



**Submission to the Department of Foreign Affairs and Trade
on the development of a national plan on
business and human rights**

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The Irish Centre for Human Rights is an academic unit located within the School of Law of the National University of Ireland Galway. The Centre undertakes teaching and research, and contributes to human rights policy development nationally and internationally. The Irish Centre for Human Rights is directed by Professor Michael O'Flaherty. This submission was prepared by Dr Shane Darcy, who lectures and researches in the field of business and human rights.

Summary of recommendations

The Irish Centre for Human Rights recommends that the Irish Government give effect to the full range of legal and policy recommendations set out in the UN Guiding Principles on business and human rights. The following specific recommendations are also made:

- The national plan on business and human rights must acknowledge that the State duty to protect human rights from harm by third parties, including business enterprises, is based on existing international human rights law
- The national plan must clarify how Ireland takes “appropriate steps to prevent, investigate, punish and redress such abuse [by business enterprises] through effective policies, legislation, regulations and adjudication”
- Ireland’s national plan should explain how the Government intends to make companies based in Ireland aware of their human rights responsibilities

- The national plan should make it clear that corporate compliance with human rights is required regardless of any business case that may exist
- The national plan should set out how the Irish Government seeks to ensure that State owned or controlled companies and those that receive support or services from the State respect human rights. Human rights compliance should be directly linked to the provision of support from Government Departments, and agencies such as Enterprise Ireland and IDA Ireland, as well as State investment, such as under the Ireland Strategic Investment Fund
- The Irish Government should address human rights in the context of procurement, and insist on human rights compliance by companies with which it contracts for products or services
- Serious consideration should be given to making due diligence by companies a mandatory requirement for all companies, especially those that may be eligible for State support and services, investment or procurement, and for large companies, such as those listed on the Irish Stock Exchange
- The national plan should clarify how the State duty to protect and the corporate responsibility to respect human rights are met in the context of trade and development
- The national plan must ensure that business respect for human rights is embedded in activities overseas, especially where the State facilitates and supports such efforts
- The national plan should include a commitment to a comprehensive review of judicial and non-judicial mechanisms, and relevant legislation, in order to ensure access to an effective remedy and to identify and address any potential barriers
- The National Contact Point established under the OECD Guidelines on Multinational Enterprises should be strengthened
- The national action plan should include a commitment to constructive engagement by Ireland with the negotiations towards a binding business and human rights treaty
- The national action plan should include a commitment to conduct an assessment of the human rights impact of Irish tax practices and to supporting and implementing efforts to prevent global tax avoidance
- The Department of Foreign Affairs and Trade should make publicly available all submissions received as part of its consultation on a national plan
- The Department should hold a consultation on a draft national action plan, as recommended by the UN Working Group on business and human rights.
- The national action plan should be subject to regular review and revision, with specific timeframes set out in the plan itself
- The Irish Government should establish a specific body tasked with providing oversight of the implementation of the national plan on business and human rights

- Ireland should report on its implementation of the Guiding Principles on business and human rights in its communications with the United Nations treaty monitoring bodies and under the Universal Periodic Review

Introduction

The Irish Centre for Human Rights welcomes the opportunity to make a submission to the Department of Foreign Affairs and Trade in relation to its development of a national plan on business and human rights. The Centre's teaching, research and advocacy activities have included a specific focus on business and human rights in recent years. A 2012 report, *Business and Human Rights in Ireland*, outlined the applicable international standards relating to business and human rights in an Irish context and made a number of legal and policy recommendations in this context.¹ The Centre has also convened a number of international conferences and seminars addressing both national and global issues in the field of business and human rights. The Centre has highlighted examples where the conduct of business enterprises domiciled in Ireland raises concerns under international human rights treaties to which the State is a party, including the International Covenant on Civil and Political Rights.² The impact of the private sector in Ireland on human rights has both a national dimension (e.g. the system of direct provision for asylum seekers, forced labour in Irish businesses) and an international dimension (e.g. Irish construction companies operating in Qatar, technology companies selling software to repressive regimes, data protection and privacy concerns with information and technology companies headquarter in Ireland).

This submission focuses primarily on recommendations concerning the State duty to protect human rights and ensure effective remediation, as established in international human rights law and elaborated upon in the United Nations Guiding Principles on business and human rights.³ The Irish Centre for Human Rights recommends that the Irish Government make every effort to give effect to the range of legal and policy recommendations set out in the Guiding Principles. This submission focuses on a number of key recommendations, which are considered to be particularly relevant in an Irish context. The adoption of a comprehensive and meaningful national plan on business and human rights is important in Ireland in view of the open and export-led nature of the Irish economy, which is considerably reliant on foreign direct investment from multinational corporations. In approaching its national action plan on

¹ Irish Centre for Human Rights, *Business and Human Rights in Ireland: Context, International Standards and Recommendations*, 2012.

² See for example Irish Centre for Human Rights, 'Second Submission on Ireland's Fourth Periodic Report before the Human Rights Committee: Human Rights and Business Enterprises', 2013.

³ *Report of the Special Representative of the Secretary-General on the issues of human rights, transnational corporations and other business enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, 21 March 2011, A/HRC/17/31.

business and human rights, the Irish Government should bear in mind that businesses in Ireland can impact the enjoyment of human rights both in Ireland, as well as overseas, through their global operations and investments. The national action plan on business and human rights represents an important opportunity to enhance the global vision espoused the Department of Foreign of Affairs and Trade.⁴

State duty to protect

The national plan on business and human rights must acknowledge that the State duty to protect human rights from harm by third parties, including business enterprises, is based on existing international human rights law. The UN Guiding Principles set out that “States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises”.⁵ The Irish national plan on business and human rights must clarify how Ireland meets the requirement to take “appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication”. In relation to preventive measures, the Guiding Principles call on States to “set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations”.⁶ Ireland’s national plan on business and human rights should explain how the Government intends to meet this requirement and ensure that companies based in Ireland are aware of their human rights responsibilities. In this regard, it is important to note that the Guiding Principles do not require States to make a business case for companies to respect human rights. While it may be possible to make such a case for respecting human rights in certain instances, Ireland should be very cautious about presenting human rights responsibilities as hinging only on the potential benefits it may bring to business. The Guiding Principles set out the corporate responsibility to respect human rights, as a “global standard of expected conduct for all business enterprises wherever they operate”,⁷ without any reference to a business case. The Irish Centre for Human Rights recommends that the national plan make it clear that corporate compliance with human rights is required regardless of any business case that may exist for such actions.

Ireland’s national plan on business and human rights should set out how the State intends to ensure that business enterprises domiciled in Ireland do not negatively impact on human rights when operating overseas. This concept of extraterritorial jurisdiction, as affirmed by the jurisprudence of the UN human rights treaty monitoring bodies, is increasingly relevant in the context of a globalised economy,

⁴ Department of Foreign Affairs and Trade, *The Global Island; Ireland’s Foreign Policy for a Changing World*, 2015.

⁵ Guiding Principles, p. 6.

⁶ Ibid., p. 7.

⁷ Ibid., p. 13.

characterised by transnational business activities.⁸ Ireland's existing legislative framework creates liability for the harmful activities of Irish companies in limited circumstances (e.g. forced labour and human trafficking). The Irish Centre for Human rights recommends that the national plan include a commitment to bring relevant laws and policies in line with the authoritative positions of the UN human rights bodies concerning the extraterritorial activities of Irish businesses.

State business nexus

The Guiding Principles require that States take additional steps to protect against human rights abuses “by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies”.⁹ The Irish national plan on business and human rights should set out how the Irish Government seeks to ensure that State owned or controlled companies and those that receive support or services from the State respect human rights. The Irish Centre for Human Rights recommends that human rights compliance should be directly linked to the provision of support from Government Departments, and agencies such as Enterprise Ireland and IDA Ireland, as well as State investment, such as via the Ireland Strategic Investment Fund. The Irish Government should address human rights in the context of procurement, and insist on human rights compliance by companies with which it contracts for products or services.¹⁰ The Guiding Principles suggest that in such instances it may be appropriate for the State to require “human rights due diligence”. Serious consideration should be given to making such due diligence a mandatory requirement for all companies, especially those that may be eligible for State support and services, investment or procurement, and for large companies, such as those listed on the Irish Stock Exchange. Such companies should also report on how they meet their human rights responsibilities.

The national plan on business and human rights should clarify how the State duty to protect and the corporate responsibility to respect human rights are met in the context of trade and development. The Irish Government has stated that its trade policy in the context of development will be “guided by” the United Nations Guiding Principles on business and human rights.¹¹ The Irish Government provides significant support to Irish companies in the context of trade, such as facilitating participation in trade missions. Such missions have often encouraged Irish businesses to seek opportunities in countries with poor human rights record, as in the case of the construction of

⁸ For an overview, see ESCR-Net, *Global Economy, Global Rights; A practitioners' guide for human rights obligations in the global economy*, 2014.

⁹ Guiding Principles, p. 9.

¹⁰ Guiding Principles, p. 10.

¹¹ Irish Aid, *One World, One Future: Ireland's Policy for International Development*, May 2013, p. 21.

facilities and infrastructure in Qatar in advance of World Cup 2022.¹² The national plan on business and human rights must ensure that business respect for human rights is embedded in activities overseas, especially where the State facilitates and supports such efforts.

Access to remedies

The UN Guiding Principles on business and human rights affirm that the State duty to protect human rights under international human rights law requires that States provide access to remedies in the event of human rights violations by business enterprises. The Guiding Principles set out that States “must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy”.¹³ A number of legal, procedural and practical barriers to effective remediation are identified in the Guiding Principles.¹⁴ The Irish Centre for Human Rights strongly recommends that the national plan include a commitment to a comprehensive review of both judicial and non-judicial mechanisms, and relevant legislation, in order to ensure access to an effective remedy and to identify and address any potential barriers. Such a review should be conducted in light of the State’s relevant international legal obligations concerning business and human rights. It should consider the strengthening of relevant mechanism and potential legislative reform in relevant areas, such as civil and criminal liability, in order to enhance accountability for human rights violations when committed by business entities, and to ensure appropriate remediation for victims. Such a review should also pay attention to the extraterritorial activities of business enterprises domiciled in Ireland. The UN Human Rights Committee has recommended “appropriate measures to strengthen the remedies provided to protect people who have been victims of activities of such business enterprises operating abroad”.¹⁵

The Irish Centre for Human Rights also recommends that Ireland strengthen the role of the National Contact Point established under the OECD Guidelines on Multinational Enterprises. The visibility and performance of the Irish National Contact Point has been underwhelming to date and Ireland must ensure that the National Contact Point has sufficient resources and expertise in human rights in order to properly fulfil its mandate. The revised OECD Guidelines on Multinational Enterprises have incorporated key aspects of the Guiding Principles in a human rights

¹² Department of Foreign Affairs and Trade, ‘Minister Jan O’Sullivan welcomes outcome of Enterprise Ireland Mission to Saudi Arabia and Qatar’, 21 October 2011, see <http://www.dfa.ie/home/index.aspx?id=87214>.

¹³ Guiding Principles, p. 22.

¹⁴ Guiding Principles, p. 23.

¹⁵ Human Rights Committee, *Concluding Observations on the sixth periodic report of Germany* (2012), paragraph 16.

chapter. To further enhance the role of the National Contact Point, Ireland should give serious consideration to granting it an independent standing.

A future binding instrument on business and human rights

In 2014, the United Nations Human Rights Council decided to establish an Inter-Governmental Working Group with an open-ended mandate to work on the elaboration of “an internationally legally binding instrument on transnational corporations and other business enterprises with respect to human rights.” Ireland, along with other EU member states voted against Resolution 26/9 establishing the Working Group. The Irish Centre for Human Rights recommends that Ireland commit in its national action plan to constructive engagement with the negotiations towards a binding treaty. It should acknowledge that such an undertaking can contribute to addressing some of the gaps in the international legal system concerning remedies for business-related human rights harms and complement, rather than undermine, existing initiatives related to the implementation of the Guiding Principles.

Taxation and human rights

On a recent visit to Ireland, the United Nations Special Rapporteur on extreme poverty and human rights Philip Alston highlighted the importance of tax and fiscal policy for human rights and the harmful effects of tax avoidance. He outlined the negative impact that tax practices in Ireland have on the enjoyment of human rights in other countries.¹⁶ His predecessor as Special Rapporteur, Magdalena Sepúlveda Carmona, explained that the state duty to protect under the Guiding Principles requires regulation of business enterprise, including legal and accounting firms, so that they do not participate in or facilitate tax abuse.¹⁷ The Special Rapporteur also emphasised that the responsibility of businesses to respect human rights may be breached by tax avoidance “insofar as they have a negative human rights impact”.¹⁸ Business enterprises that “knowingly avoid paying tax are purposefully depriving countries of the resources they need to fulfil their human rights obligations”.¹⁹ The Guiding Principles make clear that companies should not undermine a State’s ability to meet its human rights obligations.²⁰

¹⁶ See for example ‘Irish tax policies are ‘antisocial’ to developing countries, says UN expert’, *The Guardian*, 12 February 2015.

¹⁷ *Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona, A/HRC/26/28*, 22 May 2014, paragraph 6.

¹⁸ *Ibid.*, paragraph 7.

¹⁹ *Ibid.*

²⁰ Guiding Principles, p. 13.

As a follow up to the Department of Finance’s “spillover analysis” of the impact of Irish tax practices on the economies of developing countries, the Irish Centre for Human Rights recommends that the national action plan on business and human rights include a commitment to conduct an assessment of the human rights impact of Irish tax practices. The Irish national plan should also commit to supporting and implementing efforts to prevent global tax avoidance, including pushing for greater transparency through country-by-country reporting – the Netherlands’ national action plan on business and human rights includes an acknowledgment of “the growing number of international initiatives to promote transparency by means of tax disclosure”.²¹ A commitment to assessing the human rights impact of Irish tax practices could help address the damage to Ireland’s reputation caused by recent tax avoidance scandals.

Transparency and review

In order to ensure transparency in the development of the Irish national action plan on business and human rights, the Irish Centre for Human Rights considers it important that the Department of Foreign Affairs and Trade make publicly available all submissions received as part of its consultation. It welcomes the open and consultative approach of the Department in this process to date. In view of the ongoing nature of the national action plan process, and that submissions would be obtainable under freedom of information legislation, the Centre recommends making such documents available as a matter of course. The Centre also recommends that the Department hold a consultation on a draft national action plan, as recommended by the UN Working Group on business and human rights.²² In addition, the Centre supports the Working Group’s recommendation that a State’s national action plan on business and human rights be subject to regular review and revision, with specific timeframes set out in the plan itself.

Implementation and reporting

The Irish Centre for Human Rights recommends the establishment of a specific body tasked with providing oversight of the implementation of the national plan on business and human rights. Such a body should comprise members drawn from relevant Government Departments, the Irish Human Rights and Equality Commission, business associations, trade unions, and civil society. The UN Working Group has recommended that clear timelines be provided for the implementation of actions set out in the national action plan. An oversight body could assess compliance with such targets, make recommendations and contribute to ongoing review of the national plan.

²¹ Government of the Netherlands, *National Action Plan on Business and Human Rights*, December 2013, p. 10.

²² United Nations Working Group on business and human rights, *Guidance on National Action Plans on business and human rights*, December 2014.

Its work would be facilitated by annual reports from across Government departments and agencies, collated by the Department of Foreign Affairs, concerning implementation of the national business and human rights plan. Given that the state duty to protect human rights and ensure remediation based on a State's existing international human rights obligations, the Irish Centre for Human Rights recommends that Ireland should report on how it is meeting its business and human rights obligations when reporting to the United Nations treaty monitoring bodies and under the Universal Periodic Review before the Human Rights Council.

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