontein, Hartebeesfontein, Free State, Far West Rand and Evander gold mining areas as well as the coal mining areas of Mpumalanga and Kwa-Zulu Land and O'OKiep Copper District of South Africa.^{xix} Although the South African Government has taken steps to research and understand the process, adequate solutions to involving mining companies in the prevention, management and redress of the negative effects of AMD have yet to be fully realised.

Other Issues

South Africa is an international leader in the sphere of private security companies. In a region where state security forces are stretched, many organisations, including private sector and development agencies, rely on private security providers, particularly in zones of conflict. South Africa participated in the formation of the Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict.^{xx} As such, the Government should encourage and require South Africa-based private security companies to comply with the highest international standards during their operations at home and abroad.

South African companies have been active in investing in Africa and beyond. Industrial, manufacturing, mining, and tourism companies from South Africa are operating on the continent, often in high-risk zones where state security support is minimal and civilian communities are dependent on companies for the provision of essential services. The South African Government should require South African companies investing abroad to respect human rights wherever they are, and make them aware of the liability risks they face when they operate in high-risk zones.^{xxi}

Part III: Recommendations

The following recommendations are made to the Government of South Africa in relation to the above concerns:

- Consider the development of a national CSR strategy and/or Business and Human Rights Policy framework, which would clearly set out government expectations regarding the implementation of the UN Guiding Principles on Business and Human Rights. South Africa should also host the newly created UN Working Group on Business and Human Rights and

enable it to perform an audit on the level of human rights protection from local and multinational business enterprises.

- Strengthen the role of labour inspectors through collaborations with environmental protection and law enforcement agencies. On-site whistle-blowing programmes should also be implemented and monitoring carried out a more permanent, as opposed to *ad-hoc* basis;
- Enact legislation protecting local and indigenous communities during community resettlement programmes carried out by companies in the extractive and other industries. The International Finance Corporation's policy documents on community resettlement should be legislated and regulations should be passed to obligate companies to contribute to community and infrastructural development in these circumstances;
- Establish a business and human rights portfolio within the constitutional institutions such as the Commission for Gender Equality, the Office of the Public Protector, the Commission on Gender Equality, the Human Rights Commission and the Commission for the Protection of the rights of Cultural, Religious and Linguistic Communities;
- Ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families^{xxii}, and as recommended in 2007^{xxiii}, the International Covenant on Economic, Social and Cultural Rights^{xxiv} and its Optional Protocol as a matter of urgency. The ICESCR Committee has recognised that the rights to work, water and education are open to abuse by corporations. The enhanced level of transparency and accountability that accompanies these treaties would ensure that South Africa fulfils its positive obligations to fully protect human rights.
- Enact domestic legislation regulating private security companies and strengthen the constitutional prohibition of torture by providing a definition of torture in domestic criminal law. This recommendation was made in 2007 but remains unheeded.^{xxv}

The Institute for Human Rights and Business (www.ihrb.org) was established in 2009 to provide a trusted, impartial space for dialogue and independent analysis to deepen understanding of human rights challenges and the appropriate roles and responsibilities of business.

END NOTES

- ⁱ Available at: <http://www.business-humanrights.org/media/documents/un-human-rights-council-resolution-re-human-rights-transnational-corps-eng-6-jul-2011.pdf>
- ⁱⁱ Act 108 of 1996
- ⁱⁱⁱ Ibid at Sections 7 to 39
- ^{iv} Ibid at Section 8 (2)
- ^v The Bill of Rights also protects the socio-economic rights to *inter alia* property, health-care, food, water and social security and education.
- ^{vi} Section 1(xxviii)
- ^{vii} Section 28 (1) and (4)
- ^{viii} Section 29
- ^{ix} Section 32 (1) and section 33
- ^x Companies Act, 2008 (Act No. 71 of 2008), Companies Regulations, 2011, Chapter 3: Enhanced Accountability and Transparency, 43. Social and Ethics Committee, available at: http://www.acts.co.za/companies_act_2008/whnjs.htm
- ^{xi} Available at: http://www.iodsa.co.za/Portals/0/library/documents/CRISA_19_July_2011.pdf
- ^{xii} Section 198 of the Labour Relations Act
- ^{xiii} Adcorp Holdings 2011 *Labour Broker Research Challenges Misconceptions*, available at: <http://www.skillsportal.co.za/page/human-resource/labour-law/234672-Labour-broker-research-challenges-misperceptions>
- ^{xiv} Human Rights Watch 2011 *Ripe with Abuse Human Rights Conditions in South Africa's Fruit and Wine industries* Available at: <http://www.hrw.org/reports/2011/08/23/ripe-abuse-0>
- ^{xv} See, for example, responses from the wine industry, available at: <http://www.decanter.com/news/wine-news/529316/south-african-wine-pros-condemn-human-rights-report>
- ^{xvi} Available at: <http://www.ancyl.org.za/show.php?id=8113> and <http://www.ancyl.org.za/show.php?id=8109>
- ^{xvii} *Bangwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* (CCt 39/10) [2010] ZACC 26; 2011 (4) SA 113 (cc); 2011 (3) BCLR (CC) (30 November 2010)
- ^{xviii} "Mining-related observations and recommendations: Anglo Platinum, affected communities and other stakeholders, in and around the PPL Mine, Limpopo" South African Human Rights Commission, Nov 2008. Available at: <http://www.reports-and-materials.org/SAHRC-report-on-Anglo-Platinum-Nov-2008.pdf>
- ^{xix} Mine water management in the Witwatersrand Gold Fields with special emphasis on Acid Mine Drainage – Report of the inter-ministerial committee on Acid Mine Drainage, available at: <http://www.dwaf.gov.za/Documents/ACIDReport.pdf>
- ^{xx} The Montreux Document, available at: <http://www.eda.admin.ch/psc>
- ^{xxi} For guidance, see Red Flags initiative available at: www.redflags.info.
- ^{xxii} Available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&lang=en
- ^{xxiii} This recommendation was made by the Community Law Centre at the University of the Western Cape as well as Human Rights Watch in 2007. Please see the Report of the Working Group on the Universal Periodic Review South Africa, available at: http://www.upr-info.org/IMG/pdf/South_Africa_adopted_WG_report_edited.pdf
- ^{xxiv} http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en
- ^{xxv} This recommendation was also made by the Community Law Centre at the University of the Western Cape in 2007 "Human Rights Situation in South Africa: Some Areas of Concern, November 2007, New York (USA), page 6 Para 28 referred to in the Report of the Working Group on the Universal Periodic Review South Africa, available at: http://www.upr-info.org/IMG/pdf/South_Africa_adopted_WG_report_edited.pdf