



HUMAN RIGHTS
& BUSINESS

HUMAN RIGHTS & BUSINESS PROJECT

SOUTH AFRICA COUNTRY RISK ASSESSMENT



DANISH INSTITUTE FOR
HUMAN RIGHTS

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The South Africa report is the ninth in a series of country risk assessment reports authored by the Human Rights & Business Project of the Danish Institute for Human Rights. General information and queries concerning the report and the project should be directed to:

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May 2006

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1. INTRODUCTION

The Human Rights & Business Project

The Human Rights & Business Project was initiated in 1999 as a joint cooperation between the Danish Institute for Human Rights, the Confederation of Danish Industries and the Industrialization Fund for Developing Countries with support from Danish International Development Agency (Danida). The project is housed by Danish Institute for Human Rights, and governed by an advisory board of the three founding organisations as well as Danida and LO (the Danish Confederation of Trade Unions). The objective of the project is to develop practical and operational tools for the implementation of human rights in a business context and to clarify the boundaries of corporate social responsibility towards human rights.

The tools produced at the Human Rights & Business Project are based on international human rights law, and particularly international treaties. When a state becomes a party to an international treaty, it is expected to amend its national law and political system to reflect the international human rights treaty's contents. However, some states fail to change their national laws and system accordingly. This creates a problem for companies operating in that state, because obeying the national laws does not necessarily ensure that the company meets its international human rights obligations. The tools designed by the Human Rights and Business Project are designed to provide the solution to this problem. Using these tools enables companies to identify and comply with the highest relevant human rights standards, and thus to avoid and prevent human rights violations through their operations.

The Human Rights Compliance Assessment (HRCA)

The key tool produced at the project is the Human Rights Compliance Assessment (HRCA), which is a voluntary self-assessment tool that companies can use to detect potential human rights violations caused by their operations on employees, local inhabitants, and other stakeholders. The HRCA is based on the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (1966), the International Covenant on Economic, Social and Cultural Rights (1966), the International Labour Organisation Conventions, and several other major human rights treaties. Each right from the UDHR has been modified and applied to a business context, and the full HRCA forms a database that consists of approximately 350 questions and 1000 indicators.

The HRCA has been developed in cooperation with companies, NGOs, employer organisations and experts from around the world. A year-long consultation process was carried out in 2003 and 2004 in order to ensure the acceptability of the human rights standards to both business and human rights communities. During that process, over 80 companies and human rights NGOs and several human rights experts commented on the HRCA and its standards,.

A Quick Check version of the HRCA was released in 2004, which covers the most essential human rights issues that companies should consider in relation to their activities. The Quick Check was developed in cooperation with a group of development finance institutions to provide companies and investment funds with a shorter assessment that covers the most critical human rights issues. The Quick Check consists of 28 questions, each accompanied by a number of indicators that can assist the user in how to answer the questions. The Quick Check is available on our website both as a web-based computer programme and in a booklet version. See further www.humanrightsbusiness.org

The Human Rights & Business Country Risk Assessment

Developing individual country risk assessments (CRA) is another major activity at the Human Rights & Business Project. Each CRA is a detailed and systematic assessment of the human rights standards and practice of a particular country, highlighting particular areas of concern, and includes guidance to companies on how to evaluate and adjust their business practices to ensure compliance with international human rights standards in that country.

The CRA focuses on documenting and assessing risks that are particularly relevant in a business context, and provides a systematic and in-depth overview of sensitive human rights areas within the legal, political, social and cultural fields in the country of investigation.

The CRA is relevant to all companies, regardless of their size, product, service, or national origin, because the international human rights principles in the Universal Declaration of Human Rights, on which the CRA is based, are universally applicable. Similar to the HRCA, the CRA builds on twenty rights drawn from the Universal Declaration of Human Rights. Each right is examined from a corporate perspective and evaluated in three different categories: i) Formal Law; ii) Societal Practice; and iii) Company Risk.

The CRA is modelled on a red-light/green-light rating system and each right is assigned a rating. The rating system combines an evaluation of the country's human rights compliance with an overall assessment of corporate risks for engaging in human rights violations. A green light indicates human rights compliance and means that the right is a low-risk area for the company. A yellow light indicates a danger of potential non-compliance and means that the right constitutes a medium-risk area for the company. A red light indicates non-compliance and means that the right is a high-risk area for the company.

The risk for each right is assessed in three categories and an explanation of what is covered in each of the three categories is provided below.

Formal Law

In this category, state laws are analysed for their compliance with international human rights law, and areas of non-compliance are highlighted, including such as prohibition of unions, limitations on the rights of women, and inadequate protection of property. The analysis of the laws is carried out from a corporate perspective, focusing on laws that are particularly relevant in a business context. Ratifications and reservations to international human rights treaties are also highlighted.

Societal Practice

This category documents human rights violations that actually take place in society based on all kinds of practices, including social, cultural, business and political practices, among others, such as discrimination against religious minorities, violence against women, and child labour. Only violations relevant within a business context are discussed.

Company Risk

In this category, an assessment of overall risk to the company is provided. This rating is based on the each right's risk rating for formal law and societal practice, and an evaluation of the relevance, link and proximity to company operations. The Company Risk rating refers both to direct and indirect risks. A direct risk is one where the company itself is at risk of carrying out a human rights violation, such as by preventing workers from unionising, or by forcing workers to engage in unpaid or excessive overtime. An indirect risk is present if the company does not perpetrate the violation itself, but supports, endorses or benefits from violations committed by others. For instance, the company could be indirectly complicit in a violation if it purchases land from which local or indigenous people have been evicted or relocated against their will, or without consultation or proper compensation. Another example of an indirect violation is where the company subcontracts from a supplier that engages in abusive or illegal child labour. The Company Risk rating is followed by recommendations on how to prevent or address the identified risks.

The rating system used in the CRA is based on the human rights standards and the recommendations in the HRCA. Building on the same standards, the CRA can thus be used to customize the HRCA to particular countries by using the risk analysis to select the most relevant questions from the HRCA database. In this way the two tools support each other and can be integrated in country specific versions of the HRCA that reflect the sensitive human rights areas in each country.

Sources

Country Risk Assessments are carried out as desk research using a wide range of recognised information and sources. Information in the Formal Law category is based on each country's constitution, relevant statutes and regulations, including labour legislation, and applicable international human rights law. Where access to the legislative texts is limited or impossible, the most credible secondary sources are used.

Information in the Practice Category is based on reports and documentation from the United Nations Treaty Review Bodies, Amnesty International (AI), Human Rights Watch (HRW), U.S. Department of State country reports, specialised UN bodies, International Labour Organisation (ILO), International Confederation of Trade Unions (ICFTU,) and specialised international NGOs. In addition, information from national human rights institutions, local civil society organisations, and trade unions are used where relevant, available, and reliable. When necessary, we have consulted with local organisations or human rights experts and carried out interviews. Newspaper articles and news-websites are also used while conducting the CRA.

CONTENT OF THE COUNTRY RISK ASSESSMENT

The South Africa Country Risk Assessment contains the following sections

1 Executive summary

The executive summary presents a chart of the overall results of the South Africa CRA followed by a summary of each right and the ratings of all three categories.

2 Focal areas

A number of high risk areas for South Africa are selected to inform companies about the most important human rights problems they might encounter in their operations, based on the results of the CRA. The focal areas are selected in a two-stage process considering i) the status of the particular human right and the severity of the human rights violation, and ii) company risk of non-compliance and the potential severity of the violation. A description of the high risk areas is followed by recommendations, which can be used to check the company's own operations and/or the activities of its suppliers and contractors.

3 Background sheet

The background sheet provides a brief overview of South Africa including relevant statistics, its history, economy, form of government, and legal system, and not least, information about South Africa's accession to international human rights law.

4 Country risk assessment

In this section, South Africa's performance with respect to twenty rights from the UDHR is examined, and the level of risk of violation of the right by companies is assessed in three categories: i) Formal Law; ii) Societal Practices; iii) Company Risk rating followed by recommendations.

5 List of recommended stakeholders

We recommend that companies assemble a group of individuals or organisations to engage in an ongoing review of the human rights and social impacts of company operations in South Africa. These individuals or organisations, which we call "stakeholders", should be based in South Africa or have strong connections to and expertise on South Africa. DIHR has good contacts in South Africa and is able to facilitate contact to qualified NGOs. The NGOs have not been listed in the report, but a list of NGOs can be provided upon request.

2. EXECUTIVE SUMMARY

2.1. CHART OF SOUTH AFRICA'S HUMAN RIGHTS PERFORMANCE

Green Light= compliance/low risk; Yellow Light= potential non-compliance/medium risk; Red Light= non-compliance/high risk

	FORMAL LAW	PRACTICE	COMPANY RISK
Right to Freedom from Discrimination	■	■	■
Right to Life, Liberty, and Security of Person	■	■	■
Right to Freedom from Forced Labour and Servitude	■	■	■
Right to Freedom from Torture, Cruel, Inhuman or Degrading Treatment and Punishment	■	■	■
Right to Fair Trial and Recognition as a Person before the Law	■	■	■
Right to Privacy	■	■	■
Right to Freedom of Movement	■	■	■
Right to Family Life	■	■	■
Right to Own Property	■	■	■
Right to Freedom of Opinion, Expression, Thought, Conscience and Religion	■	■	■
Right to Take Part in Government	■	■	■
Right to Peaceful Assembly and Freedom of Association	■	■	■
Right to Work and to Just and Favourable Conditions of Work	■	■	■
Right to an Adequate Standard of Living	■	■	■
Right to Health	■	■	■
Right to Adequate Food	■	■	■
Right to Adequate Housing	■	■	■
Right to Education	■	■	■
Right to Participate in Cultural Life	■	■	■
Right to Intellectual Property	■	■	■

2.2. CHART OF SOUTH AFRICA'S HUMAN RIGHTS PERFORMANCE BY TOPIC

Green Light= compliance/low risk; Yellow Light= potential non-compliance/medium risk; Red Light= non-compliance/high risk

	FORMAL LAW	PRACTICE	COMPANY RISK
Forced and Bonded Labour	Green	Yellow	Yellow
Child Labour	Green	Red	Red
Work Conditions	Yellow	Red	Red
Wages	Red	Red	Red
Trade Union Rights	Green	Yellow	Yellow
Occupational Health and Safety (OHS)	Green	Red	Red
Security forces and security guards	Green	Green	Yellow
Discrimination	Yellow	Red	Red
Gender	Green	Red	Red
Migrant workers	Red	Red	Red
Indigenous people	Red	Yellow	Yellow
Forced Evictions	Green	Red	Yellow
Political rights and the rule of law	Green	Yellow	Green
Corruption	Green	Yellow	Yellow
Civil society groups	Green	Green	Yellow
Environment	Green	Yellow	Yellow

2.3. SUMMARY OF FINDINGS OF THE SOUTH AFRICA COUNTRY RISK ASSESSMENT

The CRA performed on South Africa has investigated each human right from the Universal Declaration of Human Rights at three levels. First, the rights were investigated for areas of conflict between the prevailing national laws and international human rights law. Second, the prevailing societal practices were analysed to identify any inherent human rights violations frequently perpetrated at the societal level. Third, each right was assigned an overall company risk rating, based on the ratings in the formal law and practice categories and the proximity to company operations. The results of the CRA produced the categorisation of seven human rights as high-risk areas, ten human rights as medium risk areas and three human rights as low-risk areas for companies operating in South Africa. The following presents the overall results of the CRA, including a short description of each right. The full CRA offers a detailed in-depth description of each right.

COMPANY RISK

The following rights received a red rating in the Company Risk category in the CRA, which indicates that these human rights constitute high-risk areas for companies operating in South Africa. A short description of each right follows below.

- Right to Freedom from Discrimination (art. 2)
- Right to Own Property (art. 17)
- Right to Work and Just and Favourable Conditions of Work (art. 23, 24 and 25)
- Right to an Adequate Standard of Living (art. 22)
- Right to Health (art. 25)
- Right to Adequate Food (art.25)
- Right to Education (art. 26)

Right to Freedom from Discrimination (art. 2) constitutes a high-risk human rights area for South Africa. Women, Black people, Coloured people, migrant workers, indigenous peoples, people living with HIV/AIDs and homosexuals, constitute particularly vulnerable groups in South Africa and are highly susceptible to discriminatory treatment. In spite of some progress in racial, ethnic, and gender equality since apartheid, South Africa remains a society where the means of production, employment, property and the distribution of wealth remain concentrated in the hands of White men. Women are in practice discriminated against in employment, and experience a high rate of sexual and gender-based violence. Indigenous peoples are the poorest of poor, some are excluded from property restitution laws and some forms of governance, and are generally marginalized. Contract migrant workers are totally excluded from the reach of labour laws and some human rights protections, and migrants generally are subjected to many forms of xenophobia. People living with HIV/AIDs also experience discrimination.

Right to Own Property (art. 17) is a high-risk area for companies. All non-White groups experienced violations of their right to property during apartheid, and even before, and as a result many persons lack title to property, large sections of the country are subject to competing claims on the land. Indigenous peoples have claims on large areas of the country, which are not entirely accounted for in the current legislation. Customary law and cultural practices may also result in violations of women's right to own property. The South African government also has a policy of redistribution of land, with the as-yet unimplemented possibility of expropriation. Not least, large sections of the South Africa come under environmental protection laws. In such a complex situation, any kind of lease or purchase of land is high-risk. Extensive care must be taken to check the land for all possible claims by all parties, including indigenous peoples, and supplier's practices with respect to property must also be closely monitored.

Right to Work and Just and Favourable Conditions of Work (art.23, 24 & 25) is a high-risk human rights area for companies in South Africa. Although South Africa's labour laws are comprehensive and thorough, approximately a fifth of the work force lacks access to these labour rights because they are employed in the informal sector (UNISA 2006). Furthermore, contract migrant workers are excluded from these laws by virtue of Immigration law, bilateral treaty, and the policies of mining companies that do not respect the standard set forth in labour laws. The ability to obtain work is limited by a set of complex factors, but the existence of a mechanism for employing contract migrant workers under substandard labour conditions probably plays a role in the high unemployment levels and the terms and conditions of labour of some workers.

Right to an Adequate Standard of Living (art. 22) constitutes a high-risk human rights area for South Africa. Unemployment and poverty are extremely high in South Africa, and though there are minimum wages in some sectors, even those are not enforced. Enforcement of existing minimum wage standards is inadequate, and the informal sector and contract migrant workers are placed outside of the reach of human rights protections by bilateral treaty and immigration law. South Africa has a social security system but because the informal sector is so large, and protections in the formal sector are not well enforced, this system does not cover the whole population. The company risks violating the right to an adequate standard of living if it relies on national minimum wages without investigating the living costs and needs of its employees when setting wage policies. Indirect risks for supplier violations are clearly also a serious risk for companies operating in South Africa.

Right to Health (art. 25) constitutes a high human rights risk for companies. South Africa has a national system of public health care, which minimises the company's health care obligations for its employees. However, in the cases of contract migrant workers, and often with migrant workers, the company will be responsible for the provision of health care. The company must also establish and implement workplace policies regarding HIV/AIDS in order to avoid violations of the right to health. Furthermore, though occupational health and safety regulations are extensive, provisions are not enforced in all sectors, which is a particular problem in agriculture and the informal sector and a likely issue with suppliers. Environmental contamination by the company also poses a risk of non-compliance with the right to health.

Right to Adequate Food (art. 25) constitutes a high risk human rights area for companies in South Africa. With such a high percentage of the population living under poverty level, violations of minimum wage law, and failure to set a living wage, could lead to a violation of a workers' right to adequate food. Contract migration workers are entirely dependent on their employers for food provision, as are many other migrant workers. The company must further take care to ensure that its use of land does not deprive local people of water sources or land they normally use for subsistence agriculture.

Right to Education (art. 26) is a high human rights risk for companies in South Africa. South Africa struggles with a high level of the population that has not achieved the level of education they are entitled to, which is the 9th grade education. Furthermore, there are problems of quality of primary and secondary education, as well as access to education in the rural areas in particular. The incidence of child labour, as well as difficulties in access to education in rural areas, causes a high percentage of children who are unable to enjoy the fulfilment of their right to education. Furthermore, adult workers who have not achieved a 9th grade education or the equivalent are also entitled to participate in further education programmes so as to achieve that level.

COMPANY RISK

The following rights received a yellow rating in the Company Risk category in the South Africa CRA which indicates that these human rights constitute medium-risk areas for companies operating in South Africa. A short description of each right follows below.

- Right to Life, Liberty and Security of Person (art. 3)
- Right to Freedom from Forced Labour and Servitude (art. 4)
- Right to Freedom from Torture, Cruel, Inhuman or Degrading Treatment or Punishment (art. 5)

- Right to Privacy (art. 12)
- Right to Family Life (art. 16)
- Right to Take Part in Government (art. 21)
- Right to Peaceful Assembly and Freedom of Association (art. 20 and 23)
- Right to Adequate Housing (art. 25)
- Right to Participate in Cultural Life (art. 26)
- Right to Intellectual Property (art. 26)

Right to Life, Liberty and Security of Person (art. 3) constitutes a medium-risk human rights area for South Africa. Violent crime, including violence against women and children, human trafficking, use of excessive force by the police, and violence and killings on farms are some of the problems South Africa is grappling with. Human trafficking constitutes the greatest risk to companies, as many of the persons trafficked work in both legal and illegal industries. The company could risk direct violations if it does not establish and implement strict employment policies, and would risk indirect violations if suppliers use the labour provided by trafficked persons.

Right to Freedom from Forced Labour and Servitude (art. 4) is a medium-risk human rights area for companies. The high numbers of children, including many who were trafficked from other countries, who work in prostitution and industry, make this problem one of grave concern. It was estimated that between 28,000 and 38,000 children were working in prostitution in 2004 (iafrica 2004). Furthermore, it is unknown how many adults are trafficked or come voluntarily into South Africa, and who work under similar coercive conditions. The company could risk direct violations if it does not establish and implement strict employment policies, and would risk indirect violations if suppliers use the labour provided by trafficked or coerced persons.

Right to Freedom from Torture, Cruel, Inhuman or Degrading Treatment or Punishment (art. 5) constitutes a medium-risk human rights area for companies. Though most violations are carried out in the government realm or within families, the level of workplace sexual harassment of women is increasing at South African workplaces. The probability that this issue will arise in a company's operations is high. It is the responsibility of the company to establish measures to protect all employees against sexual harassment.

Right to Privacy (art. 12) constitutes a medium-risk human rights area for companies in South Africa. Companies should exercise caution when collecting data from employees and ensure that it does not unnecessarily collect sensitive data, particularly from groups that are often exposed to harassment and discrimination in South Africa. The company should be particularly careful to protect data related to HIV status of workers. Companies involved in information and communication technology must be cautious about direct violations related to interference with privacy.

Right to Family Life (art. 16) is categorised as a medium-risk human rights area for companies. South Africa's legislation offers sufficient protection on maternity leave and pregnant and breastfeeding women, but current violations of the right take place due to lack of enforcement and the large informal sector. The company also risks violating this right due to the high number of child-headed and women-headed families. Child and women head of households are very vulnerable in the workplace, and may require flexibility and accommodations by the employer. Since these groups also tend to be discriminated against in other areas, the company will have to ensure a tough non-discrimination policy to protect these workers. Indirect violations as a result of supplier violations also constitutes a risky area

The Right to Take Part in Government (art. 21) is a medium-risk human rights area for companies operating in South Africa because of the growing trend of bribery and corruption at both petty level and high level in government. Though substantial efforts have been made to strengthen the legal framework for preventing and combating corruption, and many corruption cases have been prosecuted at high and petty levels, the practice appears to be on the increase. The company must not bribe or use other coercive measures to unjustly influence government officials, local authorities or the political and judicial process itself, and must monitor its suppliers for practices of corruption.

The Right to Peaceful Assembly and Freedom of Association (art. 20 & 23) is a medium-risk human rights area for companies operating in South Africa. Although there are adequate legal protections for the rights generally, and the government generally respects these rights, it is classified as medium risk. Recent problems include firing of employees for going on strike, and incidence of workers being fired on with rubber bullets when striking. Due to the proximity of labour to company activities, and to the vulnerability of workers generally in South Africa, this is an area where the company must exercise a great deal of care. Since such a large percentage of the workforce is employed in the informal sector where they lack access to union representation, and children and migrant workers are also effectively excluded from the benefits of the labour movement, they lack the protection of trade unions. Furthermore, the ability of trade unions to maintain and improve working conditions for the unionized workforce is probably undermined by the availability of child labour, migrant labour, and the high unemployment in South Africa.

Right to Adequate Housing (art. 25) constitutes a medium human rights risk for companies. Housing shortages and inadequate housing facilities severely restrict the right to adequate housing in South Africa, which will affect the company when existing employees or new recruits search for suitable housing within reasonable proximity to the workplace. The company might consider building or purchasing dormitory units to house its employees, but must ensure that its operations do not impair housing options or enjoyment rights of surrounding communities, which are already overburdened by the lack of suitable housing.

Right to Participate in Cultural Life (art.26) is a medium risk human rights area in South Africa due to the diversity of the population and the vulnerability of the indigenous population, who are one of the most disadvantaged groups in South Africa. In the past, the indigenous peoples were prevented from living on their traditional lands and practicing their way of life. It is critical that companies enact workplace policies that enable all workers to enjoy a non-discriminatory and culturally sensitive workplace, and operate in such a manner as to respect the cultural life of the local people.

Right to Intellectual Property (art.26) constitutes a medium risk human rights area for companies in South Africa. South Africa has extensive protections of intellectual property, and intellectual property is often closely linked to company activities. Piracy of IT-related products is also a problem. Violations of the intellectual property rights of indigenous people have already taken place, and although negotiated settlements were arrived at, there is a clear risk that such situations could recur. Thus companies must observe both South African law and international law, since South Africa has not yet ratified conventions related to the rights of indigenous peoples.

COMPANY RISK

The following rights received a green rating in the Company Risk category in the South Africa CRA which indicates that these human rights constitute low-risk risk areas for companies operating in South Africa. A short description of each right follows below.

- Right to Fair Trial and Recognition as a Person before the Law (art. 6,7,10 and 11)
- Right to Freedom of Movement (art. 13)
- Right to Freedom of Opinion, Expression, Thought, Conscience and Religion (art. 18 and 19)

Right to Fair Trial and Recognition as a Person before the Law (art. 6,7,10 and 11) constitutes a low-risk area. South Africa has good legal protections for this right. While violations of this right take place, most take place within the governmental realm, where the company can have little impact on the fulfilment of the right. The company must nonetheless be careful to ensure that if it pursues a legal proceeding against a defendant, he or she receives a fair trial according to international standards. This is particularly important in cases where the proceedings involve human rights abuse, or when the defendant cannot afford legal counsel.

Right to Freedom of Movement (art. 13) constitutes a low risk human rights area. While violations are likely to take place with respect to trafficked persons, the company will probably not face a substantial risk if it establishes policies that respect this right in the workplace, and ensures that security guards in particular implement the policy. The company must monitor suppliers for violations of this right.

Right to Freedom of Opinion, Expression, Thought, Conscience and Religion (art. 18 & 19) is a low-risk human right area for companies in South Africa. The Government generally respects these rights. An area where the company must take special care is in the area of whistleblowers, where South Africa is one of the few countries in the world to protect workers who report on their employers' illegal or irregular practices. The Company must also monitor suppliers for violations of this right.

For specific recommendations on how to minimise these risk areas, please refer to the recommendations in the focal areas or in the particular right.