



INSTITUTE OF DIRECTORS
SOUTHERN AFRICA

The Human Rights Conversation for the Board Room

Sustainable Development Forum

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INTRODUCTION/CONTEXT

The uprisings of the Arab Spring of 2011 have brought into sharp focus some of the consequences of prolonged and systematic denial by governmental regimes of the human rights of their citizens. But, it is not only governments that have been implicated, or indeed affected, by the recent revolutions. The ripples of change have extended into the business world with impacts on offshore recipients of sovereign funds or investments by individuals associated with corrupt regimes, impacts on the ability of local businesses to function, and on banks which have provided financial services in those countries as well as for foreign investors.

As these events show us long term socio-economic stability can only be achieved in societies that are based on strong foundations which include conscious recognition of human and labour rights, ethics and environmental protection.

This paper explores the issue of human rights from the perspective of southern African business leaders and examines the growing expectations on them to ensure that human rights are explicitly and pre-emptively addressed.

It asks key questions such as:

- Do business leaders have a role in giving effect to human rights?
- In South Africa where the Constitution sets out a Bill of Rights, do businesses need to go beyond compliance with the law?
- If so, how should businesses integrate human rights issues in the operations?
- And, what should businesses do when they operate beyond the national borders?

Human rights, Codes of Practice and the law

In 2011 Professor John Ruggie, the UN Secretary-General's special representative on Business and Human Rights, presented his final report in which he concluded that while governments had the primary responsibility to give effect to international conventions on human rights, business had specific responsibilities. These include the need to ensure it is not complicit in human rights abuses and that it takes significant steps to assess the risks of human rights abuse associated with its operations and proactively address them.

In South Africa, the King Report on Governance, 2009 (King III), observes that good corporate governance is essentially about effective, ethical and responsible leadership. Chapter 1 in King III, which deals with responsible leadership, reflects the changing role of business in society. It says that business can no longer operate outside of societal norms. In exercising leadership, leaders should take into account human rights in their business dealings. As such human rights are a component of the broader ethical question that companies are faced with today in terms of responsible corporate citizenship.

Furthermore, the Bill of Rights as contained in the Constitution enshrines the rights of all people in South Africa and affirms the democratic values of human dignity, equality and freedom. The challenge is how to give effect to these ideals from a business perspective and whether mere adherence to legislative requirements that seeks to realise different aspects of these rights is sufficient or explicit enough for future societal expectations.

"Legal compliance" as a business standpoint is perceived by some as low risk, low return though the costs of non-compliance (both real and reputational) can be devastating to companies. The added complication when a company is aiming only for compliance is how that affects multi-national operations, where legal compliance can mean operating in different locations to very different standards with associated reputational challenges. For some business leaders the question is whether giving effect to rights, such as the environmental (section 24) rights either adds to or detracts from value. Does giving effect to human rights mean that there is a sacrifice of business opportunities? And are those possible opportunities worth more than long term reputation?

Ethics are judged in the collective behaviour of the leadership and the organisation. On the issue of human rights, however, there are numerous codes and conventions, most of which are stated from the perspective of government obligations. As the UN Report on Business and Human Rights has articulated, both government and business have specific but different obligations. This paper seeks to encourage corporate leaders to actively engage the human rights agenda as part of their sustainability programme and as an essential element of responsible leadership.

It is our view that disregard of human rights is a short term and high risk strategy and not one which can be defended by directors. As responsible corporate citizens, companies should take the longer-term view in the context of sustainable development. To fail to do so places the future of the company at risk but also that of the customers, the local community and society as a whole. In the shorter term the company may damage its reputation and jeopardise its societal license to operate if the company, its suppliers or any of the causes it supports disregard human rights or are complicit in the denial of rights to others. As the requirement for Integrated Reporting in accordance with King III (IoD paper January 2011) becomes part of our corporate governance regime in South Africa, the focus on sustainability requires directors to explore the impact of non-financial issues, such as those of human rights on their long term sustainability. The answer then is that human rights due diligence should become a formal part of the risk framework for companies and should extend beyond the company itself.

Organizations operating beyond South Africa

Many South African organizations operate in multiple jurisdictions that have varying approaches to human rights, labour law and governance. This presents a challenge and creates additional risk for organizations particularly where governance and regulatory systems are perceived to be weak. It is in these areas that companies are particularly vulnerable to allegations of complicity with those taking advantage of vulnerable members of society.

International natural resources companies, footwear and apparel companies, that have suffered significant reputational damage as a result of allegations of direct or indirect complicity in human rights abuse have taken the lead in developing individual and collective codes of good practice including incorporating human rights policies into corporate citizenship and ethics programs. Prominent among these is the United Nations Global Compact ten principles on environmental issues, human rights and labour rights and fighting corruption. The Global Compact provides a universal framework which can assist multinational organizations with an overarching system which transcends national law. It is, however, voluntary and self-declaratory in nature and not always recognised as sufficient. In his final report, Professor John Ruggie: <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf> calls for systematic human rights due diligence exercises by companies. The best known of these was developed by the Danish Institute for Human Rights and is available electronically.

Societal expectations

If one looks at the Global Compact the work of Professor Ruggie or even the Global Reporting Initiative, it is evident that society generally holds the view that the scope of the corporate responsibility to respect human rights extends across an enterprise's own activities and to other parties, such as business partners, entities in its value chain, other non-State actors and State participants.

For directors an enterprise's leverage over third parties becomes relevant in identifying what it can reasonably do to prevent and mitigate its potential human rights impacts or help remediate any actual impacts for which it is responsible.

The responsibility to respect human rights, as outlined in the various normative frameworks, including the OECD guidelines on multinational enterprises does not preclude business enterprises from undertaking additional commitments or activities to support and promote human rights. But such desirable activities cannot offset an enterprise's failure to respect human rights throughout its operations and relationships.

In order to meet their responsibility to respect human rights, it is recommended that within the sustainable development vision and policy framework, South African organizations should have processes in place that are appropriate to their size and circumstances. These should enable them to identify, prevent, mitigate and remediate any adverse human rights risks and impacts (potential or real) they cause or contribute to through their activities and relationships. Furthermore, they should account for their human rights performance in their sustainability reporting, which should be in line with the Global Reporting Initiative's G3 or G3.1 guidelines.

Risk management

Current best practice within organizations is to include specific human rights due diligence exercise with regard to new countries or activities. It is further suggested that the process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, and tracking as well as communicating their performance. With current tensions beginning to ease in some African countries the rights of first entry for foreign business will rely heavily on their ability to support hard earned basic human rights.

From a risk management perspective this could reduce the risk of legal claims against them by showing that they took every reasonable step to avoid involvement with an alleged human rights abuse. However, it should not be assumed that due diligence exercises will automatically and fully absolve directors from personal liability for causing or contributing to human rights abuses. The tracking of human rights performance also creates a critical feedback loop for directors and boards, which enables them to understand better the concerns and expectations of relevant stakeholders. It is in this aspect that business opportunities may present themselves. Directors should make particular efforts to track their human rights performance with regard to vulnerable and/or marginalized groups, such as indigenous peoples; women; national, ethnic and religious minorities; and children in the areas of operation.

Core labour rights are included in the human rights agenda because in uneven labour markets, labour costs can be kept artificially low in certain countries. While there is marginal short term advantage to both the employer and the country looking to attract investment, in the longer term it can create both reputational and supply chain risk. On a practical level, it might be expected that the remuneration sub-committees of boards should extend their attention beyond the executive suite to ensure that key jobs within the supply chain are appropriately remunerated and that the organization cannot be seen to be complicit in exploitation of vulnerable people.

Directors should ask:

- How their company's activities, products, services, and entire value chain impact on the collective or individual rights of employees, suppliers or local communities?
- Whether their employees, suppliers or local communities are fully informed of their rights and those of others?
- Whether, corrupt regimes are benefitting unfairly at the expense of their citizens rights, from any natural resource exploitation?
- Whether payments to government are flowing to the Treasury of the host country or enriching a select few? Are those payments being reported in transparent and accountable ways?
- As natural resource come under increasing stress linked to growing populations and climate change, can the company source its critical supplies in ways that recognise the rights of local communities?

Practical starting points can be made by conducting employee surveys to establish how employees view their company's protection of human rights for information about "where to begin internally". It is essential that companies should develop policy approaches based on reference to experts in the field or at least the documentation developed by experts. When discovering breaches of human rights, or suspected breaches of human rights, such as identifying child labour in a supply chain, it is essential that companies work with experts to ensure that the victims are not left worse off by the response. It is essential to get buy in to ensure that both the company and the victims emerge from such experiences without further damage.

Director's efforts with respect to human rights should be embedded in governance processes in order to permeate the entire organisation, and influence its value chain and ensure continuity when leaders change.

Conclusion:

There is a strong argument for organizations to drive improved performance in human rights and ethics in their pursuit of long term viability. To do this, they will need performance measures, education and awareness and engagement with key stakeholders. A number of tools and mechanisms to assist organizations already exist and can be found in the Global Compact and its supporting documentation; the work on Business and Human Rights undertaken on behalf of the UN Secretary-General; due diligence tools developed by various parties including the Danish Institute for Human Rights and the UK's Corporate Leaders Group; and, the Global Reporting Initiative's new protocols on human rights and society.

Link to Professor John Ruggie's Final Report

<http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>

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