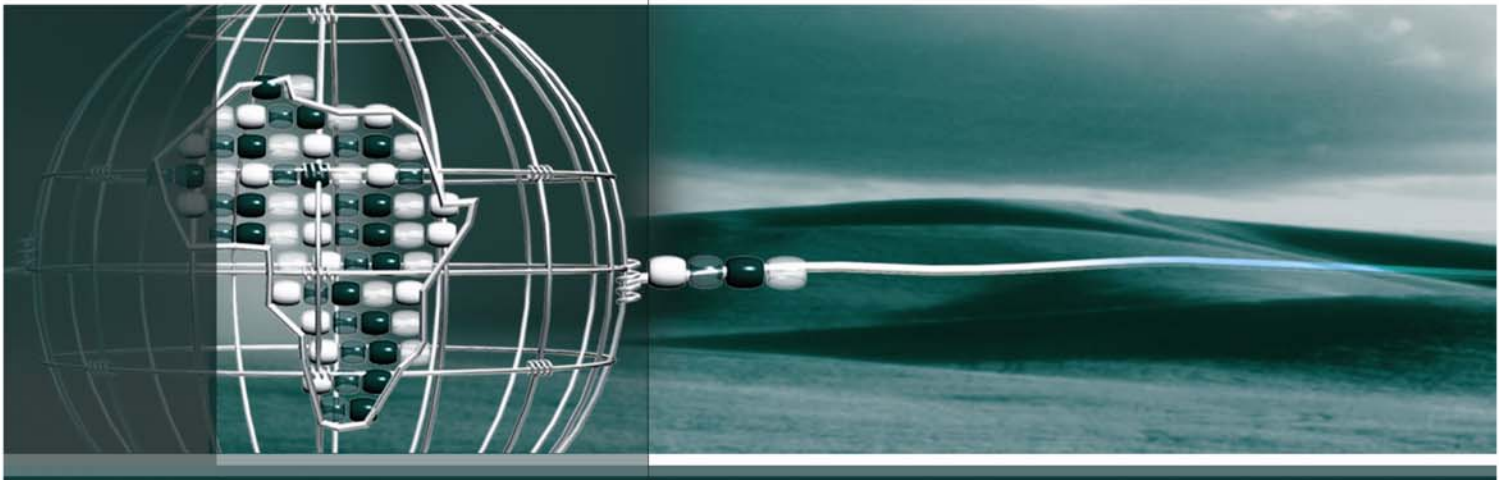




Business and Human Rights in South Africa:

Context and Recommendations for Pro-active Engagement by the National Business Initiative

2008



Summary of a report commissioned by the National Business Initiative and prepared by
Dr Ralph Hamman and Christoph Schild
of the Environmental Evaluation Unit,
University of Cape Town

*Regional partner of the World Business Council
for Sustainable Development*



CONTENTS

1. EXECUTIVE SUMMARY	3
2. AN OVERVIEW OF HUMAN RIGHTS.....	5
3. THE INCREASING PROMINENCE OF HUMAN RIGHTS AS A BUSINESS ISSUE	6
4. THE FRAMEWORK OF THE SPECIAL REPRESENTATIVE OF THE SECRETARY - GENERAL (SRSG) ON HUMAN RIGHTS AND BUSINESS	7
5. HOW ARE COMPANIES RESPONDING INTERNATIONALLY?.....	9
6. THE SOUTH AFRICAN CONTEXT FOR BUSINESS AND HUMAN RIGHTS	11
7. A SURVEY OF SOUTH AFRICAN COMPANIES' PUBLIC REPORTING ON HUMAN RIGHTS	15
Summary of Results of the Survey.....	16
Summary of Survey Results In Various Human Rights Categories.....	17
8. PERTINENT CASE STUDIES OF SOUTH AFRICAN COMPANIES	18
Sasol	18
AngloGold Ashanti.....	19

1. EXECUTIVE SUMMARY

The key messages of the report are:

- 1) Companies are likely to face increasing expectations, pressures, and incentives for enhanced due diligence on human rights. This is premised on international policy trends and South African political and legal developments. There is also an emerging understanding of the business value of human rights as a framework for adopting a strategic approach to corporate responsibility. The United Nations (UN) Human Rights Council recently adopted the Special Representative's report which emphasised the corporate responsibility to respect human rights, based on a systematic approach to human rights due diligence.
- 2) In general, South African companies are not in a good position to respond to such increased expectations. Case studies and a survey of public reports by the top 50 listed companies -- the likely champions of a strategic approach to human rights -- show that human rights-related policies and performance are uneven and that there are a number of important gaps or weaknesses. These weaknesses are especially related to land management, security arrangements, and supply chain management.
- 3) A further key weakness pertains to public reporting on policy and performance in relation to human rights and business operations outside South Africa. This is a particularly important concern with regard to operations in other African countries, some of which are characterised by weak governance and high conflict potential. Adherence to human rights principles in such contexts is both especially challenging and urgent. A pro-active business response to these concerns is also recommended on the basis of increasing domestic political momentum for the South African State to influence or even regulate South African companies' behaviour outside the country.
- 4) These factors give rise to a strong argument for the National Business Initiative (NBI) to support its members, and South African business in general, in enhancing due diligence on human rights. This ought to be premised on compelling business case incentives, including the following:
 - Pro-active, rather than reactive, approaches to building capacity on human rights issues are likely to build company-specific, sector-based, and national competitiveness. This will enable the private sector to actively influence the debate on business and human rights.

- Human rights provide a powerful, coherent framework that can clarify or ameliorate many of the uncertainties, tensions and contradictions in the current approach to corporate responsibility. They can also help establish better clarity with regard to the relationship between compliance and voluntary approaches.
- A business association such as the NBI can play a crucial role in limiting "first-mover" disadvantages by developing collective strategies and programmes to "lift the playing field", with a critical mass of companies committing to human rights issues, possibly even in areas outside South Africa.

2. AN OVERVIEW OF HUMAN RIGHTS

Formalised human rights have been with us for at least 800 years, starting with the English Magna Carta of 1215.

The first international laws on human rights came with the Geneva conventions, adopted between 1864 and 1949. The Universal Declaration of Human Rights was adopted in 1948, with its preamble stating that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world".

The Declaration's first article emphasises the universal nature of human rights: "All human beings are born free and equal in dignity and rights." The second article focuses on non-discrimination: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind."

Articles 3 to 30 define the various fundamental rights, ranging from the "right to life, liberty, and security of a person" to the right to "participate in the cultural life of the community".

The Declaration is not formally binding, but it does provide the basis for two binding human rights treaties: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights. Together these three documents are referred to as the International Bill of Human Rights.

The main categories of civil and political rights are: protection of individuals' physical integrity (e.g. freedom from torture); procedural fairness in law (e.g. right to a fair trial); freedom from racial or other forms of discrimination; freedom of belief, speech, and association; and the right to political organisation.

Economic, social, and cultural rights include the rights to decent work and freedom of association; social security; family life; adequate standards of living; "continuous improvement in living conditions"; "the highest attainable standard of mental and physical health"; education, including free universal primary education; and participation in cultural life.

The International Covenant on Economic, Social, and Cultural Rights recognises that some of the rights it lays down are difficult to achieve in the short term. It therefore defines the principle of "progressive realisation" which imposes a duty on all parties "to take steps... to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means".

In addition to the International Bill of Rights, there is a wide array of other international and regional human rights treaties, among them the labour standards of the International Labour Organisation. Regional initiatives include the African Charter on Human and Peoples' Rights, adopted in 1979 by the Organisation of African Unity. The South African Constitution is notable for the extent to which it includes in its Bill of Rights both categories of rights mentioned above.

Case law regarding application of the economic and social rights has also established the principle of progressive realisation, though its precise parameters remain disputed.

3. THE INCREASING PROMINENCE OF HUMAN RIGHTS AS A BUSINESS ISSUE

The interface between business and society has been framed predominantly in such terms as business ethics, corporate social responsibility, corporate environmentalism, and sustainable development.

However, an increasingly prominent debate is emerging around business and human rights. These discussions are not limited to identifying human rights merely as a moral framework for voluntary corporate citizenship. Rather, the debate turns on the extent to which international and national human rights law is applicable to private sector companies.

Two early initiatives to formalise this application to the private sector did not achieve formal status. They were the 1990 draft UN Code of Conduct of Transnational Corporations, and the 2003 draft "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regards to Human Rights".

However, the UN is still engaged in these issues in the form of work being undertaken by the Special Representative of the Secretary-General (SRSG) on human rights and business, John Ruggie.

He was mandated in 2005 by the UN Commission on Human Rights to provide an overview of "international standards and practices", as well as his "views and recommendations".

Human rights are also coming under the spotlight at intergovernmental and multi-stakeholder level. Some of the most prominent initiatives focus on human rights issues in weak governance or conflict zones. They include the Voluntary Principles on Security and Human Rights, and the Organisation for Economic Co-operation and Development (OECD) Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones.

Human rights are also the subject of a number of business initiatives. They include the Business Leaders' Initiative on Human Rights (BLIHR) and its 2006 Guide on Integrating Human Rights into Business Management. Civil society organisations, such as Amnesty

International and the Danish Institute for Human Rights, have also developed programmes and published reports and guidelines.

Meanwhile, the Business and Human Rights Resource Centre provides a convenient, real-time source of information on these various initiatives and related current affairs news stories.

These initiatives are driven by a number of factors, including:

- A belief that human rights are not given sufficient, systematic attention in corporate boardrooms and management structures. The SRSG for example, notes that only a few companies assess their impact on human rights, focusing rather on assessment of their environmental impact. This is possibly related to the perception that environmental issues are bottom line-sensitive while the bottom line implications of social issues are not clear or are regarded as "soft issues". This perception, however, has probably been shifted by prominent news stories dealing with Shell in Nigeria and Nike's supply chain.
- The hope that the increasing prominence of human rights in the corporate citizenship debate will lead to development of clearer legal benchmarks for the nature and boundaries of corporate responsibilities, as well as associated, binding accountability mechanisms.

4. THE FRAMEWORK OF THE SPECIAL REPRESENTATIVE OF THE SECRETARY - GENERAL (SRSG) ON HUMAN RIGHTS AND BUSINESS

Legal scholar Louis Henkin argues that the Universal Declaration of Human Rights applies to every individual and every organ of society, including companies.

However, this presents a problem for John Ruggie in his role as SRSG. Obligations implicit in the Declaration may be morally applicable, but they are not legally enforceable, in part because the Declaration itself is not even binding on its state signatories.

Indeed, Ruggie argues in his final report:

The root cause of the business and human rights predicament today lies in the governance gaps created by globalisation -- between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation. How to narrow and ultimately bridge the gaps in relation to human rights is our fundamental challenge.

Ruggie's response is a framework based on three key principles:

- The State duty to protect against human rights abuses by third parties, including companies: States are bound by international law to protect against human rights abuses by non-State actors. This is the "bedrock" of the framework. International law also includes the encouragement "for home States to take regulatory action to prevent abuse by their companies overseas".
- Corporate responsibility to respect human rights: The core of this requirement is due diligence, or "the steps a company must take to become aware of, prevent and address adverse human rights impacts". Companies should consider three sets of factors in doing so:
 - The country contexts in which their business activities take place and any specific human rights challenges these may pose.
 - What human rights impacts their own activities may have within each context. This means they should look at themselves in their capacity as producers, service providers, employers and neighbours.
 - Whether they might contribute to abuse through relationships connected to their activities, such as with business partners, suppliers, State agencies, and other non-State actors. As a minimum requirement, their assessments should be weighed against the International Bill of Human Rights and the core conventions of the International Labour Organisation.
 - The need for more effective access to remedies.

In practical terms, companies need to adopt a human rights policy, conduct human rights impact assessments, integrate human rights policies throughout the company, and track performance.

Part of this process is to define "sphere of influence" and "complicity", both of which are key terms in the UN Global Compact principles.

The Global Compact expects companies to embrace, support and enact, within their sphere of influence, a set of core values in the areas of human rights, labour standards, the environment, and action against corruption.

However, Ruggie finds that "sphere of influence" is too imprecise. He prefers the term "scope of due diligence".

"The scope of due diligence to meet corporate responsibility to respect human rights is not a fixed sphere, nor is it based on influence," says Ruggie. "Rather, it depends on the potential

and actual human rights impacts resulting from a company's business activities and the relationships connected to those activities."

The notion of complicity remains ambiguous. According to the Office of the UN High Commissioner on Human Rights, complicity includes:

- Direct complicity: a company knowingly assists in the violation of human rights.
- Beneficial complicity: a company benefits directly from the human rights abuses committed by someone else.
- Silent complicity: the failure of a company to question systematic or continuous human rights violations by state authorities.

However, complicity is still a relatively vague and untested concept. As an example, the Office of the UN High Commissioner for Human Rights says an allegation of complicity could arise against a company when it is in partnership with a government and could reasonably foresee, or subsequently obtains knowledge, that the government is likely to commit abuses in carrying out the agreement.

Most large projects require explicit government endorsement in the form of licences or support in terms of finance or infrastructure. So, when is such a relationship a partnership in which the company becomes complicit in the government's human rights abuses?

Multinational electro-engineering company ABB faced such a dilemma as a supplier of equipment to dam and oil field construction contractors in northern Sudan. This exposed it to allegations that it was complicit in the genocide perpetrated in Sudan's western Darfur region. A case study presented at the a UN Global Compact Learning Network conference in Ghana argued that ABB was not complicit. The assertion was partly based on ABB not being present in Darfur and that it had not paid taxes to the government. ABB also believed Darfur was outside its sphere of influence. This raises numerous questions. For example: would ABB have been complicit if it had paid taxes?

Ruggie concludes it is not possible to specify definitive tests for what constitutes complicity in any given context. What a company should do to avoid suggestions of complicity is to carry out due diligence.

5. HOW ARE COMPANIES RESPONDING INTERNATIONALLY?

For all the prominence and promise of human rights as a guiding framework for responsible business, there has been relatively little research on the extent to which corporate decision-makers recognise and respond to human rights concerns.

Two well-known exceptions are surveys conducted or commissioned by the Special Representative of the Secretary-General (SRSG). The first is a survey based on a questionnaire that was sent to the Fortune Global 500 companies, to which 102 responded. The second survey examined the public reports of a cross-section of 300 companies around the world, as well as eight collective initiatives (such as the Fair Labour Association) and five socially responsible investment funds.

Some of the key findings of the two surveys are:

- Almost all respondents in the Global 500 reported having an explicit set of human rights policies or management practices in place, even though fewer than half had experienced "a significant human rights issue" themselves. Firms in the extractive industries generally stand out in that they are most likely to have experienced a significant human rights issue, and all respondents in the Global 500 survey in this sector had explicit policies and practices in place.
- The human rights that were most commonly recognised in both surveys were labour rights, especially non-discrimination, and workplace health and safety. The Global 500 sample of companies also shows significant recognition of other human rights, but this is less so in the broader sample of companies in the second survey. Among this broader cross-section of companies, economic, social, and cultural rights are generally considered only in terms of philanthropic initiatives.
- In terms of accountability measures, almost all respondents in the first survey noted that they have internal reporting and compliance systems in place and about three-fourths also provide external reports. The second survey notes that reporting is very variable and external verification is rare.

The SRSG, John Ruggie, concludes from the surveys that:

In short, leading business players recognise human rights and adopt means to ensure basic accountability. Yet even among the leaders, certain weaknesses of voluntarism are evident. Companies do not necessarily recognise those rights on which they may have the greatest impact. And while the rights they do recognise typically draw on international instruments, the language is rarely identical. Some interpretations are so elastic that the standards lose meaning, making it difficult for the company itself, let alone the public, to assess performance against commitments.

In both these surveys conducted on behalf of the SRSG there is a notable lack of African companies, with none represented in the Global 500 survey and only about 2% in the second survey.

6. THE SOUTH AFRICAN CONTEXT FOR BUSINESS AND HUMAN RIGHTS

While the debate on business and human rights continues on a number of levels internationally, the issue is particularly pertinent to business in South Africa.

The apartheid legacy persists in many companies and a substantial number of South Africans remain economically marginalised. The policy of Broad-Based Black Economic Empowerment (BBBEE) has therefore been introduced to support previously disadvantaged South Africans to gain greater access to the formal economy.

BBBEE law, associated guidelines, and sector-specific legislation and negotiated charters specify that the granting of licences and government procurement contracts depends on the extent to which companies fulfil a range of criteria. These include black people's part ownership of companies, their participation in senior management, employment equity, training and skills development, preferential procurement and small business development, and a miscellaneous category including sector-specific issues and philanthropic initiatives.

In terms of international human rights law, this "positive discrimination" is allowed as a special measure as long as it is not implemented indefinitely, though there are no provisions in BBBEE policies specifying their end.

South African companies have come under significant pressure to show that their implementation of BBBEE requirements does not lead merely to "elite enrichment" but that it actually contributes to "broad-based empowerment" with benefits to a wide cross-section of previously disadvantaged South Africans.

Ironically, though, the apartheid legacy has arguably given South African companies valuable lessons in the importance of human rights issues, and how to respond to them.

An important aspect of this is the relatively widespread, systematic implementation of corporate social investment (CSI), or philanthropic initiatives primarily in education and health, and more recently in small business development.

However, CSI initiatives have been criticised for their lack of integration within core business strategy. One mining company CSI manager has argued that "businesses thought that they needed to pay what some people referred to as blood money, but that this never needed to be part of the business process".

Thus, for example, some mining companies for a long time promoted their CSI activities while neglecting the severe human rights implications of core business strategies linked to migrant labour and single-sex hostels.

The South African Constitution is renowned for the spread and depth of human rights enshrined in its Bill of Rights, which also applies to business. In an interview with Ralph Hamman, co-author of this report, Christine Jesseman of the Human Rights Commission argues that the

horizontal application of the Constitution to corporations is a relatively well defined principle in constitutional law, especially with regard to civil and political rights.

Regarding social, economic, and cultural rights, however, this relationship is less clear. She argues that the courts are likely to apply the "standard of reasonableness" to these matters: that is, to assess whether it can be reasonably expected for a company to fulfil duties in support of the progressive realisation of individuals' social, economic, and cultural rights. All in all, the legal context seems disputed, however, so the debates are likely to benefit from further case law.

South African Companies In Africa

South African companies operating in Africa face demanding human rights challenges, especially in those states characterised as "weak governance zones". This is amply illustrated by the internationally prominent controversy surrounding AngloGold Ashanti's payment of bribes to a militant group accused of gross human rights abuses.

However, concerns about South African companies' corporate responsibility is not confined to host countries but is becoming a political issue in South Africa itself.

As an example, a recent ANC foreign policy discussion paper has highlighted the need to address the role of South African companies' behaviour outside the country. The South African government seems to be taking this issue increasingly seriously, with relatively frequent discussion on the subject within government departments such as Foreign Affairs, Trade and Industry, and Environmental Affairs and Tourism.

A concern expressed by some representatives of business and government is that raised expectations of human rights compliance among South African companies in other countries may put these companies at a competitive disadvantage. Chinese and Indian companies operating in Africa, so it is alleged, show little respect for human rights and related issues, enabling them to gain a competitive advantage by circumventing legal and moral norms.

This raises some key considerations. South African companies could adopt a collective approach to adhere to certain standards. This has been done in Malawi where companies have established a collective, collaborative approach to implementing common policies against corruption. This approach is in line with developments in which many African governments are providing privileged access to licences and other benefits to companies

that they feel adopt human rights best practices and benefit local communities. This enhances and complements the various competitive advantages brought about by a pro-active approach to human rights.

It is also possible that the stereotype of Chinese or other companies disregarding human rights may be misplaced. Many of these companies strive to establish best practices, joining international initiatives such as the UN Global Compact and negotiating investment agreements that include social and environmental considerations.

Furthermore, an important aspect of, say, Chinese companies' competitive advantage is in some cases the significant backing they receive from well capitalised banks, often owned by the Chinese state. In other words, a pro-active human rights approach can provide South African companies with a possible differentiating factor in countering other advantages enjoyed by Chinese companies.

SUMMARY OF PRIORITY HUMAN RIGHTS ISSUES FOR BUSINESS IN SOUTH AFRICA

A Danish Institute for Human Rights Country Risk Assessment identifies company risk in terms of the direct risk of carrying out a human rights violation, or indirect risks that are present (if a company does not itself perpetrate a violation but supports, endorses, or benefits from violations committed by others). It lists the human rights of the Universal Declaration of Human Rights in three categories of low, medium, and high risk.

High Risk

Right to Freedom from Discrimination: Despite progress since apartheid, women, black people, migrant workers, indigenous peoples, people living with HIV/AIDS, and homosexuals are still highly susceptible to discriminatory treatment.

Right to Own Property: This is particularly relevant in terms of land issues, considering the land restitution and redistribution processes, customary land laws, and environmental protection laws.

Right to Work and Just and Favourable Conditions of Work: Despite comprehensive and progressive labour legislation, these labour rights are precarious especially in the informal sector and for contract migrant workers.

Right to an Adequate Standard of Living: The minimum wages specified by government are often not enforced and may not be adequate.

Right to Health: Company risks are especially high with regard to the health of contract migrant workers, HIV/AIDS, occupational health and safety, and environmental contamination in some sectors.

Right to Adequate Food: Over and above issues related to the minimum wage, this also pertains to company operations' impacts on land and water.

Right to Education: Child labour and limited access to quality education in rural areas constitute risks, as does the high incidence of adult illiterates.

Medium Risk

Right to Life, Liberty, and Security: Violent crime, including violence against women and children, human trafficking, use of excessive force by police, and violence on farms are particularly significant problems. For companies, the risks associated with human trafficking are linked to their workers and their suppliers.

Right to Freedom from Forced Labour and Servitude: Human trafficking in conjunction with child prostitution present company risks in terms of employment and supply chain practices.

Right to Freedom from Torture, Cruel, Inhuman or Degrading Treatment or Punishment: For companies this is most pertinent with regard to the risk of sexual harassment.

Right to Privacy: This pertains particularly to protecting data related to the HIV status of workers.

Right to Family Life: National legislation is comprehensive in this regard, but violations of this right are due to limited enforcement and the large informal sector. Women-headed households are particularly at risk.

Right to Take Part in Government: This is a risk to companies due to bribery and corruption.

Right to Peaceful Assembly and Freedom of Association: Despite progressive legislation in this regard, it is considered a risk for companies due to instances of unfair dismissal and the use of force on striking workers.

Right to Adequate Housing: The housing shortage and inadequate housing facilities present a medium-level risk to companies in terms of possible challenges faced by their employees and the communities in which they live.

Right to Participate in Cultural Life: This is considered a risk due to the high diversity of cultures in South Africa and the generally disadvantaged status of indigenous groups, such as the Khoi-San.

Right to Intellectual Property: Despite a strong legal framework, there are risks of violation in particular with regard to the intellectual property of indigenous people.

Low Risk

Right to Fair Trial and Recognition as a Person before the Law: This is considered low-risk for companies as the legal provisions are relatively strong and possible violations take place predominantly in the governmental realm.

Right to Freedom of Movement: Possible risks relate to trafficked persons and the conduct of security guards.

Right to Freedom of Opinion, Expression, Thought, Conscience and

Religion: This is considered low-risk in that the government generally respects these rights, and South Africa has special legislation protecting whistle-blowers.

7. A SURVEY OF SOUTH AFRICAN COMPANIES' PUBLIC REPORTING ON HUMAN RIGHTS

The authors of this report conducted a survey of the public reports of the top 50 listed companies on the JSE Securities Exchange. The purpose of this survey was to gain an understanding of the degree to which human rights issues are represented in companies' policies, management systems and performance, as reflected in their public reports.

The survey was also meant to identify possible patterns in terms of the role of company size and sector, and which human rights are considered more frequently or comprehensively than others. In this regard, it is meant to complement the international surveys discussed above. However, the methodology was not commensurate with that applied in the international surveys, so a direct comparison between South African listed companies and the international sample is not possible.

Data was generated from annual reports, sustainability reports, and web-based content. The reports were investigated on the basis of a selection of human rights related questions and corresponding indicators derived from a draft of the South African version of the Human Rights Compliance Assessment (HRCA), which at the time was being developed as part of the South African Business and Human Rights Project. The selection of the most pertinent questions and indicators was guided by the "materiality" criterion of the Global Reporting Initiative (GRI). Questions and indicators were chosen from each of the three human rights

categories identified in the HRCA: employment practices, community impact, and supply chain management. BBBEE was included as an additional category.

The top 50 listed South African companies thus play a potentially important leadership role in defining and illustrating best practices.

Understanding the strengths and weaknesses of these leaders will give a good impression of the status of human rights reporting and performance. In particular, if the top 50 companies display certain weaknesses, these are likely to be present also in a much broader sample.

Summary of Results of the Survey

The survey showed that there is no standardised way in which companies report and communicate on human rights issues, despite initiatives such as the GRI. Even among companies that considered their reports to be "in accordance" with GRI requirements, there is significant variability in the materiality and comparability of the information provided. Selective approaches to the indicators reported on are common, and in some instances the references to the corresponding GRI indicators are inaccurate.

Only six, or 12%, of the companies acknowledge international instruments like the Universal Declaration of Human Rights, or International Labour Organization (ILO) conventions while 10 (20%) of the companies explicitly declare respect for the South African constitution and the human rights associated with it.

The results suggest a clear leadership role for the extractive sector. This is in line with other studies of this sort, which highlight the extent to which the extractive sector has been confronted with stakeholder pressure on such issues.

Lower mean scores were achieved in the finance, retail, and information and communication technology sectors. This is likely to be related to the perception that these sectors face fewer human rights risks, coupled with companies' limited recognition of the supply chain in such terms.

Companies obtained the highest scores for BBBEE-related reporting. This is likely to be due to the powerful state sanctions and incentives related to BBBEE, based on licences and procurement standards. The second highest mean score is for employment practices, which, again, is relatively well defined in legislation and regulation. Much lower scores are obtained for the community impact and supply chain categories.

Summary of Survey Results In Various Human Rights Categories

BBBEE

Most companies surveyed have targets and monitoring for the various aspects of the BBBEE scorecard. There is much less variance between the different sectors in comparison with other human rights issues, though the infrastructure/utilities and information and communications technology (ICT) sectors have lower scores despite the existence of sector BBBEE charters in ICT and construction. More than half of the companies have diversity programmes in place

through which targeted groups can achieve the necessary skills for professional advancement. More than a third of the investigated companies have policies and measures in place which ensure BBBEE compliance of their suppliers and in their business relations.

Employment Practices

A notable feature is the worst performance in this category of the retail sector. This sector's performance is particularly weak in the human rights issues of non-discrimination and conditions of work. Given the significant numbers of employees and growing concerns surrounding the use of labour brokers and casualisation in this sector, this apparent lack of commitment to these issues (or at least to public reporting on them) may represent a future risk.

Community

Apart from the extractive sector, which has been sensitised to security issues by prior experience, all other sectors score extremely low in response to the question: "Does the company exercise due diligence procedures when selecting private security guards?"

Land Management

Even the extractive sector, which routinely faces land issues, has a very low score. This also applies to the infrastructure and utilities sector, which has direct interactions with land issues.

Corruption and Bribery

A number of companies refer to a code of conduct (which is often not made available publicly) and many companies have an "ethics hotline". The financial services, retail and ICT sectors score relatively low, despite the fact that this is a material issue for them.

Supply Chain Management

Only nine companies had policies on respect for human rights in their value chain. Notably, the financial services and infrastructure sectors had particularly low scores even though they face potentially crucial human rights issues in their value chains.

8. PERTINENT CASE STUDIES OF SOUTH AFRICAN COMPANIES

Two case studies provide valuable insights to South African companies' approaches toward and experience of human rights issues. The studies -- on Sasol and AngloGold Ashanti -- were prepared with the consent and participation of the companies for purpose of discussion at the UN Global Compact International Learning Forum Meeting in Accra, Ghana, in November 2006.

Sasol

The study examines Sasol's management practices at its natural gas project in Mozambique. It argues that Sasol's commitment to the UN Global Compact requires clarification of the scope of "internationally proclaimed human rights" (as mentioned in the Global Compact principles) relevant to Sasol's activities; understanding the nature and extent of Sasol's sphere of influence; and determining the conditions under which the company might be deemed complicit in human rights abuses.

The study emphasises the risks related to community resettlement in the project area, but notes that the company has implemented many best practices in this regard, based in part on guidelines and expectations of the International Finance Corporation as project funder.

The study notes Sasol's international investment plans, including projects in countries with problematic human rights records. Specific challenges include Qatar's policy of rejecting HIV-positive immigrants, which runs counter to Sasol's non-discrimination policy. Special attention needs to be paid to the evolving definition of "complicity". The case study author suggests that much depends on whether a host government is actively committing violations or whether

it is ineffective in preventing violations. Sasol should make use of relevant UN agencies and non-governmental organizations (NGOs) in making assessments. A systematic approach to human rights management should include, prior to investment, a careful screening of countries' human rights related risks.

AngloGold Ashanti

The study on the experiences of AngloGold Ashanti (AGA) in the Democratic Republic of Congo (DRC) illustrates the challenges and complexities faced by companies operating in weak governance zones.

A payment made by AGA exploration staff to a rebel group accused of committing extensive human rights abuses was seen by prominent NGOs as an illustration of corporate irresponsibility and was used to argue that companies such as AGA should not be operating in such areas in the first place.

AGA, on the other hand, admitted that a mistake had been made but argued that the interests of local communities and the DRC in general are better served by the company remaining in the area.

The case study argues that AGA was wrong to invest in the DRC during a period of conflict. Though there is likely to be little legal certainty on the extent to which the company became complicit in human rights abuses or whether the actions of the rebel group are within the company's sphere of influence, AGA suffered significant damage to its reputation as a result of the publicity over the payment.

Arguably the risk of complicity in human rights violations could not be assessed well enough in such difficult and chaotic circumstances and there probably ought to be a precautionary principle to guide such decisions. Such a principle would generally emphasise a more risk-averse approach, also taking into consideration the possibility of unforeseen events or circumstances.

In this example, the company relied, *inter alia*, on a particular role of the UN in the area, and this reliance was arguably part of the reason why the company was exposed to extortion by the rebel group. It also seems that these human rights risks were not sufficiently considered during the merger between AngloGold and Ashanti, bearing in mind the complex history of interactions between Ashanti and the local communities. This experience therefore illustrated the broader importance of including human rights and other corporate responsibility considerations more carefully in mergers and acquisitions.

The company's decision to remain in the area subsequent to the payment is also difficult to assess, because so much depends on how the local and national governance system develops. There is little doubt that a mining operation such as AGA's proposed Ituri mine can provide crucial employment and income opportunities for the local population, the region and the country as a whole, as long as legitimate decision-making processes are established and supported at various levels of government.

Arguably the present trajectory is more benign than when AGA made its initial decision to re-enter the region in late 2004, and the company has also shown that it can make some contribution to improved governance at various levels. At the local level, for example, this includes the establishment of a local decision-making forum to guide the development of the mine and the company's social investment programme.

The case highlights how difficult it is to assess and manage the risk of complicity in human rights abuses in such areas. Weighing these risks against the socio-economic development that large-scale investments promise is even more fraught.

Another question is whether -- in the context of increasing pressure on companies to invest in resource-rich areas -- these risks of complicity in human rights abuses are being adequately considered, particularly among smaller companies that are perhaps less in the spotlight than corporations like AGA.

OVERVIEW OF SOME HUMAN RIGHTS NGOs IN SOUTH AFRICA

Numerous institutions and NGOs are involved in promoting and protecting human rights, with a number of them including business in their mandates.

Perhaps the most prominent of these is the *Human Rights Commission*, one of a number of Chapter 9 institutions established to support enforcement of the Constitution.

The Human Rights Commission seeks to address human rights violations and achieve redress for victims, monitor the observance of human rights, raise human rights awareness, and provide education and training on human rights. Notably, the Commission has recently established a focus area on business and human rights.

To avoid overlapping among Chapter 9 institutions and to make protection of rights more effective, government is now considering the establishment of an overarching body called the South African Commission on Human Rights and Equality. This would include the South African Human Rights Commission, the Commission on Gender Equality and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, and the National Youth Commission.

NGOs that have become prominent in the human rights field in recent years include such international organisations as ActionAid and Human Rights Watch.

ActionAid has reported on allegations that Anglo Platinum has been abusing human rights of communities affected by expansion of one of its mines and associated resettlement initiatives. *Human Rights Watch* has been prominent in its criticism of AngloGold Ashanti's activities in the Democratic Republic of Congo.

Other international NGOs with an explicit focus on business and human rights include *Aim for Human Rights*, the Dutch organisation supporting the South African Business and Human Rights Project, and the Business and Human Rights Resource Centre.

The *African Institute of Corporate Citizenship* (AICC) focuses on a range of corporate responsibility issues, including human rights. The AICC is the focal point of the South African Business and Human Rights Project which has focused, among other things, on adapting the Human Rights Compliance Assessment to the South African context. This project involves a number of other South African NGOs, including the Association for Rural Advancement, the Benchmarks Foundation of Southern Africa for CSR, Fair Trade in Tourism South Africa, and Khulumani Support Group.

The Benchmarks Foundation has made a critical report on the role of mining companies in the Rustenburg region. The Khulumani Support Group is well known for its role in legal claims in United States courts for reparations from companies that it says are responsible for aiding and abetting the apartheid regime.

Other critical NGOs with a more explicit environmental focus include groundWork, which is based in Pietermaritzburg and which has been playing a significant role in advocating in support of communities affected by pollution in such places as the South Durban petroleum refining centre and the Vanderbijlpark steel production area. Biowatch has been advocating against indiscriminate planting of biotechnology crops, which has given rise to a court case involving biotechnology company Monsanto.

While these NGOs are characterised by an activist, critical approach to corporations, other environmental NGOs, such as WWF-SA and Conservation International, have sought to establish partnerships with companies in support of their objectives.

A wide range of academic departments and centres also focus on human rights.

This report is a summary of a study, Business and Human Rights in South Africa, commissioned by the National Business Initiative (NBI).

The study was undertaken by Dr Ralph Hamman and Christoph Schild of the Environmental Evaluation Unit at the University of Cape Town.

The full report is available from:

National Business initiative
P O Box 294
Auckland Park
2006 Johannesburg
South Africa
Tel: +27 (0)11 544 6000
Fax: +27 086 505 8973
www.nbi.org.za