

## Submission

to the

**Institute of Directors Southern Africa**

on the

## **DRAFT KING IV REPORT ON CORPORATE GOVERNANCE FOR SOUTH AFRICA, 2016**

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## A) INTRODUCTION

### ***About the Centre for Applied Legal Studies and Its Work on Business and Human Rights***

1. The Centre for Applied Legal Studies ('CALs') welcomes the opportunity to submit comments on the Draft King IV Report on Corporate Governance for South Africa, 2016 ('Draft King IV') in response to a call by the Institute of Directors Southern Africa ('IODSA') to do so. In the event that IODSA hosts public hearings or consultative meetings on the Draft King IV, CALS hereby requests an invitation to the same and the opportunity to be heard at such hearing or meeting.
2. CALS is a human rights non-governmental organisation and registered law clinic based at the School of Law at the University of the Witwatersrand. CALS is committed to the protection of human rights through the empowerment of individuals and communities and the pursuit of systemic change.
3. CALS' vision is a country and continent where human rights are respected, protected and fulfilled by the state, corporations, individuals and other repositories of power, the dismantling of systemic harm and a rigorous dedication to justice. It fulfils this mandate by:
  - challenging and reforming systems within Africa which perpetuate harm, inequality and human rights violations,
  - providing professional legal representation to survivors of human rights abuses; and
  - using a combination of strategic litigation, advocacy and research, to challenge systems of power and act on behalf of the vulnerable.
4. CALS operates across a range of human rights issues: basic services, business and human rights, environmental justice, gender, and rule of law. The business and human rights programme was formed in 2013 and seeks to ensure that corporate entities acknowledge their power to: influence the treatment of human rights, respect human rights and actively protect, promote and fulfil human rights. CALS often submits comments in the area of business and human rights on regulations, laws and policies. CALS' submissions may be found [here](#).
5. Most significantly is the work that CALS has done on the Draft Johannesburg Principles. The Draft Johannesburg Principles are a set of practices (drafted in consultation with financial institution advisors) that can be adopted by financial institutions that provide infrastructural development finance to ensure human rights compliance and prevent human rights violations. They include, inter alia, the performance of human rights due diligences, staggered lending to allow for

monitoring and the integration of human rights and environmental specialists in development financing decision making. The Draft Johannesburg Principles are enclosed with these submissions as “**Annexure A**”.

### ***CALS’ Submissions in Brief***

6. CALS submits that corporate entities have human rights obligations and recommends that the Draft King IV be amended to reflect this fact.
7. In summation, CALS submits that IODSA amend the Draft King IV to:
  - 7.1. Align with international, regional and domestic regulations mandating human rights observation by business entities;
  - 7.2. Align with the Constitution and the Bill of Rights, which imposes obligations on private actors, such as business entities, in accordance with section 8(2) of the Constitution; and
  - 7.3. Expressly disallow tax avoidance and view it as a contravention of corporate ethics.
8. In addition, CALS is of the view that the process for consultation on the Draft King IV should be expanded to include non-corporate stakeholders and that IODSA should consider making the Draft King IV binding.

## **B) INTERNATIONAL AND REGIONAL FRAMEWORK**

### ***International Framework***

9. For the sake of brevity this submission does not detail the entire international, regional and domestic framework for corporate accountability. It details only the instruments most relevant to corporate governance and therefore begins in 2011 when the Human Rights Council of the United Nations unanimously endorsed the UN Guiding Principles on Business and Human Rights (‘UNGPs’) prepared by Professor John Ruggie.
10. The UNGPs have three pillars: “Protect, Respect, Remedy”. The first pillar, protect, speaks to the duty of the state to protect human rights. The second pillar, respect, speaks to corporations’ responsibility to respect human rights. And the third pillar, remedy, demands that victims of human rights violations have access to a remedy. Significantly, the UNGPs are gender conscious in both their language and effect.
11. However, displeased with the manner in which corporations were avoiding liability for human rights violations, the African bloc (including South Africa), through a

statement by Ecuador, proposed that the international community consider the formulation of a binding instrument that would the governance gaps arising as a result of globalisation. The following statement was presented at the Human Rights Council session of September 2013:

“Corporations reminds us of the necessity of moving forward towards a legally binding framework to regulate the work of transnational corporations and to provide appropriate protection, justice and remedy to the victims of human rights abuses directly resulting from or related to the activities of some transnational corporations and other business enterprises.

The endorsement by the UN Human Rights Council in June 2011 of the ‘Guiding Principles on Business and Human Rights: Implementing the United Nations Protect, Respect, and Remedy Framework’ was a first step, but without a legally binding instrument, it will remain only as such: a ‘first step’ without further consequence. A legally binding instrument would provide the framework for enhanced State action to protect rights and prevent the occurrence of violations.”

12. Nine months later, in June 2014, the South African government (along with the Ecuadorian government) submitted a resolution calling for the elaboration on a binding treaty which would impose legal liability on corporations under international law *vis-a-vis* human rights.<sup>1</sup> South Africa then reconfirmed its commitment to corporate accountability in the African Union.

### ***Regional Framework***

13. Around the same time (July 2014) in the African Union, South Africa, along with a number of African countries, adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (“the African Court”).<sup>2</sup> The Protocol is ground-breaking in its reach with respect to corporate accountability, in that it does the following:

- 13.1. Defines a person as a natural or legal person, thereby extending the ambit of the African Court to include jurisdiction over the conduct of corporations;<sup>3</sup>

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<sup>1</sup> Human Rights Council, *Resolution on the Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, (24 June 2014), A/HRC/26/L.22/Rev.1.

<sup>2</sup> African Union, *Decisions on Draft Legal Instruments*, Assembly/AU/Dec.529(XXIII).

<sup>3</sup> Article 1.

- 13.2. Criminalises the following acts as a principle, co-principle, agent or accomplice: inciting, organising, directing, facilitating, or financing an offence in terms of the Protocol;<sup>4</sup> and
  - 13.3. Codifies the following crimes: Genocide, Crimes against Humanity, War Crimes, Corruption, Money Laundering, and the Illicit Exploitation of Natural Resources.<sup>5</sup>
14. Furthermore, at its 56<sup>th</sup> session in 2013, the African Commission passed a resolution on illicit capital flight.<sup>6</sup> In it, the African Commission noted that:
- 14.1. Illicit capital flight by multinational corporations leads to the loss of billions of US dollars every year;
  - 14.2. Africa is embroiled in a vicious circle of poverty, malnutrition, diseases and death because its revenue potential is being drained by multinational companies and individuals through exploitation of the loopholes and weaknesses of laws and of the monitoring system;
  - 14.3. without adequate resources the respect, protection and implementation of human rights will remain illusory;
  - 14.4. African Commission bodies are to study the impact of illicit capital flight on human rights; and
  - 14.5. States should examine their national tax laws and policies towards preventing illicit capital flight in Africa.
15. The linkage between the actions of corporate entities and human rights is evident from this resolution and the obligation of the state to ensure tax law compliance for human rights' purposes by corporate entities is equally evident. The relationship between corporate tax non-compliance and human rights violations will be discussed further below.

### ***International and Regional Framework and the Draft King IV***

16. It is clear under both international law and regional law that corporate entities carry certain responsibilities. Those responsibilities relate to corporate entities interaction with human rights and include, but are not limited to, the gendered impact of corporations internally (i.e. within their operations) and externally (i.e. external to their operations). At the most fundamental level corporate entities may not violate human rights. At a more progressive level, they should advance, protect and fulfil human rights. Unlike what is contained in the Draft King IV, human rights,

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<sup>4</sup> Article 28N(i).

<sup>5</sup> Articles 28B, 28C, 28D, 28I, 28I *Bis*, and 28L *Bis*.

<sup>6</sup> African Commission on Human and Peoples' Rights, *Resolution on Illicit Capital Flight from Africa*, (23 April 2013), Resolution 236, 53<sup>rd</sup> Ordinary Session.

in international law is not a consideration or a reputational element but a responsibility. Therefore the Draft King IV should be amended to reflect this.

17. It is also clear from the foregoing that in the opinion of South Africa, in international and regional spaces, corporate violation of human rights will no longer be tolerated. This move towards corporate accountability for human rights violations should be (and has in some ways been) reflected domestically in South African laws and policies.
18. The following section details the extent to which human rights compliance by corporate entities has been incorporated into domestic laws and policies and suggests that this should be extended towards the Draft King IV.

## **C) DOMESTIC FRAMEWORK**

### ***The Truth and Reconciliation Commission***

19. In 1998 the Truth and Reconciliation Commission ('TRC') acknowledged the role played by business entities in the orchestration and success of the apartheid state. In its final report, the TRC noted that:

“[N]ot all businesses profited equally from apartheid. It is, however, difficult not to conclude that, between 1910 and 1994, government and business (despite periodic differences and conflicts between them) co-operated in the building of an economy that benefited whites. On the one hand, they promoted and maintained the structures of white power, privilege and wealth and, on the other, the structures of black (mainly African) deprivation, discrimination, exploitation and poverty. To this extent, business was part of the mind-set of white South Africa.”<sup>7</sup>

20. It went on to say:

“Hundreds and probably thousands of South African private sector companies made the decision to collaborate actively with the government’s war machine [militarisation of South African society]. This was no reluctant decision imposed on them by coercive apartheid legislation. Many businesses, including subsidiaries of leading corporations, became willing collaborators in the creation of this war machine, which was responsible for many deaths and violations of human rights, both inside and outside the

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<sup>7</sup> Truth and Reconciliation Commission Report, volume 4, chapter 2, at para 97, available at <http://www.justice.gov.za/trc/report/finalreport/Volume%204.pdf> (last accessed 4 March 2015).

borders of our country. In addition, a variety of businesses collaborated with the state in the national security management system.”<sup>8</sup>

### ***The Constitution and Case Law***

21. It is in this context that the South African Constitution was drafted.<sup>9</sup> The Constitution embodies a departure from the manner in which government operated in Apartheid. It moved the South African state from one of parliamentary supremacy to one of constitutional supremacy. To this end, the Constitution itself provides that:

“This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”<sup>10</sup>

22. The Constitutional Court confirmed the principle of constitutional supremacy in case of *Affordable Medicines Trust*.<sup>11</sup> Further, regarding the supremacy of the Constitution in light of the duty on the courts to declare invalid any law inconsistent with the Constitution, to the extent of its inconsistency; the Constitutional Court said:

“This commitment to the supremacy of the Constitution and the rule of law means that the exercise of all public power is now subject to constitutional control.”<sup>12</sup>

23. Therefore, firstly law must not be inconsistent with the Constitution. Secondly, law must seek to realise the objectives of the Constitution, and in so doing promote the human rights ideals of the Constitution. It appears therefore, that there are two levels to constitutional supremacy. This is further evidenced by the provisions of the Constitution which call for legislative measures to realise human rights.<sup>13</sup> It is with this in mind that we suggest that the Draft King IV be amended to meet the standards of constitutional supremacy.

24. Section 8(2) of the Constitution provides “that 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”. During the

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<sup>8</sup> *Ibid*, at para 126.

<sup>9</sup> Constitution of the Republic of South Africa, 1996 (‘Constitution’).

<sup>10</sup> Section 2 of the Constitution.

<sup>11</sup> *Affordable Medicines Trust v Minister of Health and Others* 2006 (3) SA 247 (CC).

<sup>12</sup> *Ibid*, at para 48.

<sup>13</sup> The rights to equality, fair labour relations, property and lawful eviction, housing, healthcare, sufficient food and water, social security and access to information in terms of sections 9(4), 23(6), 25(5) and (6), 26(3), 27(2), and 32(2) respectively.



Certification judgment, the Constitutional Court articulated a complaint on the provision and dismissed it:

“Objection was taken to this provision on the ground that it would impose obligations upon persons other than organs of state, that is, it permitted what has been referred to in South African jurisprudence and academic writing as the “horizontal application” of bills of rights. The objection was grounded, first on the basis that the horizontal application of fundamental rights is not universally accepted. That is so, but as stated above, the requirement of universal acceptance in [Constitutional Principle II<sup>14</sup>] does not preclude the [Constitutional Assembly] from including provisions in the [Constitution] which are not universally accepted.”<sup>15</sup>

25. In so saying, the court accepted the premise that corporate entities’ responsibilities *vis-a-vis* human rights can go further than “respect” and extend towards positive duties of protection, promotion and fulfilment. However, in *Juma Musjid*, the Constitutional Court said:

“It needs to be stressed however, that the purpose of section 8(2) of the Constitution is not to obstruct private autonomy or to impose on a private party the duties of the state in protecting the Bill of Rights. It is rather to require private parties not to interfere with or diminish the enjoyment of a right. Its application also depends on the intensity of the constitutional right in question, coupled with the potential invasion of that right which could be occasioned by persons other than the state or organs of state’.”<sup>16</sup>

26. In *All Pay*, importantly, the court extended the principle of positive obligations to private bodies exercising public function.<sup>17</sup>
27. It follows therefore that under South African Constitutional law, corporations have both positive and negative duties. At the very least, corporations have the negative duty to respect human rights and ‘do no harm’. But, as appears from the *Juma Musjid* decision, they may have a positive duty depending on the constitutional

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<sup>14</sup> Constitutional Principle II reads:

“Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to inter alia the fundamental rights contained in Chapter 3 of this Constitution.”

<sup>15</sup> *Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC), at para 53.

<sup>16</sup> *Governing Body of the Juma Musjid Primary School and Others v Essay NO and Others (Centre for Child Law and Another as Amici Curiae)* 2011 (8) BCLR 761 (CC), at para 58.

<sup>17</sup> *All Pay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2)*; 2014 (6) BCLR 641 (CC); 2014 (4) SA 179 (CC), at para 66.

right in question and, as appears from *All Pay*, corporations have positive duties to promote human rights where they perform state functions.

### **Legislative framework**

28. Human rights obligations have been extended to corporate entities in a number of different statutes. Section 7(a) and (d) of the Companies Act stipulates that the purpose of the former is to “promote compliance with the Bill of Rights as provided for in the Constitution, in the application of company law” and to “reaffirm the concept of the company as a means of achieving economic and social benefits”.<sup>18</sup> It is clear therefore, that the legislature intends for corporate entities to comply with human rights.
29. To that end, the Companies Act demands that certain types of companies have social and ethics committees.<sup>19</sup> The social and ethics committee must monitor the companies’ compliance with the 10 principles set out in the United Nations Global Compact Principles and environmental practices.<sup>20</sup>
30. The National Treasury also promulgated the Regulation to the Pension Funds Act. Regulation 28 incorporates human rights principles in that it imposes on pension fund trustees an obligation to consider environmental, social and governance factors when making investment decisions. These factors should be considered especially where they may materially affect the long term sustainable performance of the asset.<sup>21</sup> In a memo released by the National Treasury it stated that the

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<sup>18</sup> Act 71 of 2008.

<sup>19</sup> Section 72(5) of the Companies Act.

<sup>20</sup> Regulation 43(5)(a)(i)(aa) and (iii) of the Companies Act. The UN Global Compact Principles are quoted below and relate to human rights.

#### Human Rights

Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; and • Principle 2: make sure that they are not complicit in human rights abuses.

#### Labour Standards

Principle 3: Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;

Principle 4: the elimination of all forms of forced and compulsory labour;

Principle 5: the effective abolition of child labour; and

Principle 6: the elimination of discrimination in respect of employment and occupation.

#### Environment

Principle 7: Businesses should support a precautionary approach to environmental challenges;

Principle 8: undertake initiatives to promote greater environmental responsibility; and

Principle 9: encourage the development and diffusion of environmentally friendly technologies

#### Anti-Corruption.

Principle 10: Businesses should work against all forms of corruption, including extortion and bribery.

<sup>21</sup> Regulation 28(2)(c)(ix) of the Pension Fund Regulations, GN R98 in Government Gazette 162 of 26 January 1962.

purpose of the regulation was to “align pension fund regulations with government policy objectives of socially responsible investment and transformation.”<sup>22</sup>

31. More recently, the South African Parliament passed the Protection of Investment Act, 2015 (‘Investment Act’).<sup>23</sup> The Investment Act is aimed at ensuring the protection of investors and their investments and to achieve a balance of rights and obligations that apply to all investors.<sup>24</sup> Section 12 of the Investment Act affords the Government or any Organ of State the sovereign right to take regulatory measures to (i) redress historical, social and economic inequalities; (ii) uphold the human rights guaranteed in the Constitution; and (iii) achieve the progressive realisation of socio-economic rights.
32. In its submissions to the International Centre for the Settlement of Investment Disputes during the *Foresti* dispute, South Africa argued that the mining legislation that preceded the Mineral and Petroleum Resources Development Act (‘MPRDA’) enabled human rights violations in private relationships.<sup>25</sup> Thus the MPRDA, another statute in South African statute books, was promulgated to redress those human rights violations and to protect human rights in private relationships such as in the relationship between the mining company and mine affected communities.

### ***South African Domestic Framework and the Draft King IV***

33. As it currently reads Draft King IV stipulates that “[h]uman rights abuses (diminution of human capital) in the supply chain of an organisation may, for instance, affect the reputation (diminution of intellectual capital) of the organisation.” The Draft King IV also obliges corporate citizens to “ensure that the organisation is a responsible corporate citizen”.<sup>26</sup> It provides that human rights, sustainable development and “compliance with legislation related to economic, social and environmental responsibility” is a corporate citizen consideration. Our reading of this provision implies that the Draft King IV treats human rights, sustainable development (a right in section 24 of the Constitution) and compliance with economic, social and environmental law as mere considerations. As has been set out in detail above, human rights are legal obligations in terms of international law, regional law and domestic law. They cannot merely be treated as considerations by corporate citizens.

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<sup>22</sup> Explanatory Memorandum on the Final Regulation 28 that gives effect to section 36(1)(bB) of the Pension Funds Act, 1956, *Government Gazette* 34070 of 4 March 2011.

<sup>23</sup> Act 22 of 2015 (‘Investment Act’).

<sup>24</sup> Investment Act, long title.

<sup>25</sup> *Piero Foresti, Laura de Carli & Others v Republic of South Africa (ICSID) Case No ARB(AF)/07/1*, at para 66.

<sup>26</sup> Institute of Directors Southern Africa, *Draft King IV Report on Corporate Governance for South Africa, 2016*, at 35 (‘Draft King IV’).

34. CALS therefore submits that the Draft King IV be amended to clearly state that human rights violations are not merely a reputational risk in the supply chain and human rights are not merely a consideration but a legal requirement in terms of South African law. A failure to comply with human rights under the law is tantamount to a failure to comply with fiduciary obligations under the law.

## **D) CONSULTATION**

### ***The Need for Broad Consultation***

35. As all the King Reports that precede it, the final version of King IV is bound to be a framework that it used, and considered valuable by most members of South African corporate society. Given the significant role played by corporate entities in South African society, the final version of King IV will impact the method of operation of not only corporate governance structures but also other stakeholders like shareholders, employees, affected communities, customers, suppliers, regulators and the state. It follows therefore that all interested parties should be given the opportunity to engage with and comment on the document on which the final King IV will be based i.e. the Draft King IV.
36. Consultation is also a requirement in terms of South African law. The founding provisions of the South African Constitution states that our democracy is founded on the values of accountability, responsiveness and openness.<sup>27</sup>
37. On our research, however, it appears that the Draft King IV is only available for public comment through an electronic portal which is also a mechanism for submitting comments. It also appears to only be available in English despite the fact that English is only the mother tongue of 9.6% of the South African population.<sup>28</sup>

### ***Consultation and the Draft King IV***

38. CALS is of the view that the Draft King IV should not only have been made available online but should also be made available in platforms that allow for a participatory and consultative mechanism of engagement with the public and communities. This is precisely because in our experience and work with communities affected by investment and/or corporate governance we find that communities are not appropriately and meaningfully consulted in decisions that pertain to them or their land or resources.

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<sup>27</sup> Constitution, section 1(d).

<sup>28</sup> *The Languages of South Africa*, available at <http://www.southafrica.info/about/people/language.htm#.VzLsldL5jGg>.

39. CALS submits that non-corporate stakeholders are material stakeholders and ought to be consulted *via* a broad robust and accessible participatory mechanism. This mechanism would include informing the public about the Draft King IV and why its development is vital in platforms such as television, radio and print media in their home languages together with reasons why it is important to have views from non-corporate stakeholders from a variety of different settings. This will go some ways in ensuring that corporate governance is viewed in manner that is mindful of intersectional identities of age, race, class, gender, ethnicity, sexual orientation and gender identity.

## **E) ILLICIT FINANCIAL FLOWS AND TAX AVOIDANCE**

### ***The Linkage between Illicit Financial Flows, Tax Avoidance and Human Rights***

40. Illicit financial flows ('IFF') cost the African continent more than US\$50 billion a year.<sup>29</sup> IFF has been defined as:

“Money that is illegally earned, transferred or utilized. These funds typically originate from three sources: commercial tax evasion, trade misinvoicing [sic] and abusive transfer pricing . . .”<sup>30</sup>

41. Tax avoidance, on the other hand, is defined as:

“The legal practice of seeking to minimize a tax bill by taking advantage of a loophole or exception to tax regulations or adopting an unintended interpretation of the tax code. Such practices can be prevented through statutory anti-avoidance rules; where such rules do not exist or are not effective, tax avoidance can be a major component of IFFs.”<sup>31</sup>

42. The existence of tax havens and off shore accounts in various jurisdictions is mentioned in the Draft King IV, but there is no meaningful engagement on how corporate practices which include transferring company profits to off shore accounts, can be halted. Although, this is an arguable premise, the taxation model is what fosters the economic and social goals of a government.<sup>32</sup> In fact, Draft King IV points out that inadequate infrastructure, service delivery failures, skills shortages, corruption, social transformation, poverty and inequality are pressing

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<sup>29</sup> African Union, *Illicit Financial Flow: Report of the High Level Panel on Illicit Financial Flows from Africa*, at 13.

<sup>30</sup> *Ibid*, at 9.

<sup>31</sup> *Ibid*, at 10.

<sup>32</sup> A Waris and M Kohonen *Linking Taxation to the Realisation of the Millennium Development Goals in Africa* at 8, available at <http://eadi.org/gc2011/waris-109.pdf>.

matters in South Africa.<sup>33</sup> A common contribution by all stakeholders within the state is essential for the maintenance of the public resources and for the cost of public administration. This should be equitably distributed among all the citizens in proportion to their means.<sup>34</sup>

43. Tax avoidance and tax evasion strategies contribute directly to the rife and extreme inequalities that exist in states where transnational companies conduct their business. Through tax contributions government is able to provide goods and services which all its citizens can enjoy. The achievement of socio-economic rights can be linked to fair taxation practices.<sup>35</sup> The provision of infrastructure, for example, facilitates certain rights such as the right to freedom of movement through the building of roads, the right to education through the financing of schools and the right to shelter through the provision of adequate housing. Tax avoidance therefore must be viewed as a human rights violation as opposed to merely non-compliance with a statute. This results in a loss of revenue for public expenditure programmes, and creates an increased reliance on external debt for developing countries.<sup>36</sup>
44. There needs to be greater support for the perspective that, the paying of tax forms part of responsible and ethical corporate governance and is a principle of ethical consciousness and corporate behaviour.

#### ***IFF, Tax Avoidance and Draft King IV***

45. CALS opines that as a matter of principle, companies need to report one another for tax avoidance practices in pursuit of ethical behaviour and consciousness. This can possibly be incentivised by States, and implemented through the relevant taxing authorities. Large companies are vulnerable to reputational risk and they are also concerned with their brand names and the dangers of falling afoul of the law, proper reporting mechanisms could be a deterrent to corporates who wish to avoid tax payment. As previously mentioned, the Draft King IV should clearly articulate that IFF and tax avoidance violate the notion of good governance and serve to prevent the realisation of human rights thus are a contravention of corporate entities responsibility to respect human rights.

## **F) BINDINGNESS**

### ***The Need for Bindingness on Principles of Responsible Corporate Governance***

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<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

46. It is accepted that the legal status of the Draft King IV is that of a set of voluntary principles and good practices of governance. The rationale is that the Draft King IV requires a holistic view on how applicable laws, binding rules, codes and standards relate to one another, including how corporate governance principles relate to relevant legislation. The drafting convention by the King Committee encompasses that ‘must’ denotes legislative provision and ‘should’ denotes recommendation. Therefore the corporate governance practices that are set out in the Draft King IV are recommendations for different categories of organisations and sectors.

47. The existence of such practices is essential in South Africa. Draft King IV states that in order to achieve growth and sustainable development (particularly in the combined economic, social and environmental South African context)—

“those charged with governance will be stretched beyond their comfort zones and will need to entrench a broader vision and thinking if they want to be part of accomplishing this”.<sup>37</sup>

48. The Draft King IV therefore accepts that those who are in charge of governance need to respond accordingly to the dire need for growth and sustainable development, even if it means doing business differently or unusually. In this same context, non-compliance of legislation by organisations and sectors at large remain. Recent non-compliance of legislation include MTN’s breach of the Mobile Number Portability business rules and regulations and Capitec Bank’s non-disclosure of cash transactions in keeping with the country’s Financial Intelligence Centre Act.<sup>38</sup> In addition, the Department of Labour, following the release of the 2014 Commission for Employment Equity is taking over 1400 companies to court for the failure to meet employment equity targets. This is indicative that a large number of companies remain non-compliant with legislation aimed at social transformation and apartheid redress. This is also the case with corporate governance practices and principles.

49. The Centre for Corporate Governance in Africa conducted research on governance in South African state owned enterprises and found that there was a lack of disclosure on submission of annual reports, budgets and corporate plans.<sup>39</sup> The study further found that issues relating to compliance with legislation were well reported and details were provided on instances of non-compliance.<sup>40</sup> A study on

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<sup>37</sup> Draft King IV, at 1.

<sup>38</sup> Act 38 of 2001.

<sup>39</sup> Centre for Corporate Governance & Hanns Seldel Foundation *Rating Corporate Governance of State Owned Enterprises: Moving Towards Improved Performance*, at 15 available at [http://www.usb.ac.za/Shared%20Documents/Rating%20SOEs.%20USB.%20Report%20Oct%202012.p](http://www.usb.ac.za/Shared%20Documents/Rating%20SOEs.%20USB.%20Report%20Oct%202012.pdf)

<sup>40</sup> *Ibid.*

the corporate practice in South Africa demonstrates a substantial variation in rates of adaptation of individual recommendations.<sup>41</sup>

### ***Bindingness and the Draft King IV***

50. The Draft King IV states that “A major challenge in implementing codes of corporate governance is that practices could be mindlessly adopted as if these were rules, resulting in corporate governance becoming a mere compliance burden”. In the South African context as described above, there should rightfully be such a compliance burden. Compliance of practices (which CALS submits should be binding) does not necessarily equate to a lack of flexibility. Flexibility is inevitable because of the different working environments, different sectors and sizes and such flexibility does not necessarily equate non-compliance.
51. One of the objectives of the Draft King IV is for the principles and practices to be implemented. Providing informed oversight of implementation and performance is one of the overarching responsibilities of the governing body of the organisation. CALS submits that in order for this objective to be met fully and for the responsibility to be fulfilled, the corporate governance practices set out in the Draft King IV need not merely be recommended practices but that the practices be by binding in nature. Further CALS submits that application of such practices should be disclosed.
52. In addition, CALS submits that where a practice has not been applied by the organisation, an explanation needs to be disclosed and where the governing body is of the opinion that such an explanation is inadequate, that will amount to non-compliance. Further, in such circumstances of non-compliance, the governing body must impose fines and/or report the non-compliance to the relevant officials in accordance to applicable laws.

### **G) CONCLUSION**

53. The Draft King IV is seminal as it will ultimately result in the document lauded for corporate governance: King IV. In the magnitude and impact of corporate entities, it is imperative that the governance structures of corporate entities are not only mindful of this, but responsive to it. Corporate entities have human rights impacts that must be bore in mind. King IV should seek to ensure positive human rights impact and prevent negative human rights impacts by corporate entities. Further, consultations on the Draft King IV should be expanded and the relationship

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<sup>41</sup> HE Scholtz ‘An Assessment of the Corporate Governance Compliance in the Annual Reports of Companies listed in the Alternative Exchange’ (2014) 16 *South African Journal of Accountability and Auditing Research* 1.



between tax avoidance and corporate ethics and human rights articulated. In addition, IODSA should consider approaching regulators to make King IV binding.