

## **BUSINESS AND HUMAN RIGHTS IN SOUTH AFRICA - WITH A NOD AT A CORPORATE LAW FIRM**

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The purpose of this workshop is to focus on the possibilities and limitations of law and constitutionalism during and since South Africa's transformation 20 years ago. Twenty years into democracy, and I find myself at a corporate law firm for the first time in my (longish) public interest law career. I have asked myself the existential question, what does it mean? The opportunity to speak at this workshop about business and human rights, is a chance to share some of these thoughts, and to engage in a philosophical exchange about my current self-chosen mode of existence and moral stance with respect to the rest of the world.

How valid are the corporate social responsibility pro bono efforts of corporate law firms? These are often referred to as "window dressing" - a euphemism for covering up corporate corpses. Is there real impact? Are there real possibilities? What are the limitations?

The statement made by Naomi Klein in her latest book in relation to 'climate challenge' can as aptly be applied to 'business and human rights', "Any attempt to rise to the climate challenge [business and human rights challenge], will be fruitless unless it is understood as part of a much broader battle of world views."<sup>1</sup> As is sometimes said, it is easier to envisage the end of the world, than to imagine the end of capitalism. Even more so now, in the era of neoliberalism - a time period in which extreme capitalism has birthed extreme inequality.

A valid question to ask therefore is, in the context of neoliberalism, is there a space for human rights in business?

I contend that one of the possibilities created by constitutionalism, 20 years on in South Africa, is an engagement with the intersect between business and human rights. For our current engagement, this paper will sketch the constitutionalism context; will look at the UN Guiding Principles in some detail; and will examine what role a law firm - as business - can play in promoting human rights. It will then conclude with some end thoughts.

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<sup>1</sup> N Klein, *This Changes Everything: Capitalism vs The Climate*, 2014

## THE CONSTITUTIONALISM CONTEXT

Doing business in South Africa, takes places in a human rights context. The term 'human rights context' is a short hand description for the relatively complex sets of laws, codes, approaches and lived experience which inform doing business in South Africa. Business is part of society, not apart from it, and as such it needs to be seen as part of the solution to social obstacles. The social responsibility of business<sup>2</sup> is thus not optional but mandatory.

The overarching framework for the human rights context is the South African Constitution Act 108 of 1996, the highest applicable law in South Africa. All other laws and best practice guidelines must adhere to it. The Constitution guarantees a number of rights, relevant within the environment of doing business, including *inter alia* the right to equality (section 9), the right to human dignity (section 10), the right to life (section 11), the right to freedom and security of the person (section 12), the right not to be subjected to slavery, servitude and forced labour (section 13), the right to privacy (section 14), the right to freedom of religion, belief and opinion (section 15), the right to freedom of expression (section 16), the right to peaceful assembly, demonstration, picket and petition (section 17), the right to association (section 18), the right to fair labour practices (section 23), the right to an environment that is not harmful to health or well-being (section 24), the right to property (section 25), the right to adequate housing (section 26), the right to water and health (section 27), and the right of access to information (section 32).

Moreover, the Constitution recognises that corporations as juristic persons are bound by fundamental rights.<sup>3</sup>

Various laws contain detailed provisions on these constitutional rights; and there is also legislation that governs corporate social responsibility. Additionally, the King Code of Corporate Governance, which integrates governance, strategy and sustainability, reflects a value system based on the social responsibility of business, and for example is included as a listing requirement of the Johannesburg Stock Exchange.

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<sup>2</sup> Reference in this paper to 'business', 'businesses' and/or 'corporations', refer to businesses that have a transnational character in their operational activities, as well as local businesses with operational activities that have the potential to impact adversely on the rights of individuals and/or communities.

<sup>3</sup> The application provision of the Constitution of the Republic of South Africa 108 of 1996,

8 (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of the duty imposed by the right.

(3) when applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court -

(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and  
(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 38(1).

(4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

It is against this background that the relevance of the Guiding Principles on Business and Human Rights must be understood in the South African context. While the Guiding Principles provide guidelines for both states and business, the focus here is on the guidelines pertaining to business. The Guiding Principles for the first time provide a language and an analytic framework to understand the scope of business responsibility for human rights as distinct from the state responsibility for the same rights.

## U N GUIDING PRINCIPLES

The Guiding Principles on Business and Human Rights (Guiding Principles)<sup>4</sup>, endorsed by the United Nations (UN) Human Rights Council on June 16, 2011 is the first global set of guidelines on business and human rights. The Guiding Principles provide an important framework for corporations, states, civil society and others as they work to strengthen their respective approaches to the issue of business and human rights.

Developed by former UN Special Representative of the Secretary General on Business and Human Rights, John Ruggie, the Guiding Principles highlight steps states can take to encourage business respect for human rights; provide a blueprint for companies to demonstrate respect for human rights and minimise the risk of harm to people; and constitute a set of benchmarks for stakeholders to assess business respect for human rights. The principles are organised under a three-pillar framework:

- **Protect:** States have a duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulations, and adjudication.
- **Respect:** Businesses have a responsibility to respect human rights, including acting with due diligence to avoid infringing on the rights of others, and addressing adverse impacts with which they are involved.
- **Remedy:** There is a need for greater access to remedy for victims of business-related abuse, both judicial and non-judicial.

The Guiding Principles go beyond the plethora of voluntary initiatives, often sector specific, that went before. Finalised through a lengthy process of principled pragmatism, the Guiding Principles are now an aspect of the business landscape. They have been widely endorsed by business organisations, international and domestic groups, in inter-governmental settings, and by standard setting bodies. Already, the Guiding Principles have been reflected in several sets of international guidelines. Their substance has been integrated into ISO 26000 (the Corporate Social Responsibility standard promulgated by the International Organisation for Standardisation), the revised Organisation for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises, and the updated Performance Standards of the International Finance Corporation (IFC). In addition, the Protect, Respect and Remedy Framework has been applied in government

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<sup>4</sup> Human Rights Council, 'Human Rights and Transnational Corporations and Other Business Enterprises', A/HRC/Res./17/4

policies, business practices, corporate law firm memos, multi-stakeholder initiatives, investor benchmarks and NGO advocacy.

However, the critics of the Guiding Principles are many and vocal, and contend, in short, that the process of principled pragmatism, was too pragmatic, resulting in guidelines which are too broad and not sufficiently detailed to set proper benchmarks for business.

The core responsibility of business under the Guiding Principles is to respect human rights (more fully described in Guiding Principles 11 to 24). It means that companies must not infringe upon human rights and must address adverse human rights impacts with which they are involved, both through their own activities and through their business relationships. It requires businesses to know and show - through policies, processes and systems - that they are preventing and addressing negative human rights impacts.

In their efforts to respect and support human rights when operating in emerging economies, corporations are likely to face one or more of the following common dilemmas: access to water; child labour; community relocation; conflict minerals; corruption; cumulative impacts; customary rights; doing business in conflict-affected countries; ethnic minorities; forced labour; free prior and informed consent (FPIC); freedom of association; freedom of religion; freedom of speech; gender equality; health and safety; HIV/Aids; housing; human trafficking; indigenous peoples' rights; living wage; migrant workers; privacy; product misuse; security forces; stabilisation clauses; working hours; and working with state-owned enterprises.

Guiding Principle 14 provides that the responsibility of businesses to respect human rights applies to all businesses, "regardless of their size, sector, operational context, ownership and structure". Yet it does add that the means through which a business meets its responsibility to respect human rights will be proportional to, among other factors, its size.

While state responsibility is absolute and defined by jurisdiction, business responsibility is context sensitive and defined by causal links: "Business enterprises should respect human rights. This means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved." (Guiding Principle 11)

The Guiding Principles constitute an authoritative normative standard on the steps that business should take to respect internationally recognised human rights. There are a number of things that the business responsibility to respect human rights is not:

- It is not a passive duty, but a pro-active one, requiring the business to take pro-active steps to adopt and embed a policy commitment, to engage in a human rights due diligence process and to participate in processes to remedy negative impacts it has caused or contributed to.
- It is not limited by the laws of individual countries, and applies whether or not the country where the business is conducted has laws that protect human rights. Yet the responsibility of corporations to respect

human rights does not exist in a law free zone, since it is reflected in legislation that corresponds to international human rights standards (e.g. workplace standards in accordance with ILO Conventions), and various laws that outlaw discrimination of various forms.

- It is not a discretionary and market driven standard, to be applied only where the business will likely gain maximum reputational benefit, but is a minimum global standard that applies wherever and however the business actually or potentially affects human rights.
- It is not a voluntary sign-up standard. Businesses are judged by their lack of respect for human rights whether or not they have elected to follow the steps outlined in the Guiding Principles.
- It is not corporate social investment. Respecting human rights is not achieved by doing good charitable deeds.
- It does not entail the application of subjective moral judgments, but is grounded in internationally recognised human rights, as expressed in the International Bill of Human Rights and the principles set out in the ILO's Declaration on Fundamental Principles and Rights at Work.

### **Status or standing of the Guiding Principles**

The 'Protect, Respect and Remedy' Framework which informs the Guiding Principles, was adopted by the Human Rights Council in 2008.<sup>5</sup> South Africa was of the view that the 'Protect, Respect and Remedy' Framework did not go far enough and expressed its discontent at the adoption stage. Yet, at about the same time, South African Navi Pillay, who is the current High Commissioner for Human Rights, expressed her support and described the statement "transnational corporations and other business enterprises have a responsibility to respect human rights" as "an innovative position" and "both sets a new and clear benchmark and represents a milestone in the evolving understanding of human rights in our societies."<sup>6</sup>

As its moniker suggests, the Guiding Principles are presented as non-binding and voluntary principles, available as a road map to both states and businesses for protecting and respecting the human rights of those who are or may be affected by certain business practices; and for remedying any violations of human rights which may have been caused by such business practices. However, the Guiding Principles are legally significant, firstly because they define "business respect for human rights", which was previously a vague concept. This definition, with its widespread acceptance by public and private players, as previously noted, allow the Guiding Principles to make their appearance in adjudications. The widespread endorsement of the Guiding Principles is creating a new principle of 'transnational public policy', of consequence in business disputes. Pre-dating the Guiding Principles, but insightful is the international arbitration between World Duty Free and Kenya, in which the tribunal accepted Kenya's claim that World Duty Free had

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<sup>5</sup> Human Rights Council, 'Protect, Respect and Remedy: a Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises', A/HRC/Res/8/5 (7 April 2008)

<sup>6</sup> N Pillay, 'The Corporate Responsibility to Respect: A Human Rights Milestone', [www.ohchr.org/Documents/Press/HC\\_Contribution\\_on\\_Business\\_and\\_HR.pdf](http://www.ohchr.org/Documents/Press/HC_Contribution_on_Business_and_HR.pdf)

obtained the contract through bribery of the Kenyan President which amounted to a breach of "international public policy" and it held that "claims based on ... contracts obtained by corruption cannot be upheld".<sup>7</sup>

Further, the wording of Guiding Principle 23 is noteworthy. To quote in full,

*23. In all contexts, business enterprises should:*

*(a) Comply with all applicable laws and respect internationally recognised human rights, wherever they operate;*

*(b) Seek ways to honour the principles of internationally recognised human rights when faced with conflicting requirements;*

*(c) Treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate. (emphasis added)*

Businesses should treat the risk of being complicit in gross human rights violations as a legal compliance issue, given the expanding web of potential corporate legal liability arising from extraterritorial civil claims, and from the incorporation of the provisions of the Rome Statute of the International Criminal Court in jurisdictions that provide for corporate criminal responsibility. In addition, corporate directors, officers and employees may be subject to individual liability for acts that amount to gross human rights abuses. In other words, a company should act on the prudent assumption that it may be held legally liable if it causes or contributes to these abuses, and take robust measures to prevent them from occurring.

Another and persuasive view is that while the Guiding Principles are not law and are not likely to be part of customary international law, they are inherently legal in both content and consequence. They are built on three intrinsically legal concepts: human rights (businesses are to respect all human rights), causation (the range of rights any business should address is informed by causal links to business operations), and proportionality (the range of actions any business should take is proportional to the nature of the business and its impact on human rights). Precisely defining rights and the scope of business responsibility, is not a corporate social responsibility exercise, but a legal one.<sup>8</sup>

While not referring directly to the Guiding Principles, the June 2014 ruling by the London High Court against Shell Nigeria, is informative. It was argued that under the Nigerian Oil Pipelines Act, anyone who suffered damage can claim if they can show that Shell was guilty of neglect in failing to 'protect, maintain or repair' the pipeline. The company's argument that they are only legally liable for oil spills caused by the operational failure of their pipelines was overruled by the court's finding that the relevant legislation imposes on the company "a general shielding and caring obligation", and that if it failed to take reasonable steps to protect its infrastructure against the illegal hacking into pipelines by criminal gangs, it could have potential liability for the mass

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<sup>7</sup> World Duty Free v Kenya, ICSID Case No. ARB/00/7, Award (4 October 2006) at 157; p 28 'The Intersection of Law and Corporate Social Responsibility: Human Rights Strategy and Litigation Readiness for Extractive Sector Companies', Yousuf Aftab. Enodo Rights (undated)

<sup>8</sup> 'The Intersection of Law and Corporate Social Responsibility: Human Rights Strategy and Litigation Readiness for Extractive Sector Companies', Yousuf Aftab. Enodo Rights (undated)

pollution of the Delta river caused by the oil spills resulting from the illegal hacking.

### **Issues to note**

Four issues, in particular are worth noting in the current discussion: due diligence; grievance mechanisms; costs of non-compliance; and voluntary vs compulsory.

- **Due diligence**

The Guiding Principles introduced the concept of 'corporate human rights due diligence', a process to help companies avoid infringing human rights or 'becoming complicit' with others who infringe such rights. As there are no human rights that business cannot infringe upon, the scope of the responsibility to respect covers all internationally recognised human rights. The responsibility to respect requires businesses to know and to show that they are respecting human rights through a process of due diligence. Human rights due diligence is not a once-off act, but only of real worth when it is ongoing, dynamic, iterative and draws upon established concepts of corporate governance and risk management. It requires the assessment of company impacts on human rights, not only from the perspective of the company, but importantly from the perspective of external stakeholders. Looking at the negative impact on human rights solely from the company's perspective assumes, incorrectly, that potential victims have the same tolerance for negative human rights consequences as a business. In addition, Guiding Principle 24 specifies that businesses should prioritise human risks on the basis of severity of harm. The dangers of the failure to prioritise highly severe but seemingly low-likelihood risks to human rights, are illustrated by some recent international corporate disasters: the global liquidity crisis of 2008, the Deepwater Horizon pipeline leak in Mexico in 2010, and the Fukushima nuclear power plant accident in 2011.

- **Grievance mechanisms**

The third pillar in the three-pillar framework, is access to remedy, and it speaks to both states as well as businesses. In the context of the Guiding Principles, a grievance is understood to be a perceived injustice invoking 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 routinised, 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. Guiding Principle 30 provides that industry, multi-stakeholder and other collaborative initiatives that are based on respect for human rights-related standards should ensure that effective grievance mechanisms are available. In turn, Guiding Principle 31 in detail describes the effectiveness criteria for non-judicial grievance mechanisms: legitimate, accessible, predictable, equitable, transparent, rights-compatible and a source of continuous learning. In addition, operational-level mechanisms that businesses help administer should for their design and performance consult the stakeholder groups for whose use they are intended, and they should focus on dialogue as the

means to address and resolve grievances. 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.

- **Costs of non-compliance**

One of the costs of non-compliance that businesses sometimes do not fully take into reckoning, is the costs of conflict with local communities arising from exploration and production activities. To illustrate, the international example of Newmont Mining Company may be considered. Newmont Mining Company, the majority owner of the USD 4.8 billion Conga gold mine project in northern Peru, calculated a USD 2.1 million per day initial cost resulting from the project's suspension due to protests about water pollution by local residents in November 2011. There are other examples. Costs to extractive companies arising from community conflict, which could be avoided by a proper implementation of the Guiding Principles, include but are not limited to, lost opportunity costs such as the inability to pursue future projects; the need for additional staff time to respond to community conflict; and delayed production with the concomitant costs for wages and idle machinery.

- **Voluntary vs. compulsory**

The South African government is in support of the Guiding Principles becoming a binding treaty. It was the co-sponsor of a Human Rights Council resolution adopted on 26 June 2014.<sup>9</sup> The adoption of this Resolution began a process of elaborating an international legally binding instrument, to regulate, in international human rights law, the activities of corporations. The Resolution mandates an open-ended intergovernmental working group with this task. Speaking on behalf of South Africa, ambassador Abdul Samad Minty noted that the government of South Africa accords special priority to issues concerning multinationals, business and human rights. He highlighted that the South African government holds a strong view that multinationals, which are the drivers of globalisation, cannot operate in a void.<sup>10</sup> Ambassador Minty stressed that a universal regulatory framework in the form of a binding instrument to provide legal protections, effective remedies, as well as a range of other measures in a quest for protections of victims, is desirable and imperative.<sup>11</sup>

This resolution is supported by many civil society organisations which call for human rights due diligence to be made mandatory through policies and regulations that make it a precondition for government procurement contracts, export credit licenses, and stock exchange listings, among others; and through the inclusion of human rights obligations of investors in bilateral investment treaties and in the investor-state dispute resolution clauses of those treaties.

However, some are concerned that focusing on a binding treaty distracts from the full implementation of the Guiding Principles; and also that there is no time

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<sup>9</sup> Human Rights Council, 'Elaboration of an internationally binding instrument on transnational corporations and other business enterprises with respect to human rights, A/HRC/Res./26/9

<sup>10</sup> <http://www.rwnside.org.sg/title2/climate/info.service/2014/cc140602.htm>

<sup>11</sup> <http://www.rwnside.org.sg/title2/climate/info.service/2014/cc140602.htm>

limitation as the working group's mandate is open-ended. The expected treaty, when eventually finalised, would be the first international human rights agreement to specifically and explicitly regulate the activities of corporations with regard to individuals' and communities' fundamental rights.

### **Concluding notes on the Guiding Principles**

In conclusion, four points must be noted. Firstly, the Guiding Principles do not eliminate the need for stakeholder engagements, but rather when so engaging, business should do so in a systematic way, informed by legal concepts and potential legal risks. Secondly, the corporate responsibility to respect human rights establishes a globally authoritative process standard on how companies should manage their business with respect to human rights. If it is regarded as soft law, it is one with hard consequences. Thirdly, the rules of the game have changed and the implementation of the Guiding Principles is a business imperative. Fourthly, it is necessary to develop business practices which not only mitigate human rights risks, but rather create human rights opportunities. While the language of the Guiding Principles is that of 'human rights risks' and 'adverse human rights aspects', by intentionally incorporating the Guiding Principles in the DNA of businesses, will turn risks into opportunities. Understanding, implementing and embracing the Guiding Principles is a human rights opportunity for business.

### **LAW FIRM AS BUSINESS AND ROLE IN PROMOTING HUMAN RIGHTS**

As illustration I want to look at a corporate law firm, as business. This is an appealing exercise, and for the following reasons:

- As a business, to what extent does the corporate law firm itself comply with human rights guidelines;
- As a law firm, what is its commitment to corporate social responsibility and/or pro bono activities;
- As a law firm, what does it do to promote and protect human rights;
- As a law firm, does it give legal advice to corporate businesses, and what is its responsibility or duty to provide its clients with advice and recommendations which go beyond ensuring compliance and avoiding liabilities.

The law firm on which I will rest my gaze, is Webber Wentzel. Webber Wentzel is among South Africa's Big 5 corporate law firms, with 337 attorneys and 108 candidate attorneys. As one of South Africa's oldest law firms, it has historical ties with gold and diamond mining. Its current growth areas are oil and gas, and agribusiness. It has offices in Johannesburg and Cape Town; and practices in alliance with Linklaters, an international law firm. I am an attorney in its Pro Bono Practice Group.

### **Extent to which corporate law firm itself complies**

Corporate law firms such as Webber Wentzel are big businesses in their own right. Earlier this year Webber Wentzel appointed a committee and tasked it with ensuring that the firm is compliant with the UN Guiding Principles. The timing of this initiative is in keeping with international trends. At the end of October 2014, the International Bar Association (IBA) issued guidance to bar

associations, private lawyers and law firms about how to integrate the Guiding Principles in their work.<sup>12</sup>

### **Law firm has corporate social responsibility and pro bono activities**

Webber Wentzel has corporate social responsibility and pro bono activities. It consciously goes about dovetailing the social responsibility programmes with the objectives of the Pro Bono Practice Group.

### **Law firm does matters that promote and protect human rights**

In the last calendar year (January to December 2013), the firm recorded more than 12 000 pro bono hours. But it is really interesting to look beyond the hours. Actually, what this business is doing, is promoting and protecting human rights. And it does so by through the work of a permanent Pro Bono Practice Group which now consists of 5 ½ attorneys (in 2013 it was 4 ½), two candidate attorneys and one administrative assistant. At the end of the paper is a table containing some of the pro bono matters done by Webber Wentzel during 2013, and the human right/s protected and/or promoted by these matters. These outcomes were achieved in often complex matters, many long running in nature.

### **Law firm gives legal advice to corporate businesses**

As the IBA points out in its report, "There are few areas of legal practice for which the Guiding Principles - and the international human rights standards which they reference - are not potentially relevant."<sup>13</sup>

Certain human rights obligations arise from a law firm's provision of legal services and advice to business clients. Importantly, despite having independent human rights obligations, a law firm cannot force a business client to do anything that the client does not want to do. This tension may lead to situations where a firm's duty to its client could appear to conflict with its human rights obligations under the Guiding Principles. Where such a tension arises, it should be an option for the law firm to decide whether it can leverage its role as trusted advisor to the business to encourage it to consider the human rights impacts of its decisions. Given the confidential nature of the firm-client relationship, a law firm can do so "without fear that the communication will become public."

The IBA recommends the following practical tactics:

- Emphasising to all clients up-front that it intends to advise on the 'big picture,' which includes human rights risks, in order to provide greatest value to all clients
- Raising the kinds of problems that other companies have faced when they have not fully addressed human rights issues associated with a similar matter
- Offering capacity-building training to clients and their legal departments on human rights issues

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<sup>12</sup> <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=c9bd50c6-c2b3-455b-b086-a7efbfe1f6a5>

<sup>13</sup> <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=c9bd50c6-c2b3-455b-b086-a7efbfe1f6a5>

- Providing advice and services on business and human rights on a pro bono basis to clients
- Issuing client alerts on specific human rights issues related to its individual practice groups
- Participating in multi-stakeholder dialogues where the firm can champion business and human rights issues
- Supporting the efforts of law societies and bar associations to provide training and guidance for member lawyers on business and human rights issues

## CONCLUDING THOUGHTS

I have two (initial) concluding thoughts.

The first is a narrow one, namely should compliance with the UN Guiding Principles be compulsory? South Africa is already over-regulated, and what would be of far greater worth to protecting and promoting human rights, is greater enforcement of compliance with existing legislation that does so directly and indirectly.

The second is a more existential one. Despite the overwhelming construct of neoliberalism, Naomi Klein describes sign of hope.<sup>14</sup> Business and law firms have become much more powerful in South Africa during the last 20 years. Yet, this has also created the resources and the space for law firms to engage the Constitution for the greater good. But it is not without its contradictions.

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<sup>14</sup> N Klein, *This Changes Everything: Capitalism vs The Climate*, 2014

**SOME WEBBER WENTZEL PRO BONO MATTERS AND THE CONSTITUTIONAL RIGHTS PROTECTED, PROMOTED AND/OR STRENGTHENED**

MATTER	CONSTITUTIONAL RIGHTS / ISSUES
<p>Representing Helen Suzman Foundation in the Constitutional Court confirmation and leave to appeal proceedings of <i>Glenister v President of the Republic of South Africa and Others</i>, in which legislation establishing the Directorate for Priority Crime Investigation (the Hawks), was challenged successfully in the Western Cape Division of the High Court, Cape Town. [2012 to 2014] [reported]</p>	<ul style="list-style-type: none"> <li>• Lawful, procedurally fair and just administrative action</li> <li>• Interpretation of statutes</li> </ul>
<p>Representing AIDS-FREE World (an international non-profit organisation) in challenging the failure of the South African Police Service to investigate crimes against humanity committed in Zimbabwe around the 2008 elections. [2013 to 2014] [reported]</p>	<ul style="list-style-type: none"> <li>• Crimes against humanity</li> <li>• Obligations on a State to investigate crimes against humanity</li> </ul>
<p>Representing the Helen Suzman Foundation in challenging the process adopted by the Judicial Service Commission as well as their interpretation of section 174 of the Constitution of the Republic of South Africa when it appoints judges to the bench. The matter has evolved into an application to compel the JSC to provide crucial information which goes to the heart of their decision making processes. The interlocutory proceeding will probably go to the Constitutional Court. [2013 to 2014]</p>	<ul style="list-style-type: none"> <li>• Lawful, procedurally fair and just administrative action</li> </ul>
<p>Represented the Institute for Accountability in Southern Africa in the Constitutional Court proceedings of <i>F v Min of Safety and Security and ano</i> in which F sought to hold the Minister liable for the conduct of a police officer on standby duty who raped and assaulted a 13-year old girl. [reported]</p>	<ul style="list-style-type: none"> <li>• Security of the person; bodily integrity; vicarious liability</li> <li>• The judgment extended the scope of vicarious liability</li> </ul>
<p>Represented Freedom under Law in the Constitutional Court proceedings of <i>Freedom Under Law v President of the Republic of South Africa and others</i>, in which the constitutionality of section 8(a) of the Judges' Remuneration and Conditions of Employment Act, 47 of 2001, which purported to grant to the President a discretion to extend the terms of office of the Chief Justice of the Constitutional Court.</p>	<ul style="list-style-type: none"> <li>• Independence of the judiciary</li> </ul>

[reported]	
Represented the plaintiff, a victim of workplace sexual harassment, seeking to expand the exception on the running of prescription for adult survivors of child abuse.	<ul style="list-style-type: none"> <li>• Human dignity</li> <li>• Security of the person</li> <li>• Fair labour relations</li> </ul>
Represented Corruption Watch and TAC in a review of a decision by the Special Investigation Unit to refuse access to records	<ul style="list-style-type: none"> <li>• Access to information</li> </ul>
Represented a domestic violence victim who, when unsuccessfully attempted to open a case with the South African Police Service, was unlawfully detained and assaulted by members of SAPS.	<ul style="list-style-type: none"> <li>• Human dignity</li> <li>• Freedom and security of the person</li> <li>• Access to justice</li> </ul>
In a claim for support based in parental duty, represented two intellectually challenged minors, whose natural and adoptive fathers, respectively, shirked their responsibilities and refused to pay the home where the boys are cared for.	<ul style="list-style-type: none"> <li>• Children rights under section 28</li> </ul>
Discrimination based on HIV status case which resulted in a successful constructive dismissal claim.	<ul style="list-style-type: none"> <li>• Right not to be unfairly discriminated</li> <li>• Fair labour practices</li> </ul>
A refugee was charged and detained on an alleged charge of rape; first appearance was 84 hour after arrest and he was detained for seven months without bail.	<ul style="list-style-type: none"> <li>• Section 35 rights</li> <li>• Human dignity</li> </ul>
Represented the Harry Gwala Informal Settlement, in which the Constitutional Court ordered the relevant province to investigate whether in-situ development, rather than the removal of the community, is feasible in terms of the National Housing Code.	<ul style="list-style-type: none"> <li>• Access to housing</li> <li>• Access to water</li> <li>• Right to an environment that is not harmful</li> </ul>
Assisted the Khomani San to reach a detailed agreement with the state as to the implementation of its contractual and legal duties to provide post restitution of land support.	<ul style="list-style-type: none"> <li>• Right to restitution of land</li> </ul>
Representing the Protea South Informal Settlement residents to procure an in situ upgrade, alternatively relocation to the nearest feasible site in terms of the National Housing Code with the proper application of a code providing a new set of standards and criteria for the development of dolomitic land by the City Johannesburg.	<ul style="list-style-type: none"> <li>• Access to housing</li> <li>• Access to water</li> <li>• Right to an environment that is not harmful</li> </ul>
Representing the Thembelihle Informal Settlement occupiers to procure an in situ upgrade alternatively relocation to the nearest	<ul style="list-style-type: none"> <li>• Access to housing</li> <li>• Access to water</li> </ul>

feasible site in terms of the National Housing Code with the proper application of a code providing a new set of standards and criteria for the development of dolomitic land by the City Johannesburg.	<ul style="list-style-type: none"> <li>• Right to an environment that is not harmful</li> </ul>
Representing a traditional leader of the Makuleke Traditional Community in reviewing a decision by a chief to appoint a headman.	<ul style="list-style-type: none"> <li>• Customary rights</li> </ul>
Acted for community members who were using shale from a pit on land belonging to the traditional community in the rural Easter Cape to resist an interdict against them by the traditional leader, on the basis that they too had the right in the land as the land was communal land	<ul style="list-style-type: none"> <li>• Property right</li> <li>• Use of communal land</li> <li>• Limits of traditional authorities powers</li> </ul>
Assisting in securing transfer of titles to land for members of the Driefontein community who had been removed from stands they held under freehold title during the 1980s.	<ul style="list-style-type: none"> <li>• Property rights</li> <li>• Security of tenure</li> </ul>
Assisting traditional leader to get recognition of an independent traditional community.	<ul style="list-style-type: none"> <li>• Right to participate in cultural life, practice, form, join and maintain cultural beliefs</li> </ul>
Assisting a traditional community to secure tenure that was rendered insecure by virtue of its land being allocated to another traditional leader in 1964. This leader has been dispossessing the community of land to private developers.	<ul style="list-style-type: none"> <li>• Property rights</li> <li>• Security of tenure</li> </ul>
Assisted a group of farmers, who were evicted by the City of Johannesburg to make way for the development of a township, to receive compensation.	<ul style="list-style-type: none"> <li>• Property rights</li> </ul>
Assisting clients to negotiate appropriate agreements for surface use and a stake in the mine between a company that holds a mineral lease over land and the heirs of the original owners of farm, who formed themselves into an association.	<ul style="list-style-type: none"> <li>• Property rights</li> </ul>
Assisted a community to gain access to information from Emalahleni municipality	<ul style="list-style-type: none"> <li>• Access to information</li> </ul>
Assisted a client, who is a refugee, to receive his Unemployment Insurance Fund benefit from the Labour Department after it refused to process his claim because he did not have a green barcoded identity book.	<ul style="list-style-type: none"> <li>• Right to fair labour practices</li> <li>• Right to social security</li> </ul>
Assisted the Psychological Society of South Africa to make submissions on the relationship between hate speech and the mental health of lesbian and gay persons.	<ul style="list-style-type: none"> <li>• Right to equality</li> <li>• Right to mental integrity, freedom and security of the person</li> </ul>
Assisted Cape Mental Health to be admitted as amicus in an application challenging the	<ul style="list-style-type: none"> <li>• Rights to equality</li> </ul>

Rough 1<sup>st</sup> draft - not for circulation

constitutionality of s77(6) of the Criminal Procedure Act, which deals with persons with mental disabilities and their ability to follow criminal proceedings.	<ul style="list-style-type: none"><li>• Right to dignity</li><li>• Rights of children</li></ul>
Acting for a traditional council that had lodged a land restitution claim, in obtaining an order compelling the Regional Land Claims Commissioner to comply with its various obligations i.t.o the Restitution of Land Rights Act.	<ul style="list-style-type: none"><li>• Right to restitution of land</li><li>• Duty of state to fulfil rights In terms of the Bill of Rights</li></ul>