

“Shadow” National Baseline Assessment of Current Implementation of Business and Human Rights Frameworks

South Africa



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The Centre for Human Rights at the University of Pretoria

with support from the
International Corporate Accountability Roundtable (ICAR)



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[The International Corporate Accountability Roundtable \(ICAR\)](#) is a coalition of human rights, environmental, labor, and development organizations that creates, promotes, and defends legal frameworks to ensure corporations respect human rights in their global operations.

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TABLE OF CONTENTS

EXECUTIVE SUMMARY	2
INTRODUCTION	5
Background	5
The National Baseline Assessment (NBA) Template	5
The South African Context	6
Approach and Structure of the “Shadow” NBA for South Africa.....	7
PILLAR I	8
Guiding Principle 1	8
Guiding Principle 2	38
Guiding Principle 3	42
Guiding Principle 4	51
Guiding Principle 5	59
Guiding Principle 6	66
Guiding Principle 7	77
Guiding Principle 8	86
Guiding Principle 9	90
Guiding Principle 10	97
PILLAR III	100
Guiding Principle 25	100
Guiding Principle 26	106
Guiding Principle 27	118
Guiding Principle 28	127
Guiding Principle 31	130
ENDNOTES.....	135

EXECUTIVE SUMMARY

South Africa's legislative and regulatory framework around business and human rights is relatively well developed, especially in the context of an emerging economy. However, it appears that, in most cases, these laws and regulations are not interpreted as one would expect nor fully implemented and enforced. The country is also at an interesting point in time, where multi-stakeholder discussions and government activities are revolving around legal and policy reforms that impact business and human rights. Some examples include the renegotiation of bilateral investment treaties (BITs), development of a new investment bill, and talks around the development of a new public procurement bill.

At the international level, civil society and the global community at large commend South Africa for ratifying the International Covenant on Economic, Social, and Cultural Rights in 2015, albeit twenty-one years after signing the covenant. However, commitment to several other international and regional instruments is still lacking, including the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment.

At the same time, South Africa has been quiet on matters involving soft law, especially in the context of business and human rights. While many States have openly expressed support for the UN Guiding Principles on Business and Human Rights (UNGPs), the South African government is currently prioritizing the process around a treaty on business and human rights at the UN level. However, the South African Human Rights Commission (SAHRC) has led several capacity building initiatives that include a focus on the UNGPs. In addition, several multinational companies in South Africa have expressed interest and support for the UNGPs and are building internal capacity around them.

Under South Africa's domestic legislative framework, several issues require attention in terms of business and human rights impacts:

- Concerns in the labor sphere revolve around job insecurity, inadequate wages, and poor working conditions, especially in the informal sector. South Africa has also seen a series of protests around outsourcing and the use of "labor brokers," which is an issue that has been prioritized by the government for legal reform.
- Land reform remains a controversial topic in the country, due to the legacies of South Africa's turbulent past and the historically discriminatory dispensation of land. Several laws and regulations that may have implications for human rights are silent on the issue, including, among others, the Companies Act in South Africa. There is thus an urgent need for policy reform that clarifies the human rights responsibilities and accountability of company executives and directors.
- South Africa is considered to have one of the best tax administrators in the region, and the government is involved in external capacity building initiatives through the South African Revenue Service. However, several concerns remain around the issue of illicit financial flows due to ongoing transfer pricing and other tax avoidance practices in the country.

- The public procurement system in South Africa is frequently under scrutiny, often facing allegations of corruption and cartel-related incidents. While South African laws provide various guidelines for public procurement practices, there are no prescribed procedures in the law or specific oversight mechanisms.
- Human rights due diligence requirements and measurements are still lacking across the business spectrum in South Africa, including among State-owned enterprises, which is a segment of the economy that is criticized by the South African media as being rife with corruption and misadministration.
- In 2013, the South African government unilaterally canceled several of its BITs, mainly with Western European countries. Soon after, discussions started around a new bill that would replace a number of BITs, including those that were cancelled and some that are coming up for renewal. The Protection of Investment Bill, which was passed by the South African Parliament towards the end of 2015, will regulate foreign direct investment going forward. While the human rights implications are still relatively unclear, the bill has been widely criticized for deterring foreign direct investment.
- South Africa's business landscape is quite active in the field of corporate governance, perhaps most notably through the efforts put into the development of the King Report on Corporate Governance, which has a prominent focus on human rights.
- The remedy framework in South Africa consists of a combination of judicial, quasi-judicial, and non-judicial remedies. The court system consists of several levels, with the Constitutional Court at the apex. The SAHRC is one of a few national human rights institutions in the world to have a complaints mechanism and investigative powers. South Africa also houses an active Public Protector that has launched several business and human rights-related investigations around the abuse of public power, misadministration of public funds, and corruption in procurement practices.
- Barriers to access to remedies that victims of corporate human rights abuse face in South Africa include a number of issues that are not unique to the country. Apart from recurring barriers such as difficulties in piercing the corporate veil and issues around *forum non conveniens*, victims in South Africa face very high legal costs with relatively little financial aid, which is exacerbated by the "loser pays" principle. South Africa is also known to have a legal environment that is not very conducive to successful class-action lawsuits, which is often the most appropriate filing class in business and human rights-related cases.

During the compilation of this report, it became increasingly clear that there is a dire need for further research into several issues that are linked to business and human rights in South Africa, but have not been explored in-depth by civil society or academia before. Such issues include the link between business and human rights issues and the topics of corruption, public procurement, trade, and investment.

South Africa is home to a vibrant civil society, and the relationship between civil society and government has been relatively constructive, particularly in the field of business and human rights leading up to the treaty negotiations at the UN Human Rights Council. In this regard, we cannot

emphasize enough the need for civil society, academia, practitioners, and government to take the information laid out in this document and to develop it further. Bearing in mind the pace at which legislative and regulatory frameworks are changed, it is very possible that some of the information contained in this report will become outdated. We rely on the business and human rights community in South Africa to take it upon themselves to ensure that information around respect for human rights in the conduct of business is well documented, updated, and shared with the public.

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INTRODUCTION

BACKGROUND

In June 2011, the United Nations Human Rights Council unanimously endorsed the UN Guiding Principles on Business and Human Rights (UNGPs).¹ Three years later, in June 2014, the Council called on all of its Member States to develop National Action Plans (NAPs) to promote the implementation of the UNGPs within their respective national contexts.² This development followed similar requests to respective Member States made by the European Union in 2011³ and 2012⁴ and by the Council of Europe in 2014.⁵ Since 2011, and due in part to these initiatives, a number of individual States have developed and published NAPs on business and human rights, and many more are currently in the process.⁶

In August 2013, the International Corporate Accountability Roundtable (ICAR) and the Danish Institute for Human Rights (DIHR) launched a joint project to develop guidance on NAPs in the form of a “toolkit” for use by governments and other stakeholders.⁷ This collaboration took place following interventions by both organizations on the need for NAPs and for their development in line with a human rights-based approach.⁸ This guidance was published in June 2014, in a report entitled *National Action Plans on Business and Human Rights: A Toolkit for the Development, Implementation, and Review of State Commitments to Business and Human Rights Frameworks*.⁹

Since the publication of the NAPs Toolkit, both ICAR and DIHR have instituted several “road-testing” projects with country-level partners, wherein aspects of the NAPs Toolkit have been put into practice across various national contexts. In this regard, ICAR partnered with the Centre for Human Rights (CHR) at the University of Pretoria and the Khulumani Support Group in November 2014 to carry out a year-long project that focused on building the capacity of South African civil society with regard to business and human rights frameworks and NAPs as a tool for implementation. As part of this project, and with the support of ICAR, CHR has developed this report.

THE NATIONAL BASELINE ASSESSMENT (NBA) TEMPLATE

The first component of the NAPs Toolkit is the National Baseline Assessment (NBA) Template. In general, a baseline assessment is a study conducted at the start of an intervention to analyze current conditions. The results of the baseline assessment can then be used to assess impact. A government can use a baseline assessment to compare future conditions with their initial status after a particular intervention or program, such as a NAP, has taken place and to provide greater understanding of an intervention or program’s effects and results.¹⁰

The NBA Template provides criteria, indicators, and scoping questions by which to assess how far current law, policy, and other measures at the national level give effect to the State’s duty to protect human rights under the UNGPs and other international business and human rights standards. The NBA Template offers a standardized approach to business and human rights baseline analysis across countries. However, ICAR and DIHR designed the NBA Template to be adapted by local users to ensure that it can be used in a context-sensitive way. Moreover, the NBA Template primarily uses qualitative indicators, but these may be supplemented with quantitative indicators and benchmarks at the national level and, if resources permit and States and other

stakeholders so-desire, at the regional or international levels. The NBA Template itself is found at Annex 4 to the NAPs Toolkit.¹¹

Using the NBA Template to develop a country-specific NBA assists States in coherently and transparently identifying and selecting measures to include in business and human rights policies, including within NAPs. It also facilitates State reporting on the impact of such policies over time and supports general business and human rights advocacy within a particular country. To ensure cohesion, and in line with the initial purpose of the exercise, the NBA Template follows a structure that is based on the structure of the UNGPs. However, it should be noted that since the request from the UN Human Rights Council for Member States to use NAPs as an implementation tool of the UNGPs, the discourse around business and human rights has been rapidly expanding and changing. There is general consensus that NAPs can and should be used to assess implementation of business and human rights frameworks beyond the scope of the UNGPs and in a way that highlights current progress and gaps in all business and human rights-related legislation, regulation, policy, and programs.

THE SOUTH AFRICAN CONTEXT

NAPs may be developed in a number of different ways, but should be developed in both host and home States of transnational corporations as all national contexts greatly benefit from enhanced clarity and accountability with regard to government policies and practices in relation to business and human rights. Regardless of focus, NAPs should be developed or adopted by governments because they are, by definition, an articulation of State commitments in relation to a particular policy area. While some governments have directly led NAP processes, including multi-stakeholder consultations, others have relied on civil society, national human rights institutions, or academia in carrying out specific steps in the process, including the completion of NBAs. In other contexts, civil society groups have conducted “shadow” NBAs independent of the government in order to lay the foundation for a NAP process or to provide evidence-based recommendations for developing business and human rights policies, including within a NAP, at the government level.

In the case of South Africa, the call for a NAP has so far been led by academia and civil society. At the time of the publication of this report, however, the South African government had not yet committed to developing a NAP on business and human rights. As such, this report and the “shadow” NBA it contains is aimed at laying the foundations for a potential NAP process, and supporting general business and human rights advocacy in South Africa. It aims to do so by providing an overview of existing legislative and regulatory frameworks relating to business and human rights in South Africa, as well as remaining gaps in such frameworks or in their implementation.

As a strong advocate for the development of NBAs being the first step in the NAP process, the CHR, with the support of ICAR, has completed this “shadow” South African NBA based on desktop research, as well as preliminary consultations with business and human rights practitioners.

It should be noted that this report and the “shadow” NBA it contains are intended to be living documents for further consultation and uptake by civil society, academic institutions, business, and government in South Africa, where domestic and foreign policies around business and human rights are often changing or being developed. The South African government is also playing an active role at the UN Human Rights Council in debating a potential treaty on business and human

rights. It is also clear that much is changing in the business and human rights landscape domestically, as the South African government has recently canceled several of its bilateral investment treaties (BITs) and is in the process of discussing a new bill on foreign investment in its Parliament. It is against this backdrop that CHR and ICAR hope that the “shadow” NBA will be further developed by a diverse array of stakeholders in South Africa as such developments emerge.

APPROACH AND STRUCTURE OF THE “SHADOW” NBA FOR SOUTH AFRICA

The aim of the NBA Template is to allow for the evaluation of a State’s current implementation of the UNGPs and other relevant business and human rights frameworks on a transparent and consistent basis and in line with the general principles of the human rights-based approach and human rights measurement, as set out in the NAPs Toolkit. Accordingly, the structure of the “shadow” NBA for South Africa mirrors that of the UNGPs: the NBA is made up of a set of tables, one for each UNGP under Pillar I and those relating to the State remedy aspects of Pillar III. Because the UNGPs are wide-ranging in nature, each UNGP is broken down further into a number of elements. Indicators are then defined for each element identified. Many of the indicators in the NBA Template are derived from relevant international law and standards from intergovernmental organizations. However, because these indicators provide increased clarity and can contribute to the State’s duty to protect human rights, some of these indicators are based on or refer to other business and human rights frameworks outside of the UNGPs, such as those devised through multi-stakeholder initiatives and addressing specific thematic concerns or industry sectors.

The indicators in the NBA operationalize business and human rights frameworks by earmarking a concrete piece of information that can be examined, at the national level, as a marker of South Africa’s compliance with the UNGP element in question. Short sets of scoping questions are included per indicator to provide enhanced clarity. It should also be noted that, in contrast to human rights indicators in other contexts, a longer list of indicators is included in the NBA. This is because rather than focusing on a single human right (e.g., the right to water), the many business and human rights frameworks captured in this NBA reference a host of human rights and labor rights standards. Thus, a wide variety of national measures will usually be relevant to satisfying a given indicator; however, the list of indicators included is not meant to be exclusive or exhaustive.

Moreover, while it is advised that the NBA be as comprehensive as possible, as noted above, the NBA includes indicators in relation to Pillar I and the State remedy aspects of Pillar III only. This is largely because the intent of the NBA process is to capture State practice on human rights. Corporate respect for human rights may be inferred from examining the various voluntary and regulatory mechanisms the State employs, but that is beyond the scope of the authors’ efforts with this NBA and broader work around business and human rights NAPs. Finally, it should be reiterated that the analysis and approach that have been adopted in developing the “shadow” NBA take inspiration from established approaches to developing human rights monitoring frameworks based on indicators, as well as existing guidance on NAPs.¹²

PILLAR I

GUIDING PRINCIPLE 1	
States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.	
Commentary to Guiding Principle 1	
<p>States' international human rights law obligations require that they respect, protect, and fulfill the human rights of individuals within their territory and/or jurisdiction. This includes the duty to protect against human rights abuse by third parties, including business enterprises.</p> <p>The State duty to protect is a standard of conduct. Therefore, States are not per se responsible for human rights abuse by private actors. However, States may breach their international human rights law obligations where such abuse can be attributed to them, or where they fail to take appropriate steps to prevent, investigate, punish, and redress private actors' abuse. While States generally have discretion in deciding upon these steps, they should consider the full range of permissible preventative and remedial measures, including policies, legislation, regulations, and adjudication. States also have the duty to protect and promote the rule of law, including by taking measures to ensure equality before the law, fairness in its application, and by providing for adequate accountability, legal certainty, and procedural and legal transparency.</p>	
1.1. International and Regional Legal Instruments Has the government signed and ratified relevant international and regional legal instruments?	
Indicators	Scoping Questions
International Human Rights Legal Instruments	Has the government signed and ratified relevant international human rights legal instruments, such as ICERD, ICCPR, ICESCR, CEDAW, CAT, CRC, ICMW, CPED, CRPD, the core ILO conventions, and any corresponding protocols?
Regional Human Rights Legal Instruments	Has the government signed and ratified relevant regional human rights legal instruments, such as the African (Banjul) Charter on Human and Peoples' Rights, the American Convention on Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and any corresponding protocols?

Other Human Rights Legal Instruments	Are there any other relevant human rights legal instruments that the government has signed and ratified?
Implementation Status	
<p>The first and second sets of indicators and scoping questions above request information about the international and regional human rights legal instruments that the South Africa government has signed and ratified, as such actions holds the South African government legally accountable to the standards set out therein. As such, the international and regional human rights legal instruments listed below articulate human rights obligations to which the South African government has consented.. This provides both evidence of the South African government’s level of commitment or lack of commitment to human rights and also demonstrates the framework of human rights harms that the South African government is obligated to “take appropriate steps to prevent, investigate, punish, and redress” in relation to third party abuses.</p> <p>South Africa has ratified or acceded to the following international human rights instruments:¹³</p> <ol style="list-style-type: none"> 1. International Covenant on Civil and Political Rights (ICCPR) – Signed on 3 October 1994 and ratified on 10 December 1998; 2. International Covenant on Economic Social and Cultural Rights (ICESCR) – Signed on 3 October 1994 and ratified on 12 January 2015; 3. Optional Protocol to the International Covenant on Civil and Political Rights – Acceded to on 28 August 2002; 4. Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty – Acceded to on 28 August 2002; 5. International Covenant on Economic Social and Cultural Rights (ICESCR) – Signed on 3 October 1994 and ratified on 18 January 2015; 6. Convention Against Corruption – Signed on 9 December 2003 and ratified on 22 November 2004; 7. Convention Against Torture (CAT) – Signed on 29 January 1993 and ratified on 10 December 1998; 8. International Convention on the Elimination of All Forms of Racial Discrimination (CERD) – Signed on 3 October 1994 and ratified on 10 December 1998; 9. Convention on Elimination of all forms of Discrimination Against Women (CEDAW) – Signed on 29 January 1993 and ratified on 15 December 1995; 10. Convention on the Rights of Persons with Disabilities – Signed on 30 March 2007 and ratified on 30 November 2007; 11. Convention on the Rights of the Child – Signed on 29 January 1993 and ratified on 16 June 1995; 12. Optional Protocol on the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography – Acceded to on 30 June 2003; 13. Optional Protocol on the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict – Ratified on 24 October 2009; 	

14. Amendment to article 43(2) of the Convention on the Rights of the Child – Acceded to on 5 August 1997 and entry into force on 18 November 2002;
15. Convention Against Transnational Organized Crime – Signed on 14 December 2000 and ratified on 20 February 2004;
16. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime – Signed on 14 December 2000 and ratified on 20 February 2004.

South Africa has ratified or acceded to the following **ILO Conventions**:¹⁴

1. Forced Labour Convention (C29, 1930) – Ratified on 05 March 1997;
2. Labour Inspectors Convention (C81, 1947) – Ratified on 20 June 2013;
3. Freedom of Association and Protection of the Right to Organise Convention (C87, 1948) – Ratified on 19 February 1996;
4. Right to Organise and Collective Bargaining Convention (C98, 1949) – Ratified on 19 February 1996;
5. Equal Remuneration Convention (C100, 1951) – Ratified on 30 March 2000;
6. Abolition of Forced Labour Convention (C105, 1957) – Ratified on 05 March 1997;
7. Discrimination (Employment and Occupation) Convention (C111, 1958) – Ratified on 05 March 1997;
8. Minimum Age Convention (C138, 1973) – Ratified on 30 March 2000– Ratified on 30 March 2000, **NB**: Minimum age specified-15 year;
9. Occupational Safety and Health Convention (C155, 1981) – Ratified on 18 February 2003;
10. Domestic Workers Convention (C189, 2011) – Ratified on 20 June 2013;
11. Worst Forms of Child Labour Convention (C182, 1999) – Ratified on 07 June 2000;
12. Safety and Health in Mines Convention (C176, 1995) – Ratified on 09 June 2000;
13. Night Work (Women) Convention (Revised)(C089, 1948) – Ratified on 02 March 1948;
14. Convention Concerning Statistics of Wages and Hours of Work (C63, 1938) – Ratified on 08 August 1939;
15. Underground Work (Women) Convention (C045, 1935) – Ratified on 25 June 1936;
16. Workmen’s Compensation (Occupational Diseases) Convention (Revised) (C42, 1934) – Ratified 26 February 1952;
17. Minimum Wage-Fixing Machinery Convention (C026, 1928) – Ratified 28 December 1932;
18. Equality of Treatment (Accident Compensation) Convention (C019, 1925) – Ratified 30 March 1926;
19. Unemployment Convention (C002, 1919) – Ratified 20 February 1924;
20. Tripartite Consultation (International Labour Standards) Convention (C144, 1976) – Ratified on 18 February 2003;
21. Labour Inspection Convention (C081, 1947) – Ratified 20 June 2013;
22. Worst Forms of Child Labour Convention (C182, 1999) – Ratified 7 June 2000.

South Africa has ratified or acceded to the following **regional human rights legal instruments**:

1. African Charter on Human and Peoples' Rights – Signed on 9 June 1986 and ratified on 9 June 1996;
2. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa – Ratified on 17 December 2004;
3. Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and People's Rights – Signed on 9 June 1999 and ratified on 3 July 2002;
4. African Charter on the Rights and Welfare of the Child – Signed on 10 October 1997 and ratified on 7 January 2000;
5. African Union Convention on Preventing and Combating Corruption – Signed on 16 March 2004 and ratified on 11 November 2005;
6. African Union Convention on the Conservation of Nature and Natural Resources – Signed on 18 April 2012 and ratified on 15 May 2013;
7. OAU Convention Governing the Specific Aspects of Refugee Problems in Africa – Ratified on 15 December 1995;
8. OAU Convention on the Prevention and Combating of Terrorism – Signed on 14 July 1999 and ratified on 7 November 2002;
9. Protocol to the OAU Convention on the Prevention and Combating of Terrorism – Ratified on 25 March 2007;
10. African Youth Charter – Signed on 7 May 2009 and ratified on 28 May 2009;
11. African Charter on Democracy, Elections and Governance – Signed on 1 February 2010 and ratified on 24 December 2010;
12. African Convention on the Conservation of Nature and Natural Resources (Algiers Convention) 2003 – Signed on 18 April 2012 and ratified on 15 May 2013.

Gaps

South Africa has signed but not ratified the following **international human rights legal instruments**:

1. Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment – Signed on 20 September 2006;

South Africa has not signed the following **international human rights legal instruments**:

1. International Convention on the Protection of All Migrant Workers and Members of Their Families;
2. ILO Hours of Work (Industry) Convention (C1, 1919);
3. ILO Social Security (Minimum Standards) Convention (C102, 1952);
4. ILO Medical Care and Sickness Benefits Convention (C130, 1969);
5. ILO Minimum Wage Fixing Convention (C131, 1970);
6. ILO Holidays with Pay (Revised) Convention (C132, 1970);
7. ILO Workers' Representatives Convention (C135 of 1971);

8. ILO Migrant Workers (Supplementary Provisions) Convention (C143, 1975);
9. ILO Indigenous and Tribal Peoples Convention (C169, 1989);
10. ILO Maternity Protection Convention (C183, 2000).

South Africa has not signed the following **regional human rights legal instruments**:

1. AU Convention for the Protection and Assistance of Internally Displaced Persons;
2. African Convention on the Conservation of Nature;
3. African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention);
4. Protocol on the Statute of the African Court of Justice and Human Rights;
5. Charter for African Cultural Renaissance.

1.2. International and Regional Soft Law Instruments

Has the government signed relevant international and regional soft law instruments?

Indicators	Scoping Questions
International Human Soft Law Rights Instruments	Has the government signed relevant international human rights soft law instruments, such as the UDHR, other UN declarations and/or resolutions, and the ILO Tripartite Declaration?
Regional Human Rights Soft Law Instruments	Has the government signed relevant regional human rights soft law instruments, such as the American Declaration of the Rights and Duties of Man and the ASEAN Human Rights Declaration?
Other Human Rights Soft Law Instruments	Are there any other relevant human rights soft law instruments that the government has signed?

Implementation Status

The first and second indicators and scoping questions above request information about the international and regional soft law instruments the South African government has signed. Although these instruments are not legally binding, they constitute another part of the human rights framework aiming to address the harms that the South African government should “take appropriate steps to prevent, investigate, punish, and redress” in relation to third party abuses.

Below is a list of the **international and regional soft law instruments** the South African government has signed or indicated its support for:

<ol style="list-style-type: none"> 1. United Nations <ol style="list-style-type: none"> a. Universal Declaration of Human Rights (UDHR); b. United Nations Guiding Principles on Business and Human Rights (UNGPs) – though there is a relatively low level of reaction from the South African government on the UNGPs, it was unanimously adopted in 2011 by the United Nations Human Rights Council, including South Africa as a Member State; c. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law – adopted without a vote; d. United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) – at its adoption in 2007, South Africa voted in favor. 2. International Labor Organization <ol style="list-style-type: none"> a. Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy; b. International Labor Organization (ILO) Declaration on Social Justice for a Fair Globalization; c. ILO Declaration on Fundamental Principles and Rights at Work. 	
Gaps	
<p>Although the South African government has signed or otherwise indicated its support for the international and regional soft law instruments listed above, there are others that the South African government has not explicitly supported.</p> <p>Due to the fact that the majority of voluntary declarations are taken up without a country-by-country vote, it is difficult to list all soft law mechanisms at the international and regional level that the South African government has not directly supported. In order to close the gaps in the South African government's recognition of these non-binding declarations, the South African government should sign or otherwise indicate its support for them.</p>	
1.3. UN Guiding Principles on Business and Human Rights Is the State actively implementing the UNGPs?	
Indicators	Scoping Questions
Formal Statement of Support	Has the State given a formal statement of support for the UNGPs?

Implementation Structures	Has the State put in place relevant structures to ensure implementation of the UNGPs, for example, through the establishment or designation of a body tasked with implementation measures or through the allocation of internal resources?
Capacity-Building	Has the State put in place measures to capacitate government actors and local citizens with knowledge and information on the UNGPs, for example, through workshops, conferences, or other events?
Information	Has the State disseminated information about the UNGPs through public media sources, internal guidance documents, or other materials?
Other UNGPs Implementation Measures	Has the State taken any other measures to implement the UNGPs within the State?
Implementation Status	
<p>South Africa's formal support for the UNGPs has been demonstrated in the following ways:</p> <ol style="list-style-type: none"> 1. Whereas the government has not formally endorsed the UNGPs, institutions such as the South Africa Human Rights Commission (SAHRC) have demonstrated support. The SAHRC's annual performance plan for 2014-2015 makes provision for the role of the Commission in business and human rights.¹⁵ The plan mentions, though without detailing, the participation of the Commission in several initiatives on business and human rights, often drawing from or making use of the UNGPs. The agriculture and mining sectors are singled out as priority areas for the Commission; the SAHRC views both of these sectors as opportunities for systemic consideration of business and human rights issues, including in relation to service delivery, security, international trade agreements, and other socio-economic challenges. 2. Also outside the government, major corporations in South Africa have also endorsed the UNGPs. For example, Standard Bank's position is that it "recognizes that part of its corporate responsibility is to protect and uphold human rights in its operational practice and financing activities in line with the UN's Guiding Principles on Business and Human Rights."¹⁶ Similar sentiments have been demonstrated by several other multinational companies in the mining, private security, and agricultural sectors. <p>South Africa has put into place the following implementation structures for the UNGPs:</p> <ol style="list-style-type: none"> 1. Whereas preliminary research has not revealed any formal steps taken by the South African government to implement the UNGPs, the South African government has taken a position on an ongoing debate on whether business and human rights are better regulated by a 	

binding treaty as opposed to soft law, such as the UNGPs. The South African government supported Human Rights Council Resolution 26/9, which established an open-ended Inter-Governmental Working Group (IGWG) to elaborate the possibility of developing a binding instrument on business and human rights.¹⁷ While this is not necessarily an indication of the South African government's willingness (or unwillingness) to engage with the UNGPs, it was confirmed by all States at the first meeting of the IGWG that the two processes/proposed instruments are not mutually exclusive, but rather, in fact, complimentary.

2. The SAHRC, in partnership with the Danish Institute for Human Rights, has published a Business and Human Rights Country Guide. The Country Guide draws from the UNGPs significantly and is based on the roles and responsibilities of government and companies as set out in the UNGPs. The Country Guide offers guidance to corporations on promotion and respect for human rights in South Africa. It is intended that the Guide will lead to the development of a NAP on business and human rights in the country.¹⁸

Examples of South Africa's **capacity-building efforts**, which include consular outreach, UNGPs events, UNGPs workshops, and public-private workshops, are listed below:

1. On 27 June 2013, the South Africa Human Rights Commission held a "Business and Transparency Conference," where business experts converged to discuss the role and relevance of transparency for the business sector. The discussions involved business stakeholders and government representatives and aimed to aid crafting of a NAP for South Africa in implementation of the UNGPs.¹⁹
2. The SAHRC also committed itself to include business and human rights as one of its strategic focus areas for 2014-2015. With this in mind, the Commission engaged in several capacity building workshops and seminars focusing on business and human rights generally, but also drawing from the work that has been done around the UNGPs.

South Africa has attempted to **disseminate information** to the public in the following ways:

Most of the work around the UNGPs has been led by the SAHRC, including capacity building around business and human rights with a focus on the UNGPs, sub-regional knowledge sharing and consultations, the development of a country guide on business and human rights, and hosting roundtable discussions on business and human rights and how it relates to other areas of their work. As such, analyzing the efforts of the SAHRC to disseminate similar information to the public is insightful in relation to this indicator.

While no dedicated government publication on the UNGPs could be found, the SAHRC does mention the UNGPs and their impact on the business and human rights discourse in SAHRC publications. The capacity building and community engagement exercises focusing on business and human rights also included several representatives from communities in and around South Africa, resulting in better public knowledge and understanding of the UNGPs and the business and human rights discourse in general.

Gaps	
<p>The South African government has not publicly or explicitly stated its support for the UNGPs. Of course, when reference is made to the “South African government” in this context, it is a reference to the relevant government departments and agencies. In the South African context, the government departments and agencies working closely on international human rights commitments include the Department of International Relations and Cooperation (DIRCO), which serves as the South African counterpart to what most other States call the “Ministry of Foreign Affairs.” DIRCO works closely with the Department of Justice and Constitutional Development (DOJCD) on issues concerning international legal obligations, including international human rights commitments.</p> <p>The UNGPs were endorsed unanimously by the UN Human Rights Council on 16 June 2011, including by South Africa. However, since the adoption and endorsement of the UNGPs, the South African government has not done much in respect of implementing the UNGPs. In fact, together with the Ecuadorian government, the South African government is leading a process that is investigating the possibility of having a treaty on business and human rights (see above). While it was confirmed in July 2015 that the UNGPs and the treaty process are not mutually exclusive, they are still regarded by many as two competing processes.</p> <p>It is still very early in the treaty process, which will most likely take a number of years to conclude. Although it is too early to know what the final outcome of the process will be, there already are reasons for concern. As it stands, the proposed treaty will only focus on businesses with “transnational character.” The practical implications of this limited review are yet to be clarified. In the meantime, States are encouraged to use the UNGPs to ensure that the human rights impacts of business are prevented or mitigated as much as possible. The UNGPs do not create any new legal obligations, and rely on the domestic legal framework of the State to ensure that the three pillars of the UNGPs (protection by government, respect by corporations, and access to remedy) are implemented. The UN Working Group has identified several ways in which the UNGPs could be implemented, but most notably through the development of NAPs. At the time of publication of this report, the South African government has made no official commitment to work on a NAP or any other method of implementation of the UNGPs.</p>	
1.4. Other Relevant Standards and Initiatives	
Is the State supporting or participating in other standards and initiatives relevant to business and human rights?	
Indicators	Scoping Questions
Standards	Has the government supported other standards on business and human rights, such as the IFC Performance Standards, the OECD Guidelines for Multinational Enterprises, and the UN Global Compact?

Initiatives	Has the government participated in initiatives, multi-stakeholder or otherwise, on business and human rights, such as the Global Network Initiative (GNI), the International Code of Conduct for Private Security Service Providers Association (ICoCA), and the Voluntary Principles on Security and Human Rights (VPs)?
Implementation Status	
<p>The South African government supports and is involved with the following standards and initiatives:</p> <ol style="list-style-type: none"> 1. A member of the International Finance Corporation (IFC), which means the country:²⁰ <ol style="list-style-type: none"> a. Is a member of the World Bank; b. Has signed the IFC's Articles of Agreement; c. Commits to upholding the IFC Performance Standards in funded projects. 2. South Africa is not a member of the OECD, but has a working relationship with the organization on the following fronts:²¹ <ol style="list-style-type: none"> a. Macroeconomic policy and structural reform; b. Debt management; c. Fiscal policy; d. Domestic resource mobilization; e. Competition policy; f. Agricultural policy; g. Public governance; h. Rural and urban development; i. The fight against bribery; j. Development; k. Science, technology, and innovation; l. Chemicals testing; m. Tourism. 3. Open Government Partnership: <ol style="list-style-type: none"> a. South Africa is implementing the first action plan under the partnership and is in the process of developing the second action plan.²² 	

Gaps	
<p>The following gaps exist in terms of how the South African government supports and is involved with the following standards and initiatives:</p> <ol style="list-style-type: none"> Voluntary Principles on Security and Human Rights Initiative: <ol style="list-style-type: none"> South Africa is not a participant in this initiative.²³ However, a number of corporations operating in South Africa have committed themselves under this initiative. The Initiative's annual report for the year 2013 states that one corporation had reported that its global security team had visited South Africa to update the security risk register and evaluate the existing security risk mitigation strategies. The company reported partnering with an NGO to provide a five-day train-the-trainers workshop on the Voluntary Principles to personnel in South Africa.²⁴ Other companies also reported including training on the Principles for their personnel in the same report. International Code of Conduct for Private Security Service Providers: <ol style="list-style-type: none"> South Africa is not a State member of the International Code of Conduct Association. Joint International Labor Organization and International Finance Corporation Better Work Standards: <ol style="list-style-type: none"> South Africa is not a member.²⁵ The Extractive Industries Transparency Initiative (EITI): <ol style="list-style-type: none"> South Africa is not a member of EITI and there exists differing explanations for non-membership.²⁶ 	
1.5. National Laws and Regulations	
Does the general law of the State provide protection against business-related human rights abuses?	
Indicators	Scoping Questions
Constitution	Does the constitution contain wording aimed at human rights protection?
Labor Law	Has the government put in place labor laws and regulations to ensure the protection and promotion of workers' rights?
Environmental Law	Has the government put in place environmental laws and regulations to ensure the protection and promotion of the rights of its citizens to health, a healthy environment, and livelihoods including, for example, clean water, clean air, and cultivatable land?

Property and Land Management Law	Has the government put in place land management laws and regulations to ensure the protection of the rights of its citizens, including the recognition of customary land rights and the incorporation of human rights considerations into environmental and social impact assessments and related licensing practices?
Health and Safety Law	Has the government put in place health and safety laws and regulations to ensure the physical and mental health of workers and communities?
Corporate and Securities Law	Has the government put in place corporate and securities laws and regulations to support ethical corporate behavior and business respect for human rights, such as through financial reporting, incorporation/registration, and stock exchange listing requirements?
Tax Law	Has the government put in place tax laws and regulations to support ethical corporate behavior?
Trade Law	Has the government put in place trade laws and regulations to support the protection and promotion of human rights within trade practices?
Disclosure and Reporting	Has the government put in place law to support disclosure and reporting by corporations on human rights, labor rights, environmental impacts, corporate social responsibility, or other ethical issues?
Procurement Law	Has the government put in place laws and regulations to support the incorporation of human rights considerations into the procurement by the State of goods and services from the private sector?
Anti-Bribery and Corruption	Has the government put in place laws and regulations aimed at promoting anti-bribery and combatting corruption within and across governments?

Human Rights Defender and/or Whistleblower Protection	Has the government put in place laws and regulations aimed at protecting the rights of human rights defenders and/or whistleblowers?
Information and Communications Technologies (ICT) Law	Has the government put in place laws and regulations to ensure the protection of access to information, freedom of expression, privacy, and other information- and communication-based rights, online as well as offline?
Other Laws and Regulations	Has the government put in place any other relevant laws and regulations aimed at protecting and promoting human rights from business-related harms, including torture, genocide, and crimes against humanity? Do such laws and regulations extend extraterritorially, as permitted by the UNGPs and international human rights law?
Implementation Status	
<p>The first indicator and scoping question above request information about the South African Constitution and whether or not it contains language that is protective of human rights. The existence or lack thereof of such language provides evidence as to whether or not the general laws protect business-related human rights.</p> <p>Chapter 2 of the South African Constitution comprehensively lists the different types of human rights protected, including civil, political, and socio-economic rights. Importantly, Section 8(2) of the Constitution provides that provisions in the Bill of Rights are binding to both natural and juristic persons. This essentially means business corporations have a constitutional obligation not to violate constitutional guarantees in the Bill of Rights. Stated differently, the Bill of Rights is binding both vertically (State and individual) and horizontally (between non-State actors).</p> <p>Some of the protected rights under the Constitution²⁷ include:</p> <ol style="list-style-type: none"> 1. Equality before the law and the right to equal protection and benefit of the law; 2. Inherent dignity of everyone and the right to have that dignity respected and protected; 3. Right to freedom and security of the person; 4. Prohibition of slavery, servitude, and forced labor; 5. Right to privacy; 	

6. Right to freedom of conscience, religion, thought, belief, and opinion;
7. Right to freedom of expression;
8. Right, peacefully and unarmed, to assemble, to demonstrate, to picket, and to present petitions;
9. Political rights;
10. Right to freedom of movement;
11. Labor relations rights;
12. Environmental and property rights;
13. Right to housing;
14. Rights of children;
15. Right to education;
16. Right to access information;
17. Right to just administrative action;
18. Right to a fair trial.

The second indicator and scoping question relate to labor law and request information on existing labor laws that protect workers' rights. The existence or lack thereof of such laws provides evidence as to whether or not the general laws protect business-related human rights.

The following is a non-exhaustive list of existing South African **labor laws** that protect various areas of workers' rights:

1. The Basic Conditions of Employment Act.²⁸ This act gives effect to the right to fair labor practices as provided for in Section 23(1) of the Constitution of South Africa. It regulates basic working conditions such as hours of work, leave, remuneration, termination of employment, and prohibits employment of children and forced labor.
2. The Employment Equity Act²⁹ prohibits unfair discrimination, embodies South Africa's affirmative action policy, and establishes the Commission for Employment Equity.
3. The Labour Relations Act³⁰ gives effect to Section 27 of the South Africa Constitution and regulates trade union organization and guarantees freedom of association and collective bargaining. The Act also regulates the right to strike and alternative dispute resolution, and establishes the Labour Court and the Labour Appeal Court.
4. The Unemployment Insurance Contributions Act³¹ provides for the imposition and collection of contributions for the benefit of the Unemployment Insurance Fund.
5. The Occupational Health and Safety Act³² aims to provide for the health and safety of persons at work and for the health and safety of persons in connection with the activities of persons at work and to establish an advisory council for occupational health and safety.³³

6. The Compensation for Occupational Injuries and Diseases Act³⁴ provides for compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment and death resulting from such injuries or diseases.
7. The Skills Development Act³⁵ provides an institutional framework to devise and implement national, sector-specific, and workplace strategies to develop and improve the skills of the South African workforce.³⁶

The third indicator and scoping question specifically request information about environmental regulations that are intended to protect the right to health, a healthy environment, and livelihoods. Existence or lack thereof of such laws provides evidence on whether or not general laws protect business-related human rights.

The following is a non-exhaustive list of relevant existing **environmental laws**.³⁷

1. National Environmental Management: Biodiversity Act.³⁸ This law provides for the management and conservation of South Africa's biodiversity, the protection of species and ecosystems that warrant national protection and sustainable use of indigenous biological resources. The Act also provides for the fair and equitable sharing of benefits arising from bio-prospecting involving indigenous biological resources. It also provides regulations for the registration of professional hunters, hunting outfitters and trainers (GN1147 - GG38347), as well as the Alien and Invasive Species Regulations, 2014 (GG 37885 - GN 598) and regulations to phase-out the use of Polychlorinated Biphenyls (PCBs) materials and Polychlorinated Biphenyl (PCB) contaminated materials (G37818 - GN549);
2. National Environmental Management Act, 1998.³⁹ This law provides regulations for environmental impact assessments.
3. National Environmental Management: Waste Amendment Act;⁴⁰
4. National Environmental Management: Air Quality Act: National Dust Control Regulations;⁴¹
5. National Environmental Management: Waste Act; National Norms and Standards for the Assessment of Waste for Landfill Disposal.⁴²

The fourth indicator and scoping question request information about property and land management law. Specifically, whether laws in this category recognize customary land rights and incorporate environmental and human rights into licensing and social impact assessments. Existence or lack thereof of such laws provides evidence as to whether or not the general laws protect business-related human rights.

Below is a non-exhaustive list of relevant South Africa laws related to **property and land management**:

1. The Communal Land Rights Act⁴³ provides for, *inter alia*, security of tenure by transferring communal lands to communities and regulates the democratic administration of communal lands by communities.
2. The Expropriation Act⁴⁴ regulates expropriation of land and other property for public use.

3. The Extension of Security of Tenure Act⁴⁵ regulates long-term security of land tenure, conditions of residence on certain land, and conditions on and circumstances under which the right of persons to reside on land may be terminated.
4. The Land Reform (Labour Tenants) Act⁴⁶ provides for security of tenure of labor tenants and those persons occupying or using land as a result of their association with labor tenants. It also makes provision for acquisition of land and rights in land by labor tenants.
5. The National Heritage Resources Act⁴⁷ creates a system for management of national heritage resources and outlines the general principles that govern heritage resource management throughout South Africa.
6. The Restitution of Land Rights Act⁴⁸ provides for the restitution of rights in land to persons or communities dispossessed of such rights after 19 June 1913 as a result of past racially discriminatory laws or practices. It also establishes a Commission on Restitution of Land Rights and a Land Claims Court.
7. The Mineral and Petroleum Resources Development Act⁴⁹ legislates on equitable access to and sustainable development of South Africa's mineral and petroleum resources.

The fifth indicator and scoping question request information about whether health and safety laws and regulations that ensure the physical and mental health of workers and communities exist. Existence or lack thereof of such laws provides evidence as to whether or not the general laws protect business-related human rights.

The following is a non-exhaustive list of relevant existing South Africa **health and safety laws and regulations**:

1. The Occupational Health and Safety Act⁵⁰ aims to provide for the health and safety of persons at work and persons in connection with the activities of persons at work and to establish an advisory council for occupational health and safety.⁵¹
2. The Mine, Health and Safety Act⁵² provides for protection of the health and safety of employees and other persons at mines, and the enforcement of health and safety measures. It makes provisions for monitoring systems, inspections, investigations, and inquiries to improve health and safety. It also affirms the right to refuse to work in dangerous conditions and gives effect to the public international law obligations of the State relating to mining health and safety.⁵³
3. The Compensation for Occupational Injuries and Diseases Act⁵⁴ provides for compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment and death resulting from such injuries or diseases.⁵⁵
4. The Occupational Diseases in Mines and Works Act⁵⁶ regulates payment of compensation in respect of certain diseases contracted by persons employed in mines and related work sites.

The sixth indicator and scoping question request information about whether corporate and securities laws that support ethical corporate behavior and business respect for human rights exist. Existence or lack thereof of such laws provides evidence as to whether or not the general laws protect business-related human rights.

The following is a non-exhaustive list of relevant existing South Africa **corporate and securities laws** that support ethical corporate behavior and business respect for human rights:

1. The Finance Markets Act⁵⁷ provides for the regulation of financial markets, licensing, and regulation of exchanges, central securities depositories, clearing houses, and trade repositories. It also provides for regulation and control of securities trading, clearing and settlement, and the custody and administration of securities. The Act also prohibits insider trading.
2. The Companies Act⁵⁸ and Companies Amendment Act⁵⁹ requires that all State owned companies, all listed public companies, and all companies that have a significant public interest have social and ethics committees (SEC). The role of the SEC is to monitor companies' activities with regard to social and economic development, good corporate citizenship, health and public safety, consumer relationships, and labor and employment.
3. While not required under law, the Johannesburg Stock Exchange (JSE) annually ranks publicly listed companies in the JSE according to their environmental, social, and governance (ESG) performance in an attempt to promote ethical corporate behavior.
4. Institute of Directors Southern Africa (IoDSA) is a membership based professional organization that promotes good governance in business, and is most well-known for the King III reporting standards, which promote reporting based on social, environmental, and financial performance.

The seventh indicator and scoping question request information about whether tax laws and regulations that support ethical corporate behavior exist. Existence or lack thereof of such laws provides evidence as to whether or not the general laws protect business-related human rights.

The following is a non-exhaustive list of relevant existing South Africa **tax laws and regulations**:⁶⁰

1. The Income Tax Act⁶¹ regulates taxation of income and donations, recovery of taxes on persons, and deduction by employers from employees' remuneration among other things.
2. The Value-Added Tax Act⁶² regulates taxation in respect to the supply of goods and services and the importation of goods.
3. The Customs and Excise Act⁶³ provides for the levying of customs and excise duties and a surcharge for fuel levy, Road Accident Fund levy, air passenger tax, and an environmental levy. The law also provides for prohibition and control of the importation, export, manufacture, or use of certain goods.
4. The Transfer Duty Act⁶⁴ consolidates and amends laws on transfer duty.

5. The Estate Duty Act⁶⁵ regulates the estate duty on estates of deceased persons.
6. The Securities Transfer Tax Act⁶⁶ provides for the levying of a securities transfer tax in respect of every transfer of any security.
7. The Securities Transfer Tax Administration Act⁶⁷ provides for the administration of a securities transfer tax.
8. The Skills Development Levies Act⁶⁸ provides for the imposition of a skills development levy.
9. The Unemployment Insurance Contributions Act⁶⁹ regulates the imposition and collection of contributions for the benefit of the Unemployment Insurance Fund.

The eighth indicator and scoping question request information about whether the government has put in place trade laws and regulations to support the protection and promotion of human rights within trade practices.

The following is a non-exhaustive list of relevant existing South Africa **tax trade laws**:

1. South African trade law consist of the following key government legislation and policies:
 - a. International Trade Administration Act;
 - b. New Growth Path;
 - c. Industrial Policy Action Plan;
 - d. National Industrial Policy Framework;
 - e. Trade Policy and Strategy Framework.
2. Trade in South Africa is overseen and regulated by the International Trade Administration Commission of South Africa (ITAC), which is a public entity established in terms of the International Trade Administrative Act. ITAC replaced its predecessor, the Board of Tariffs and Trade, and is mandated to foster economic growth and development in order to raise incomes and promote investment and employment in South Africa. Its core functions include custom tariff investigations, trade remedies, and import and export control.
3. The ITAC is guided by four core principles – integrity, trust, accountability, and commitment. The trade remedy element of its work is largely focused on protecting the potential human rights impacts of trade in South Africa. There are three trade remedy instruments in South Africa. Firstly, anti-dumping measures are taken against injurious dumping imports. In the international trade context, “dumping” refers to a situation where goods are sold in a foreign market at prices lower than in the country of origin. Anti-dumping measures are used to protect the competitiveness of local content. Secondly, countervailing measures are used against subsidized imports that threaten or cause injury to domestic manufacturers. Lastly, “safeguards” are actions against trade that may be regarded as fair but which overwhelm domestic producers. This is used against unforeseen surges of imports that threaten or cause injury to domestic producers.

The tenth indicator and scoping question relate to procurement law and request information about whether existing procurement laws and regulations support the incorporation of human rights considerations into procurement decisions. Existence or lack thereof of such laws provides evidence as to whether or not the general laws protect business-related human rights.

The following is a non-exhaustive list of relevant existing **South Africa procurement laws and regulations**:⁷⁰

1. Constitution of South Africa at Section 217: 217(1) requires State organs, when they contract for goods and services, to do so in accordance with a system which is fair, equitable, transparent, competitive, and cost-effective. Section 217(2) permits State organs to implement procurement policy providing for protection of persons or categories of persons disadvantaged by unfair discrimination (as an exception to the general rule in 217(1)).
2. The Preferential Procurement Policy Framework Act (PPPFA)⁷¹ provides a framework for the implementation of the procurement policy contemplated in section 217(2) of the Constitution.
3. The PPPFA Regulations⁷² empowers the Minister to make regulations regarding any matter that may be necessary or expedient to prescribe in order to achieve the objects of the Act.
4. The Municipal Systems Act⁷³ provides for the core principles, mechanisms, and processes that are necessary to enable municipalities to move progressively towards the social and economic empowerment of local communities, and ensures universal access to essential services.
5. The Local Government Municipal Finance Management Act⁷⁴ was enacted to secure sound and sustainable management of the financial affairs of municipalities and other institutions in the local sphere of government. The law also establishes treasury norms and standards for the local sphere of government

The last four indicators and scoping questions request information about anti-bribery and corruption laws, whistleblower protections, and information and communication technologies laws that protect access to information and freedom of expression, and other relevant laws and regulations. The existence or lack thereof of such laws provides evidence as to whether or not the general laws protect business-related human rights.

The following is a non-exhaustive list of relevant **anti-bribery and corruption laws, whistleblower protections, information and communication technologies laws**, and **“other”** laws and regulations:

1. Anti-Bribery and Corruption Law:⁷⁵
 - a. The Prevention and Combating of Corrupt Activities Act⁷⁶ legislates measures to prevent and combat corruption and corrupt activities. It also provides for the offence of corruption and offenses relating to corrupt activities.

- b. The Local Government: Municipal Finance Management Act:⁷⁷ See procurement laws above.
 - c. The Protected Disclosures Act⁷⁸ makes provisions for procedures in terms of which employees in both the private and the public sector may disclose information regarding unlawful or irregular conduct by their employers or other employees. The Act also provides for the protection of employees who make a disclosure.
 - d. The Promotion of Administrative Justice Act⁷⁹ gives effect to section 33 of the South Africa Constitution on the right to administrative action that is lawful, reasonable, and procedurally fair and to the right to written reasons for administrative action.
 - e. The Promotion of Access to Information Act⁸⁰ gives effect to the constitutional right of access to any information held by the State and any information that is held by another person and that is required for the exercise or protection of any rights.
 - f. The Public Finance Management Act⁸¹ regulates financial management in the national government and provincial governments. The object of the Act is to ensure that all revenue, expenditure, assets, and liabilities of those governments are managed efficiently and effectively. The law also provides for the responsibilities of persons entrusted with financial management in those governments.
 - g. The Public Service Act⁸² regulates the organization and administration of the public service of South Africa, conditions of employment, terms of office, discipline, retirement, and discharge of members of the public service.
2. Whistleblower Protection⁸³:
- a. The Protected Disclosures Act:⁸⁴ See above on anti-bribery and anti-corruption laws.
 - b. The Promotion of Access to Information Act.⁸⁵ See above on anti-bribery and anti-corruption laws.
 - c. The Companies Act⁸⁶ defines the relationships between companies and their respective shareholders or members and directors. It also provides for equitable and efficient amalgamations, mergers, and takeovers of companies as well as makes provision for efficient rescue of financially distressed companies and appropriate legal redress for investors and third parties with respect to companies.
3. Information and Communications Law:⁸⁷
- a. Constitution of South Africa at Section 32 provides that everyone has a right to access information held by the State and any information that is held by another person which is required for the exercise or protection of any rights.
 - b. The Electronic Communications Act⁸⁸ promotes convergence in the broadcasting, broadcasting signal distribution, and telecommunications sectors, and provides the legal framework for convergence of these sectors. The law also makes provision for the regulation of electronic communications services, electronic communications network services, and broadcasting services as well as control of the radio frequency spectrum.
 - c. The Postal Services Act⁸⁹ regulates postal services and operational functions of the postal company.
 - d. The Broadcasting Act⁹⁰ establishes the broadcasting policy for South Africa.
 - e. The Independent Communications Authority of South Africa Act⁹¹ establishes the Independent Communications Authority of South Africa Promotion of Access to information Act (see above on whistleblower laws).

Gaps

Despite the ways that the general law of South Africa provides protection against business-related human rights violations explained under “implementation status,” gaps remain.

The following explains some of the gaps that exist in the protection of business-related human rights abuses under South Africa **labor laws**:

1. Some of the gaps in South Africa’s labor laws can be picked from remarks from the Judiciary. Justice Dunstan Mlambo, Judge President of the Labour Court has pointed out that a challenge remains in informal jobs, where conditions are insecure and income inadequate. The Judge has called for a re-evaluation of South Africa’s labor laws to determine the extent to which they guarantee decent work. The judge lamented the adoption of strategies to “minimize or avoid labor law.” These strategies included outsourcing, use of fixed term contracts, temporary and part-time work, and labor brokering.⁹²

The following explains some of the gaps that exist in the protection of business-related human rights abuses under South African **property and land management laws**:

1. Land reforms remain a controversial topic in South Africa. The Restitution of Land Rights Act makes it possible for restitution or equitable redress to be given to persons and communities that lost land as a result of past racially discriminatory laws or practices. However, the process of acquiring and distributing land has been described as lengthy, which in turn escalates the cost of redistribution as former land-owners stop investing in the land, leaving farms in poor condition at the point of acquisition. Another criticism is the inadequate post-settlement support and unavailability of suitable markets, which means few beneficiaries of land reforms transition to sustainable farming.⁹³

The following explains some of the gaps that exist in the protection of business-related human rights abuses under South Africa **corporate and securities laws** and **tax laws**:

1. Corporate and Securities Laws:
 - a. M Gwanyanya has identified a number of weaknesses in South Africa’s Companies Act.⁹⁴ He argues that the Act does not expressly mention human rights as an issue that companies should be concerned with. Secondly, the Act does not clarify duties of directors, particularly on what they are competent to do or not do in light of the Bill of Rights in the Constitution. The Act does not formally recognize interests of other stakeholders other than shareholders. Reference to “acting in best interest of shareholders,” Gwanyanya argues, creates an impression that shareholder primacy is still preferred.

The following explains some of the gaps that exist in the protection of business-related human rights abuses under South Africa **tax laws**:

1. Direct human rights impacts are not clear when looking at the legislative framework around tax in South Africa. However, this does not necessarily indicate an absence of human rights impacts. Over the past few years, the impacts of tax collection and the policies and frameworks regulating tax on human rights have come under much scrutiny in Southern Africa. This was due to several case studies from other parts of the sub-region, perhaps most notably Zambia, exposing how multinational companies perform acts of tax avoidance. The theory is that the multinational companies avoiding taxes in Africa are keeping the governments in question from fulfilling their own human rights obligations due to the loss of income from taxes. It is common knowledge that certain human rights obligations require substantial resources, especially in the context of socio-economic rights. However, it is of course theoretical, and relies on several variables to be in place.
2. After it was reported that Africa loses approximately \$50 billion US dollars as a result of illicit financial flows each year, the African Union Commission, in conjunction with the UN Economic Commission for Africa, formed a High Level Panel on Illicit Financial Flows from Africa. Former South African President, Thabo Mbeki, chairs the Panel. While the Panel focuses on the impacts of illicit financial flows from the continent at large, a visit to South Africa formed part of its research. South Africa has managed to mitigate, through its legislative and regulatory frameworks on tax and the South African Revenue Service (SARS), illicit financial flows from the country in a significant manner. Furthermore, SARS played a fundamental role in setting up the African Tax Administrators Forum (ATAF), an organization tasked with and focusing on capacity building for tax administrators in Africa. While the engagement aims to address several shortcomings in tax administration in Africa, it includes the mitigation of adverse human rights impacts.

The following explains some of the gaps that exist in the protection of business-related human rights abuses under South Africa **procurement laws and regulations**:

1. South African public procurement is first and foremost governed by the Constitution of South Africa, and guided by five principles – fairness, equitability, transparency, competitiveness, and cost-effectiveness. These Constitutional requirements are echoed in the Public Finance Management Act (PFMA), which is the main piece of legislation in relation to public procurement. The principle of fairness requires that procurement procedures be procedurally fair. All processes are required to be open and transparent. They must be conducted publicly, and information be made generally available.
2. The PFMA is implemented through the National Treasury Regulations, and in conjunction with the Preferential Procurement Policy Framework Act (PPPFA). The PPPFA constitutes a preferential policy framework aimed at addressing the inequalities of South Africa's past, and prescribes requirements in line with what is known as "broad based black economic empowerment," the affirmative action policy of

the South African government. Some of the provisions may not be applied in certain circumstances, for example, where the provision of goods or services are most likely to be done by an international supplier or service provider.

3. South Africa is a founding member of the World Trade Organization (WTO), and is classified as a developed country by the WTO. In this capacity, South Africa is also signatory to the WTO Agreement on Government Procurement.
4. Recent trends in the South African public procurement space indicate that procurement is being used to create employment for previously disadvantaged members of society. There is also an increased focus on local content, and attempts to eliminate corruption from the public procurement process.
5. Although the legislative and regulatory frameworks around public procurement are guided by human rights principles and the Constitution of South Africa, there are no special authorities that review claims of non-compliance with procurement legislation. Because decisions made by government and/ or State agencies fall under administrative law, the Promotion of Administrative Justice Act (PAJA) mainly dictates the rules and procedures for administrative review. PAJA allows any person to institute proceedings before the High Court for the review of administrative actions.
6. While various different methods of carrying out procurement exist, there are no prescribed procedures. As mentioned above, procurement processes are guided by human rights principles, but in light of the fact that there are no prescribed procurement processes (and coupled with the lack of a specialized oversight mechanism), there is relatively little control to ensure that procurement is done in line with the principles as set out in the Constitution. Furthermore, the oversight of any procurement activities relies almost exclusively on a reactionary approach, with very little pro-active measures ensuring that procurement takes place in line with human rights principles.

The following explains some of the gaps that exist in the protection of business-related human rights abuses under South Africa **information and communications technologies (ICT) laws**:

1. ICT companies confront a number of human rights issues, including workers' rights both in a company's operations and the value chain. Other related concerns include privacy rights, freedom of expression, environmental rights (e.g. with respect to disposal of electronics), and rights of vulnerable groups such as children. Currently, there are no laws in South Africa specific to concerns of human rights in relation to the ICT sector.

1.6. Investigation, Punishment, and Redress Measures

Do relevant State agencies responsible for law enforcement address business and human rights?

Indicators	Scoping Questions
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Sector Risk Assessment	Is the State undertaking or supporting any specific activities to identify specific business sectors or activities that may have particularly negative impacts on human rights, such as the extractive, apparel, and other sectors?
Vulnerable Group Assessment	Is the State undertaking or supporting any specific activities to identify specific impacts on particularly vulnerable groups, such as women, children, minorities, and indigenous peoples?
Police	Have police authorities been provided with information and training on issues related to business and human rights? Are the police given statutory authority to address business-related human rights harms?
Labor, Health, and Safety	Are relevant labor, health, and safety authorities aware of potential or actual adverse impacts by business on labor, health, and safety? Are such State actors given statutory authority to address business-related human rights harms?
Environment	Have relevant environmental authorities been provided with information and training on issues related to business and human rights? Are such State actors given statutory authority to address business-related human rights harms?
Tax	Have relevant tax authorities been provided with information and training on issues related to business and human rights and connections to local tax laws? Are such State actors given statutory authority to address business-related human rights harms?
Judicial Grievance Mechanisms	Are the judiciary, including civil, criminal, and commercial courts, as well as employment and other administrative tribunals, and those with prosecuting authority informed and trained on issues related to business and human rights? Is the judiciary given statutory authority to address business-related human rights harms, including through civil, criminal, or administrative penalties for business-related human rights harms?

Non-Judicial Grievance Mechanisms	Does the State support and/or participate in non-judicial grievance mechanisms aimed at securing redress for business-related human rights harms, including through entities such as National Human Rights Institutions, OECD National Contact Points, or ombudsmen?
Legal Aid and Assistance	Does the State support legal aid and assistance that aims to address barriers in accessing remedy for business-related human rights harms?
Other Measures	Are there any other measures taken by the State to promote the investigation, punishment, and redress of business-related human rights harms?
Implementation Status	
<p>In order to assess to what extent relevant State agencies responsible for law enforcement address business and human rights, this section presents information about sector risk assessments, vulnerable group assessments, police training, labor, health and safety authorities, environmental authorities, judicial grievance mechanisms, non-judicial grievance mechanisms, and other measures the State is taking.</p> <p>The first and second indicators and scoping questions relate to risk assessments and request information about any efforts the State is taking to identify business sectors or activities that pose significant risk of human rights abuses, as well as information about any efforts to identify victims that are particularly vulnerable to abuses.</p> <p>The following is a list of efforts the South Africa government is making to identify high risk sectors or activities through sector risk assessments and to identify particularly vulnerable victims through vulnerable group assessments:</p> <ol style="list-style-type: none"> 1. Sector Risk Assessment: <ol style="list-style-type: none"> a. The Human Rights and Business Country Guide for South Africa has highlighted agriculture, the extractive industry, and construction as high risk sectors in the country with respect to the interplay of business and human rights. Concerns in the agricultural sector include air and water pollution, barriers to membership in trade unions, displacement, and health and safety. In the extractive industry, concerns include barriers to collective bargaining, participation and access to information for communities, and violation of human rights by security forces, such as in the deaths of demonstrating workers in Marikana. In the construction sector, concerns include undue influence of companies on public officials, failure to prevent accidents and long-term health effects, and high HIV prevalence rates in the sector. 2. Vulnerable Groups Assessment: 	

- a. The Human Rights and Business Country Guide for South Africa identifies a number of risk holders at the workplace.⁹⁵ These are ethnic minorities, indigenous peoples, migrant workers, persons with disabilities, people living with HIV/AIDS, sexual minorities, women, young workers, and temporary workers. These categories of individuals, along with children and refugees/asylum seekers, are similarly at risk at the community level.

The fourth and fifth indicators request information about whether safety, health, labor, and environmental authorities are aware of the potential harmful impacts of business in their respective fields. They also request information on whether these bodies have the authority to address business-related human rights abuses. The existence or lack thereof of this type of knowledge and authority provides evidence as to whether or not State agencies responsible for safety, health, labor, and the environment address business and human rights issues.

The following is a list of ways through which the South African government's **labor (occupational health, and safety)** body, **environmental** body, and **tax** body learn about business related abuses and the authority they have to address those abuses:

Labor related legislation that may impact on business and human rights in South Africa generally consist of three pieces of legislation, the Occupational Health and Safety Act, Basic Conditions of Employment Act, and the Employment Equity Act:

1. The Occupational Health, and Safety Act:
 - a. The Advisory Council for Occupational Health and Safety (ACOHS) is established under Article 2 of the Amended Occupational Health and Safety Act. The ACOHS is mandated to advise the Minister of Manpower on issues around the application and implementation of the Occupational Health and Safety Act. The ACOHS may do research and investigations to carry out this function, as it deems necessary. This would also apply to situations that relate to potential human rights violations in the context of occupational health and safety. The ACOHS may also advise the Department of Manpower about the formulation and publication of standards, specifications, or other forms of guidance for the purpose of assisting employers, employees, and users to maintain appropriate standards of occupational health and safety.
2. The Basic Conditions of Employment Act and Amendments:
 - a. The Basic Conditions of Employment Act applies to all employers and workers, and regulates leave, working hours, employment contract, deductions, pay slips, and termination of employment contracts. Various different issues are covered under the Act, and oversight and implementation of the Act depends on the specific issue. The provisions of the Act are broadly regulated in practice by Labor inspectors, who are also tasked to advise employers and employees on their rights and obligations in terms of employment laws. The Labor inspectors conduct inspections, investigate complaints, and may question persons. The Labor inspectors may also serve compliance orders issued by the Labor Court.
3. The Employment Equity Act:

- a. The Employment Equity Act (EEA) applies to all employers and workers. It protects workers and job seekers from unfair discrimination and provides a framework for implementing affirmative action. The Commission for Employment Equity (CEE) is established under Chapter 4 of the EEA. The CEE oversees the implementation of the EEA, and may hold public hearings on matters around employment equity. The CEE must also submit an annual report to the Minister of Labor.
- 4. The National Environment Management Act:
 - a. The National Environment Management Act (NEMA), in conjunction with regulations made under the Act, serves as the main law when it comes to environmental affairs. Chapter 2 of NEMA establishes the Committee for Environmental Coordination (CEC), which is intended to provide national and provincial government departments with a structure for coordination on high profile government initiatives including the National Strategy for Sustainable Development, preparations for annual sessions of the United Nations Commission on Sustainable Development, and activities under various other international environmental instruments. To assist the CEC in performing its duties, sub-committees on law reform and biodiversity have been established, as well as on environmental management plans and implementation plans.

The seventh indicator and scoping question request information about whether the judiciary has the authority to deal with business related human rights abuses. The existence or lack thereof of this authority provides evidence on whether or not State agencies responsible for law enforcement address business and human rights issues.

The following is a non-exhaustive list of relevant **judicial grievance mechanisms** in South Africa:

1. South Africa has an independent judiciary that is only subject to the Constitution. Section 166 of the Constitution establishes the following courts: the Constitutional Court, the Supreme Court of Appeal, High Courts, Magistrates' Courts, and other courts that may be established through Acts of Parliament.
2. The Constitutional Court is the highest court in all Constitutional matters. It is the only court that may adjudicate disputes between organs of the State in the national or provincial sphere concerning the constitutional status, powers, or functions of any of those organs of State, or that may decide on the constitutionality of any amendment to the Constitution or any parliamentary or provincial bill. It also serves as the final court of review for all matters concerning human rights, and would therefore be the ultimate adjudicatory body on matters related to business and human rights.
3. The Supreme Court of Appeal (SCA) is the highest court in respect of all matters other than constitutional ones. It has the jurisdiction to hear and determine an appeal against any decision of a high court. Decisions of the SCA are binding on all courts of a lower order, and the decisions of high courts are binding on magistrate courts within the respective areas of jurisdiction of the divisions.⁹⁶
4. High Courts in South Africa have jurisdiction within their specified area over all persons residing or present in that area. These courts hear matters that are of such a serious nature that the lower courts would not be an appropriate forum or lack the power to impose the

required penalty. Except for cases where a minimum or maximum sentence is prescribed by law, their penal jurisdiction is unlimited and includes handing down a sentence of life imprisonment in certain specified cases.

5. South Africa has several specialist high courts that include:
 - a. The Labour Court and Labour Court of Appeal
 - b. Land Claims Court
 - c. Competition Appeal Court
 - d. Electoral Court
 - e. Tax Court
6. Circuit local divisions serve as itinerant courts that are presided over by a judge of the provincial division. These courts periodically conduct hearings at remote areas outside the seat of the High Court. The Judge President of the provincial division concerned designates the areas in which hearings take place. These courts exist with a view to promote access to justice, and could play an important role in access to justice for victims of corporate human rights abuse.
7. Regional courts are established largely in accordance with provincial boundaries, with a regional court division for each province to hear matters within their jurisdiction. These courts adjudicate civil disputes, including divorce proceedings. While the regional courts mainly hear civil disputes related to family law, it may adjudicate a civil claim related to business and human rights.
8. Magistrates' courts serve as the first point of contact with the formal judicial system in South Africa, and therefore take up the bulk of the DOJCD's resources.
9. Small claims courts in South Africa are mandated to adjudicate small civil claims, and are limited to claims of R12,000 (approximately \$1000 USD).
10. Equality Courts in South Africa are established under the Employment Equity Act in conjunction with the Promotion of Equality and Prevention of Unfair Discrimination Act. These courts were created with the aim to prevent and prohibit unfair discrimination and harassment, promote equality, eliminate unfair discrimination, and prevent and prohibit hate speech. The above-mentioned acts also provide access to remedies for victims of discrimination, compliance with international law obligations (including treaty obligations), and measures to educate the public and raise public awareness about equality.
11. South Africa has Traditional courts (formerly known as Chiefs' courts) in traditional community areas in rural villages. These courts are presided over by traditional leaders, whose judicial functions are regulated under law.
12. South Africa has established community courts on a pilot basis to provide speedy resolution of certain types of community offences. These courts focus on restorative justice processes.
13. The South African Revenue Service (SARS) opened a criminal courtroom at the Johannesburg Magistrate's Office which is dedicated to the prosecution of tax offenders.

14. In 2013/2014, South Africa re-introduced Sexual Offences courts that will be established and become operational within the next three years. The courts will have specially trained officials, procedures, and equipment to reduce the chance of secondary trauma for victims of sexual offences.

The eighth indicator and scoping question requests information about whether the South African government supports or participates in any non-judicial grievance mechanisms that provide redress for business related human rights abuses. This information provides evidence as to whether or not State agencies responsible for law enforcement address business and human rights.

The following is a non-exhaustive list of **non-judicial grievance mechanisms** that the South African government either supports or participates in:

1. The South Africa Human Rights Commission may qualify as a non-judicial mechanism by virtue of powers bestowed on the Commission. Section 184 of the South African Constitution empowers the Commission to investigate and report on human rights observance and to take steps to secure redress for human rights violations.
2. The Commission for Conciliation, Mediation, and Arbitration (CCMA) is a dispute resolution body established in terms of the Labor Relations Act (LRA). It serves as an independent body and does not belong to or controlled by any political party, trade union, or business. The CCMA is tasked to hear disputes around labor rights.
3. Several forms of alternative dispute resolution mechanisms exist in South Africa, some of which are industry or sector specific. Some alternative dispute resolution mechanisms are overseen by bodies like the Arbitration Foundation of South Africa (AFSA). AFSA is a joint venture between business and the legal and accounting professions.
4. Other non-judicial grievance mechanisms that are available for South Africans in the context of business and human rights include those at the regional and international levels:
 - a. International financial institutions: South Africa is a member to several multilateral development banks and financial institutions. Most of these institutions have grievance mechanisms that look at business and human rights in the broader context (social and environmental implications).
 - b. African Commission on Human and Peoples' Rights (ACHPR): The ACHPR technically qualifies as a quasi-judicial body, but will for purposes of this report be listed as a non-judicial body. While the ACHPR does not have extensive jurisprudence on business and human rights related matters, it has heard some communications on issues around land and the involvement of governments in corporate human rights abuses. South Africa, as a State party to the African Charter on Human and Peoples' Rights, may be brought before the ACHPR for adjudication.
 - c. The South African government also participates in several dispute resolution forums linked to their participation in bilateral or multilateral agreements. For example, as a State party to the International Bank for Reconstruction and Development (IBRD), South Africa may be brought before the International Centre for the Settlement of Investment Disputes (ICSID).

Gaps

Although the information presented under “implementation status” explains how relevant State agencies for law enforcement address business and human rights, there are gaps that should be addressed in order to ensure that there are effective investigation, punishment, and redress measures in place.

The following explains some of the gaps that exist in how relevant State agencies involved in regulating the **environment** address business and human rights:

1. Although the National Environmental Management Act established a Committee for Environmental Coordination (CEC), the CEC has been dysfunctional at times, most notably from 2004 to 2008. The CEC experienced difficulties with regard to its strategic functioning and a lack of interest and participation of high-level members. The lack of participation by Directors-General and Heads of Departments within the Department of Environmental Affairs and Tourism led to poor decision-making on issues of cooperative environmental management, which in turn prevented the CEC from carrying out its function. Poorly defined relationship and links between the CEC and Cluster system has also emerged as a problem in uplifting the general strategic functioning of the CEC.

The following explains some of the gaps that exist in how State bodies involved in **non-judicial grievance mechanisms** address business and human rights:

1. Police training initiatives: In communicating with former police officers, it is clear that the South African Police Service has engaged in some human rights training initiatives. However, finding information on these initiatives is very difficult. The South African government is encouraged to make information regarding special training and capacity building easily accessible and available to the public.

GUIDING PRINCIPLE 2

States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.

Commentary to Guiding Principle 2

At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis. Within these parameters some human rights treaty bodies recommend that home States take steps to prevent abuse abroad by business enterprises within their jurisdiction.

There are strong policy reasons for home States to set out clearly the expectation that businesses respect human rights abroad, especially where the State itself is involved in or supports those businesses. The reasons include ensuring predictability for business enterprises by providing coherent and consistent messages, and preserving the State's own reputation.

States have adopted a range of approaches in this regard. Some are domestic measures with extraterritorial implications. Examples include requirements on "parent" companies to report on the global operations of the entire enterprise; multilateral soft-law instruments such as the Guidelines for Multinational Enterprises of the Organization for Economic Co-operation and Development; and performance standards required by institutions that support overseas investments. Other approaches amount to direct extraterritorial legislation and enforcement. This includes criminal regimes that allow for prosecutions based on the nationality of the perpetrator no matter where the offence occurs. Various factors may contribute to the perceived and actual reasonableness of States' actions, for example whether they are grounded in multilateral agreement.

2.1. Home State Measures with Extraterritorial Implications

Has the State adopted domestic measures which set out clearly the expectation that businesses domiciled in their territory and/or jurisdiction respect human rights abroad?

Indicators	Scoping Questions
Expectation setting	Has the State set out and fully disseminated to relevant government agencies (including embassies and consulates) clear policy statements on the expectation that all companies domiciled in its territory and/or jurisdiction respect human rights?
Criminal or civil liability regimes	Has the State introduced criminal or civil liability regimes that allow for prosecutions or civil lawsuits against corporations based on where the corporation is domiciled, regardless of where the offense occurs?

"Duty of care" for parent companies	Has the State established a "duty of care" for parent companies in terms of the human rights impacts of their subsidiaries, regardless of where the subsidiaries operate?
Reporting requirements	Has the State introduced requirements on companies to publicly report on their operations abroad, including on human rights and labor issues?
Support for soft law measures	Does the State support and participate in relevant soft-law instruments, such as the OECD Guidelines and the Due Diligence Guidance for Responsible Supply Chains?
Performance standards for over-seas investments	Do State institutions that support overseas investment have and enforce performance standards that support the protection and promotion of human rights?
Implementation Status	
<p>In order to assess whether the South African government has adopted domestic measures that clearly set out the expectation that businesses domiciled in South Africa respect human rights throughout their operations, this section presents information on government activities in expectation setting, the existence of criminal or civil liability regimes, "duty of care" requirements for parent companies, reporting requirements, government support for soft law measures, and performance standards for overseas investments.</p> <p>The first indicator and scoping question request information about whether or not the South African government has disseminated policy statements to relevant government agencies stating that all South African domiciled companies are expected to respect human rights abroad. Whether or not the South African government has done so provides evidence that the government either has or has not adopted domestic measures clearly setting out this expectation.</p> <p>The following is a non-exhaustive list of government activities that may constitute expectation setting:</p> <ol style="list-style-type: none"> 1. The Department of Trade and Industry (DTI) has incorporated a lot of human rights language in its laws and policies, mainly due to the Black Economic Empowerment (BEE) policy of the South African government. The BEE policy is an affirmative action policy aimed at empowering those that were previously disadvantaged. The BEE policy permeates all laws related to employment and business conduct, setting an expectation from all businesses to take equality matters into account when engaging in business activities. 	

2. Corporate social responsibility (CSR) has also been part of the South African legal framework, and in accordance with the Companies Act, all companies are required to set up social and ethics committees to report on the social impacts of businesses in South Africa and South African business operating abroad.

The second indicator and scoping question request information about whether or not the South African government has introduced criminal or civil liability regimes that allow for jurisdiction over the actions of corporations that are domiciled in South Africa regardless of where the actions occurred. Existence of these regimes or lack thereof provides evidence as to whether or not the government has adopted domestic measures that clearly set out the expectation that South African domiciled companies need to respect human rights abroad.

The following is a non-exhaustive list of **criminal or civil liability regimes** in South Africa that have extraterritorial implications for corporations:

1. Corporate criminal liability, especially at the international level, remains contentious. South Africa was an active participant in the negotiations leading to adoption of the Rome Statute of the International Criminal Court and ratified it on 1 July 2002.⁹⁷ The Statute, however, makes no provision for corporate criminal liability. At the regional level, the African Union adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. The effect of this Protocol is to merge the African Court of Human and Peoples Rights with the Court of Justice of the African Union. The new court will now be referred to as the African Court of Justice and Human and Peoples' Rights. Article 46C of this protocol introduces, for the first time in the continent, corporate criminal liability. If the South African government ratifies the protocol, corporate responsibility for human rights violations will be redefined in an unprecedented manner both in South Africa and the rest of the continent.

The fourth indicator and scoping question requests information on whether the South African government requires corporations to publically report about their operations abroad, including their human rights impacts. The existence or lack thereof of such reporting requirements provides evidence as to whether or not the government has adopted domestic measures that clearly set out the expectation that South African domiciled companies need to respect human rights abroad.

1. The Companies Act and Companies Amendment Act require, under Regulation 43, that all State-owned companies, all listed public companies, and all companies that have a significant public interest have social and ethics committees (SEC). The role of SECs is to monitor the company's activities with regard to social and economic development, good corporate citizenship, health and public safety, consumer relationships, and labor and employment. SECs are required to report on the company's performance on an annual basis. While the reporting practices of SECs are still relatively new and undefined, there is no reason to believe that the same reporting standards and requirements do not apply if the company operates abroad and is domiciled in South Africa.

2.2. Implementation of Recommendations from International or Regional Bodies	
Has the State received and followed-up on recommendations from international or regional bodies, such as the UN Human Rights Council and UN treaty bodies, regarding steps to prevent abuse abroad by business enterprises domiciled within the State's territory or jurisdiction?	
Indicators	Scoping Questions
Human Rights Council Recommendations	Has the State noted and accepted recommendations from the UN Human Rights Council, such as through the Universal Periodic Review (UPR) process, that are relevant to preventing abuses abroad by companies domiciled within the State's territory or jurisdiction? How has the State followed up on these recommendations and has the State monitored its implementation of the recommendations?
UN Treaty Body Recommendations	Has the State noted and accepted recommendations from UN treaty bodies that are relevant to preventing abuses abroad by companies domiciled within the State's territory or jurisdiction? How has the State followed up on these recommendations? Has the State monitored its implementation of the recommendations?
Other International or Regional Body Recommendations	Has the State noted and accepted recommendations by any other international or regional bodies regarding steps to prevent business-related human rights abuses abroad?
Implementation Status	
<p>The three indicators and scoping questions in this section request information on whether or not the South African government has received and followed up on recommendations regarding the prevention of business related human rights abuses both domestically and abroad from the Human Rights Council, UN treaty bodies, and other international or regional bodies. The existence of follow up on such recommendations or lack thereof provides evidence as to whether or not the government sets the clear expectation that companies should respect human rights throughout their operations. The following includes information about recommendations received from the Human Rights Council, United Nations treaty bodies, and other international or regional bodies and any follow up by the South African government:</p> <ol style="list-style-type: none"> 1. Human Rights Council Recommendations: According to the Report of the Working Group on the Universal Periodic Review for South Africa of 9 July 2012, a number of recommendations were made to South Africa.⁹⁸ Some of the relevant recommendations on business and human rights included a recommendation to consider using international standards for the protection of migrant workers such as provided in the Convention on the Rights of All Migrant Workers and Members of their Families as well as the ILO Domestic Workers Convention. 	

GUIDING PRINCIPLE 3

In meeting their duty to protect, States should:

- (a) Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps;
- (b) Ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights;
- (c) Provide effective guidance to business enterprises on how to respect human rights throughout their operations;
- (d) Encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts.

Commentary to Guiding Principle 3

States should not assume that businesses invariably prefer, or benefit from, State inaction, and they should consider a smart mix of measures—national and international, mandatory, and voluntary—to foster business respect for human rights.

The failure to enforce existing laws that directly or indirectly regulate business respect for human rights is often a significant legal gap in State practice. Such laws might range from non-discrimination and labor laws to environmental, property, privacy, and anti-bribery laws. Therefore, it is important for States to consider whether such laws are currently being enforced effectively, and if not, why this is the case and what measures may reasonably correct the situation.

It is equally important for States to review whether these laws provide the necessary coverage in light of evolving circumstances and whether, together with relevant policies, they provide an environment conducive to business respect for human rights. For example, greater clarity in some areas of law and policy, such as those governing access to land, including entitlements in relation to ownership or use of land, is often necessary to protect both rights-holders and business enterprises.

Laws and policies that govern the creation and ongoing operation of business enterprises, such as corporate and securities laws, directly shape business behavior. Yet their implications for human rights remain poorly understood. For example, there is a lack of clarity in corporate and securities law regarding what companies and their officers are permitted, let alone required, to do regarding human rights. Laws and policies in this area should provide sufficient guidance to enable enterprises to respect human rights, with due regard to the role of existing governance structures such as corporate boards.

Guidance to business enterprises on respecting human rights should indicate expected outcomes and help share best practices. It should advise on appropriate methods, including human rights due diligence, and how to consider effectively issues of gender, vulnerability, and/or marginalization, recognizing the specific challenges that may be faced by indigenous peoples, women, national or ethnic minorities, religious and linguistic minorities, children, persons with disabilities, and migrant workers and their families.

National human rights institutions that comply with the Paris Principles have an important role to play in helping States identify whether relevant laws are aligned with their human rights obligations and are being effectively enforced, and in providing guidance on human rights also to business enterprises and other non-State actors.

Communication by business enterprises on how they address their human rights impacts can range from informal engagement with affected stakeholders to formal public reporting. State encouragement of, or where appropriate requirements for, such communication are important in fostering respect for human rights by business enterprises. Incentives to communicate adequate information could include provisions to give weight to such self-reporting in the event of any judicial or administrative proceeding. A requirement to communicate can be particularly appropriate where the nature of business operations or operating contexts pose a significant risk to human rights. Policies or laws in this area can usefully clarify what and how businesses should communicate, helping to ensure both the accessibility and accuracy of communications.

Any stipulation of what would constitute adequate communication should take into account risks that it may pose to the safety and security of individuals and facilities; legitimate requirements of commercial confidentiality; and variations in companies' size and structures.

Financial reporting requirements should clarify that human rights impacts in some instances may be "material" or "significant" to the economic performance of the business enterprise.

3.1. Development and Enforcement of Relevant Laws and Regulations

What laws and regulations exist that directly or indirectly regulate business respect for human rights?

Indicators	Scoping Questions
Corporate and Securities Law	Has the State put in place corporate and securities laws and regulations to support ethical corporate behavior and business respect for human rights, such as those relating to financial reporting, articles of incorporation, registration, corporate board, director, and stock exchange listing requirements?
Labor Law	Has the State put in place labor laws and regulations to ensure business respect for workers' rights?

Environmental Law	Has the State put in place environmental laws and regulations to ensure business respect for the rights of its citizens to health, a healthy environment, and livelihoods including, for example, clean water, clean air, and cultivatable land?
Property and Land Management Law	Has the State put in place land management laws and regulations to ensure business respect for the rights of its citizens, including the recognition of customary land rights and the incorporation of human rights considerations into environmental and social impact assessments and related licensing practices?
Health and Safety Law	Has the State put in place health and safety laws and regulations to ensure business respect for the physical and mental health of workers and communities?
Consumer Law	Has the State put in place consumer laws and regulations to ensure business respect for human rights and to promote consumer interest in the human rights impacts of purchased products and services?
Non-Discrimination Law	Has the State put in place anti-discrimination laws and regulations to support ethical corporate behavior and business respect for human rights?
Tax Law	Has the State put in place tax laws and regulations to support ethical corporate behavior and business respect for human rights?
Trade Law	Has the State put in place trade laws and regulations to support business respect for human rights within trade practices?
Privacy and Technology Law	Has the State put in place information security and privacy laws and regulations to support ethical corporate behavior and business respect for human rights?
Disclosure and Reporting	Has the State put in place laws and regulations to support disclosure and reporting by corporations on human rights, labor rights, environmental impacts, corporate social responsibility, or other ethical issues?

Procurement Law	Has the State put in place laws and regulations to support the incorporation of human rights considerations into the procurement by the State of goods and services from the private sector?
Anti-Bribery and Corruption	Has the State put in place laws and regulations aimed at promoting anti-bribery and combatting corruption within and across governments?
Human Rights Defender and/or Whistleblower Protection	Has the State put in place laws and regulations aimed at supporting business respect for the rights of human rights defenders and/or whistleblowers?
Criminal Law	Has the State put in place criminal laws and regulations to ensure that corporate crimes that are related to human rights are investigated, prosecuted, and properly sanctioned?
Civil Law	Has the State put in place civil laws and regulations to ensure investigation, punishment, and redress of business-related human rights harms?
Other Law	Has the State put in place any other laws and regulations to ensure business respect for human rights?
Implementation Status	
<p>For Corporate and Securities, Labor, Environmental, Property and Land Management, Health and Safety, Non-Discrimination, Tax, Trade, Disclosure and Reporting, Procurement, Anti-Bribery and Corruption and Whistleblower protection laws, please see GP 1.5 and GP 1.6. For further information on Disclosure and Reporting laws and Criminal and Civil liability, please see GP 2.1.</p> <p>Consumer Law</p> <p>Section 38 of the Constitution guarantees access to courts to protect interests of a group or classes of persons. South Africa also has a Consumer Protection Act, which entered into force on 1 April 2011.</p> <p>The Consumer Protection Act seeks to protect consumers from unfair business practices, inferior products, and false or misleading marketing. It specifically aims to promote a fair, accessible, and sustainable marketplace for consumer products and services, establish national norms and standards to ensure consumer protection, makes provision for improved standards of consumer information, and promote responsible consumer</p>	

behavior. The Act is further trying to establish a consistent legislative and enforcement framework relating to consumer transactions and agreements. It also establishes the National Consumer Commission.

The Consumer Protection Act applies to every transaction occurring within South Africa, and the promotion or supply of any goods or service occurring in South Africa. It does not apply to goods or services promoted or supplied to the State, certain industries exempted from the Act, credit agreements to the National Credit Act, services under employment contracts, and agreements giving effect to collective bargaining agreements.

Consumer rights that are protected under the Consumer Protection Act include:

1. The right to equality in the consumer market and protection against discriminatory marketing practices;
2. The right to privacy;
3. The right to choose;
4. The right to disclosure of information;
5. The right to fair and responsible marketing;
6. The right to fair and honest dealing;
7. The right to fair, just, and reasonable terms and conditions;
8. The right to fair value, good quality, and safety; and
9. The right to accountability by suppliers.

Privacy and Technology Law

On 27 November 2013, the Protection of Personal Information (POPI) Act was signed into law in South Africa. However, the actual commencement date of the Act is still to be determined and announced in the Government Gazette. POPI is based on the constitutional rights to privacy, and will be the overarching piece of legislation on matters of privacy and personal information. POPI will also regulate, in harmony with international standards, the processing of personal information by public and private bodies in a manner that gives effect to the right to privacy.

POPI will establish an Information Regulator, which will have the following duties:

1. To provide education on matters concerning privacy and personal information;
4. To monitor and enforce compliance to the Act by private and public bodies;
5. To consult with the public on matters related to privacy and personal information;

6. To receive complaints and conduct investigations on matters concerning privacy and the protection of personal information;
7. To conduct research and report to Parliament on matters of privacy and personal information, including any international instruments, principles, and standards that may be developed; and
8. To facilitate cross-border cooperation in the enforcement of privacy laws by participating in any initiative that is aimed at such cooperation.

It is expected that POPI will affect all organizations and business entities, due to its wide reach. Organizations and businesses will have one year to comply with the provisions of POPI, once entered into force. While POPI will be the main piece of legislation regulating the right to privacy and the use of personal information, other existing laws and regulations that are applicable in the South African context include:

1. The Electronic Communications and Transactions Act;
2. The Regulation of Interception of Communications and Provisions of Communication Related Information Act;
3. The Promotion of Access to Information Act;
4. The Consumer Protection Act;
5. ISO 27001/2; and
6. ISO 29100.

3.2. Relevant Policies

Have policies that seek to foster business respect for human rights been adopted and publicly communicated by the State?

Indicators	Scoping Questions
National Action Plans (NAPs)	Has the State introduced and/or implemented policies to help facilitate business respect for human rights through the adoption of National Action Plans (NAPs) on business and human rights, corporate social responsibility, development, anti-discrimination, government transparency, women's rights, or human rights in general?
Sector-Specific Policies	Has the State introduced and/or implemented sector-specific policies to help facilitate business respect for human rights within particularly high-risk industries, such as the extractive, apparel, and other sectors?
Other Policies	Have other policies been adopted by the State that aim to foster business respect for human rights?

Implementation Status	
<p>National Action Plans (NAPs):</p> <p>The following National Action Plans (NAPs) and strategies are publicly available and accessible:</p> <ol style="list-style-type: none"> 1. National Plans of Action for the Promotion and Protection of Human Rights; 2. National Action Plan and Strategy to combat racism; and 3. 365 Day National Action Plan to End Gender Violence. 	
Gaps	
<p>The general National Plans of Action for the Promotion and Protection of Human Rights was adopted in 1998, and though it is quite wide in its focus, it does not make specific reference to business and human rights. The NAP is also quite outdated, and there has been no follow up plan or updated version for almost 18 years.</p>	
3.3. Corporate Reporting and Public Communications	
<p>What type of reporting and public communications by business enterprises on how they address their human rights impacts is required by law?</p>	
Indicators	Scoping Questions
Financial Reporting	Is corporate financial reporting required the State? Is the law clarifying that, in some cases, human rights impacts are “material” to the economic performance of the reporting company?
Non-Financial Reporting	Is corporate non-financial reporting required and enforced by the State? Is the law clarifying that, in some cases, human rights impacts are “material” to the performance and operations of the reporting company?
Public Consultations	Are there legal requirements for companies to have public consultations before, during, and after the commencement of a major project that may impact local communities? Is there a requirement for the free, prior, and informed consent (FPIC) of impacted communities? Is there a mandatory public release of environmental and social impact assessments by companies?

Other Public Communications	Are there any other legal requirements on companies in terms of public communications?
3.4. Guidance and Incentives Does the State provide guidance and incentives for companies in terms of business respect for human rights?	
Indicators	Scoping Questions
Guidance based on industry sectors, human rights issues and company size	Has the State developed guidance for businesses on respecting human rights that is appropriate to different industry sectors (for example, high-risk sectors such as extractives), particular human rights issues (for example, working conditions, discrimination), and different types of corporations (for example, MNEs, SMEs)?
Guidance on expected outcomes and best practice	Has the State provided indicators of expected human rights outcomes, information regarding relevant national laws and regulations, and examples of best practice and due diligence methods?
Incentives	Has the State provided incentives for business respect for human rights, such as favorable treatment following non-mandatory self-reporting by companies of human rights policies and practices?
Implementation Status	
Incentives Mining sector: Under the Mineral Petroleum Resources Development Act (28 Of 2000) a mining right may only be granted in the event that a social and labor plan (SLP) is submitted to the Department of Mineral Resources (DMR). The DMR provides guidelines on employment equity and skills development reports that need to form part of the SLP. The objectives of SLPs are: <ol style="list-style-type: none"> 1. Promote employment and advance the socio-economic wellbeing of all South Africans; 2. Contribute to the transformation of the mining industry; and 3. Ensure that holders of mining rights contribute to the socio-economic development of the areas in which they are operating as well as the areas from which the majority of the workforce is sourced. 	

3.5. National Human Rights Institutions (NHRIs)	
Has the State formally recognized and supported the role of NHRIs in promoting implementation of the UNGPs?	
Indicators	Scoping Questions
NHRI Establishment, Recognition, and Support	Has the State established a National Human Rights Institution (NHRI)? If so, how was the NHRI established, and what kind of recognition and support does the State provide for the NHRI?
NHRI Focus on Business and Human Rights	Does the NHRI's mandate include business and human rights? Does the State finance NHRI activities within the field of business and human rights? Does the State support the NHRI in providing guidance on human rights to business enterprises? Does the State support the NHRI in monitoring the national business and human rights situation and to provide access to justice for victims of corporate-related human rights abuses? Has the role of the NHRI in promoting implementation of the UNGPs been formally recognized, and, if so, does the State support the NHRI in that role?
Implementation Status	
<p>The South African Human Rights Commission (SAHRC) maintains a delicate balance in fulfilling its different roles under Section 184 of the Constitution, which includes investigations into alleged human rights violations, promoting and protecting human rights, and providing education on human rights in South Africa. It should be noted that, similar to some other national human rights institutions elsewhere, the Commissioners are political appointments, often with close ties to government. The Commissioners tend to play a very active role in setting the agenda of the SAHRC, with dedicated thematic areas.</p> <p>While the South African government has not publically supported the role of the SAHRC in promoting the implementation of the UNGPs, the SAHRC has appointed several focal persons on the issues of business and human rights. However, due to the South African government's commitment to the treaty process, and silence around the UNGPs, the SAHRC's work around the UNGPs has been limited to capacity building and exploratory discussions.</p>	

GUIDING PRINCIPLE 4

States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence.

Commentary to Guiding Principle 4

States individually are the primary duty-bearers under international human rights law, and collectively they are the trustees of the international human rights regime. Where a business enterprise is controlled by the State or where its acts can be attributed otherwise to the State, an abuse of human rights by the business enterprise may entail a violation of the State's own international law obligations. Moreover, the closer a business enterprise is to the State, or the more it relies on statutory authority or taxpayer support, the stronger the State's policy rationale becomes for ensuring that the enterprise respects human rights.

Where States own or control business enterprises, they have greatest means within their powers to ensure that relevant policies, legislation, and regulations regarding respect for human rights are implemented. Senior management typically reports to State agencies, and associated government departments have greater scope for scrutiny and oversight, including ensuring that effective human rights due diligence is implemented. (These enterprises are also subject to the corporate responsibility to respect human rights, addressed in Chapter II.)

A range of agencies linked formally or informally to the State may provide support and services to business activities. These include export credit agencies, official investment insurance or guarantee agencies, development agencies and development finance institutions. Where these agencies do not explicitly consider the actual and potential adverse impacts on human rights of beneficiary enterprises, they put themselves at risk—in reputational, financial, political and potentially legal terms—for supporting any such harm, and they may add to the human rights challenges faced by the recipient State.

4.1. Businesses Owned or Controlled by the State

Does the State exercise special measures to support the human rights performance of State-owned or -controlled business enterprises?

Indicators	Scoping Questions
Human Rights Due Diligence Requirements	What types of human rights due diligence measure by State-owner or – controlled business enterprises are required by the State? How do associated government departments ensure that effective human rights due diligence is being carried out? What type of scrutiny and oversight do such government departments have over these enterprises (for

	example, inclusion of human rights performance information in management reports to relevant State agencies)?
Supply Chain Management Requirements	What types of supply chain management measures by State-owned or -controlled business enterprises are required by the State? How do associated government departments ensure that effective supply chain management is being carried out? What type of scrutiny and oversight do such government departments have over these enterprises (for example, inclusion of supply chain information in management reports to relevant State agencies)?
Other Measures	Has the State set out any other special measures to support the human rights performance of State-owned or -controlled business enterprises?
Implementation Status	
<p>Indicator one and the scoping questions that follow focus on the existence of appropriate human rights due diligence requirements for State-owned or State-controlled business enterprises. Aside from these requirements, States should assess the effectiveness of these requirements and government departments should oversee this. Due diligence requirements are essential measures that enable businesses to predict and prevent human rights violations at the work environment.</p> <p>Below is a list of the appropriate and relevant human rights due diligence requirements that exist for State-owned and State-controlled business enterprises in South Africa:</p> <ol style="list-style-type: none"> 1. BHP Billiton: <ol style="list-style-type: none"> a. The manganese mining company's subsidiary, Samancor, introduced a human rights and security training program in 2013. The primary objective of the training is to enhance employees' capacity on basic human rights principles and how they relate to security operations.⁹⁹ The training modules and the training were developed and delivered by the Centre for Human Rights of the University of Pretoria.¹⁰⁰ 2. Anglo-American South Africa: <ol style="list-style-type: none"> a. The company introduced the "Speak Up" initiative in 2001 as a confidential reporting system to allow employees, business partners, and other stakeholders to lodge complaints concerning conduct contrary to the values of Anglo-American.¹⁰¹ This initiative is managed by Deloitte Tip-offs Anonymous. Complaints are submitted through either an online platform or by telephone, fax, e-mail, or regular mail. Complaints can be submitted in English, isiZulu, Afrikaans, IsiXhosa, and Sesotho. 3. Alexkor Limited: <ol style="list-style-type: none"> a. Alexkor Limited is wholly owned by the government. The core operations of the company are the mining of diamonds in the north-west coast of South Africa. The non-core operational activities are comprised of residential services, community services, 	

outside engineering services, external transport services, guesthouses, a fuel station, and an airport. The company's corporate social responsibility program has played a key role in employment by directly employing about 3,000 people and in the provision of housing, water, education, and healthcare in the communities within which it operates.¹⁰²

- b. The company has been committed to supporting a hospital at Alexander Bay and has offered substantial contribution to the social welfare facility for the Richtersveld pensioners. It also provides free education facilities to all children resident at Alexander Bay as well as for children living at nearby mining communities.
 - c. Specifically, the following legislations and government policy mechanisms regulate the activities of the company;
 - i. The Alexkor Act No. 116 of 1992 (as amended in 2001);
 - ii. The Employment Equity Act No. 55 of 1998;
 - iii. The King Code of Governance Principles for South Africa 2009 (King III);
 - iv. The Mine Health and Safety Act No. 29 of 1996;
 - v. The National Environmental Management Act No. 107 of 1998;
 - vi. The Preferential Procurement Policy Framework Act, 2000; and
 - vii. The Corporate Plan.
 - d. Moreover, the company has instituted measures to ensure that all its marketing activities, policies and procedures are gender neutral. The company has also established governance policies to ensure that each staff member have a working understanding of the laws, rules, and standards applicable to the company and its activities.¹⁰³
4. Transnet SOC Limited:
- a. In 2012, the Minister of Public Enterprises called on all State-Owned Companies (SOCs) to sign the UN Global Compact (UNGC).¹⁰⁴ Transnet responded by becoming a signatory in July 2012 and thereby committing to comply with the fundamental human rights enshrined in:
 - i. The Universal Declaration of Human Rights;
 - ii. The UN Guiding Principles on Business and Human Rights; and
 - iii. The South African Bill of Rights in the 1996 Constitution.¹⁰⁵
 - b. Therefore, the Remuneration, Social, and Ethics Committee of the Board was tasked to monitor the Company's activities particularly on issues pertinent to human rights, equality, health, labor, and consumer relations.¹⁰⁶

The second indicator and scoping questions address the existence of **supply chain management requirements** that apply to State-owned or -controlled business enterprises. The scoping questions also address the efficacy and oversight of these requirements. Human rights abuses can occur anywhere along the supply chain, so it is essential for businesses to know and scrutinize every level, from raw materials, to labor, to output. Below is a non-exhaustive list of relevant and existing **supply chain management requirements**:

1. Preferential Procurement Policy Framework Act 5 Of 2000:

- a. The Act gives effect to section 217(3) of the 1996 Constitution by providing a framework for the implementation of the procurement policy contemplated in section 217(2) of the Constitution and to provide for associated matters.¹⁰⁷ Even though the Act is silent on discrimination based on race, color, religion, sex, or origin, it stipulates that people with disabilities should not be discriminated against and also gives preference to “Historically Disadvantaged Individual (HDI),” especially females and persons with disabilities.¹⁰⁸
2. Employment Equity Act Amendment Act 47 of 2013:
 - a. This Act amended the Employment Equity Act of 1998 and further regulates the prohibition of unfair discrimination against employees and addresses the evidentiary burden of proof in allegations of unfair discrimination.¹⁰⁹ It also regulates the formulation and implementation of employment equity plans which are to be submitted to the Director-General by State-Owned Companies.
 - b. Sub-section 1 of Section 6 states that “no person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, color, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth or on any other arbitrary ground.”¹¹⁰ Therefore, any difference in terms and conditions of employment between employees of the same employer doing the same work of equal value that is directly or indirectly based on any one or more of these grounds is unfair discrimination.

Gaps

Gaps still exist despite the fact that the South African government has put in place mechanisms addressing human rights due diligence and supply chain management for State-owned and State-controlled business enterprises.

An explanation to the existing gaps in the South African government’s activities for human rights due diligence for State-owned and State-controlled business enterprises is as follows:

1. New Companies Act of 2008:
 - a. The South African government possesses a general incorporation statute. The conduct of business in South Africa is regulated by national legislation applicable to all industries as well as national industry specific legislation.¹¹¹
 - b. The conduct of corporate business is governed by New Companies Act 71 of 2008 and the Close Corporations Act 69 of 1984.
 - c. The Companies Act and Close Corporations Act were substituted with the New Companies Act 71 of 2008. Through this act, the government has created legal and organizational frameworks that regulate government corporations.
 - d. Currently, any human rights and due diligence efforts are coordinated across corporations; however, the uncoordinated nature of the monitoring and supervisory mechanisms leaves significant gaps. Nevertheless, the New Company’s Act of 2008 makes provisions for standardized budgeting and auditing practices for all State-owned enterprises. This mechanisms could be used to address human rights due diligence because the requirements are critical for all for government businesses.¹¹²

2. Centralized oversight:
 - a. Even though there is a Minister of Public Enterprises within the executive branch, no single agency is responsible for the oversight and supervision of State-Owned Companies (SOCs). In other words, there is no specific department mandated to regulate government companies with a central management interest. This phenomenon poses a great gap in terms of centralized supervision and implementation monitoring.
3. The Parliamentary Portfolio Committees:
 - a. The Portfolio Committees of the South African Parliament exercise effective oversight over the activities of SOCs and other executive bodies and their agencies. These committees oversee and scrutinize all the operations of all government companies. Meanwhile, each SOC is overseen by the departments and departmental committees with jurisdiction over their activities. This constitutes a duplication of efforts and functions, and inhibits coordination and common practices among government companies which make human rights due diligence standards difficult to establish.
4. Poor Integration of State Relations with Business Enterprises:
 - a. The State should demand business enterprises to conduct human rights due diligence as part of their core operations especially in SOCs. The institution of the due diligence principle as a minimum threshold will be a key strategy to communicate to the business world, as well as raise standards of the social corporate responsibility of businesses in the private sector.

Below is a brief explanation of some of the gaps in South African government activities for **supply chain requirements** for State-owned or -controlled business enterprises:

1. Guidelines for Sustainable Supply Chain Management:
 - a. Section 43(5) of the Companies Act 71 of 2008 establishes a Social and Ethics Committee compulsory to all State-owned companies, listed public companies, and companies that score above 500 points in terms of regulation 26(2) of the New Companies Act.¹¹³ This committee is responsible for ensuring that businesses work towards transforming the communities in which they operate and protect the safety, health, and dignity of employees.
2. United Nations Global Compact:
 - a. The United Nations (UN) Global Compact requests companies to embrace and enact nine universal principles in the areas of human rights, labor standards, and the environment.¹¹⁴ More than 12 State-owned companies have become signatories to the compact and continue to support the UN Global Compact through their sustainable practices.

These guidelines apply to all businesses, not just government-owned or controlled entities, and the South African government has a significant opportunity to fully implement these guidelines with the businesses it has direct influence over.

4.2. Businesses Receiving Substantial Support and Services from State Agencies	
Does the State exercise special measures to support the human rights performance of businesses receiving substantial support and service from State agencies (for example, export credit agencies, public banks, public pension funds, official investment insurance or guarantee agencies, development agencies, or development finance institutions)?	
Indicators	Scoping Questions
Human Rights Considerations	Has the State required that businesses receiving substantial support and services from State agencies take into account human rights considerations?
Human Rights Due Diligence Requirements	What types of human rights due diligence measures by State-supported businesses are required by the State? How do associated government departments ensure that effective human rights due diligence is being carried out? What type of scrutiny and oversight do such government departments have over these businesses?
Other Measures	Has the State set out any other special measures to support the human rights performance of State-owned or -controlled business enterprises?
Implementation Status	
<p>The first indicator and scoping question consider human rights considerations required of businesses receiving substantial support and services from State agencies. Though these businesses are not directly controlled by the State, they receive significant investment and support and thus should be held to similar standards in their human rights conduct. Below is a non-exhaustive list of other relevant and existing measures that require human rights considerations:</p> <ol style="list-style-type: none"> 1. Development Bank of Southern Africa (Development Bank of Southern Africa Amendment Act, 2014): <ol style="list-style-type: none"> a. The Development Bank of Southern Africa performs the economic development function of the South African government within the framework of the Constitution.¹¹⁵ The Interim Constitution (Act 200 of 1993), later repealed and replaced by the Constitution (Act 108 of 1996), transformed the roles and function of the Bank to promote economic development and growth within the African region and the oceanic islands within an integrated financial development system targeted at efficient deployment of scarce resources.¹¹⁶ On this account, the Bank is now mandated to operate in African territories to participate in large scale infrastructure and strategic investments with the potential to enhance trade and economic growth on the continent to support South Africa's commitment to regional integration. The projects and investments are supposed to meet standards requiring the right to bargain, minimum age, prohibition of forced labor, and acceptable conditions of work. 	

The second indicator and scoping questions consider **human rights due diligence requirements** for businesses receiving substantial support and services from State agencies. Due diligence is crucial for all businesses connected to a State actor, even if they are not controlled directly. Below is a non-exhaustive list of other relevant and existing **human rights due diligence requirements**:

1. The Employment Equity Amendment Act of 2013 (EEA):
 - a. The EEA Act requires all contractors to offer the same wages and fringe benefits to all employees including laborers and mechanics they employ locally based on the prevailing wages and fringe benefits when they are employed directly at the site of work.¹¹⁷ It also stipulates that contractors should insert a due diligence provisions requiring their subcontractors to comply with these directives.
2. The International Finance Corporation (IFC):
 - a. The IFC, a member of the World Bank Group, holds all of its clients to a due diligence regime composed of eight Performance Standards and accompanying Guidance Notes.¹¹⁸ The IFC's Performance Standards contain numerous requirements, including environmental protection, land acquisition and resettlement procedures, protection of affected communities and indigenous peoples, security issues, observance of international labor standards, and associated supply chain assessment.
 - b. This due diligence regime contains three steps: 1) a pre-approval assessment process; 2) the adoption of policies that conform to the IFC's standards; and 3) contractual undertakings to comply with these standards throughout the life of their projects.
3. The Organization for Economic Cooperation and Development (OECD):

In June 2012, the OECD Council adopted a Recommendation on Common Approaches for Officially Supported Export Credits and Environment and Social Due Diligence, addressing both environmental and social impacts for the first time. The Recommendation requires due diligence through the consideration of these impacts and risks as an integral part of the decision-making and risk management process.¹¹⁹

Gaps

Although the South African government has adopted the measures discussed under “implementation status” to support the human rights performance of businesses receiving substantial support and service from State agencies, there are gaps in these measures. Below is a brief explanation of the gaps in South African government activities for **human rights considerations**:

1. Development Bank of Southern Africa:
 - a. Although the DBSA is a State-owned company operating within the framework of the Constitution, the Bank has serious institutional deficiencies and accountability gaps that can cause harm on the operational field and hence lead to failed projects and investments.¹²⁰ The DBSA has a zero tolerance approach to dishonest, corrupt, and illegal conduct. However this approach, which is central to the Bank's Code of Ethics, lack enforcement and noncompliance of legal requirements such as labor rights and discrimination are not duly investigated nor are appropriate measures taken in areas where such practices may be more prevalent.¹²¹

- b. Despite the fact that the Bank does not tolerate criminal behavior and makes provision for formal charges to be laid against any perpetrator, this is loosely defined and enforced, especially on acts that constitute criminality. The Bank's comprehensive management approach covers all operations and risks associated with corrupt and dishonest behavior, but no one has been dismissed or prosecuted on such grounds.

Below is a brief explanation of the gaps in South African government activities for **human rights due diligence requirements**:

1. The South African Reserve Bank:

- a. The South African Reserve Bank was prepared to extend Rand 2 billion in loans to Swaziland in 2011, which was guaranteed by the South African government.¹²² This indicates the government's inconsistent position on human rights and democracy, especially in its foreign policy. The conditions on which the government guaranteed the loan include human rights and democracy provisions based on a 2004 bilateral agreement between the two countries that was never really implemented. It is unclear why this was allowed to happen when the inadequacy of human rights, democratic governance, and respect for the rule of law has contributed to much of Swaziland's current economic challenges that now require financial support from the South African government. There are also doubts as to whether these human rights conditions will be effectively implemented and monitored this time around, or even be accepted by the government of Swaziland.

GUIDING PRINCIPLE 5

States should exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights.

Commentary to Guiding Principle 5

States do not relinquish their international human rights law obligations when they privatize the delivery of services that may impact upon the enjoyment of human rights. Failure by States to ensure that business enterprises performing such services operate in a manner consistent with the State's human rights obligations may entail both reputational and legal consequences for the State itself. As a necessary step, the relevant service contracts or enabling legislation should clarify the State's expectations that these enterprises respect human rights. States should ensure that they can effectively oversee the enterprises' activities, including through the provision of adequate independent monitoring and accountability mechanisms.

5.1. Public Service Delivery

Does the State ensure that human rights are protected in situations where private enterprises provide for government services that may impact upon the enjoyment of human rights?

Indicators	Scoping Questions
Legislative or Contractual Protections	Has the State adopted legislative or contractual protections for human rights in delivery of privatized services by the central or local government, for example, for the provision of services related to health, education, care-delivery, housing, or the penal system? Do such protections include a State-performed human rights impact assessment of the potential consequences of a planned privatization of provision of public services, prior to the provision of such services? Do public procurement contracts clarify the State's expectation that businesses respect human rights in delivering services and comply with human rights standards?
Awareness-Raising	What measures does the State take to promote awareness of and respect for human rights by businesses that the State commercially contracts with?

Screening	What kind of screening processes does the State have in place to promote business respect for human rights? Does the State engage in selective processes that give preferential treatment to companies that demonstrate respect for human rights? Does the State exclude from the bidding process those companies that have demonstrated poor respect for human rights (such as poor and hazardous working conditions, as well as excessive use of force or maltreatment of individuals receiving care)?
Monitoring and Oversight	Do relevant State agencies effectively oversee the activities of the enterprises that provide services on behalf of the State? Does the State provide for adequate independent monitoring and accountability mechanisms of the activities of the private providers? Does the State provide for specific oversight of high-risk services, such as those related to health and security?
Other Measures	Is the State a party to 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? If so, how does it incorporate commitments into national laws? Is the State party to the International Code of Conduct for Private Security Providers, and if so, how does it incorporate commitments into national laws and procurement processes? Is the State party to the Voluntary Principles on Security and Human Rights? If so, how does it incorporate commitments into national laws, including around the provision of public security? Has the State put any other measures in place to ensure that public service delivery by private enterprises does not have any negative human rights impacts?
Implementation Status	
<p>The first indicator and scoping questions consider legislative or contractual protections adopted by the State to protect human rights in government procurement, including impact assessments and compliance clauses within the contract. These protections are the first line of defense in preventing human rights abuses in government procurement and contracting.</p> <p>Below is a non-exhaustive list of other relevant and existing legislative or contractual protections to support human rights in government procurement:</p>	

1. Promotion of Equality and Prevention of Unfair Discrimination Act of 2000:
 - a. This act is partially in tandem with the provisions of the International Covenant on Civil and Political Rights by protecting against discrimination at work within South African geographic borders. It further requires that government contractors comply with human rights principles and that employees are treated equally during employment, without regard to their race, color, religion, sex, or national origin.¹²³
 - b. The Act also designates Magistrates' Courts as equality courts to promote equality and prevent unfair discrimination at the workplace both in the public and private sectors within South Africa.¹²⁴ To give effect to the Act and sections 9 and 23(1) of Schedule 6 of the 1996 Constitution of South Africa, it seeks to prevent and prohibit unfair discrimination and harassment, to promote equality and protect human dignity, as well as to prohibit hate speech in the workplace and to deal with issues connected therewith.¹²⁵
 - c. Moreover, the Act primarily attempts to eradicate social and economic inequalities that are systemic in the South African society generated through historical events such as colonialism, apartheid, and patriarchy which subjected a majority of the population to great pain and suffering.¹²⁶ To this end, both the public and private firms, as well as foreign firms doing business on South African soil, are obliged to comply with the provisions of the Act.
2. Preferential Procurement Policy Framework Act 5 of 2000:
 - a. The Act gives effect to section 217(3) of the 1996 Constitution by providing a framework for the implementation of the procurement policy contemplated in section 217(2) of the Constitution and to provide for associated matters. Even though the Act is silent on discrimination based on race, color, religion, sex, or origin, it stipulates that people with disabilities should not be discriminated against and also gives preference to "Historically Disadvantaged Individual (HDI)," especially females and persons with disabilities.¹²⁷
3. The Employment Equity Amendment Act (EEAA) 47 of 2013:
 - a. The EEAA regulates the prohibition of unfair treatment and discrimination against employees by employers within South Africa. It also controls the certification of psychometric testing of employees to prevent unfair discrimination on the grounds of intellectual disabilities by employers.¹²⁸ The Act further provides for the evidentiary burden of proof in allegations of unfair discrimination at the workplace by employers and regulates the preparation and delivery of employment equity plans as well as the submission of reports by designated employers to the Director-General to ensure that business enterprises comply with the provisions in the Act.¹²⁹ If a contractor or subcontractor fails to comply with these guidelines, they open themselves up to civil and criminal liability, as well as possible debarment.
4. Occupational Health and Safety Act 181 of 1993:
 - a. This act provides for the health and safety needs of employees at work and for the health and safety of persons in relation to the use of plants and machinery in the discharge of their duties.¹³⁰ It seeks to protect employees and other persons at work against occupational health hazards—health and safety issues arising out of or in connection with the activities of employees at work.¹³¹

- b. Moreover, the Act establishes an Advisory Council on Occupational Health and Safety to oversee the implementation and enforcement of the provisions in the act and other related matters connected therewith. It establishes the Ministry of Labor as the lead implementer and supervisory body.¹³²
- 5. The Basic Conditions of Employment Amendment Act 11 of 2002:
 - a. This act gives effect to the right to fair labor practices provided under Section 23(1) of the South African Constitution and other relevant international laws by establishing and providing for the controlling of basic conditions of employment in both the public and private sectors in South Africa.¹³³ It ensures that business enterprises comply with the obligations of the Republic as a member State of the International Labour Organisation (ILO) and provide for matters related therewith. The Ministry of Labor is the supervisory body to the implementation of this act.¹³⁴
- 6. Protection from Harassment Act, 2010:
 - a. This act provides for the issuing of protection orders against harassment and seeks to effect consequential amendments to the Fire Arms Control Act of 2000 by providing for matters connected therewith.¹³⁵ It also protects fundamental human rights and freedoms enshrined in the Bill of Rights in the Constitution.¹³⁶
 - b. These human rights include: the right to equality; the right to privacy; the right to dignity; the right to freedom and security of the person, which incorporates the right to be free from all forms of violence from either public or private sources; and the rights of children to have their best interests considered to be of paramount importance.¹³⁷ In order to afford victims of harassment an effective remedy against such behavior, the act introduces measures that seek to enable the relevant organs of the State to give full effect to the provisions of the Act.
- 7. The United Nations Convention on the Elimination of all forms of Discrimination against Women (CEDAW):
 - a. South Africa has international commitments and obligations under the CEDAW, a binding international treaty and customary law in the field of human rights to promote equality and to prevent discrimination against women in both public and private sectors, as well as in its dealings with foreign firms operating within South Africa's geographic borders.¹³⁸

The second indicator and scoping question address measures taken by the State to **raise awareness** and respect for human rights through government procurement. Campaigns to raise awareness are a simple step States can take to push businesses to respect human rights on their own accord.

Below is a non-exhaustive list of other relevant and existing **awareness-raising** measures to support human rights in government procurement:

- 1. The South African Government Approach to Business and Human Rights:
 - a. In 2015, the South African Human Rights Commission (SAHRC) launched the South African Government Approach on Business and Human Rights, which illustrates how the government approaches business and human rights by providing relevant examples of laws, regulations, and policies. The document also considers business and human rights in international guidelines and foreign policy, new and emerging tools, and best practices for companies.¹³⁹

- b. Prior to the launch, the Commission convened a series of stakeholder workshops on the UNGPs, including a workshop expressly addressing issues related to business, procurement, and human rights.

The third indicator and scoping questions consider **screening processes** adopted by the State to promote business respect for human rights, including preferential treatment in or exclusion from the bidding process based on businesses' demonstrated human rights records. Robust and uniform screening processes allow various government agencies to streamline their contracting processes through shared information and collaboration.

Below is a non-exhaustive list of other relevant and existing **screening processes** to support human rights in government procurement:

1. Preferential Procurement Policy Framework Act No. 5 of 2000:
 - a. This act obligates State agencies to negotiate contracts based on various incentives.¹⁴⁰ One of the most flexible negotiation options, available only in dealing with service contractors, empowers agencies to select the bidder that offers the government the "best value."¹⁴¹ Agencies must always consider price and quality in assessing the "best value," but they also have some discretion to identify other factors, such as capacity to manage a supply chain for human rights compliance.
2. Organization for Economic Cooperation and Development (OECD) Recommendation on Common Approaches on Environment and Officially Supported Export Credits:
 - a. The Convention on the OECD of 14 December 1960 and, in particular, to Article 5 (b) thereof, in 2001 recognizes that export credit policy can contribute positively to sustainable development and should be coherent with its objectives. It should foster transparency, predictability, and responsibility in decision-making by encouraging disclosure of relevant environmental information with due regard to any legal stipulations, business confidentiality, and other competitive concerns.¹⁴² It also encourages the prevention and mitigation of adverse environmental impacts of projects and enhances financial risk assessment of projects by taking into account their environmental aspects.
 - b. South Africa, as a member State, is obligated to screen all applications for officially supported export credits covered by this recommendation. The screening should identify projects which require a review due to their potential adverse environmental impacts and projects which are in sensitive sectors or located in or near sensitive areas. The parties involved in a project, such as the applicants (exporters and lenders) and project sponsors, should provide all information necessary to carry out the screening. The screening should take place as early as possible in the risk assessment process and where appropriate, should also identify the overall projects, if any, to which capital goods and/or services are related.

Gaps

Although the South African government has adopted legislative and policy measures discussed under “implementation status” that set out the expectation that contractors will respect human rights in their operations, there are gaps in these measures.

Below is a brief explanation of the gaps in South African government activities for **legislative or contractual protections**:

1. Parliamentary Acts and Legislations:

- a. While parliamentary acts promoting and protecting human rights, especially in the areas of unfair discrimination and labor relations, they are limited in their effectiveness because there is often no express or implied incentive for the supervisory ministries and departments to enforce many of these rights. Moreover, the scope of these acts are limited to those international human rights that South Africa has committed to protect by treaty, or to rights protected by domestic commitments.
- b. The presumption against the extraterritorial application of South African statutes ensures that most parliamentary legislations raising labor or human rights standards, such the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 and the Employment Equity Amendment Act (EEAA) 47 of 2013, only apply domestically. In an increasingly global economy, and rising influence of South African global geopolitics, domestic-only application of these standards dramatically limits their impact.
- c. The Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 and the Employment Equity Amendment Act (EEAA) 47 of 2013 provide important protections for workers by prohibiting discrimination based on named characteristics. However, it is not clear whether discrimination “in employment” applies beyond hiring and firing (e.g., to wages, promotion, and benefits).¹⁴³

2. The Basic Conditions of Employment Amendment Act (BCEAA) 11 of 2002:

- a. The BCEAA specifically addresses some human rights without limiting the scope of their protection, but it does not follow the UNGP recommendation of domestic laws that require broad business compliance with all human rights relevant to a business.¹⁴⁴
- b. The BCEAA does not currently include many essential human rights, instead adopting specific rights in a piecemeal fashion. As a result, the BCEAA is out of sync with South Africa’s trade policy in terms of international agreement and unilateral import prohibitions. To expand the BCEAA’s scope, it should incorporate the ILO’s core labor standards, which include freedom of association and the prohibitions of forced labor, child labor, and discrimination with respect to work. There is also an opportunity to clarify some of the definitions the BCEAA provides for human rights.

3. Preferential Procurement Policy Framework Act 5 Of 2000 and the Department of Labor’s Contract Cleaning Sector:

- a. While these initiatives have influenced policy and guidance addressing recruitment fees, they neglect to specify what components or amounts of requirement fees are considered permissible. Therefore, the Department of Labor and the National Treasury should define what constitutes a recruitment fee, because State agencies and contractors may not be able to effectively implement these provisions.
- b. The Department of Labor and the National Treasury do not specifically monitor anti-trafficking policies in many of its contracts, hindering their ability to detect potential abuses and implement the government’s policies in this regard. While the Department

of Labor and National Treasury monitor some contractor labor practices, the departments largely focus their efforts on monitoring performance of contractors in the delivery goods and services.

Below is a brief explanation of the gaps in South African government activities for **raising awareness**:

1. Contracting Departments and Interdepartmental Awareness:

- a. The South African government should do more to reach out to appropriate departments and agencies that award State contracts and spread information across agencies. One way to do this is to create policy manuals and hold trainings specifically designed for contracting departments in the area of public procurement. The SAHRC's current approach is aimed at a wider public audience, but other government bodies should supplement these to target federal officials with discretion to change procurement guidelines and promote interdepartmental awareness.¹⁴⁵

Below is a brief explanation of the gaps in the South African government's activities for **screening processes**:

1. Responsible Contractors:

- a. The standard of contractor responsibility only considers limited factors addressing contractors' ethics and integrity. This standard has not typically been employed to evaluate contractors' human rights records. However, there is an opportunity to expand this tool to potentially exclude a contractor if they lack necessary operational controls and safety programs to cope with a high risk of human rights violations.

2. Contractor Integrity and Ethics:

- a. The Preferential Procurement Policy Framework Act 5 of 2000 and the National Treasury standards to evaluate contractor integrity and ethics cover a limited list of procurement-related offences. However, the Act does not require bidders to disclose violations of labor standards or human rights, or acts of criminal negligence, even if they are repeated and serious violations.¹⁴⁶

3. The Preferential Procurement Policy Framework Act:

- a. While the Act can be a useful tool for State departments and agencies in determining contractor responsibility, it is still a very limited tool, especially in regard to human rights. It includes information on addressing discrimination against disadvantaged groups, but does not address any other human rights violations.¹⁴⁷ The Act might easily be expanded to include agency or court findings that a contractor has violated another country's domestic law that implements human rights protections.

GUIDING PRINCIPLE 6

States should promote respect for human rights by business enterprises with which they conduct commercial transactions.

Commentary to Guiding Principle 6

States conduct a variety of commercial transactions with business enterprises, not least through their procurement activities. This provides States—individually and collectively—with unique opportunities to promote awareness of and respect for human rights by those enterprises, including through the terms of contracts, with due regard to States’ relevant obligations under national and international law.

6.1. Public Procurement

Which types of requirements or incentives to respect human rights can be found in legislative measures or in terms of public procurement?

Indicators	Scoping Questions
Planning for Procurement Needs and Risks	Have State agencies decided whether their contractors must comply with specific human rights or protect against defined human rights harms as a contract obligation? If so, have State agencies made an effort to expand the scope of protection and clarify specific human rights definitions to resolve vagueness?
Providing Notice During Bid Solicitation	Do State agencies notify potential contractors when there is a significant risk of a human rights violation that undermines fair competition? Does such notice trigger specific disclosure and compliance obligations?
Screening and Selection	In addition to evaluating price and capacity, do State agencies evaluate whether potential contractors are responsible, based on integrity and business ethics, and on compliance with domestic law that protects the safety and health of workers and communities? Do State agencies engage in selective or targeted public procurement, such as preferential award to discriminated groups (for example, ethnic minorities) or to companies working to achieve specific human right objectives (for example, gender equality)? Do State agencies require contractors to certify that they know their subcontractors; including specific locations of production or supply, and that they have management systems to

	ensure compliance? Do State agencies exclude companies with commercial contracts in high-risk countries or a bad human rights record from public procurement?
Award Stage	Do State agencies have criteria and sub-criteria for what constitutes the most economically advantageous tender, including human rights criteria? Have State agencies taken steps to clarify how human rights standards and policies might be used to form part of the award criteria for a particular contract? Do State agencies require contractors to disclose information on their supply chain, including specific subcontractors and the addresses of factories or sites of supply? Do State agencies confirm a contractor's assurances and required development of compliance plans during the award stage?
Contract Terms	Is the State taking step to ensure that human rights requirements, material to the procured good or service, are a part of contractual performance clauses? Have State agencies inserted compliance obligations into contract terms? When a State agency identifies a risk of harm or human rights violations, does it authorize contract officers to insert into the contract an obligation to comply with the domestic law of the country of production or supply?
Auditing and Monitoring	Do State agencies have information systems to audit and monitor contractors to ensure that the contractor meets its performance or compliance obligations and does not adversely impact human rights? Do such systems respond to work complaints? Are such systems independent from, yet accountable to, the State?
Enforcement of Contract Terms and Corrective Action	Do State agencies dedicate staff to enforcement of the contract terms and provide them with detailed policies? Have State agencies put in place procedures to correct adverse human rights impacts identified, such as financial or other remedies if a contractor violates human rights? Do the procedures favor changing the behavior of the contractor to improve their human rights performance rather than simply terminate the relationship? Do State agencies provide for due diligence as both a defense and as a remedy for breach of compliance standards?

Other Measures	Have State agencies put any other measures in place to ensure that public procurement complies with human rights protection?
Implementation Status	
<p>The first indicator and scoping questions consider the State’s attempts to plan for procurement needs and risks through contract obligations with clear human rights definitions. Such forethought ensures that agencies, and the businesses they contract with, will anticipate situations most ripe for human rights violations and be prepared to prevent them.</p> <p>Below is a non-exhaustive list of other relevant and existing plans for procurement needs and risks provided by State agencies to support human rights in government procurement:</p> <ol style="list-style-type: none"> 1. The Promotion of Equality and Prevention of Unfair Discrimination Act of 2000: <ol style="list-style-type: none"> a. This act protects employees and prospective employees against discrimination at work within South Africa’s geographic borders. It further requires that government contractors comply with human rights principles and that employees are treated equally during employment, without regard to their race, color, religion, sex, or national origin.¹⁴⁸ b. The Act also designates Magistrates’ Courts as equality courts to promote equality and prevent unfair discrimination at the workplace both in the public and private sectors within South Africa.¹⁴⁹ To give effect to the Act and sections 9 and 23(1) of Schedule 6 of the 1996 Constitution of South Africa, it seeks to prevent and prohibit unfair discrimination and harassment, to promote equality and protect human dignity, as well as prohibit hate speech in the workplace and to deal with issues connected therewith.¹⁵⁰ 2. The Prevention and Combating of Trafficking in Persons Act of 2013: <ol style="list-style-type: none"> a. The South African government has recently increased its focus on trafficking and has strengthened business regulations accordingly. In 2013, the National Assembly passed the Prevention and Combating Trafficking in Person Act of 2013. This act gives effect to South Africa’s obligations regarding trafficking of persons in terms of international commitments through multilateral and bilateral agreements and treaties.¹⁵¹ b. Among other measures, the Act seeks to provide for the offence of trafficking in persons and other related offences. It directs State departments and agencies to establish partnerships with the private sector to combat trafficking and ensure that corporate actions do not support it.¹⁵² c. The Act also provides measures for protecting and supporting victims of trafficking in persons in order to provide for the coordinated efforts in the operationalization and application of the Act. 3. Broad sectoral policies— General Procurement Guidelines: <ol style="list-style-type: none"> a. These guidelines were prepared and subsequently issued by the government as prescriptive standards of behavior, ethics, and accountability which are required from the public service as well as the procurement statement of the South African government’s commitment to a fair procurement system. It seeks to enable the emergence of sustainable small, medium, and 	

micro business enterprises to add common wealth to the country's achievement of enhancing economic growth and social well-being of the citizens.¹⁵³

- b. Although, human rights are not explicit in the policy, the underpinning guidelines seeks to develop and advance multi-stakeholder initiatives that respond to human rights and harms in high-risk sectors, such as footwear and apparel, extractive industries, electronics, and information technology.

The second indicator and scoping questions address the State's efforts to **provide notice during bid solicitation** when there is significant risk of human rights violations that could undermine fair competition or trigger specific disclosure and compliance obligations. This not only reminds contractors of the State's commitment to human rights, but also offers them a chance to correct their behavior before facing consequences.

Below is a non-exhaustive list of other relevant and existing State attempts to **provide notice during bid solicitation** to support human rights in government procurement:

1. General Procurement Guidelines:

- a. This guideline requires that State departments and agencies notify potential contractors of the capacities required of responsible bidders, including compliance obligations or performance standards.¹⁵⁴ The guidelines are underpinned by five pillars: the value for money; open and effective competition; ethics and fair dealing; accountability and reporting; and equity. It also prescribes a minimum set of standards that are to be observed and are supplemented by individual accounting officials' procurement procedures contained in the Public Finance Management Act of 1999.¹⁵⁵
- b. According to guidelines, departments need to apply effort and research to get the best outcome by ensuring that:
 - i. Potential suppliers have reasonable access to procurement opportunities and are notified at least in the government tender bulletin;
 - ii. Adequate and timely information is provided to suppliers to enable them bid;
 - iii. Bias and favoritism are eliminated;
 - iv. Bidding costs are fair and equitable;
 - v. Bidders are dealt with on a basis of mutual trust and respect; and
 - vi. Business is conducted in a fair and transparent manner.¹⁵⁶

The third indicator and scoping questions consider **screening and selection** evaluations conducted by State agencies to promote business respect for human rights, including targeted public procurement, subcontractor certifications, or the exclusion of companies with bad human rights records.

Below is a non-exhaustive list of other relevant and existing **screening and selection** evaluations conducted by State agencies to support human rights in government procurement:

1. The Preferential Procurement Policy Framework Act 5 of 2000:
 - a. The Act gives effect to section 217(3) of the 1996 Constitution by providing a framework for the implementation of the procurement policy contemplated in section 217(2) of the Constitution and to provide for associated matters.¹⁵⁷ Even though the Act is silent on discrimination based on race, color, religion, sex, or origin, it stipulates that people with disabilities should not be discriminated against and also gives preference to “Historically Disadvantaged Individual (HDI),” especially females and persons with disabilities.¹⁵⁸
2. The Public Investment Corporation Act 23 of 2004:
 - a. This Act grants the president authority to establish policies to advance the economy or the efficiency of public investment, spending, and procurement.¹⁵⁹ This authority complements the Preferential Procurement Policy Framework and the Procurement Policy Guidelines which set compliance with domestic labor laws as a basic standard of integrity, business ethics, and mutual respect as well as the elimination of bias and favoritism.
 - b. The Act also provides for the establishment of a juristic body known as the Public Investment Corporation to provide for the investment of certain money received or held by, for or on behalf of the government and other bodies and matters related therewith.¹⁶⁰
3. The Promotion and Protection of Investment Bill of 2013:
 - a. This bill, when passed into law, would provide for the protection of investment and the achievement of a balance of rights and obligations that apply to all investors as well as to provide for matters connected therewith.¹⁶¹
 - b. It recognizes the need to protect and promote the rights enshrined in the Bill of Rights and the Constitution and the importance of job creation and economic growth toward enhancing the well-being of citizens. It therefore seeks to maintain an open and transparent environment for investments on non-discriminatory and mutually respectful bases.
 - c. In its guidance, the bill makes clear that it will hold banks responsible for failing to conduct due diligence on their customers and may even hold intermediary banks responsible for failing to block transactions with blocked persons.

The fourth indicator and scoping questions address how human rights standards and other criteria are considered by the State in the **award stage** of federal procurement. States that clearly reward companies with good human rights records will encourage other contractors to follow suit.

Below is a non-exhaustive list of relevant and existing standards designed to support human rights in government procurement at the **award stage**:

1. The Preferential Procurement Policy Framework Act 5 of 2000:
 - a. This act provides for most domestic contractors and subcontractors to develop a written affirmative action plan for each of its establishments. The agency must assure that the contractor has the capacity in place to avoid discrimination, as well as provide

for complaints and investigations.¹⁶² The Act also requires special provisions for categories of persons historically disadvantaged by unfair discrimination on the basis of race, gender, or disability.¹⁶³

The fifth indicator and scoping questions consider **contract terms** inserted by the State to prevent human rights violations in federal procurement. These protections are essential to ensure that companies do more than pay lip service to human rights, offering the State a remedy if something goes wrong.

Below is a non-exhaustive list of relevant and existing **contract terms** inserted by State agencies to support human rights in government procurement:

1. The Prevention and Combating of Corrupt Activities Act 12 of 2004:
 - a. In 2004, this was introduced to provide for the strengthening of measures to prevent and combat corruption and corrupt activities and to provide for investigative measures in respect to corruption and related activities.¹⁶⁴ It also establishes and endorses a Registrar in order to place certain restrictions on persons and enterprises convicted of corrupt activities relating to tenders and contracts.¹⁶⁵
 - b. The Act further provides for the placement of duty on certain persons holding a position of authority to report certain corrupt transaction and to provide extra territorial jurisdiction in respect to offences of corruption and offences relating to corrupt activities and matters related therewith.¹⁶⁶

The sixth indicator and scoping questions address whether the State has information systems to **audit and monitor** contractors to ensure human rights are respected in federal procurement. The seventh indicator and scoping questions consider **enforcement of contract terms and corrective action** imposed by State agencies to provide for due diligence in federal procurement. Contract terms are meaningless if States do not monitor their contractors' behavior and correct behavior that runs afoul of the contract.

Below is a non-exhaustive list of relevant and existing information systems to **audit and monitor** and then **enforce and correct** contractor compliance with human rights obligations:

1. The Prevention and Combating of Trafficking in Persons Act of 2013:
 - a. The South African government has recently increased its focus on trafficking and has strengthened business regulations accordingly. In 2013, the National Assembly passed the Prevention and Combating Trafficking in Person Act of 2013. This Act gives effect to South Africa's obligations regarding trafficking of persons in terms of international commitments through multilateral and bilateral agreements and treaties.¹⁶⁷

- b. Among other measures, the Act seeks to provide for offence of trafficking in persons and other related offences related therewith. It directs State departments and agencies to establish partnerships with private sector to combat trafficking and ensure that corporate actions do not support it.¹⁶⁸
- c. The Act also provides measures for protecting and supporting victims of trafficking in persons in order to provide for the coordinated efforts in the operationalization and application of the Act.¹⁶⁹
- 2. The Prevention and Combating of Corrupt Activities Act 12 of 2004:
 - a. In 2004, this was introduced to provide for the strengthening of measures to prevent and combat corruption and corrupt activities and to provide for investigative measures in respect to corruption and related activities.¹⁷⁰ It also establishes and endorses a Registrar in order to place certain restrictions on persons and enterprises convicted of corrupt activities relating to tenders and contracts.¹⁷¹
The Act further provides for the placement of duty on certain persons holding a position of authority to report certain corrupt transaction and to provide extra territorial jurisdiction in respect to offences of corruption and offences relating to corrupt activities and matters related therewith.¹⁷²

Gaps

Although the South African government has adopted measures discussed under “implementation status” that set out the expectation that contractors will respect human rights in their operations, there are gaps in these measures.

Below is a brief explanation of the gaps in South African government activities’ **plans for procurement needs and risks**:

- 1. The Promotion of Equality and Prevention of Unfair Discrimination Act of 2000:
 - a. As mentioned previously, the Act does not explicitly provide for the freedom of association (e.g., the right to bargain collectively), freedom of expression, the right to dignity, the right to privacy, or a prohibition on torture.
 - b. Though many human rights are protected by the Constitution, criminal law, and labor laws, if a contractor sources production through low wage labor abroad, which frequently occurs in a system of lowest price competition, federal procurement standards do not hold corporations accountable.
 - c. Additionally, procurement officers have limited flexibility and discretion to identify or take steps to address possible risks and the Act provides scanty guidance to agencies that would prefer to avoid contractors who source production to another country and then fail to pay minimum wage in that country.¹⁷³

Below is a brief explanation of the gaps in South African government activities in **providing notice during bid solicitation**:

- 1. Providing Notice During Bid Solicitation – General Procurement Guidelines:

- a. The guidelines require departments and agencies to notify bidders about compliance requirements and require special procedures for bidders in certain sectors with higher risk of human rights violations. These are important steps; however, these regulations leave gaps in supply chains.¹⁷⁴
- b. To remedy this gap, departments and agencies could use the Department of Labor's notice regarding risk of forced child labor as a model to protect other human rights.

Below is a brief explanation of the gaps in South African government activities in **screening and selection, award stage, and contract terms**:

1. The Prevention and Combating of Corrupt Activities Act 12 of 2004:
 - a. Even though this act is the government's major policy and law that regulates public corruption and corrupt activities, it fails to address critical human rights concerns that arise out of corrupt practices.¹⁷⁵
2. The United Nations Global Compact:
 - a. In partnership with the South African Human Rights Commission and business enterprises operating in South Africa, UNGC provide principles and criteria that enterprises can use to evaluate a prospective contractor's capacity to comply with human rights standards, including a contractor's capacity to disclose the supply chain, identify risks of harm to workers and communities, identify applicable domestic laws and standards, implement a plan to correct past violations and prevent future ones, and provide appropriate remedies if their supply chain causes harm.¹⁷⁶
 - b. These criteria should be adopted and implemented by agencies in their screening and selection processes. A purchasing agency could allocate points based on the quality of a competitor's compliance plan for protecting human rights, which could then be integrated into the final evaluation of the award stage.
 - c. For more robust protection, the department or agency could instead require that the winning bidder establish a clean supply chain, evaluated with compliances plans similar to those used to control trafficking. Alternately, agencies could require bidders to qualify for pre-award clearance for capacity to protect human rights, similar to that used to prove capacity to prohibit discrimination.
 - d. However, any of these approaches would require the purchasing agency to have authority to require compliance with the human right at risk, which would be difficult to implement under the current limitations of the Preferential Procurement Policy Framework Act.
3. The Promotion and Protection of Investment Bill of 2013:
 - a. The Bill appears to be moving in the direction of requiring due diligence by contractors, toward one of the clearly stated goals of the UNGPs. Unfortunately, the human rights provisions in the Bill present major gaps.¹⁷⁷ A major recurring gap is that most of the rights are not mentioned but only refers to the Bill of Rights and the Constitution.
4. The Preferential Procurement Policy Framework Act 5 of 2000:
 - a. While the Act's proposed rule to require contractors to provide compliance plans would apply to both supplies and services, it does not generally applies to all commercial activities.¹⁷⁸ This exclusion is a significant gap, particularly because it denies contract

officers authority to request a compliance plan even when the commercial product is on the Department of Labor's list of prohibited activities made with forced child labor or when there is evidence that a principal good being purchased was produced with forced labor or trafficking.¹⁷⁹

- b. Even at the fabrication and finishing stages of production, contractors supplying goods have denied any knowledge of violations, but lack capacity to manage their own supply chain.
- c. At this stage, the Act could authorize agencies to insert contract clauses that require supply chain transparency and compliance with domestic laws in the country. It could also authorize departments and agencies to incorporate contractors' assurances or compliance plans as contract obligations. There appears to be a lack of transparency in agency decision-making processes, and at present no established policy of human rights integration into contracts or the training of contracting officers.

Below is a brief explanation of the gaps in the South African government's activities in **auditing and monitoring**, as well as **enforcement of contract terms and corrective action**:

1. Contract Management Guide (CMG):

- a. In general, the CMG's procurement rules were not designed to protect human rights or provide relief to victims, but instead to enable the government to enforce its contracts and protect taxpayer money. The CMG relies on prosecutors, enforcement agencies, and courts that can award damage for negligence to respond if a contractor violates the law or hurts people.¹⁸⁰ It should provide its own accountability mechanism.
- b. The CMG provides that due diligence is a defense in a proceeding for suspension or debarment.¹⁸¹ It would be helpful to take this one step further by naming due diligence not only as a defense, but also an effective remedy. This would allow the agency to implement a contract-specific approach to due diligence, rather than having to resort to termination.
- c. The CMG's provisions regarding full or partial termination are specific to types of contracts. On the one hand, this flexibility would permit an agency to terminate a contract for violations of human rights compliance, certification, or due diligence, but only if those standards are explicit obligations in the contract. On the other hand, the CMG does not provide any consistent guidance on full or partial termination, leaving it to individual agencies to be proactive on human rights enforcement.
- d. The CMG's mid-range remedies are generally available for violation of contract performance obligations, but not all of these remedies are available for violation of human rights standards.¹⁸² Remedies also vary from one human right to the next. The CMG should clarify that mid-range remedies apply to all contract obligations, including compliance with human rights and domestic laws that implement those rights.

6.2. Other Commercial Activities

Has the State taken measures to promote awareness of and respect for human rights by other enterprises with which the State conducts commercial activities?

Indicators

Scoping Questions

Business Partnerships	Does the State take measures to promote respect for human rights among other businesses with which it engages in commercial relationships, such as through business partnerships for economic development and innovation (for example, growth funds, or strategic support for innovation in certain sectors, such as green energy or medical technology)?
Implementation Status	
<p>The indicator and scoping question consider measures the State takes to promote respect for human rights in its business partnerships for economic development and innovation. Any time a State controls, supports, or partners with the private sector, it must be sure to honor its commitments to human rights.</p> <p>Below is a non-exhaustive list of relevant and existing measures to protect human rights in federal business partnerships:</p> <ol style="list-style-type: none"> 1. The Public Investment Corporation Act 23 of 2004: <ol style="list-style-type: none"> a. This act grants the president authority to establish policies to advance the economy or efficiency of public investment, spending, and procurement.¹⁸³ This authority complements the Preferential Procurement Policy Framework and the Procurement Policy Guidelines which set compliance with domestic labor laws as a basic standard of integrity, business ethics, and mutual respect as well as the elimination of bias and favoritism. b. The Act also provides for the establishment of a juristic body known as the Public Investment Corporation to provide for the investment by certain money received or held by, for or on behalf of the government and other bodies and matters related therewith.¹⁸⁴ 2. The Promotion and Protection of Investment Bill of 2013: <ol style="list-style-type: none"> a. This bill would provide for the protection of investment and achieve a balance of rights and obligations that apply to all investors, as well as to provide for matters connected therewith.¹⁸⁵ b. It recognizes the need to protect and promote the rights enshrined in the Bill of Rights and the Constitution and the importance of job creation and economic growth toward enhancing the well-being of citizens.¹⁸⁶ Therefore, it seeks to maintain an open and transparent environment for investments on non-discriminatory and mutually respectful bases. c. In its guidance, the Bill makes clear that it will hold banks responsible for failing to conduct due diligence on their customers and may even hold intermediary banks responsible for failing to block transactions with blocked persons.¹⁸⁷ <p>For a discussion of other business partnerships with the South African government, see GPs 4.1 and 4.2.</p>	

Gaps

Although the South African government has adopted measures promoting awareness of and respect for human rights through its business partnerships, there are gaps in these measures.

Below is a brief explanation of some of the gaps in South African government activities for **business partnerships**:

1. The Public Investment Corporation Act 23 of 2004:
 - a. The Act does not incorporate the important human rights and labor standards present in most parliamentary legislations and in the Bill of Rights; it also possesses many of the same gaps in protection explored throughout GPs 4, 5, and 6.
 - b. The Act does add to the Preferential Procurement Policy Framework Act, enhancing the government's ability to monitor and enforce its protections, but such a large spending bill will inevitably have wide-ranging human rights implications. Without robust protection for labor standards, supply chain management, and procurement standards, at least some of that spending is sure to support human rights violations that go against national ideals.

GUIDING PRINCIPLE 7

Because the risk of gross human rights abuses is heightened in conflict-affected areas, States should help ensure that business enterprises operating in those contexts are not involved with such abuses, including by:

- (a) Engaging at the earliest stage possible with business enterprises to help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships;
- (b) Providing adequate assistance to business enterprises to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence;
- (c) Denying access to public support and services for a business enterprise that is involved with gross human rights abuses and refuses to cooperate in addressing the situation;
- (d) Ensuring that their current practices, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses.

Commentary to Guiding Principle 7

Some of the worst human rights abuses involving business occur amid conflict over the control of territory, resources or a Government itself—where the human rights regime cannot be expected to function as intended. Responsible businesses increasingly seek guidance from States about how to avoid contributing to human rights harm in these difficult contexts. Innovative and practical approaches are needed. In particular, it is important to pay attention to the risk of sexual and gender-based violence, which is especially prevalent during times of conflict.

It is important for all States to address issues early before situations on the ground deteriorate. In conflict-affected areas, the “host” State may be unable to protect human rights adequately due to a lack of effective control. Where transnational corporations are involved, their “home” States therefore have roles to play in assisting both those corporations and host States to ensure that businesses are not involved with human rights abuse, while neighboring States can provide important additional support.

To achieve greater policy coherence and assist business enterprises adequately in such situations, home States should foster closer cooperation among their development assistance agencies, foreign and trade ministries, and export finance institutions in their capitals and within their embassies, as well as between these agencies and host Government actors; develop early-warning indicators to alert Government agencies and business enterprises to problems; and attach appropriate consequences to any failure by enterprises to cooperate in these contexts, including by denying or withdrawing existing public support or services, or where that is not possible, denying their future provision.

States should warn business enterprises of the heightened risk of being involved with gross abuses of human rights in conflict-affected areas. They should review whether their policies, legislation, regulations and enforcement measures effectively address this heightened risk, including through provisions for human rights due diligence by business. Where they identify gaps, States should take appropriate steps to address them. This may include exploring civil, administrative or criminal liability for enterprises domiciled or operating in their territory and/or jurisdiction that

commit or contribute to gross human rights abuses. Moreover, States should consider multilateral approaches to prevent and address such acts, as well as support effective collective initiatives.

All these measures are in addition to States' obligations under international humanitarian law in situations of armed conflict, and under international criminal law.

7.1. Guidance

Does the home State play a role in assisting both corporations and host States to ensure that businesses are not involved with human rights abuse in conflict-affected areas?

Indicators	Scoping Questions
Host State relationship	Does the State seek to ensure that it is informed of the role of corporations headquartered within its jurisdiction in conflict-affected areas? Does the home State engage with the host State in ensuring that businesses are respecting human rights?
Business Guidance	Does the State provide guidance for companies operating in conflict-affected areas on what specific human rights issues that the companies should be aware of and pay specific attention to in their due diligence process (such as gender and sexual violence, discrimination, and contributing to conflict through finance)?

Implementation Status

The indicators and scoping questions above inquire about measures the South African government is taking to ensure that business enterprises operating in conflict-affected areas are not involved with human rights abuses. This section addresses the South African government's interactions with host States, as well as its guidance to businesses in conflict-affected areas.

Communication with host States and guidance to businesses operating in conflict-affected areas are important to ensure that South African-based companies are respecting human rights, which are highly vulnerable to abuse during times of conflict.

The first indicator and scoping question look at the host State relationship, specifically, whether the South African government engages with the host State and seeks to be informed about the activities of South African-headquartered companies in the host State. Host State engagement allows the South African government to take appropriate action to protect human rights when South African-based companies are engaging or contributing to human rights abuses.

Regarding the **host State relationship**, South African works with local embassies on business, mainly trade and investments; however, it is unclear to what extent this coordination focuses on business and human rights. Other embassies have units on human rights but fail to link them explicitly to corporate engagement.

The second indicator and scoping question address the guidance the South African government provides to businesses operating in conflict-affected areas regarding potential human rights abuses. Equipping businesses with knowledge about potential issues in conflict-affected areas helps to safeguard human rights, as businesses can work this knowledge into their business plans and risk assessments.

Measures the South African Government has developed to help **guide businesses** to respect human rights in conflict-affected areas include the following:

1. The Department of Treasury coordinates the South African government's efforts to assist and support South African businesses operating internationally.¹⁸⁸ It provides guidance to companies as well as problem-solving assistance, including encouraging corporate social responsibility and informing companies about corruption and bribery.¹⁸⁹
2. The Department of International Relations and Cooperation also coordinates with embassies and consulates, which are all staffed with Commercial Officers versed on business concerns within their respective countries.¹⁹⁰
3. As required under Section 6 of the International Trade Administration Act, the International Trade Administration Commission of South Africa publishes a list of "all known conflict countries and fragile States worldwide to assist businesses on how to engage in these areas."¹⁹¹

Gaps

Gaps remain in the **guidance** the South African government provides regarding businesses operating in conflict-areas.

Publicly available guidance focuses heavily on conflict minerals. Despite strengths in target areas like conflict minerals, there appears to be no single overarching law, and therefore no overarching policy or guidance, covering all human rights abuses by all businesses in all conflict zones.

The South African Department of Treasury publishes country-specific commercial guides that provide information relevant to conducting business in each country.¹⁹² However, this report does not contain a significant focus on the risk of human rights violations posed by corporate involvement, particularly in conflict-affected areas.

7.2. International Frameworks and Initiatives

Has the State officially supported or implemented international frameworks and initiatives on the private sector role in conflict-affected areas?

Indicators

Scoping Questions

Promotion of Initiatives	Does the State participate in and/or promote relevant initiatives (for example, the Voluntary Principles or the International Code of Conduct for Private Security Service Providers)?
Implementation Status	
<p>This section asks about the South African government's support and implementation of international frameworks and initiatives on the private sector role in conflict-affected areas.</p> <p>The indicator and scoping question request information about whether the South African government has participated in and promoted relevant initiatives, such as the Voluntary Principles on Security and Human Rights (Voluntary Principles) or the International Code of Conduct for Private Security Service Providers. South African participation in these measures promotes the protection of human rights worldwide in conflict-affected areas. It communicates South Africa's commitment to respect human rights in business operations and its encouragement to South African-based businesses to do the same.</p> <p>South Africa is participating in international efforts to further address corporate violations in conflict zones, including international efforts to convene States, as well as specifically targeted initiatives. South Africa has promoted the following initiatives:</p> <ol style="list-style-type: none"> 1. South Africa is participating in the OECD and World Bank work on governance zones and fragile States, as well as the Kimberley Process on conflict diamonds.¹⁹³ Further, in 2012 South Africa recognized the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals.¹⁹⁴ 2. South Africa joined the International Code of Conduct for Private Security Providers in 2013. South Africa is also a founding member of the International Code of Conduct for Private Security Providers Association, for which it has expressed strong support.¹⁹⁵ <p>South Africa has also signed the Montreux Document on Private Military and Security Companies, a multilateral initiative proposed by the International Committee of the Red Cross and the government of Switzerland that was finalized in 2008.¹⁹⁶</p>	
Gaps	
<p>International frameworks and initiatives on the private sector role in conflict-affected areas are currently being implemented and weaknesses and gaps are surfacing. For example, civil society has questioned the effectiveness of the Voluntary Principles; Global Witness reported on the Voluntary Principles' implementation in Nigeria, concluding that there were significant weaknesses with the initiative. Academics and civil society have also criticized the Kimberly Process for failing to evolve and adequately address the problem of conflict minerals.¹⁹⁷</p> <p>The South African government also needs to coordinate policies regarding international frameworks and initiatives. For example, the policies of the South Africa Police Service and the Department of Home Affairs differ regarding the International Code of Conduct for Private Security Service Providers.</p>	

There are also additional **initiatives** that the South African government should consider promoting, including the Tourism Child-Protection Code of Conduct. The Code protects against the sexual exploitation of children, an issue of heightened concern in conflict-affected areas. It is comprised of five voluntary guidelines for businesses and requires annual reporting on the implementation of the guidelines.

7.3. Supportive Measures

Does the State investigate company activities in conflict-affected areas, act upon these investigations, and provide redress?

Indicators	Scoping Questions
Investigative Measures	Does the State have a procedure for investigating company activities in conflict-affected areas (for example, through the appointment of a mission that may report to the Parliament or asking the local embassy to investigate in the host State and report to relevant authorities in the home State)?
Follow-Up and Remedial Measures	Does the State have a procedure for follow-up on issues identified through the investigative process (for example, through the denial or withdrawal of existing public support or services to business enterprises that are involved in human rights abuse or other crimes)? Has the State developed mechanisms of extraterritorial criminal liability? Is it possible for the State to impose sanctions on persons and entities for example, by seizing equipment or freezing assets?
Implementation Status	
<p>This section inquiries about supportive measures taken by the South African government with regard to company activities in conflict-affected areas, specifically looking at whether the South African government conducts investigations and takes follow-up and remedial measures to address any adverse findings. The potential to be investigated and punished is a powerful deterrent of misconduct. Therefore, it is important that South African investigatory and remedial powers over corporations are meaningfully exercised, so that corporate involvement in human rights abuses in conflict-affected areas is curbed.</p> <p>The first indicator and scoping question request information about whether the South African government has procedures for investigating company activities in conflict-affected areas. Investigations give teeth to the laws and regulations governing corporate behavior and can help ensure that human rights are being respected by corporations in conflict-affected areas.</p> <p>Investigative measures that the South African takes include the following:</p>	

1. South Africa does not appear to have country offices devoted to investigating business and human rights issues; regulations tend to require self-reporting. South Africa does, however, appear to work with embassies on business and human rights issues.
2. In certain situations, the Department of Trade and Industry and the Department of Treasury can exercise jurisdiction over companies conducting operations internationally.¹⁹⁸ This would include conduct occurring in conflict-affected areas. Also, the Department of Treasury and Department of International Relations and Cooperation investigate violations of economic sanctions and, where appropriate, coordinate their investigative and enforcement activities with foreign regulators and/or law enforcement agencies.

The second indicator and scoping question request information about whether the South African government has follow-up procedures for issues identified through the investigative process, discussed above. Having an effective remedy is a critical component of addressing human rights abuses. When investigations indicate there have been violations, the South African government should be able to follow up and hold corporations accountable.

South Africa takes the following **follow-up and remedial measures**:

The South African government sometimes employs economic sanctions as a foreign policy tool, including when it feels that human rights violations are at issue.¹⁹⁹ These sanctions necessarily bar business activity with or in target nations; however, these efforts are aimed at foreign governments, not corporations.

Gaps

The South African government would do well to expand its current international engagement in the area of business and human rights to develop a comprehensive approach to engaging with host and peer nations on a practical level, including a comprehensive approach to the work of South African embassies. Gaps in regulation and liability may also be contributing to weak predictability and challenges in enforcement.

7.4. Gross Human Rights Abuses

Has the State put in place measures for addressing the risk of business involvement in gross human rights abuses?

Indicators	Scoping Questions
Early-Warning Procedures	Has the State put in place procedures to warn business enterprises of the heightened risk of being involved with gross abuses of human rights in conflict-affected areas?

Cross-Unit Cooperation	Has the State put in place efforts with the aim of fostering closer cooperation among its development assistance agencies, foreign and trade ministries, and export finance institutions in its capitals and within its embassies, as well as between these agencies and host State actors?
Civil and/or Criminal Liability	Has the State introduced civil or criminal liability for enterprises domiciled or operating in their territory and/or jurisdiction that commit or contribute to gross human rights abuses, including abuses outside of its territorial jurisdiction, as permitted by the UNGPs and international human rights law?
Multilateral Approach	Has the State engaged in multilateral approaches to prevent and address acts of gross human rights abuses? Does the State accept the jurisdiction of the International Criminal Court (ICC)?
Implementation Status	
<p>In order to examine the measures the South African government takes to address the risk that businesses may be involved in gross human rights abuses, this section looks at early-warning procedures, cross-unit cooperation, civil and criminal liability, and multilateral approaches taken by the government with regard to business involvement in gross human rights abuses. As history has shown, gross human rights abuse requires multifaceted approaches. It is important that the South African government work with other entities and South African-based businesses to identify the risk of gross human rights abuse, including possible corporate involvement.</p> <p>The first indicator and scoping question request information about whether the South African government has put in place procedures to warn business enterprises of the heightened risk of being involved with gross abuses of human rights in conflict-affected areas. Early warning would enable businesses to take immediate steps to ensure that they are not contributing to any abuses, thereby minimizing potential abuse.</p> <p>Early warning procedures worldwide are still under development, and are focused on conflict prevention rather than conflict as it relates to business. The South African Department of International Relations and Cooperation issues up to date conflict warnings, but they are targeted toward travel rather than business.</p> <p>The fourth indicator and scoping question request information about whether the South African government has engaged in multilateral approaches to prevent and address acts of gross human rights abuses. To meaningfully address grave human rights abuse, the expertise and capacities of different entities must be pooled and joint efforts undertaken.</p> <p>Regarding the South African governments multilateral approach:</p>	

1. The South African government supports international criminal justice, including the UN War Crimes Commission and is a State party to the Rome Statute.	
Gaps	
<p>Gaps remain in the South African government's approach to ensuring corporations are not involved with the commission of gross human rights abuses. Early-warning procedures to alert businesses to these abuses need to be developed and cross-unit cooperation needs to be clarified and enhanced. The South African government does not have a permanent coordinating body that addresses human rights issues.</p> <p>Further, the South African government should consider bolstering civil and criminal liability for companies who are involved in human rights abuses.</p> <p>For additional discussion of existing remedies and gaps, see The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business, a 2013 report published by the International Corporate Accountability Roundtable (ICAR).</p>	
7.9. Role of Export Credit Agencies and Insurance Agencies Does the State ensure that Export Credit Agencies and Insurance Agencies do not contribute or financially benefit from negative human rights impacts and abuse?	
Indicators	Scoping Questions
Special Measures	Has the State put in place special measures to ensure that export credit agencies and insurance companies are not contributing to, or financially benefitting from, negative human rights impacts and abuse? Are there rules and incentives for such institutions to take human rights impacts into consideration in their financing and investment procedures?
Implementation Status	
<p>The indicator and scoping question request information about whether the South African government has put in place special measures to ensure that export credit agencies and insurance companies are not contributing to, or financially benefitting from, negative human rights impacts and abuse. An individual's human rights should not suffer at the expense of projects backed by export credit or insurance agencies. Rather, export credit and insurance agencies should ensure that companies are taking appropriate measures to protect communities from abuse.</p> <p>The special measures the South African government as put in place includes the following:</p>	
1. The International Trade Administration Act 71 of 2002:	

- a. Section 6 of the Act establishes the International Trade Administration Commission (ITAC) with the mandate to enforce and administer imports and exports control measures in South Africa.²⁰⁰ The ITAC collaborates with other government departments and agencies, such as the Department of Environmental Affairs, Mineral Resources, the National Regulator for Compulsory Specifications, and the Department of International Relations and Cooperation.²⁰¹ The Act is silent on human rights but stipulates that under extreme circumstances, such as grievous human rights violations, credit can be denied. While the Commission does Human Rights due diligence, little information is publicly available about the process.

The South African government participates in the OECD, which in 2012 revised its Recommendation on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence, specifically including text on human rights. However, these recommendations are nonbinding.²⁰²

Gaps

There is still progress to be made on integrating human rights considerations into **export credit and investment guarantee agencies'** policies. For example, more robust tools should be developed. South Africa's ECA assesses projects in terms of their coherence with the State's international policies, such as the promotion of sustainable development, human rights and good governance. However, these criteria are not assessed through specific questionnaires administered to exporters or investors applying for insurance. An independent mechanism should be developed where project-affected individuals can file grievances.

GUIDING PRINCIPLE 8	
States should ensure that governmental departments, agencies and other State-based institutions that shape business practices are aware of and observe the State's human rights obligations when fulfilling their respective mandates, including by providing them with relevant information, training and support.	
Commentary to Guiding Principle 8	
<p>There is no inevitable tension between States' human rights obligations and the laws and policies they put in place that shape business practices. However, at times, States have to make difficult balancing decisions to reconcile different societal needs. To achieve the appropriate balance, States need to take a broad approach to managing the business and human rights agenda, aimed at ensuring both vertical and horizontal domestic policy coherence.</p> <p>Vertical policy coherence entails States having the necessary policies, laws and processes to implement their international human rights law obligations. Horizontal policy coherence means supporting and equipping departments and agencies, at both the national and subnational levels, that shape business practices—including those responsible for corporate law and securities regulation, investment, export credit and insurance, trade and labor—to be informed of and act in a manner compatible with the Governments' human rights obligations.</p>	
8.1. Policy Coherence	
Have efforts been made within the State to support knowledge and understanding for human rights and business and the State duty?	
Indicators	Scoping Questions
Clear Commitment	Has the State developed a firm written commitment to business and human rights, and has this commitment been communicated to governmental departments? Further, does this commitment help to clarify the role of different departments (for example, labor, business, development, foreign affairs, finance, or justice)?
Roles and Responsibilities	Has the State developed a clear division of responsibilities to help coordinate human rights and business issues between and across different government agencies and departments?
Resources	Has the State provided the responsible entity or office with adequate resources in terms of economic funding and political backing, in order for it to work actively in contributing to meeting the duty of the State

	to protect human rights within individual areas of responsibility and expertise?
Guidance and Training	Has the State developed guidance material and training to help clarify the roles of different departments in promoting and protecting human rights with regard to the role of business? Does this guidance include specific information on protection of human rights and how this relates to international and regional obligations and commitments (for example, UN, OECD, and regional obligations and commitments)? Does this guidance include specific information on the protection of human rights in trade, with an emphasis on the role of regional bodies and international organizations (for example, the WTO, IFIs (WB, IFC, etc.), and regional IFIs (EBRD, EIB, etc.))? Further, does the guidance provide information on the roles and responsibilities across ministries or agencies (for example, enterprise, labor, development, foreign affairs, agriculture, environment and climate change, financial sector, health, information society policy, and national financial institutions and funds)?
Implementation Status	
<p>The South African Government, in partnership with the private sector, has established development initiatives that provide opportunities for companies to contribute both to human development and the protection of human rights. These commitments are realized under the supervision of the South African Human Rights Commission and the government entities according to the sector. These commitments include:</p> <ol style="list-style-type: none"> 1. The Business and Human Rights Country guide: <ol style="list-style-type: none"> a. In 2015, the government through the South African Human Rights Commission with the Danish Institute of Human Rights published a Business and Human Rights Country Guide for South Africa. This document provides guidance to companies on how they can promote and respect human rights in South Africa. The Country Guide is an essential instrument in policing business compliance with human rights and empowers civil society to be able to measure progress and regression in sectors such as mining, safety and security, and conditions of employment. 2. The Framework Agreement for a Sustainable Mining Industry: <ol style="list-style-type: none"> a. In July 2013, the government, trade unions and federations, the Chamber of Mines, and the South African Mining Development Association signed the agreement, which aims to increase the sustainability of the mining sector. The agreement's objectives 	

include: ensuring the rule of law and peace and stability; improved working conditions; and the provision of proper and sustainable human settlement infrastructure in the Rustenburg Platinum belt.

3. **Broad-Based Black Economic Empowerment (B-BBEE):**

- a. South Africa's first democratic government was elected in 1994 with a clear mandate to redress the inequalities of the past in every sphere – political, social, and economic. Since then, government has embarked on a comprehensive program to provide a legislative framework for the transformation of South Africa's economy. In 2003, the B-BBEE was published.
- b. Its aims to ensure that the economy is structured and transformed to enable the meaningful participation of the majority of South Africa's citizens and to further create capacity within the broader economic landscape at all levels through skills development, employment equity, socio economic development, preferential procurement, enterprise development (especially small and medium enterprises), entry of black entrepreneurs into the mainstream of economic activity, and the advancement of co-operatives. B-BBEE needs to be implemented in an effective and sustainable manner in order to unleash and harness the full potential of black people and to foster the objectives of a pro-employment developmental growth path.²⁰³

4. **The National Development Plan 2030:**

- a. The plan aims to reduce the unemployment rate from 25 percent to 6 percent by 2030 and to increase labor force participation, the employment rate, and income among the bottom 40 percent of the population. It also aims to reduce poverty and inequality.²⁰⁴

5. **Department of Labor's Strategic Plan:**

- a. In order to promote health and safety in the workplace and reduce accidents in the agriculture, construction, chemical, and iron and steel industries, the South African Department of Labor has launched the Department of Labor's Strategic Plan. It focuses on awareness raising of occupational health and safety issues among employers and employees.²⁰⁵

6. **ILO Decent Work Country Program 2010-2014:** The program focuses on creating jobs, especially among women, youth, and persons with disabilities. The strategic vision for the program seeks to match South Africa's needs and priorities with UNDP's capabilities, in pursuit of a more inclusive society characterized by dismissing disparities and an increasing circle of prosperity.²⁰⁶

The second indicator and scoping question request information about whether the South African government has developed a clear division of roles and responsibilities to help coordinate human rights and business issues between and across different government agencies and departments.

Regarding the Country Guide, the South African Human Rights Commission intends to host training workshops in assisting government and concerned stakeholders on how to implement the Country Guide.

The South African government has distributed the roles and responsibilities between agencies and departments with regard to business and human rights according to the field of activity.

For the **trade unions sector**, the responsible agencies are the National Economic Development and Labor Council (NEDLAC), the Department of Labor, the Department of Mineral Resources, and the Employment Conditions Commission for Conciliation.

For the **Labor sector**, the responsible agencies are the Department of Labour, the Labour Court, the South African Social Security Agency, and the Commission for Conciliation, Mediation, and Arbitration.

Moreover, to promote and strengthen gender equality based on a culture of human rights, the South African government has put in place the Commission on Gender Equality to advance gender equality in all spheres of society and make recommendations on any legislation affecting the status of women.

Gaps

Despite the conversations around business and human rights within the South African government, there is a grave concern about the impunity with which sometimes companies continue to operate.

The lack of access to effective remedies as stated in section 26.2, a lack of bargaining power in contractual negotiations, and unlawful use of force by State and non-State actors reinforce this situation of impunity.

There is a need for legal reforms that strengthen accountability and the remedies pillar of the UNGPs to overcome obstacles to justice discussed in section 26.2. To remedy this situation of impunity, it is also particularly important that States prevent companies headquartered within their borders from contributing to human rights violations in the countries in which they do business, by writing regulations and creating laws that provide for transnational litigation in case of lacking or difficulties in accessing justice.

GUIDING PRINCIPLE 9

States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts.

Commentary to Guiding Principle 9

Economic agreements concluded by States, either with other States or with business enterprises—such as bilateral investment treaties, free-trade agreements or contracts for investment projects—creates economic opportunities for States. But they can also affect the domestic policy space of Governments. For example, the terms of international investment agreements may constrain States from fully implementing new human rights legislation, or put them at risk of binding international arbitration if they do so. Therefore, States should ensure that they retain adequate policy and regulatory ability to protect human rights under the terms of such agreements, while providing the necessary investor protection.

9.1. Bilateral and Multilateral Investment Agreements and Arbitration of Disputes

Has the State put in place policies, guidance, monitoring, and reporting for relevant ministries or agencies with regard to the conclusion of bilateral and multilateral investment agreements and with regard to the arbitration of disputes?

Indicators	Scoping Questions
Human Rights Provisions in IIAs and BITs	Has the State worked at promoting the inclusion of specific human rights provisions in International Investment Agreements (IIAs) and Bilateral Investment Treaties (BITs)?
Inclusion of Social Issues in IIAs and BITs	Has the State worked at promoting the inclusion of social issues, such as the environment, labor rights, or social rights, in International Investment Agreements and Bilateral Investment Treaties?
Stabilization Clauses	Has the State put in place measures to ensure that stabilization clauses do not limit the host government's ability to meet its human rights obligations?

Implementation Status

In order to assess whether the South African government has put in place policies, guidance, monitoring, and reporting for relevant departments or agencies with regard to the conclusion of bilateral and multilateral investment agreements and the arbitration of disputes, this section presents

information on the inclusion of human rights provisions, social issues, and stabilization clauses in International Investment Agreements (IIAs) and Bilateral Investment Treaties (BITs).

The first and second indicator and scoping question request information about whether the South African government has promoted the inclusion of human rights provisions and social issues in IIAs and BITs.

In 2013, the South African government unilaterally cancelled several BITs, and soon thereafter started negotiations around a new bill that would regulate South African investments. The bill, called the Protection of Investment Bill, was passed by the South African Parliament towards the end of 2015. It is aimed at replacing several BITs, mainly with Western European countries, that will most likely not be renewed. The bill must now be approved by the National Assembly.

The inclusion of **human rights provisions and social issues in IIAs and BITs** have been promoted by the South African government in the following ways:

1. There is limited access to information on treaties, especially human rights inclusion in IIAs and BITs. However, there is evidence from the treaties themselves as well as from how treaty disputes are handled.²⁰⁷ This shows that the South African government has been mindful of the need to include civil and human rights provisions in treaties. Practically, there are gaps and inadequacies in the approaches that the South African government has employed and therefore more rigorous and systematic approaches to integrate human rights in these instruments are required.
2. International Arbitration bodies are increasingly turning to international human rights agreements in interpreting investment and trade provisions, and what protections are owed to parties.²⁰⁸
3. Free Trade Agreement between the Members of the European Free Trade Association (EFTA) States and the Southern African Customs Union (SACU) States:
 - a. The EFTA and SACU Free Trade Agreement has limited human rights provisions but does affirm a commitment to the principles and objectives set out in the UN Charter and the Universal Declaration of Human Rights.²⁰⁹ In this regards, it frequently make reference to the socio-economic rights of the citizens of the respective countries. This agreement more openly seeks to promote investment and trade and therefore sustainable development by, for example, substantially increasing investment opportunities in the free trade area, as well as contributing to the harmonious development and expansion of world trade by the removal of barriers to trade.²¹⁰ It also provides for adequate and effective protection of intellectual property rights.²¹¹ Labor rights are less protected in the agreement with State parties retaining to their rights to set their own labor standards.
4. United States-Southern African Customs Union (SACU) Free Trade Agreement:
 - a. As stated by Langton:

*Negotiations to launch a Free Trade Agreement (FTA) between the United States and the five members of the Southern African Customs Union (SACU) (Botswana, Lesotho, Namibia, South Africa, and Swaziland) began on June 3, 2003. The FTA would eliminate tariffs over time, reduce or eliminate non-tariff barriers, liberalize service trade, protect intellectual property rights, and provide technical assistance to help SACU nations achieve sustainable economic growth through international trade and investment. Some U.S. civil society organizations are concerned that a SACU FTA could have negative consequences for poor Southern Africans, citing potential adjustment costs for import-competing farmers, poor enforcement of labor rights, privatization of utilities, and increased restrictions on importing generic drugs to treat HIV/AIDS. The United States and members of SACU have both expressed concerns on labor rights and environmental regulations issues.*²¹²

5. The Trade, Development and Cooperation Agreement (TDCA):

- a. This agreement regulates the trade between South Africa and the European Union (EU). The EU is the main trading partner of South Africa. In 2008, about 36 per cent of South Africa's agricultural products were exported to the EU.²¹³ Part of the agreement, which entered into force on 1 January 2000, regulates agricultural trade between South Africa and the EU. The agricultural aspect of the TDCA involves various degrees of trade liberalization, ranging from immediate liberalization to transitional liberalization over longer periods of time, up to 10 years by the EU and 12 years by South Africa.²¹⁴ During the negotiation, the EU publicly stated that its negotiating objectives include strengthening human rights such as labor and environmental rights.²¹⁵

6. The SACU-India Preferential Trade Agreement:

- a. The SACU-India Preferential Trade Agreement (PTA) is currently being negotiated under the terms of the enabling clause of the World Trade Organization on 'Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries'.²¹⁶ The PTA will therefore not cover all trade, as FTAs do, but be confined to products (tariff lines) of special interest to the parties.²¹⁷ There have been some demands regarding transparency and protections concerning worker rights, consumer safety, and the environment. According to the Department of Trade and Industry (DTI), South Africa and India are in the process of exchanging tariff requests.²¹⁸

The third indicator and scoping question request information about whether the South African government has put in place measures to ensure that stabilization clauses do not limit the host government's ability to meet its human rights obligations. South African companies should not seek to limit their responsibility and State responsiveness to human rights through stabilization clauses in contracts.

Human rights organizations have criticized the use of **stabilization clauses** to limit human rights protections.²¹⁹ The South African government has made some effort to limit the use of stabilization clauses.

Gaps

There is still much room for the South African government to improve in promoting the inclusion of **human rights provisions and social issues in IIAs and BITs**. The basic objectives and core principles of BITs enumerated on the Department of Trade and Industry's Bilateral Investment Treaties and Related Agreements website reflect neither a concern for human rights nor social issues.²²⁰ Similarly, with regard to FTAs, the Department of Trade and Industry states that "South Africa as well as other SACU member States and EFTA partners consult on a wide range of issues related to trade and investment. Topics for consultation and possible further cooperation include market access issues, labor, the environment, protection and enforcement of intellectual property rights, and, in appropriate cases, capacity building." There is no explicit reference to human rights beyond the related areas of labor and environment.

The South African government should consider amending its trade and investments treaties or agreements to include additional human rights provisions. Further, lessons can be drawn from criticisms of current and proposed trade agreements. For example, the South African government can reevaluate the controversy surrounding the Trade, Development and Cooperation Agreement (TDCA) and draw lessons from its failures and successes to be applied to future agreements.

TDCA has been heavily criticized, especially with respect to labor. Criticism extends not only to specific provisions or lack thereof, but also to the overall structure and the existence of the agreement itself. Additionally, prominent reports conclude that the treaty created conditions of less, rather than more, accountability for corporations.²²¹ Environmental reports argue that the agreement encouraged the development of industries which have been harmful to the environment, such as specific types of farming and mining.²²² These reports should inform how the South African government evaluates, amends, and concludes future trade agreements. They illuminate the complexity of including human rights in trade agreements, showing that despite stated commitments to standards and provisions for complaints, trade agreements can alter entire structures and balances of power. Such systematic effects may not have been initially visible, but can now be accounted for more carefully.

Potential human rights impacts include limiting freedom of expression and internet users' privacy, wage losses for workers, increasing income inequalities, decreasing access to medicine and medical treatments, inhibiting development of new drugs, and having potentially detrimental effects on the environment. The South African government should consider how these issues can be resolved in further negotiations.

In sum, although this aspect of business and human rights is still developing, it would be helpful for agreements to be even more explicit regarding human rights provisions, including regarding arbitration clauses. It would also help for the South African government to provide both public and private support for such application.

Additionally, Article 28(1) of the SACU-EFTA agreement, referred to in the investment section, could be strengthened. Article 28(1) states: "The Parties shall endeavor to create and maintain a stable and transparent investment framework and shall not impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, or disposal of investments by investors of the other Parties. Parties

shall admit investments by investors of the other Parties in accordance with their laws and regulations.”²²³ The language, “in accordance with their laws and regulations,” weakens the ability of governments to protect investing parties or address their concerns and should be rephrased.²²⁴

Current and future BITS should contain obligations on the part of foreign investors.²²⁵ While the obligations of multinational corporations is still an emerging area in international law, environmental and human rights obligations amongst others have been placed on corporations under the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy of 1977 and the OECD Guidelines for Multinational Enterprises of 1976 (as revised in 2000). Moreover, the UN Global Compact requires multinational companies to commit to ten core principles, which relate to human rights, labor rights, environmental protection, and anti-corruption.

The African Charter on Human and Peoples' Rights (Banjul Charter) must also be taken into account. Articles 27-29 of the Charter place obligations on individuals, not only States, in respect of human rights²²⁶ and Article 21(5) places particular obligations on the South African government to regulate foreign economic exploitation of South African resources as follows: “States parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation, particularly that practiced by international monopolies, so as to enable their peoples to fully benefit from the advantages derived from their national resources.”²²⁷ This would include adverse actions by foreign investors.

9.2. Government Agreements

Has the State put in place policies and guidance for relevant ministries and agencies with regard to the conclusion of government agreements?

Indicators	Scoping Questions
Human Rights in Government Agreements	Does the State take measures to ensure that human rights considerations are made in agreements between the State and corporations? Are such agreements aligned with the UN’s principles for responsible contracts? ²²⁸
The Role of the Home State	How does the home State ensure that companies headquartered within its jurisdiction respect the principles of responsible contracting when those companies enter into agreements with host States?

Implementation Status

In order to assess whether the South African government has put in place policies and guidance for relevant ministries and agencies with regard to the conclusion of government agreements, this section presents information on the consideration of human rights in South African government agreements and the role the South African government plays to ensure South African-based companies respect human rights when contracting with home States.

The first indicator and scoping question request information about whether the South African government has taken measures to ensure that human rights considerations are made in agreements between the South African government and corporations. Contracts entered into by the South African government should adhere to high standards of human rights protection and serve as a model to businesses in their private contracts.

The consideration by the South African government of **human rights in government agreements** is addressed below:

1. Departmental policies sets out recruitment and labor practices for South African government contracts, including recruitment, wages, hours, leave, overtime, housing, access to identification documents, and return travel. Policy varies across departments.
2. The South African government has taken efforts to ensure that business and human rights are considered in its contracts. In 2015, the South African Human Rights Commission hosted a workshop on business and human rights to identify best practices and challenges. The SAHRC also launched the Business and Human Rights Guide to sensitize businesses on the shortcomings of business and human rights in the country.²²⁹

The second indicator and scoping question request information about whether the home State ensures that companies headquartered within its jurisdiction respect the principles of responsible contracting when those companies enter into agreements with host States. Doing so expresses the South African government's commitment to respecting business and human rights to other countries, and encourages additional respect for human rights in the corporate context.

The South African government's **role as the home State** of companies headquartered within its jurisdiction is as follows:

1. South African companies doing business abroad remain covered by a large portion of South African laws. However, these laws, such as labor and anti-discrimination laws, apply only to South African citizens and would not apply to foreign nationals.

Additionally, complicity for human rights violations is just beginning to be developed internationally.²³⁰ After the Universal Periodic Review Process of 2012, the South African government has also established working groups in five priority areas to oversee implementation, including a group on Treaties and International Human Rights Mechanisms.²³¹ Although there is much development to be done, these are significant first steps toward unifying government policy and resources in an accessible format for corporations and individuals.

Gaps

Gaps exist in the South African government's policy regarding **government agreements** where it concerns business and human rights. As explained by Peacock and Ambrose: 'In 2007, investors from Luxembourg and Italy brought a claim against South Africa under ICSID, arguing that South Africa's Mining and Petroleum Resources Development Act (MPRDA) contained provisions that expropriated their mineral rights. The MPRDA forms part of South Africa's Black Economic Empowerment (BEE) Policy (an affirmative action policy) and requires, among other things, equity in mining companies to be partly owned by "Historically Disadvantaged Persons." In 2010, the parties settled the claim and in the immediate aftermath of the settlement, South Africa launched its review of BITs. Concluding that BITs "pose risks and limitations on the ability of the government to pursue its constitutional-based transformation agenda," South Africa terminated BITs with several States, including Belgium and Luxembourg'.²³² The implication is that investors may consider that the South African government's stance towards BITs reflects a desire to advance its broad-based BEE policy. The redistributive aspects of this policy could be incompatible with the expropriation and fair and equitable treatment provisions in most BITs. It is likely that South Africa is adopting a targeted approach to the termination of BITs.

GUIDING PRINCIPLE 10

States, when acting as members of multilateral institutions that deal with business-related issues, should:

- (a) Seek to ensure that those institutions neither restrain the ability of their member States to meet their duty to protect nor hinder business enterprises from respecting human rights;
- (b) Encourage those institutions, within their respective mandates and capacities, to promote business respect for human rights and, where requested, to help States meet their duty to protect against human rights abuse by business enterprises, including through technical assistance, capacity-building and awareness-raising;
- (c) Draw on these Guiding Principles to promote shared understanding and advance international cooperation in the management of business and human rights challenges.

Commentary to Guiding Principle 10

Greater policy coherence is also needed at the international level, including where States participate in multilateral institutions that deal with business-related issues, such as international trade and financial institutions. States retain their international human rights law obligations when they participate in such institutions.

Capacity-building and awareness-raising through such institutions can play a vital role in helping all States to fulfill their duty to protect, including by enabling the sharing of information about challenges and best practices, thus promoting more consistent approaches.

Collective action through multilateral institutions can help States level the playing field with regard to business respect for human rights, but it should do so by raising the performance of laggards. Cooperation between States, multilateral institutions and other stakeholders can also play an important role.

These Guiding Principles provide a common reference point in this regard, and could serve as a useful basis for building a cumulative positive effect that takes into account the respective roles and responsibilities of all relevant stakeholders.

10.1. Membership in Multilateral Institutions

How does the State seek to ensure that the institutions it is a member of neither restrain its duty to protect nor hinder the business responsibility to respect?

Indicators	Scoping Questions
Internal Procedures and Commitment	Has the State established procedures and measures to ensure support for business and human rights frameworks, including the UNGPs, in positions taken internationally and regionally (for example, on human rights screening and documenting of negotiating positions, as well as training of trade and development officials on business and human rights frameworks)?
Promotional Activities	Does the State promote its duty to protect and the corporate responsibility to respect in multilateral institutions, including international trade and financial institutions, the UN system, regional institutions, and with business organization and workers associations? Has the State taken measures to promote awareness of the UNGPs and the broader business and human rights agenda?
Implementation Status	
<p><u>Internal Procedures and Commitment</u></p> <p>The South African government through the South African Human Rights Commission has a strong commitment to human rights. According to the King Report on Corporate Governance (King III), the government requires companies to apply or explain 75 different principles, 20 related to sustainability. Principle 20 speaks to the obligations of companies to respect human rights.</p> <p>In the mining sector, the South African Human Rights Commission has done the following to ensure and monitor that the provisions of UNGPs are respected:</p> <ol style="list-style-type: none"> 1. Convened a public hearing of a community affected by unsafe and unregulated illegal mining; 2. Engaged with a spectrum of stakeholders surrounding illegal mining; 3. Hosted workshops and seminars on Acid Mine Drainage; 4. Undertook a site visit to investigate the environmental impacts of various mining and re-mining activities; and 5. Convened a routable workshop on illegal mining.²³³ <p>In the agriculture field, the South African Human Rights Commission since 2001 has instituted national and provincial inquiries into human rights violations in various farming communities around the country.</p>	

The Human Rights and Business Country Guide

The Danish Institute for Human Rights, together with the South African Human Rights Commission, produced the South African Country Guide for Human Rights. It provides country-specific guidance to help companies respect human rights and contribute to development. The Country Guide provides a systematic overview of the human rights issues of which companies should be aware. For each issue, it provides guidance for companies on how to ensure respect for human rights in their operations or in collaboration with suppliers and other business partners.

The South African government has launched the National Plan of Action for Children 2012-2017 to embrace new legislation and legal instruments aimed at protecting children, which has been adopted at local, regional, and international levels.

Promotional Activities

The South African Human Rights Commission, with regards to promoting transparency within the private sector has embarked on:

1. Stakeholder engagements with civil society, business, and the State;
2. Education campaigns to inform communities on their right to information; and
3. Education campaigns with the State and business informing them on the obligations with regard to rights-holders.²³⁴

The South African government in partnership with the Danish Institute of Human Rights has published guidance for business to help companies ensure respect for human rights when addressing common challenges. Publications include:

1. **Bench Marks Foundation:** In a 2011 publication, the Foundation made the following recommendations to mining companies in South Africa: Provide proper housing and accommodation for all employees and assume responsibility for the impacts that the living-out allowance has on informal dwellings and the resultant health and safety problems, as well as the spread of HIV/AIDS.²³⁵
2. **Know Your Rights and Responsibilities Campaign:** The campaign is designed to aid citizens by educating them about their rights when accessing government services, ensuring that when accessing services citizens do so responsibly.²³⁶

Gaps

Gaps exist in South African government policy regarding **government agreements** when it concerns business and human rights. See the gaps outlined in Section 9.2

PILLAR III

GUIDING PRINCIPLE 25

As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.

Commentary to Guiding Principle 25

Unless States take appropriate steps to investigate, punish and redress business-related human rights abuses when they do occur, the State duty to protect can be rendered weak or even meaningless.

Access to effective remedy has both procedural and substantive aspects. The remedies provided by the grievance mechanisms discussed in this section may take a range of substantive forms the aim of which, generally speaking, will be to counteract or make good any human rights harms that have occurred. Remedy may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition. Procedures for the provision of remedy should be impartial, protected from corruption and free from political or other attempts to influence the outcome.

For the purpose of these Guiding Principles, a grievance is understood to be a perceived injustice evoking an individual's or a 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 routinized, State-based or non-State-based, judicial or non-judicial process through which grievances concerning business-related human rights abuse can be raised and remedy can be sought.

State-based grievance mechanisms may be administered by a branch or agency of the State, or by an independent body on a statutory or constitutional basis. They may be judicial or non-judicial. In some mechanisms, those affected are directly involved in seeking remedy; in others, an intermediary seeks remedy on their behalf. Examples include the courts (for both criminal and civil actions), labour tribunals, national human rights institutions, National Contact Points under the Guidelines for Multinational Enterprises of the Organisation for Economic Co-operation and Development, many ombudsperson offices, and Government-run complaints offices.

Ensuring access to remedy for business-related human rights abuses requires also that States facilitate public awareness and understanding of these mechanisms, how they can be accessed, and any support (financial or expert) for doing so.

State-based judicial and non-judicial grievance mechanisms should form the foundation of a wider system of remedy. Within such a system, operational- level grievance mechanisms can provide early stage recourse and resolution. State-based and operational-level mechanisms, in turn, can be supplemented or enhanced by the remedial functions of collaborative initiatives as well as those of international and regional human rights mechanisms. Further guidance with regard to these mechanisms is provided in Guiding Principles 26 to 31.	
25.1. Redress for Business-Related Human Rights Abuses	
Has the State put in place measures to ensure redress for business-related human rights abuses?	
Indicators	Scoping Questions
Sanctions	Has the State put in place mechanisms that introduce civil liability, criminal sanctions, and administrative sanctions, such as fines or limited access to government funding, for human rights abuses?
Financial or non-Financial Compensation	Has the State put in place mechanisms that introduce civil liability, criminal sanctions, and administrative sanctions, such as fines or limited access to government funding, for human rights abuses?
Prevention of Harm	Has the State put in place mechanisms that introduce processes for the prevention of harm, such as injunctions or guarantees of non-repetition, for human rights abuses?
Apologies	Has the State put in place mechanisms to promote apologies for human rights abuses?
State Based Mechanisms	Has the State put in place judicial and non-judicial, criminal and civil mechanisms where grievances can be raised and addressed? Has the State identified and removed barriers (financial, legal, practical, and evidentiary) to accessing those mechanisms? Are such mechanisms available to address extraterritorial harms, as permitted by the UNGPs and international human rights law?
Non-State-Based Mechanisms	Has the State supported non-State based mechanisms?
Other Measures	Has the State put in place other measures to ensure redress for business related human rights abuses?
Implementation Status	

In the framework of its obligation to protect human rights, South African government has established legal and judicial mechanisms relating to business and human rights abuses. These relevant policies, legislation, and regulations include:

1. South African Constitution (stating that the fundamental rights will be protected and respected in the Bill of Rights);
2. The Complaints Handling Procedure, Determination of the Procedure Contemplated in Section 9(6) of the Human Rights Commission Act 54 of 1994;
3. The Employment Equity Act;
4. The Promotion of Equality and Prevention of Unfair Discrimination Act;
5. The Protection from Harassment Act;
6. The Unemployment Insurance Act;
7. The Occupational Health and Safety Act;
8. The Compensation for Occupational Injuries and Diseases Act;
9. The Prevention and Combating of Trafficking in Person Act;
10. The Criminal Law Amendment Act prohibits Sex Trafficking;
11. The Mineral and Petroleum Resources Development Act, No 28 of 2002; and
12. The Prevention and Combating of Corrupt Activities Act.

25.2. Roles and Responsibility Within States

Has the State defined clear roles and responsibilities within the State on access to effective remedy?

Indicators	Scoping Questions
Competent Authorities	Has the State defined competent authorities to investigate allegations of business-related human rights abuse? If so, are these authorities equipped with the knowledge necessary in order to attribute the abuses to the relevant redress mechanism?

Implementation Status

The South African Constitution has established “**protection mechanisms**” called the “[S]tate institutions supporting constitutional democracy.” Chapter 9 of that Constitution creates 7 institutions for protecting people’s rights and for making sure that the government does its work properly.

Among those institutions, those which might have competent authorities to investigate allegations of business-related human rights abuse include:

1. The South African Human rights Commission:

- a. According to the South African Human Rights Commission Act, 2013 and Section 184 of the Constitution of South Africa, the SAHRC is a national institution established to entrench constitutional democracy through the promotion and protection of human rights by: addressing human rights violations and seeking effective redress for such violations; monitoring and assessing the observance of human rights; and investigating and reporting on the observance of human rights. In each province there is a Provincial Manager in charge to receive complaints dealing with human rights violations. The SAHRC has the relevant experience to conduct investigations dealing with human rights abuses. It has published investigations reports since 1995.²³⁷

2. The Public Protector:

- a. In light of the Public Protector Act of 23 of 1994, the mandate of the Public Protector is to strengthen constitutional democracy by investigating and redressing improper and prejudicial conduct, maladministration, and abuse of power in State affairs; resolving administrative disputes or rectifying any act or omission in administrative conduct through mediation, conciliation, or negotiation; advising on appropriate remedies or employing any other expedient means; reporting and recommending; advising and investigating violations of the Executive Members Ethics Act of 1994; resolving disputes relating to the operation of the Promotion of Access to Information Act of 2000; and discharging other responsibilities.²³⁸

3. The Commission of Gender Equality :

- a. The Commission on Gender Equality is a State institution set up under the Constitution to promote and strengthen democracy and a culture of human rights in the country. The Commission's role is to advance gender equality in all spheres of society and make recommendations on any legislation affecting the status of women.²³⁹

4. The Commission for Conciliation, Mediation, and Arbitration:

- a. The CCMA is a dispute resolution body established under the Labor Relations Act, 66 of 1995 (LRA).
- b. In case of a violation of rights by the employer, the employee may contact the Commission for Conciliation, Mediation and Arbitration. Since its inception, the CCMA has enjoyed a national settlement rate of 70 percent.²⁴⁰

There are also others institutions that protect people's rights: Constitutional Court, Land Claims Commission, and the Land Claims Court. People can also take cases about human rights abuses to the magistrate's courts and High Courts.

Gaps	
<p>The SAHRC sometimes faces budgetary difficulties, which results in slow processing of certain citizens' complaints. Another criticism of the Commission is lack of independence and objectivity from some complaints or events, such as the latest xenophobic attacks that took place in South Africa.</p> <p>Regarding the issue of access to information, the law provides for access to government information, although the government does not always comply with the law. If a government department refuses to provide information, the requester can launch a formal appeal. If this also fails, the requester may appeal a decision to the High Court, a lengthy and expensive process. The Open Democracy Advice Center tracks requests for information and whether they are answered after the period provided for in the legislation or are unanswered.²⁴¹</p> <p>The law prohibits discrimination in employment, access to health care, and education based on physical, sensory, intellectual, and mental disability. Department of Transportation policies on providing services to persons with disabilities were consistent with the Constitution's prohibition on discrimination. Nevertheless, government and private sector discrimination exists. The law mandates access to buildings for persons with disabilities, but such regulations are rarely enforced, and public awareness of them remains minimal.</p> <p>The law prohibits harassment of persons with disabilities and, in conjunction with the Employment Equity Act, provides guidelines on the recruitment and selection of persons with disabilities, reasonable accommodation for persons with disabilities, and guidelines on proper handling of employee medical information. Enforcement of this law is limited. The law also requires employers with more than 50 workers to create an affirmative action plan with provisions for achieving employment equity for persons with disabilities. Nevertheless, persons with disabilities constitute only an estimated 2.3 percent of the workforce. The Ministry for Women, Children, and Persons with Disabilities launched a website linking persons with disabilities to civil service positions, but the government had not met its target of filling 2 percent of government positions with persons with disabilities.²⁴²</p>	
25.3 Public Information-Sharing and Accessibility	
Has the State developed measures through which to inform about grievance mechanisms available, grievances received, and relevant processes?	
Indicators	Scoping Questions
Public Information on the Mechanism	Has the State made efforts to promote public awareness and understanding of remediation mechanisms, including how they can be accessed and their accessibility? Does the State inform about the outcome of grievances and actions for follow-up when systemic issues are identified?

Accessibility	Does the State ensure that the mechanisms are available to all affected stakeholders (including, for example, women, peoples with disabilities, children, and indigenous peoples)? This includes providing services such as legal aid and legal counseling, as well as support to, for example, the NHRI, CSOs, or trade unions that work to ensure greater accessibility within grievance mechanisms.
Implementation Status	
<p>South Africa's Constitution gives every person the right of access to information, held by a public or private body, which is required for the exercise or protection of any right. The Promotion of Access to Information Act of 2000 gives effect to this right.</p> <p>The South African government, through the SAHRC, is helping to make this right a reality by offering citizens a simple, easily understandable guide to the law and how to use it. The guide explains how to request access to information, what assistance is available from the information officer of a public body, when access to information may legally be refused, and what legal remedies there are in cases where information is illegally withheld. The guide also lists public bodies from which information can be requested, along with contact details of their information officers.</p> <p>The SAHRC also provides time-to-time training for the population on how to access information dealing with human rights.²⁴³</p> <p>In terms of providing services such as legal aid and legal counseling, the South African government has established the Legal Aid South Africa Act, 2014. This act aims to ensure access to justice and the realization of the right of a person to have legal representation as envisaged in the Constitution and to render or make legal aid and legal advice available.</p>	
Gaps	
The Legal Aid Act, which should be used to assist the poorest people, does not fully accomplish this role; for example, the provision of funds as a legal and judicial assistance is left to the discretion of the chief executive of the Legal Aid. This has recently led to proceedings before the Constitutional Court with the Marikana case. ²⁴⁴	

GUIDING PRINCIPLE 26

States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.

Commentary to Guiding Principle 26

Effective judicial mechanisms are at the core of ensuring access to remedy. Their ability to address business-related human rights abuses depends on their impartiality, integrity and ability to accord due process.

States should ensure that they do not erect barriers to prevent legitimate cases from being brought before the courts in situations where judicial recourse is an essential part of accessing remedy or alternative sources of effective remedy are unavailable. They should also ensure that the provision of justice is not prevented by corruption of the judicial process, that courts are independent of economic or political pressures from other State agents and from business actors, and that the legitimate and peaceful activities of human rights defenders are not obstructed.

Legal barriers that can prevent legitimate cases involving business-related human rights abuse from being addressed can arise where, for example:

- The way in which legal responsibility is attributed among members of a corporate group under domestic criminal and civil laws facilitates the avoidance of appropriate accountability;
- Where claimants face a denial of justice in a host State and cannot access home State courts regardless of the merits of the claim;
- Where certain groups, such as indigenous peoples and migrants, are excluded from the same level of legal protection of their human rights that applies to the wider population.

Practical and procedural barriers to accessing judicial remedy can arise where, for example:

- The costs of bringing claims go beyond being an appropriate deterrent to unmeritorious cases and/or cannot be reduced to reasonable levels through Government support, “market-based” mechanisms (such as litigation insurance and legal fee structures), or other means;
- Claimants experience difficulty in securing legal representation, due to a lack of resources or of other incentives for lawyers to advise claimants in this area;
- There are inadequate options for aggregating claims or enabling representative proceedings (such as class actions and other collective action procedures), and this prevents effective remedy for individual claimants;
- State prosecutors lack adequate resources, expertise and support to meet the State’s own obligations to investigate individual and business involvement in human rights-related crimes.

Many of these barriers are the result of, or compounded by, the frequent imbalances between the parties to business-related human rights claims, such as in their financial resources, access to information and expertise. Moreover, whether through active discrimination or as the unintended consequences

of the way judicial mechanisms are designed and operate, individuals from groups or populations at heightened risk of vulnerability or marginalization often face additional cultural, social, physical and financial impediments to accessing, using and benefiting from these mechanisms. Particular attention should be given to the rights and specific needs of such groups or populations at each stage of the remedial process: access, procedures and outcome.

26.1. Judicial Mechanisms

Has the State put in place a judicial mechanism with the competency to adjudicate business-related human rights abuses within the national jurisdiction of the State? If so, are these mechanisms in line with the criteria of impartiality, integrity, and ability to accord due process?

Indicators	Scoping Questions
National and Regional Courts	Do the national and regional courts have the competency to adjudicate business and human rights abuses, including for abuses that take place outside of their territorial jurisdiction, as permitted by the UNGPs and international human rights law? If so, do they do so in a way that is impartial and with integrity and ability to accord due process?
Labor Tribunals	Do national labor tribunals have the competency to adjudicate business and human rights abuses? If so, do they do so in a way that is impartial and with integrity and ability to accord due process?
Other Mechanisms	Do other judicial mechanisms have the competency to adjudicate on business related human rights abuses? If so, do they do so in a way that is impartial and with integrity and ability to accord due process?

Implementation Status

1. NATIONAL AND REGIONAL COURTS

The first indicator and scoping questions refer to the competency of national and regional courts to deal with business and human rights cases. Therefore, it is instructive to look at the powers given to courts in order to deal with such cases. Here is a non-exhaustive list of the competent courts:

a. Criminal and civil courts

Violations of human rights in the workplace can be brought to the High Courts of South Africa. For instance, in July 2013, three complainants filed a case before the North Gauteng High Court against the South African National Defense Force in order to obtain compensation for discrimination on the basis of their HIV status.²⁴⁵

Victims of sexual assault occurring in the workplace can bring separate criminal or civil charges against the alleged perpetrators in court.²⁴⁶

Complaints of forced labor can be brought before the civil or criminal courts.²⁴⁷ In addition, child labor violations are tried in either a criminal or labor court.²⁴⁸ Of the 11 cases of child labor violations reported by the Department of Labor from April 2011 to March 2012, only two were processed.²⁴⁹ For example, in 2013, two individuals started to be prosecuted before South African Courts for suspected forced labor of ten children.²⁵⁰

Courts have an obligation to exercise their remedial power when rights entrenched in the Constitution, and the Bill of Rights specifically, are concerned.²⁵¹

b. Equality Courts

Equality Courts in South Africa do not arise from constitutional provisions. However, they play a significant role in the transformation of the South African society.

Cases of discrimination, hate speech, or harassment can be brought in Equality Courts without any costs.²⁵² This includes situations that occur at the workplace. In a country such as South Africa that has suffered from a regime of racial depression and structural divisions based on racial identification in the past, such policies are very positive for victims, as well as society.

c. Children's Courts

No provision is found in the Constitution of South Africa regarding Children's Courts. However, protection and rights of children are enshrined in the Constitution in Section 28 and some are non-derogable.²⁵³ More specifically, the Constitution recognizes the right of every child to be protected against the worst forms of child exploitation and labor in Section 28(e) and (f).²⁵⁴

As a result, when child labor occurs under the care of a parent or caregiver, the matter will be referred to a Children's Court in order to ensure that the best interests of the child are protected.²⁵⁵

d. Constitutional Court of South Africa

When in the course of a trial, the constitutionality of a law or policy is challenged, the case can escalate until it reaches the Constitutional Court of South Africa.

Section 167(7) of the Constitution defines a constitutional matter as including “any issue involving the interpretation, protection or enforcement of the Constitution.”²⁵⁶ This relates to lawsuits that invoke the violation of rights enshrined in the Constitution. In that sense, Section 172 of the Constitution gives powers to courts, when faced with a constitutional matter, to declare a law or conduct “invalid to the extent of its inconsistency” with constitutional provisions.

The Constitutional Court is given the mandate by the Constitution to give the final decision on the constitutionality of an Act of Parliament, provincial Act or conduct of the president.²⁵⁷

An example of such lawsuit is the case of Thembekile Mankayi.²⁵⁸ This former miner worked for the corporation AngloGold Ashanti and was diagnosed with the miners' lung disease called silicosis.²⁵⁹ He decided to sue the company in 2006 in South Africa.²⁶⁰ In the course of the trial, the constitutionality of the statutory compensation scheme for miners was questioned.²⁶¹ The case was heard by the Constitutional Court, which ruled in 2011 in the miner's favor.²⁶² Many observers including lawyers saw in this decision as a victory for miners suffering from illnesses resulting from the negligence of their employers.²⁶³ Following this ruling, steps have been taken to prepare class action lawsuits in order to obtain compensation for South African miners.²⁶⁴ For example, in September 2011, a class action lawsuit was brought to the United Kingdom courts on behalf of miners diagnosed with silicosis after working for the company AngloAmerican.²⁶⁵

Another example is when the Constitutional Court heard a case which dealt with the lack of protection of community rights to procedural fairness as part of the constitutional right to just administrative action protected in section 33 of the Constitution.²⁶⁶

2. LABOR COURTS

The second indicator and scoping questions refer to the competency of labor courts to deal with business and human rights cases. Therefore, it is necessary to analyze the powers given to these specific courts in order for them to deal with such cases.

Labor courts in South Africa can hear cases brought to them and can also deal with appeals of cases brought before the Commission for Conciliation, Mediation, and Arbitration (CCMA) (see below).

Cases of discrimination and sexual harassment can be appealed to labor courts after having being brought before the Commission for Conciliation, Mediation, and Arbitration (see below).²⁶⁷ For instance in February 2012, a labor court declared the dismissal of a horse-riding instructor unfair because the decision was made on the basis of his HIV status, and awarded him a 12-month compensation.²⁶⁸

Child labor violations are tried in either a criminal or Labor Court.²⁶⁹ Of the 11 cases of child labor violations reported by the Department of Labor from April 2011 to March 2012, only two were processed.²⁷⁰

A wide range of remedies exist including declaratory orders, mandatory and structural interdicts, supervisory jurisdiction, severance from an offending statute, and the obligation for parties to negotiate relief under court auspices²⁷¹

Remedies can arise from different branches of law such as administrative law,²⁷² company law,²⁷³ competition law,²⁷⁴ contract law,²⁷⁵ and environmental law.²⁷⁶

3. OTHER MECHANISMS

The third indicator and scoping questions refer to the competency of national and regional courts to deal with business and human rights cases. It therefore requires an analysis of the powers given to courts in order to deal with such cases. Here is a non-exhaustive list of the competent courts to hear such cases.

a. The Commission for Conciliation, Mediation, and Arbitration:

The Commission for Conciliation, Mediation, and Arbitration (CCMA) is an independent body whose role is to resolve labor disputes.²⁷⁷ The CCMA was established by the Labor Relations Act in 1995 and since then it has helped a wide range of complainants to have access to courts to deal with their labor disputes free of charge.²⁷⁸

The CCMA has the mandate to deal with issues of unfair labor practices.²⁷⁹ The Commission is given a function of compulsory arbitration in cases of labor disputes.²⁸⁰

The CCMA should be differentiated from other judicial mechanisms because its judicial or administrative nature has been debated.²⁸¹ Indeed, in a judgement of 1999 *Carephone (Pty) Ltd v Marcus NO*, the Labor Appeal Court ruled that even though the process is judicial, the action is administrative in nature.²⁸² However, in another ruling *Sidumo v Rustenburg Platinum Mines Ltd*, a separate concurring judgement was given and explained that the CCMA's functions were judicial and not administrative, and therefore its procedure should be ruled by section 34 of the Constitution that deals with access to courts.²⁸³

The debate has not been resolved and it was proposed by O'Regan J that the process before the CCMA should obey both sections 33 and 34 of the Constitution which deals with just administrative action and access to courts.²⁸⁴ In that sense, equity and fairness have to lead the process before the CCMA and the arbitrator has to remain as unbiased and impartial as possible.²⁸⁵ In the same vein, Currie and De Waal are of the view that the proceedings have to remain "lawful and procedurally fair," decisions must be made public as a rule, and the remedy proposed should be "justifiable and consistent with the right to fair labor practices."²⁸⁶

More specifically to the context of our analysis, cases that can be submitted to the CCMA include cases of discrimination and sexual harassment.²⁸⁷ If these cases remain unresolved at this level, they can then be taken to labor courts.²⁸⁸

As a conclusion, it is possible to say that access to courts is positively enhanced in South Africa through the mechanisms highlighted above, even though barriers for access to judicial remedy persist.

Gaps
<p>This section deals with the implementation and gaps in the mandate of the courts in South Africa relating to their powers in labor and human rights disputes. The issue centers on courts' competencies and the actual implementation of their mandates.</p> <p>1. EQUALITY COURTS</p> <p>The main issue with the Equality Courts is that their mandate does not arise from the Constitution.</p> <p>2. CONSTITUTIONAL COURT OF SOUTH AFRICA</p> <p>Since the end of apartheid, the Constitutional Court of South Africa has rendered transformational and progressive judgements in favor of human rights and equity. It is perceived as an agent of change in South Africa and in this sense, hopefully it will start accepting cases of business-related violations of human rights and the constitutionality of business-related policies.</p> <p>3. CCMA</p> <p>In relation to the CCMA, while its mandate does not arise from the Constitution, rather an Act of Parliament, this has not impacted its ability to deal with labor disputes. Indeed, the CCMA is described as an effective means for workers to seek justice at a reasonable cost. It is perceived as a fair and impartial body given the fact that its proceedings are also regulated by section 33 and/or section 34 of the Constitution.</p>

26.2. Barriers for Access to Judicial Remedy	
Has the State taken measures to ensure that there are no barriers to access to judicial remedy for addressing business-related human rights abuses?	
Indicators	Scoping Questions
Legal Barriers	Has the State taken measures to ensure that there are no legal barriers to prevent legitimate cases from being brought before the courts? This includes: (1) ensuring that it is possible to hold corporations accountable under domestic criminal and civil laws, meaning that liability exists under the law; (2) ensuring that all members of society can raise complaints, including indigenous peoples, migrants, women, and children, and are afforded the same legal protection as for the wider population; (3) ensuring that extraterritorial harms can be addressed within the courts, as permitted by the UNGPs and international human rights law; and (4) ensuring that issues such as conflicts of law, statutes of limitations, parent company liability, and standards of liability do not result in barriers to victims of business-related human rights harms in accessing the courts?

Practical and Procedural Barriers	Has the State taken measures to ensure that there are no practical or procedural barriers to prevent legitimate cases from being brought before the courts? This includes: (1) ensuring financial support, (2) providing legal representation or guidance, (3) providing opportunities for class-actions and multiparty litigation; (4) allowing for recovery of attorneys' fees; (5) preventing retaliatory actions against claimants; (6) reforming access to evidence; and (7) providing training for prosecutors and judges.
Social Barriers	Has the State taken measures to ensure that there are no social barriers to prevent legitimate cases from being brought before the courts? This includes: (1) addressing imbalances between the parties, (2) targeted awareness-raising among vulnerable groups (for example, women, indigenous people, and children), (3) availability of child-sensitive procedures to children and their representatives, (4) legal aid and other type of assistance, (5) efforts to combat corruption, and (6) protection of human rights defenders.
Implementation Status	
<p>This section will list the measures that have been taken in order to remove barriers to judicial remedy. Judicial, practical, procedural, and social barriers to accessing remedy exist in South Africa. A few measures have been taken in order to ensure that access to courts is enhanced.</p> <p>1. LEGAL BARRIERS</p> <p>Legal barriers are hurdles that victims of business-related violations of human rights have to overcome before accessing courts. These legal barriers vary and include the complexity of corporation structures and the doctrine of limited liability.²⁸⁹ This principle holds that parent companies and their subsidiaries are separate legal entities. This means that parent companies and their shareholders cannot be held accountable for the acts of their subsidiaries.</p> <p>An exception to the doctrine of limited liability that can be used by claimants is “piercing the corporate veil.”²⁹⁰ Increasingly used by human rights organizations, exceptions exist for the complainants to lift the corporate veil and hold the parent company liable for the acts or omissions of the subsidiary when the shareholders go beyond their roles and become part of the managerial entity of the company by dictating decisions.²⁹¹</p> <p>In addressing these issues, it is necessary to look at the possibility for South African victims to bring cases in the jurisdiction where parent companies are based.</p> <p>A good example is <i>Lubbe v. Cape PLC</i>, a case that was brought by South African miners against a U.K. company who were diagnosed with asbestos-related disease in the United Kingdom in 1997.²⁹² In this case, former Cape PLC workers and people living in the region of mining operations sought compensation from their former employer in the English High Court and alleged that their diseases emanated from the asbestos mining and milling activities of the company in South Africa.²⁹³ One of the main arguments of the plaintiffs was that the levels of asbestos dust the workers were exposed to by the</p>	

corporation were 30 times the British legal limit of asbestos dust without adequate protection against its effects.²⁹⁴ In addition, plaintiffs also alleged that the people living in the region where Cape operated were submitted to conditions that provoked asbestos-related injuries.²⁹⁵

The corporation argued that the case should be dealt with by South African courts and not in the United Kingdom, using the argument of the forum non conveniens (see below).²⁹⁶ After a long series of procedures before U.K. Courts in which the arguments of the corporation had been accepted, the House of Lords recognized the competence of English Courts in dealing with the cases.²⁹⁷ The main reason invoked was that due to the absence of legal aid for personal injury claims and the challenges of the plaintiffs in getting legal representation, South African Courts would not be an adequate forum to have their claims heard.²⁹⁸ Following the increase in the number of plaintiffs, the company decided to reach a court settlement with the complainants, but then failed to fulfill its obligations, triggering a new procedure in 2002.²⁹⁹ After the South African company Gencor Ltd. joined the lawsuit as a defendant, in 2003, the plaintiffs and defendants reached a settlement agreement including a trust to compensate the victims.³⁰⁰

Another legal barrier is the non-applicability of criminal law to corporate entities.³⁰¹ In some jurisdictions, corporations cannot be prosecuted in criminal courts.³⁰² In South Africa, criminal cases can be brought for violations of human rights committed in the workplace (see above). However, little information is available regarding the ability for plaintiffs to take cases to criminal courts against corporate entities or their representatives.

Another important legal barrier can be restrictive access to courts for individual victims, their representatives, and other organizations.³⁰³ Often in practice, class or collective actions influence the possibility for the individual plaintiff to be represented and have their interests reflected in the judgment.³⁰⁴ Moreover, there are countries in which restrictions apply to the filing of complaints by NGOs.³⁰⁵ In South Africa, collective lawsuits and class actions cases are accepted,³⁰⁶ which is a positive step in ensuring that victims of systemic violations see their rights respected and in preventing violations in the future.

2. PRACTICAL AND PROCEDURAL BARRIERS

Practical and procedural barriers to judicial remedy continue to exist. Such barriers include the limited or lack of availability of legal aid in order to bring human rights violation cases,³⁰⁷ the rule of payment of legal costs by the loser of the lawsuit ("loser pays"),³⁰⁸ the lack of qualified legal counsel for victims at reasonable costs,³⁰⁹ the difficulties in bringing class action lawsuits,³¹⁰ issues related to corruption, partiality of courts, and absence of fair trial arrangements,³¹¹ and the absence of sufficient compensation and remedies.³¹²

In order to fight against these barriers, the State has ensured the gratuity of certain procedures, such as in cases before Equality Courts. This makes it easier for complainants to bring cases, as financial constraints can be a large burden for many.

Moreover, the possibility for pro-bono cases to be brought increase access to courts for indigent people.

In terms of legal aid, the Legal Aid Board is a South African body whose aim is to provide assistance to indigent people who wish to bring legal cases to court. However, Legal Aid is reported to face severe financial and capacity constraints in South Africa.

The efforts to render access to courts easier have included the recent use of African languages in judicial proceedings.³¹³

Following the adoption of the Jurisdiction of Regional Courts Amendment Act 31 of 2008, regional magistrate courts have been given civil jurisdiction, thus enhancing affordability and proximity.³¹⁴

Another aspect of enhanced access to courts is public litigation; it is possible for non-State legal actors such as law clinics and State-paid public defenders in rural areas to bring public interest litigation. This enables access to courts and increases the potential for litigation in this sector. However, issues of lack of staff and funds remain.³¹⁵

3. SOCIAL BARRIERS

In a diverse society such as South Africa, many segments of the population face vulnerabilities, which can then become social barriers to access to remedy if not properly addressed by the State.

A positive aspect in reducing social barriers is the possibility to postpone a case on the basis of absence of equality of arms.³¹⁶ This allows for vulnerable people to be assisted before courts.

Gaps

Even though measures have been taken to remove barriers to accessing judicial remedy, this section will list remaining barriers.

1. LEGAL BARRIERS

Barriers to accessing justice for victims of trafficking include deportation before being given the chance to file a complaint or participate in the prosecution of their traffickers.³¹⁷

For example, in 2013, the repatriation of eight child victims of trafficking without provision of victim statements resulted in the absence of trial against the alleged traffickers.³¹⁸

Moreover, police corruption is often seen as a major barrier in the fight against human trafficking and forced labor in South Africa.³¹⁹

During court processes, obstacles to accessing remedy include issues of standing,³²⁰ undue delay and length of proceedings,³²¹ and legal costs.³²²

Outside of courts, obstacles to accessing remedy include issues in enforcing judgements,³²³ and especially when they have been given by foreign jurisdictions.³²⁴ Reprisals against witnesses or victims are also a challenge.³²⁵

Other main issues that prevent full access to remedy are the rules of precedent and stare decisis as obstacles to access to justice. Indeed, judicial precedent, even when it was established during apartheid, has to be followed by courts unless it can be broken by the direct application of a right contained in the Constitution.³²⁶

The fact that the 2008 Companies Act does not provide directly for the corporation's constitutional liability makes it hard for victims to invoke this type of liability.³²⁷

2. PRACTICAL AND PROCEDURAL BARRIERS

One of the practical barriers to accessing remedy is that South Africa did not accept the jurisdiction of the African Court on Human and Peoples' Rights which means that victims of human rights violations in South Africa cannot directly file complaints to this regional court.³²⁸ As a result, two cases in 2012 were deemed inadmissible before the Court.³²⁹

In terms of balance of power between companies and victims, it is necessary to note that victims often face inequalities in legal representation because few practitioners take up cases in representation of the victims.³³⁰

Indeed, access to courts is conditioned to availability of funding. Most South Africans face legal representation issues due to lack of affordability.³³¹ Financial barriers remain for people who are not among the poorest, and thus cannot benefit from Legal Aid, but still cannot afford legal services.³³²

Only 10% of the funds of the Legal Aid Board are allocated to civil matters and the focus of the board does not encompass violations by corporations.³³³

A current case before the Constitutional Court between the Legal Aid Board and the Marikana miners, victims of a massacre in 2012, demonstrates the fact that funding in cases of corporate violations of human rights are not necessarily part of the mandate of the Legal Aid Board.

In public interest litigation, there is often a conflict between the relief sought for the victim and the interest of the case for the public.³³⁴

Remedies tend to be more limited in private law than public law.³³⁵ In terms of the remedies sought, it is impossible to compensate some losses, which makes it hard for victims of irreparable violations. For instance, environmental harm cannot be repaired by money only.³³⁶

Other impediments to jurisdiction include prescription and statute of limitations,³³⁷ amnesties, pardons, decisions not to prosecute,³³⁸ State secrets, and national security.³³⁹

3. SOCIAL BARRIERS

In a diverse society such as South Africa, many segments of the population face vulnerabilities. These prevent them from exercising their full right to access to justice.³⁴⁰ Such populations include: indigenous peoples such as the Khoisan; migrant and temporary workers in extractive industries (especially from Zimbabwe and Nigeria); people living with HIV/AIDS (in the mining sector); and women and youth affected by mining activities.³⁴¹

Desperate living conditions form part of the social factors that prevent people from accessing courts and legal representation.³⁴² A few include:³⁴³

1. 25% of the population is unemployed;
2. 34.6% of individuals age 7-24 are not in any educational institution due to lack of funding;³⁴⁴
3. High levels of illiteracy;³⁴⁵
4. Language barriers which render communication and legal services harder;³⁴⁶
5. Widespread poverty (34.1% of the population live under \$2 a day; the top 10% of South Africans are 33.1 times richer than the bottom 10%);³⁴⁷ and
6. Rural populations are geographically excluded from urban legal services.³⁴⁸

26.3. Remedy for Abuses Taking Place in Host-States

Has the State taken measures to address the issue of access of victims to judicial remedy for abuses by domiciliary companies in host States?

Indicators	Scoping Questions
Remedy of Extraterritorial Effect	Has the State put in place measures to promote access to remedy of claimants (including vulnerable groups such as indigenous peoples, women, and children) that have been denied justice in a host State, enabling them to access home State courts?
Forum Non Conveniens	Does the State allow a court considering a forum non conveniens motion to consider factors against dismissal in addition to factors in favor of dismissal?

Implementation Status

This section deals with the existence of mechanisms to promote access to remedy for claimants of abuses taking place in host States and in which South African companies are involved.

In dealing with such type of liability, it is necessary to explain the doctrine of forum non conveniens. This doctrine can be the basis for courts to reject a case brought to them, on the basis that it would be more “convenient” for the parties to bring the case to another jurisdiction/State.³⁴⁹

There is a principle in South Africa that a court cannot refuse to hear a matter on the basis of convenience as long as it has jurisdiction.³⁵⁰ However, in the case Bid Industrial Holdings, the court decided that defendants could bring this doctrine as an argument for the case to be rejected, contradicting

the principle.³⁵¹ The decision on the most convenient jurisdiction is taken on the basis of different criteria including the nature of the alternative forum, the location of evidence and witnesses, and the law applicable to the case.³⁵²

For instance, the Cape PLC case (see above) is a good example of the use of the forum conveniens doctrine, although it was against South African plaintiffs in the United Kingdom.

Gaps

This section deals with the degree of implementation of access to remedy for abuses that take place in host States and in which South African companies are involved.

Gaps in the implementation of such access to remedy include the absence of clear extraterritorial jurisdiction of South African Courts to hear cases of violations of human rights by South African corporate entities abroad.

In the Kaunda v President of the Republic of South Africa case, extraterritorial jurisdiction in the private context was accepted by the Constitutional Court as long as it does not violate sovereignty.³⁵³³⁵⁴

Another key issue is the establishment of the jurisdictional link between the victims and the company and the company with the State.³⁵⁵

The Khulumani “apartheid reparations” lawsuits are also an example of extraterritorial jurisdiction when dealing with human rights violations in foreign jurisdictions.³⁵⁶ The case was brought to U.S. courts in 2002 by a group of South African nationals in order to sue about 20 banks and corporations that were allegedly complicit in the apartheid government's gross human rights abuses such as extrajudicial killings, torture, and rape.³⁵⁷ Arguments of the claimants included the idea that the investments and participation in industries by the defendants encouraged abuse by the apartheid government against black people.³⁵⁸ In August 2013, the U.S. Court of Appeals recommended the dismissal of the case on the ground of the Kiobel v Shell U.S. Supreme Court decision.³⁵⁹

Another issue concerns the tendency of South African courts not to recognize vicarious responsibility of companies as long as the companies have taken all precautionary measures to avoid harm.³⁶⁰ This could be relevant to the development of the due diligence discourse in South Africa, as private and public entities could avoid responsibility and liability if all reasonable measures have been taken to prevent people from getting harmed in business activities.

GUIDING PRINCIPLE 27

States should provide effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms, as part of a comprehensive State-based system for the remedy of business-related human rights abuse.

Commentary to Guiding Principle 27

Administrative, legislative and other non-judicial mechanisms play an essential role in complementing and supplementing judicial mechanisms. Even where judicial systems are effective and well-resourced, they cannot carry the burden of addressing all alleged abuses; judicial remedy is not always required; nor is it always the favored approach for all claimants.

Gaps in the provision of remedy for business-related human rights abuses could be filled, where appropriate, by expanding the mandates of existing non-judicial mechanisms and/or by adding new mechanisms. These may be mediation-based, adjudicative or follow other culturally appropriate and rights-compatible processes—or involve some combination of these—depending on the issues concerned, any public interest involved, and the potential needs of the parties. To ensure their effectiveness, they should meet the criteria set out in Principle 31.

National human rights institutions have a particularly important role to play in this regard.

As with judicial mechanisms, States should consider ways to address any imbalances between the parties to business-related human rights claims and any additional barriers to access faced by individuals from groups or populations at heightened risk of vulnerability or marginalization.

27.1. Types of Non-Judicial Mechanisms

Has the State provided effective and appropriate non-judicial grievance mechanisms?

Indicators	Scoping Questions
Mediation-Based Mechanisms	Does the State provide access of claimants to mediation-based non-judicial mechanisms such as National Contact Points under the OECD Guidelines? Can these mechanisms be used for remedying business-related human rights abuses? Do these mechanisms meet the effectiveness criteria set out in UNGP 31?
Adjudicative Mechanisms	Does the State provide access of the claimant to adjudicative mechanisms such as government-run complaints offices? Can these mechanisms be used for remedying business-related human rights abuses? Do these mechanisms meet the effectiveness criteria set out in UNGP 31?

Other Mechanisms	Does the State provide access to other types of non-judicial mechanisms? Can these mechanisms be used for remedying business-related human rights abuses? Do these mechanisms meet the effectiveness criteria set out in UNGP 31?
Implementation Status	
<p>This section refers to the competency of non-judicial grievance mechanisms to deal with business and human rights cases. It is therefore necessary to look at the powers given to them. Below is a non-exhaustive list of the competent mechanisms.</p> <p>1. The Commission for Conciliation, Mediation and Arbitration</p> <p>The Commission for Conciliation, Mediation, and Arbitration (CCMA) is an independent body whose role is to resolve labor disputes.³⁶¹ The CCMA was established by the Labor Relations Act in 1995 and since then has helped a wide range of complainants to access courts to deal with their labor disputes free of charge.³⁶²</p> <p>The CCMA has the mandate to deal with issues of unfair labor practices.³⁶³ The Commission is given a function of compulsory arbitration in cases of labor disputes.³⁶⁴</p> <p>The CCMA should be differentiated from other judicial mechanisms because its judicial or administrative nature has been debated.³⁶⁵ Indeed, in a judgement of 1999 Carephone (Pty) Ltd v Marcus NO, the Labor Appeal Court ruled that even though the process is judicial, the action is administrative in nature.³⁶⁶ However, in another ruling, Sidumo v Rustenburg Platinum Mines Ltd, a separate concurring judgement was given and explained that the CCMA's functions were judicial and not administrative, and therefore its procedure should be ruled by section 34 of the Constitution that deals with access to courts.³⁶⁷</p> <p>The debate has not been resolved and it was proposed by O'Regan J that the process before the CCMA should obey both sections 33 and 34 of the Constitution which deals with just administrative action and access to courts.³⁶⁸</p> <p>In that sense, equity and fairness have to lead the process before the CCMA and the arbitrator has to remain as unbiased and impartial as possible.³⁶⁹ In the same vein, Currie and De Waal are of the view that the proceedings have to remain "lawful and procedurally fair," decisions must be made public as a rule, and the remedy proposed should be "justifiable and consistent with the right to fair labor practices."³⁷⁰</p> <p>In the period 2011-2012, out of 160,000 cases, about 135,000 were related to unfair dismissals and unfair labor practices.³⁷¹ The CCMA has a 70 percent settlement rate, which makes it an efficient and reliable mechanism.³⁷²</p> <p>More specifically to the issue at hand, cases that can be submitted to the CCMA include those of discrimination and sexual harassment.³⁷³ If these cases remain unresolved at this level, they can then be taken to labor courts.³⁷⁴</p>	

2. The Commission for Gender Equality

This Commission was established under section 187 of the Constitution of South Africa in order to promote gender equality.³⁷⁵

It has the power to “monitor, investigate, research, educate, lobby, advise, and report on issues concerning gender equality.”³⁷⁶

Gender equality and gender-based discrimination cases can be filed before the Commission for Gender Equality which will then use its monitoring and investigation mandate to find solutions to the dispute.

The Commission for Gender Equality can also receive complaints of forced labor.³⁷⁷

3. The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Minorities

This Commission was established under section 185 of the Constitution of South Africa in order to promote respect of cultural, religious, and linguistic minorities in South Africa and promote “peace, friendship, humanity, tolerance, and national unity” among communities.³⁷⁸

It has the power to “monitor, investigate, research, educate, lobby, advise, and report” on issues concerning religious, cultural, or linguistic minorities.³⁷⁹ It also has the mandate of reporting to the South African Human Rights Commission when it is necessary to conduct further investigation.³⁸⁰

Cases of discrimination against indigenous people by corporate entities can be brought before this Commission.

4. Office of the Public Protector

The office’s mandate is found in section 182 of the Constitution and includes investigating any conduct in State affairs.³⁸¹ The positive aspects of such an institution are that it has the constitutional duty to remain impartial, fair, accessible to the public, and open to victims and plaintiffs.³⁸²

Figures reveal that the SAHRC and Office of the Public Protector³⁸³ handled around 9,000 cases between 2012-2013, which mostly involved racial discrimination and hate speech at the workplace.³⁸⁴

5. Commissions of Inquiry

These commissions can be created by the president according to section 84(2)(f) of the Constitution in order to investigate the circumstances of tragic incidents, actors involved in such accidents, and the potential remedies for victims.

The most famous commission of inquiry is the Marikana Commission of Inquiry. In August 2012, following a movement by miners to have their wages increased, 44 people were killed, including 34 miners, and more than 70 people were injured at the Marikana mine in the North West Province.³⁸⁵ In order to investigate the massacre, a Commission of Inquiry was established in January 2015.³⁸⁶

6. Inspection Committees for health and safety at the workplace

The body in charge of enforcing the Mine, Health, and Safety Act is the **Department of Mineral Resources** whose role is to ensure abidance through the Mine, Health, and Safety Inspectorate.³⁸⁷ Another instrument used by the Department of Mineral Resources is the Mine, Health, and Safety Council, a board comprised of State, employer and labor representatives.³⁸⁸ This body's duty is to give advice to the authorities on the occupational health and safety policies that should be established in South African mines.³⁸⁹ Mine inspectors have the authority to randomly inspect mines, which makes it efficient to control safety.³⁹⁰ If safety regulations have not been followed, employers can face fines or imprisonment.³⁹¹

The Labor Department's Inspection and Enforcement Service conducts workplace inspections to monitor and enforce labor laws and investigate occupational health and safety incidents.³⁹² The inspectors of the department have the mandate to investigate by questioning staff members and employers, and also by searching at the workplace.³⁹³ If the Occupational Health and Safety Act has been violated, employers can face fines or imprisonment.³⁹⁴ In risky sectors, including the iron and steel sectors, the department can conduct forceful inspections.³⁹⁵

A Risk Committee for Mines and Works was created in 2009 by the Department of Health. Its goal is to monitor potential health-related risks.³⁹⁶

5. Procedures for access to business-related information

Environmental Impact Assessments and Environmental Management Plans are available to the public through procedures under the Promotion of Access to Information Act (PAIA).³⁹⁷

27.2. Role of the NHRI

Has the State provided specific competency to the national human rights institution (NHRI) to perform the role as a non-judicial mechanism for addressing grievances?

Indicators	Scoping Questions
Complaints-Handling Role	Has the State given the NHRI the mandate that allows it to receive and handle complaints relating to corporate human rights abuses?
Supportive Role	Has the State given the NHRI the mandate that allows the NHRI to be in a supportive role to claimants, such as through mediation, conciliation, expert support, or legal aid?

Awareness-Raising	Has the State given the NHRI the mandate to promote awareness on remedy to and redress for corporate human rights abuses?
Training	Has the State given the NHRI the mandate to provide training of relevant stakeholders on their access to remedy for corporate human rights abuses?
Counseling	Has the State given the NHRI the mandate to provide counselling on which remedy to access?

Implementation Status

This section deals with the competences given to the South African Human Rights Commission in terms of violations of human rights committed by companies.

The SAHRC's mandate to investigate violations of human rights is established in section 184 of the South African Constitution.³⁹⁸

The SAHRC has started a number of investigations and inquiries after complaints were brought to its attention by victims of mining operations.³⁹⁹ For instance, an example of such investigation is the inquiry started in 2008 into the impacts of the Potgietersrus platinum mine in Limpopo, Mokopane on local communities.⁴⁰⁰

The report tried to strike a balance between awareness-raising, international best practices, proactive judgements, recommendations on how to enhance capacity for communities to claim human rights, recommendations to companies for them to adopt proactive approaches to resettlement, and due diligence.⁴⁰¹ The implementation of these recommendations was then monitored for two years.⁴⁰²

The SAHRC is also able to receive complaints filed by victims of human rights.⁴⁰³

For instance, in August 2014, a complaint was lodged to the SAHRC against ArcelorMittal through Bench Marks Foundation.⁴⁰⁴ The grounds of the complaint included allegations that the company's activities and absence of regulations impacted on the health and environment of the members of the community and children.⁴⁰⁵

The SAHRC has the power to receive complaints from victims of human rights abuses, including forced labor, because the Commission has investigatory powers.⁴⁰⁶

Cases of trafficking in persons and child labor can be taken to the Commission with the assistance of trade unions and the CCMA.⁴⁰⁷ During 2012-2013, the SAHRC investigated almost 9,000 cases of human trafficking.⁴⁰⁸

Implementation Status
<p>The Commission also thoroughly investigates cases of discrimination in the work place. Figures reveal that the SAHRC and Office of the Public Protector⁴⁰⁹ handled around 9,000 cases in 2012-2013, which mostly involved racial discrimination and hate speech at the workplace.⁴¹⁰</p> <p>For example, in 2014 the Commission heard a complaint lodged against ArcelorMittal concerning unfair labor practices and more specifically race-based discrimination and prohibition of the right to association (establish and join a Communist Party unit).⁴¹¹</p> <p>Cases involving discrimination against persons with disabilities are also handled by the South African Human Rights Commission (SAHCR).⁴¹²</p> <p>While the SAHRC does receive labor related complaints, these are generally referred to bodies with compensatory powers such as the bargaining councils, the Department of Labor, and the CCMA.⁴¹³</p>
Gaps
<p>This section deals with the implementation and gaps in the mandate of the SAHRC and discusses its competences and the actual implementation of its mandate.</p> <p>The SAHRC has been effective and open to victims. However, the fact that the Commission is simply an investigative body makes it difficult for victims to seek remedies as the findings of the Commission do not suffice to start a court process.⁴¹⁴</p> <p>Moreover, it is quite complicated to find information regarding business-related violations of human rights on the website of the Commission, which means that victims might not even be aware of this avenue.</p>

27.3. Barriers for Access to Non-Judicial Remedy	
Has the State taken measures to ensure that there are no barriers to access to non-judicial remedy for addressing business-related human rights abuses?	
Indicators	Scoping Questions
Practical and Procedural Barriers	<p>Has the State taken measures to ensure that there are no practical or procedural barriers to prevent legitimate cases from being heard by non-judicial mechanisms? Measures to prevent procedural barriers include:</p> <ol style="list-style-type: none"> 1. Financial support; 2. Providing guidance; 3. Ensuring that the information on the mechanism is provided in a language that is understandable to potential complainants;

	4. Ensuring accessibility despite geographical issues or difficulties (for example, long distances).
Other Barriers	<p>Has the State taken measures to ensure that there are no other barriers to prevent legitimate cases from being heard by non-judicial mechanisms? Measures to prevent other barriers include:</p> <ol style="list-style-type: none"> 1. Addressing imbalances between the parties; 2. Targeted awareness-raising among vulnerable groups (such as women, indigenous peoples, or children); 3. Expert advice or type of assistance; 4. Efforts to combat corruption; 5. Protection of human rights defenders.
Implementation Status	
<p>This section will list the measures that have been taken in order to remove barriers to non-judicial remedy.</p> <p>Judicial, practical, procedural, and social barriers to access to remedy exist in South Africa. A few measures have been taken in order to ensure that access to non-judicial remedy is enhanced.</p> <p>1. PROCEDURAL AND PRACTICAL BARRIERS</p> <p>Practical and procedural barriers include the limited or lack of availability of legal aid in order to bring human rights violation cases,⁴¹⁵ the rule of payment of legal costs by the loser of the lawsuit (“loser pays”),⁴¹⁶ the lack of qualified legal counsels at reasonable costs,⁴¹⁷ the difficulties in bringing class action lawsuits,⁴¹⁸ issues related to corruption, partiality of courts, absence of fair trial arrangements,⁴¹⁹ and the absence of sufficient compensation and remedies.⁴²⁰</p> <p>In terms of legal aid, the Legal Aid Board is a South African body whose aim is to provide assistance to indigent people in order for them to bring cases to courts.</p> <p>A deep reform of the legal system has occurred and resulted in the favoring of access to non-judicial remedies in South Africa.</p>	
Gaps	

Even though measures have been taken in order to remove barriers to access to non-judicial remedy, this section will list the remaining barriers.

1. LEGAL BARRIERS

One of the barriers when investigating abuses of migrant workers, for instance, is the fear for expulsion and unemployment in the formal sector. This severely impacts the reporting of abuses.⁴²¹

2. PROCEDURAL AND PRACTICAL BARRIERS

Barriers regarding inspection committees exist. The ILO reports that there has been a shortage in qualified inspectors, which severely impacts the quality and occurrence of workplace inspections.⁴²² Indeed, a 2011 Human Rights Watch report denounces the fact that only 107 labor inspectors were in charge of visiting over 6,000 farms in addition to all other workplaces in the Western Cape province.⁴²³

Other barriers to effective inspections include deficiency in communication systems, record-keeping, and electronic data keeping.⁴²⁴

In addition to these structural constraints early warning mechanisms to employers, especially in farms, impacted on the quality of the inspections and the investigations on violations.⁴²⁵ The lack of strategic planning and modest follow-up of inspections are said to be impacting the quality and frequency of inspections as well.⁴²⁶ According to the ILO, the fact that responsibilities are shared in the occupational health and safety sector has led to the atomization of the strategy on health and safety at the national level.⁴²⁷

The Institute for Human Rights and Business recommends that the role of labor inspectors be fortified through a set of partnerships with agencies in charge of environmental protection and law enforcement.⁴²⁸ They also recommend the creation of on-site whistleblowing and monitoring programs on a permanent basis.⁴²⁹

In the period between 2010-2014 the Risk Committee for Mines and Works created by the Department of Health met only twice.⁴³⁰ This negatively impacts the quality of research and investigations conducted.

Moreover, concerns over health and safety provision in the mining sector were raised by the Union of Mineworkers in South Africa and the African National Congress Youth League (ANCYL) through a Memorandum of Demands sent to the Chamber of Mines and the Government of South Africa in 2013.⁴³¹

The reluctance of the Legal Aid Board in awarding legal aid to plaintiffs before Commission of Inquiry also acts as a barrier to bringing complaints to non-judicial mechanisms.

The current case before the Constitutional Court between the Legal Aid Board and the Marikana miners victims of the massacre in 2012 demonstrates the fact that funding cases of corporate violations of human rights are not necessarily part of the mandate of the Legal Aid Board.

In order to solve practical and procedural issues, the Institute for Human Rights and Business recommended in 2013 that a “business and human rights portfolio” should be created as part of the mandate of each constitutional institution 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.⁴³²

GUIDING PRINCIPLE 28

States should consider ways to facilitate access to effective non-State-based grievance mechanisms dealing with business-related human rights harms.

Commentary to Guiding Principle 28

One category of non-State-based grievance mechanisms encompasses those administered by a business enterprise alone or with stakeholders, by an industry association or a multi-stakeholder group. They are non-judicial, but may use adjudicative, dialogue-based or other culturally appropriate and rights-compatible processes. These mechanisms may offer particular benefits such as speed of access and remediation, reduced costs and/or transnational reach.

Another category comprises regional and international human rights bodies. These have dealt most often with alleged violations by States of their obligations to respect human rights. However, some have also dealt with the failure of a State to meet its duty to protect against human rights abuse by business enterprises.

States can play a helpful role in raising awareness of, or otherwise facilitating access to, such options, alongside the mechanisms provided by States themselves.

28.1. Facilitating Access to Mechanisms

Has the State supported access to effective non-State-based grievance mechanisms dealing with business-related human rights harms?

Indicators	Scoping Questions
Business-Based Grievance Mechanisms	Has the State supported access to business-based grievance mechanisms (such as whistleblower mechanisms or project-level grievance mechanisms) through efforts such as dissemination of information and support for access (for example, through guidance documents and tools)?
Multi-Stakeholder Grievance Mechanism	Has the State supported access to multi-stakeholder grievance mechanisms through efforts such as dissemination of information and support for access?
Organizational-Based Grievance Mechanisms	Has the State supported access to organizational-based grievance mechanisms (including the union systems) through efforts such as dissemination of information and support for access?
International Grievance Mechanisms	Has the State supported access to international grievance mechanisms through efforts such as dissemination of information, support for access (for example, through legal aid) as well as support for establishing contact between the claimants in international system?

Regional Grievance Mechanisms	Has the State supported access to regional grievance mechanisms through efforts such as dissemination of information and support for access (for example, through legal aid)?
Other Mechanisms	Has the State supported access to other grievance mechanisms through efforts such as dissemination of information and support for access?

Implementation Status
<p>This section enumerates non-State grievance mechanisms that the State has supported and discusses how support was given.</p> <p>1. A culture of corporate liability</p> <p>A culture of corporate responsibility and compliance with international standards has been increasing in South Africa.⁴³³</p> <p>The role of the State is to show companies that courts can adjudicate on issues of corporate liability and can hold companies responsible beyond the liability of their representatives.</p> <p>The principle of limited liability is that parent companies and their subsidiaries are separate legal entities. This means that parent companies and their shareholders cannot be held accountable for the acts of their subsidiaries.</p> <p>An exception that can be used by claimants is the possibility to “pierce the corporate veil.”⁴³⁴ Increasingly used by human rights organizations, the doctrine is an exceptions to the limited liability principle that allows the complainants to lift the corporate veil and hold the parent company liable for the acts or omissions of the subsidiary when the shareholders go beyond their roles and become part of the managerial entity of the company by dictating decisions.⁴³⁵</p> <p>Moreover, directors can be held directly liable if they have not acted in the interests of the company and have not acted in the scope of their fiduciary duties under company law.⁴³⁶</p> <p>Liability can also arise under other bodies of law such as competition ⁴³⁷ or environmental law. Under the National Environmental Management Act, companies have a duty to prevent pollution and to correct environmental damage.⁴³⁸ Environmental inspectors can order companies to comply with environmental obligations.⁴³⁹ If the company fails to fulfill its obligations, it will have to pay for the cost of remedy.⁴⁴⁰</p> <p>Under mining laws, mining companies are also “fully and retrospectively liable” in cases of mining pollution.⁴⁴¹ According to mine safety legislation, there is also a due diligence obligation for companies to prevent loss of life, injury, or ill-health arising from a disused mine. ⁴⁴² It is also possible to hold a director criminally liable for failing to ensure the safety of his or her employees.⁴⁴³</p>

2. Agreements between companies and communities

It is possible for corporations to reach agreements with communities regarding to their livelihoods and human rights prior to or during a project. For instance, in August 2013, the Open Society Initiative for Southern Africa reported that an agreement had been reached between the San and Khoi indigenous groups and the pharmaceutical company Cape Kingdom Nutraceuticals.⁴⁴⁴ The corporation recognized the indigenous groups' intellectual property rights over the use of the buchu medical plant and agreed to give 3 percent of their profits to the groups.⁴⁴⁵

3. Business-based grievance mechanisms and due diligence mechanisms

Businesses, in an effort to comply with standards set at the international and national level, can establish grievance mechanisms at the business level in order for their employees to bring complaints. For example, in 2001, the company Anglo-American created "Speak Up," a reporting system by which employees, business partners, and other stakeholders can file confidential complaints about conduct they allege to be contrary to the values of Anglo-American through an online form or by telephone, fax, e-mail, or regular mail in English, isiZulu, Afrikaans, IsiXhosa, and/or Sesotho.⁴⁴⁶

Business and/or project based grievance mechanisms have come under the spotlight in recent years, due to some high profile cases that involved company based grievance mechanisms like the Barrick Gold case in Papua New Guinea.⁴⁴⁷ Though South African law does not require special human rights focused internal grievance mechanisms in companies, several multinational companies operating in South Africa have undertaken the task to set up internal or project based grievance mechanisms. These are usually integrated into existing grievance mechanisms within the human resources department of companies. A concern with this approach is that the human resources personnel are often not equipped with the necessary skills or knowledge to identify the human rights impacts, or even risks, and make the correct determinations on follow-up actions.

Gaps

This section deals with the implementation of non-State grievance mechanisms to which the State has supported access.

One of the practical issues is that South Africa did not accept the jurisdiction of the African Court on Human and Peoples' Rights (through Declaration), which means that victims of human rights violations in South Africa cannot directly file complaints to this regional court.⁴⁴⁸ As a result, two cases in 2012 were deemed inadmissible before the Court.⁴⁴⁹

The majority of practical issues that South Africa faces in supporting access to business grievance mechanisms are international challenges of corporate liability. Holding companies accountable for violations of human rights is a new concept which makes it more complicated for States, especially developing ones, to set standards and oblige companies to showcase their own grievance mechanisms.

GUIDING PRINCIPLE 31

In order to ensure their effectiveness, non-judicial grievance mechanisms, both State-based and non-State-based, should be:

- (a) Legitimate: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;
- (b) Accessible: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;
- (c) Predictable: providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;
- (d) Equitable: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;
- (e) Transparent: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake;
- (f) Rights-compatible: ensuring that outcomes and remedies accord with internationally recognized human rights;
- (g) A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms;

Operational-level mechanisms should also be:

- (l) Based on engagement and dialogue: consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances.

Commentary to Guiding Principle 31

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. These criteria provide a benchmark for designing, revising or assessing a non-judicial grievance mechanism to help ensure that it is effective in practice. Poorly designed or implemented grievance mechanisms can risk compounding a sense of grievance among affected stakeholders by heightening their sense of disempowerment and disrespect by the process.

The first seven criteria apply to any State-based or non-State-based, adjudicative or dialogue-based mechanism. The eighth criterion is specific to operational-level mechanisms that business enterprises help administer.

The term “grievance mechanism” is used here as a term of art. The term itself may not always be appropriate or helpful when applied to a specific mechanism, but the criteria for effectiveness remain the same. Commentary on the specific criteria follows:

- (a) Stakeholders for whose use a mechanism is intended must trust it if they are to choose to use it. Accountability for ensuring that the parties to a grievance process cannot interfere with its fair conduct is typically one important factor in building stakeholder trust;

- (b) Barriers to access may include a lack of awareness of the mechanism, language, literacy, costs, physical location and fears of reprisal;
- (c) In order for a mechanism to be trusted and used, it should provide public information about the procedure it offers. Time frames for each stage should be respected wherever possible, while allowing that flexibility may sometimes be needed;
- (d) In grievances or disputes between business enterprises and affected stakeholders, the latter frequently have much less access to information and expert resources, and often lack the financial resources to pay for them. Where this imbalance is not redressed, it can reduce both the achievement and perception of a fair process and make it harder to arrive at durable solutions;
- (e) Communicating regularly with parties about the progress of individual grievances can be essential to retaining confidence in the process. Providing transparency about the mechanism's performance to wider stakeholders, through statistics, case studies or more detailed information about the handling of certain cases, can be important to demonstrate its legitimacy and retain broad trust. At the same time, confidentiality of the dialogue between parties and of individuals' identities should be provided where necessary;
- (f) Grievances are frequently not framed in terms of human rights and many do not initially raise human rights concerns. Regardless, where outcomes have implications for human rights, care should be taken to ensure that they are in line with internationally recognized human rights;
- (g) Regular analysis of the frequency, patterns and causes of grievances can enable the institution administering the mechanism to identify and influence policies, procedures or practices that should be altered to prevent future harm;
- (h) For an operational-level grievance mechanism, engaging with affected stakeholder groups about its design and performance can help to ensure that it meets their needs, that they will use it in practice, and that there is a shared interest in ensuring its success. Since a business enterprise cannot, with legitimacy, both be the subject of complaints and unilaterally determine their outcome, these mechanisms should focus on reaching agreed solutions through dialogue. Where adjudication is needed, this should be provided by a legitimate, independent third-party mechanism.

31.1. Alignment with the Effectiveness Criteria

Does the State ensure that State-based non-judicial grievance mechanisms meet the effectiveness criteria?

Indicators	Scoping Questions
1. Legitimate	Has the State taken measures to ensure that the mechanisms enable trust from the stakeholder groups for whose use they are intended (including that it has a firm mandate, is independent and transparent, includes ensuring non-interference with fair conduct, and includes feedback mechanisms for when foul play is detected)?
2. Accessible	Has the State taken measures to ensure that the mechanisms are accessible (including language and literacy issues, cost associated with raising complaints, geographical issues, fear of reprisal, and vulnerability of claimant, for example, due to gender, age, religion, or minority status)?
3. Predictable	Has the State taken measures to ensure that the mechanisms are predictable (including clear and public information about the procedure, timeframes for the procedure, and information on the process and outcome of the mechanism)?

4. Equitable	Has the State taken measures to ensure that the mechanisms are equitable (including access of all parties to information, advice, and expert resources)?
5. Transparent	Has the State taken measures to ensure that the mechanisms are transparent (including regular communication about grievance resolution progress as well as wider public information on cases received and in process in order to identify and address societal trends)?
6. Rights compatible	Has the State taken measures to ensure that the mechanisms are rights-compatible (including that grievances are framed in terms of human rights when they do raise human rights concerns and that the institutions and authorities managing the mechanisms are aware of human rights and how these relate to the cases dealt with)?
7. A source of continuous learning	Has the State taken measures to ensure that the mechanisms are a source of continuous learning (including State support for regular analysis of the frequency, patterns, and causes of grievances to promote a strengthening of the mechanism)? Has the State incorporated lessons learned through operation of the mechanisms to improve the mechanisms' effectiveness?
Implementation Status	
<p>The main non-judicial remedy mechanisms in South Africa that are related to human rights are the CCMA, which is labor focused, and the South African Human Rights Commission, which is mandated to receive complaints, do investigations, and issue findings.</p> <p>1. The Commission for Conciliation, Mediation and Arbitration (CCMA)</p> <p><i>a. Legitimate</i></p> <p>The CCMA receives its mandate from the labor laws in South Africa, and recently replaced the Industrial Court as the main avenue for labor related dispute resolution in South Africa. The motivations behind this move include:</p> <ul style="list-style-type: none"> i. Shifting from a highly adversarial model of relations to one based on greater cooperation, industrial peace, and justice; and ii. To provide appropriate and up to date redress for new and developing forms of labor disputes in South Africa. <p>The Labor Relations Act, and its numerous amendments over the past few years, form a legislative framework that gives the CCMA the power to:</p> <ul style="list-style-type: none"> i. Conciliate workplace disputes; ii. Arbitrate disputes that remain unresolved after conciliation; iii. Facilitate the establishment of workplace forums and statutory councils; 	

- iv. Compile and publish information and statistics about its activities; and
- v. Consider applications for accreditation and subsidy from bargaining councils and private agencies.

Section 145 of the Labor Relations Act allows for an appeal procedure. Under this section, a party may apply to the Labor Court on the basis of an alleged defect with a commissioner's rulings or awards. The party who alleges such a defect must apply to the Labor Court to set aside the award within six weeks of the award being served.

b. Accessible

The CCMA uses English, isiZulu, and Afrikaans as the three identified languages for official business communication. For oral communication, the CCMA is required to make every attempt to accommodate the language preference of the user of the system. For written communications, the CCMA must consider the language environment of the target audience, and the preferred language of the receiver of the communications. When hearing cases, the CCMA will hear a case in the preferred language understood by all parties involved. This must be determined in advance in order to allow for the arrangement of professional interpreting and translation services. Interpreters are available to parties pre-hearing, during the hearing, and post-hearing.

Given that South Africa has 11 official languages, in addition to sign language, the language policy of the CCMA is quite accommodating and the system accessible in this regard.

c. Predictable

The CCMA is mandated to interpret labor laws in South Africa in a manner that is in accordance with judicial decisions by courts. The CCMA must follow the interpretations placed upon a provision by the most recent decision of the highest court dealing with that provision, and follows the principle of stare decisis.

As mentioned above, the Labor Court is placed at the pinnacle of the pyramid of adjudicative bodies established under labor laws in South Africa, which emphasizes the need to interpret any dispute before the CCMA in accordance with the relevant laws to allow for accurate appeal procedures.

Furthermore, the LRA requires that any interpretation be done in a way that gives effect to its primary objective and is in compliance with the Constitution and with the public international legal obligations of South Africa.

d. Equitable

The CCMA is presided over by commissioners that are appointed by the governing body of the CCMA on the strength of their experience and expertise in labor matters, particularly dispute prevention and resolution. The commissioners are required to carry out their job with complete impartiality and are bound to the Commissioner Code of Conduct.

The Constitution also states under Section 33 that everyone has a right to administrative action that is lawful, reasonable, and procedurally fair. Using the CCMA mechanism is an administrative process, and as a result all commissioners are constitutionally required to make decisions that are lawful, reasonable, and procedurally fair.

e. Transparent

The CCMA vision and mission lists “transparency” as one of the guiding principles in the activities of the mechanism. In this regard, the CCMA is guided by the statutory obligations contained in the Constitution and the labor legislative framework.

f. Rights compatible

The disputes that come before the CCMA are directly related to the rights in the Constitution, and those contained in labor legislation.

g. A source of continuous learning

The CCMA is committed to continuously improve its processes, products, and services. As a result, regular review and assessment of the mechanism is required. South African labor legislation, and consequently the entire labor architecture, have recently been reviewed and undergone several amendments. As mentioned before, the CCMA’s status and position changed in that it now plays the role the Industrial Courts used to play in the past.

In terms of independence, the CCMA is independent from the government and is managed by a Governing Body that appoints commissioners.⁴⁵⁰ No party can interfere in the process, which makes the independence of commissioners paramount.

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³⁷² BENJAMIN, *supra* note 371; DIHR & SAHRC, *supra* note 95, at 17.

³⁷³ MyWage, *supra* note 267; DIHR & SAHRC, *supra* note 95, at 17.

³⁷⁴ MyWage, *supra* note 267; DIHR & SAHRC, *supra* note 95, at 17.

³⁷⁵ CONSTITUTION OF SOUTH AFRICA, Dec. 4, 1996, No. 108 of 1996, § 187(1).

³⁷⁶ *Id.* § 187(2).

³⁷⁷ DIHR & SAHRC, *supra* note 95, at 35.

³⁷⁸ CONSTITUTION OF SOUTH AFRICA, Dec. 4, 1996, No. 108 of 1996, § 185(1) & § (2).

³⁷⁹ *Id.* § 185(3).

³⁸⁰ *Id.* § 185(4).

³⁸¹ *Id.*

³⁸² *Id.* § 182(4) & 182(5).

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³⁸⁶ *Id.*

³⁸⁷ Dep't of Mineral Resources, *About Mine Health and Safety*, Republic of South Africa (2011) <http://www.dmr.gov.za/mine-health-a-safety.html>; DIHR & SAHRC, *supra* note 95, at 38.

³⁸⁸ *Welcome to Mine Health and Safety Council*, Mine Health & Safety Council, <http://www.mhsc.org.za> (Mar. 10, 2016); DIHR & SAHRC, *supra* note 95, at 38.

³⁸⁹ Mine Health & Safety Council, *supra* note 388; DIHR & SAHRC, *supra* note 95, at 38.

³⁹⁰ DIHR & SAHRC, *supra* note 95, at 38.

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³⁹⁶ DIHR & SAHRC, *supra* note 95, at 39.

³⁹⁷ DIHR & SAHRC, *supra* note 95, at 60.

³⁹⁸ CONSTITUTION OF SOUTH AFRICA, Dec. 4, 1996, No. 108 of 1996.

³⁹⁹ NORA GÖTZMANN & CLAIRE METHVEN O'BRIEN, BUSINESS AND HUMAN RIGHTS: A GUIDEBOOK FOR NATIONAL HUMAN RIGHTS INSTITUTIONS, Int'l Coordinating Committee of National Human Rights Institutions (ICC) & Danish Institute for Human Rights (DIHR) 69 (Nov., 2013).

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⁴⁰¹ *Id.*

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- ⁴⁰⁴ DIHR & SAHRC, *supra* note 95, at 40.
- ⁴⁰⁵ *Id.*
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- ⁴⁰⁷ DIHR & SAHRC, *supra* note 95, at 32.
- ⁴⁰⁸ *Id.* at 35.
- ⁴⁰⁹ Freedom House, *supra* note 383; DIHR & SAHRC, *supra* note 95, at 17.
- ⁴¹⁰ South African Human Rights Comm’n, *supra* note 403; DIHR & SAHRC, *supra* note 95, at 35.
- ⁴¹¹ DIHR & SAHRC, *supra* note 95, at 40.
- ⁴¹² *Id.* at 14
- ⁴¹³ *Id.* at 40.
- ⁴¹⁴ Meeting with the South African Human Rights Comm’n, Apr. 14, 2015.
- ⁴¹⁵ ZERK, *supra* note 289, at 79.
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- ⁴¹⁷ *Id.* at 81.
- ⁴¹⁸ *Id.* at 82.
- ⁴¹⁹ *Id.* at 83.
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- ⁴²⁵ Human Rights Watch, *supra* note 423; DIHR & SAHRC, *supra* note 95, at 38.
- ⁴²⁶ Int’l Labour Organization, *supra* note 422; DIHR & SAHRC, *supra* note 95, at 38.
- ⁴²⁷ Int’l Labour Organization, *supra* note 422; DIHR & SAHRC, *supra* note 95, at 38.
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- ⁴³³ *Id.* at 2.
- ⁴³⁴ ZERK, *supra* note 289, at 65.
- ⁴³⁵ Lecture given by Professor Sheldon Leader at the University of Pretoria on Apr. 1, 2015.
- ⁴³⁶ INT’L COMM’N OF JURISTS, *supra* note 267, at 9-10.
- ⁴³⁷ *Id.* at 16.

⁴³⁸ *Id.* at 17.

⁴³⁹ *Id.* at 18.

⁴⁴⁰ *Id.*

⁴⁴¹ *Id.* at 20.

⁴⁴² *Id.* at 19.

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⁴⁵⁰ Comm'n for Conciliation, Mediation & Arbitration, *supra* note 277.