



Submission Consultation - Ireland's National Action Plan on Business and Human Rights

Dated March 2015

FIDH, (the International Federation for Human Rights) and one of its member organisation in Ireland FLAC (Free Legal Advice Centres) welcome the consultation organized by the Human Rights Unit of the Department of Foreign Affairs and Trade of Ireland, in the framework of the development of a National Action Plan (NAP) for the implementation of the UN Guiding Principles on Business and Human Rights (UNGPs).

FIDH is an international non-governmental organisation defending all civil, political, economic, social and cultural rights set out in the Universal Declaration of Human Rights. As a non-partisan, non-religious, apolitical and not-for-profit organisation, independence and objectivity are the foundation of FIDH's credibility. The protection of economic, social and cultural rights in the context of globalisation is one of FIDH's priorities.

FLAC is one of its 178 member organisations in more than 90 countries. FLAC is an Irish, independent non-governmental human rights organisation which is dedicated to the promotion of equal access to justice for all. It provides legal advice and information, advances the use of the law in the public interest through the Public Interest Law Alliance and provides analysis of and advocacy in relation to the law particularly as it affects the rights of those who are poor and marginalised.

The consultation of the Human Rights Unit of the Department of Foreign Affairs and Trade of Ireland provides an opportunity to discuss and address the challenges posed by the implementation of the United Nations Guiding Principles in Ireland – a country which, as the recent publication by the Department of Foreign Affairs and Trade, *The Global Island*, reminds us recognises human rights as a core value for a fairer and more just society at the same time as the country seeks to grow its trade and investment.¹

Process

In the framework of the development of Ireland's National Action Plan, FIDH and FLAC emphasize the importance of carrying-out an **inclusive, transparent and continuous consultation process** with right-holders, representatives of civil society at home and abroad (NGOs and trade unions), the Irish Human Rights and Equality Commission, communities,

1 The Global Island. Ireland's Foreign Policy for a Changing World. Department of Foreign Affairs and Trade. January 2015

groups, individuals who may be affected by business activities, in addition to other stakeholders such as business representatives. In the context of Ireland's activities overseas, and in the context of Ireland's particular focus on **human rights defenders**, particular attention should be paid to support and enable the participation and consultation of human rights defenders denouncing corporate abuse who often face repression.

Legal expertise should be retained for the duration of the development of the National Plan to assess and advise on the existence and adequacy of effective, affordable and accessible complaint and redress mechanisms in Ireland, within the European Union and more widely. All relevant Ministries, state agencies and other relevant public bodies should be involved in the process.

In addition, it is important that the action plan provides for the establishment of **monitoring and evaluation mechanisms** so as to ensure effective implementation. Civil society, right-holders and independent experts should be consulted and involved in this monitoring and evaluation process, which should be fair, transparent and adequately resourced. If it is to be effective, the National Plan for Business and Human Rights will require clear provisions about the effects of non-compliance. They should be clear that the State will not engage in, continue or support activities which fail to provide sufficient safeguards or protection for human rights. There must also be clear **monitoring mechanisms** which involve civil society. There must be accessible and adequate complaint mechanisms for those who are adversely affected by breaches that can lead to remedial measures, sanctions or penalties in cases of violations.

The plan must provide **clear and detailed objectives**, as well as a set timetable and dedicated financial resources to ensure its implementation, and include performance indicators to assess progress.

The United Nations Guiding Principles on Business and Human Rights are based on three pillars: (1) the State's duty to protect human rights, (2) the corporate responsibility to respect human rights, and (3) the need to ensure access to effective remedy and redress mechanisms for victims of corporate-related human rights violations.

To ensure the effective implementation of these Guiding Principles, FIDH and FLAC suggest that Ireland's National Action Plan be structured around the three pillars named, and provide a strategic mix of voluntary and regulatory measures, as referred to in the UN Framework on Business and Human Rights.

To this end, FIDH and FLAC would like to recommend the following:

1. State's duty to protect : do no harm and strengthen policy coherence

Under international human rights law, States have a duty to protect human rights. Such duty implies an obligation to protect individuals from abuse committed by third parties, including business enterprises.

Furthermore and as part of States' obligation to respect human rights, they are required to "do no harm", including in other countries. This obligation can be traced back to the United

Nations Charter². It is grounded in States' obligation of international assistance and cooperation which is recognized in the Charter and in the Universal Declaration of Human Rights (UDHR)³ and is binding for all 157 parties to the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁴. It notably requires States to refrain from any action that could represent an obstacle to the realisation of economic, social and cultural rights in third countries. This also applies when States are taking decisions as members of international organisations.

Pursuant to the UN Guiding Principles, « States should ensure that governmental departments, agencies and other State-based institutions that shape business practices are aware of and observe the State's human rights obligations when fulfilling their respective mandates, including by providing them with relevant information, training and support »⁵ and « States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence »⁶. Moreover, abuses by businesses entirely or partially controlled or owned by States can be attributed through action or omission to States, and thereby constitute a breach of States' own international human rights obligations.

States' obligation to protect human rights extends beyond their own borders. States should therefore adopt measures with extraterritorial scope to ensure the respect of human rights businesses⁷.

Our organisations welcome the commitment of the Irish government, in Ireland's 2013 Policy for International Development, to "strive to ensure that economic development, including engagement by Irish companies, is compatible with our commitment to human rights [...]" In addition, we welcome the recognition in 'The Global Island' that "[b]usiness is exerting an ever greater power and influence over the implementation of human rights" as well as the recognition of the need to uphold the UN Guiding Principles, that is "the duty of states to protect against human rights abuses by third parties, the corporate responsibility to respect human rights, and the improved ability of victims to access an appropriate remedy when violations take place"⁸. Furthermore, we take note of the government's recognition of the "the value of influencing EU policy".

In light of Ireland's international human rights obligations and policy commitments, and to ensure policy coherence, FIDH and FLAC suggest including in its national action plan measures to:

On policy coherence and the State-business nexus:

- Require the State and all state agencies or companies benefiting from State support to

2 Preamble and articles 55 and 56 of the United Nations Charter, signed on 26 June 1945

3 Article 22 and 28 of the Universal Declaration of Human Rights, adopted in 1948.

4 Five articles of the ICESCR refer to the obligation of international assistance and cooperation. See in particular Art. 2(1).

5 UNGP, Principle 8.

6 UNGP, Principle 4.

7 Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, , September 2011.

8 Ireland's Policy for International Development; "One World, One Future", 2013.

conduct a due diligence process and publicly account for such process. Human rights criteria should be taken into consideration in all investment decisions and in the award of public contracts. All public tenders and contracts should include clauses on human rights and provide enforcement mechanisms for the violations of human rights.

- Identify templates and rules to embed the obligation to undertake human rights impact assessments in advance and throughout the continuance of activities conducted by or on behalf of the State or any State agencies either at home or abroad;
- Where the State, state agencies or state supported companies conclude any agreement, include mandatory clauses and take all necessary measures to ensure the protection and the promotion of human rights by third parties including economic actors, and provide an explicit reference to national and international human rights law, as appropriate, the UN Guiding Principles and, where relevant, the OECD Guidelines for multinational enterprises;
- Where the State, State agencies or state supported companies conclude any agreement with another state, embed a general clause providing that treaties are interpreted in accordance with international instruments on human rights, including in respect for provisions relating to investment and investor protection;
- Ensure that Irish Aid's operations are guided by respect for human rights. Environmental and social impact assessments included in project selection procedures should include a criteria of effective comprehensive respect for human rights by counterparts (be they states, corporations, investment funds, public banks, NGOs, etc.). Such criteria must be complied with throughout the project cycle and be demonstrated through a due diligence process and measurement of impact on human rights. In addition, in order to address the real or potential adverse human rights impacts of projects supported by Irish Aid, Ireland should establish a grievance mechanism for those affected, structured in a way and equipped with appropriate means to ensure responsiveness, investigation, settlement of disputes and redress for victims;
- The transposition of the European Directive on Public Procurement 2014/24 of May 2014 into national legislation by April 2016 provides an opportunity to strengthen respect for human rights in public procurement practices. A public consultation⁹ on the transposition of the Directive by the Office of Government Procurement closed in December 2014 but it is submitted that it would be important that the Office take account of the work being done to develop the National Plan on Business and Human Rights when transposing the directive;
- The statutory establishment of NewERA to furnish specialist advisory functions to a number of commercial State Agencies is an example of how specialist assistance could be provided in relation to business and human rights. In addition to providing information and advice on corporate governance of these agencies, it could be tasked with providing information on the human rights performance of these agencies to

9 <http://www.procurement.ie/ga/nuacht/2095>

Government, as a method of State monitoring.

- Ethical guidelines, consistent with the UN Guiding Principles, should be developed for the Ireland Strategic Investment Fund, formerly the National Pensions Reserve Fund, which the State recognises as a major engine for State investment.

On trade and human rights:

- Ensure that trade and investment agreements concluded by the EU and Ireland with third countries include effective measures to respect, protect and fulfil human rights. States parties' ability to regulate in order to ensure human rights protection should not be hindered by the conclusion of trade and investment agreements. In particular:
- Ensure that genuine human rights impact assessments in the pre-negotiation phase of all Free trade agreements and Investment agreements of which the EU is part;
- Such impacts assessments should comply with the principles applicable to human rights impact assessments of trade and investment agreements developed by the United Nations Special Rapporteur on the Right to Food;¹⁰
- Set up a clause that obliges the parties to conduct regularly those HRIA ex-post when the treaty is entered into force with the possibility for the parties to benefit from exceptions and flexibilities allowing to comply with their HR obligations;
- Ask for the revision or renunciation by the EU of the Investor-State Dispute settlement mechanism. In any case, ensure that the protection given to investor is interpreted in conformity with the international and domestic human rights obligations of the parties, and that potentially affected people can access a complaint mechanism to raise human rights violations. Should dispute settlement mechanisms be included, ensure independence, human rights expertise, transparency, obligation to receive amicus curia and to answer to the raised arguments, provide for appeal mechanisms and effective recourse for populations whose rights are affected by the arbitration decision.

- Finally, FIDH and FLAC call on Ireland to actively support the work of the UN Working Group on Business and Human Rights and to actively participate, from the onset, in the discussions of the open-ended intergovernmental working group of the Human Rights Council towards the elaboration of an international instrument on business and human rights.

2. Corporate responsibility to respect human rights

¹⁰ United Nations Special Rapporteur on the Right to food, *Guiding principles on human rights impact assessments of trade and investment agreements*, A/HRC/19/59/Add.5, December 2011.

As recognized in the UN Guiding Principles, businesses should respect human rights wherever they operate. To ensure they can do so, the State should ensure that the existing legal framework contributes to and enables respect for human rights by businesses. According to the UN Guiding Principles, States should ensure that "*laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights*"¹¹. In this regard, FIDH and FLAC suggest that a preliminary step in the development of a National Plan be an evaluation of whether existing laws, including company and business Law, are sufficient and/or adequate to ensure that companies and enterprises respect human rights and that where it is not respected, that legal reforms be adopted, including to ensure sufficient complaint and redress mechanisms are available. The current legal framework does not correspond to the reality of economic and financial globalization. Therefore, current corporate and business laws need to be understood from a human rights perspective and where necessary, strengthened for better rights protection.

This is particularly the case where companies operate across borders. In accordance with the authoritative interpretation of UN Treaty Bodies¹² and the Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights¹³, the State's duty to protect implies an obligation to regulate companies' activities under its jurisdiction, including those operating abroad, in order to ensure that companies respect human rights.

There are complementary issues: how can the State advance human rights which might be affected by the operations of Irish companies operating directly or through subsidiaries overseas? And on the other hand, how can the State provide effective complaint and redress mechanisms to those in Ireland affected by human rights violations of multi-national companies where the seat of the company or the parent company is situated outside the State and/or outside the European Union?

Pursuant to the UN Guiding Principles, companies should exercise human rights due diligence "*in order to identify, prevent, mitigate and account for how they address their adverse human rights impacts*". Such due diligence must cover "*adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships*"¹⁴.

FIDH and FLAC recommend that Irish authorities:

1. Conduct a baseline assessment study of Irish company and business law as part of the development of the National Plan on Business and Human Rights;

11 UNGP, Principle 3 (b).

12 See notably Concluding observations of the Committee on Economic, Social and Cultural Rights in 2013 for Austria, Norway and Belgium; CERD, "Concluding Observations of CERD: Canada", CERD/C/CAN/CO/18, 25 May 2007; Committee on the right of the child, General Comment No.16 (2013) on State obligations regarding the impact of the business sector on children's rights, CRC/C/GC/16, 17 April 2013. .

13 See also the "Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights", 28 September 2013, adopted by leading experts in international law and human rights.

14 UNGP, Principle 17 (a).

2. Where an Irish company is operating abroad, directly or indirectly, ensure that Irish regulation is sufficiently strong to safeguard human rights in the country of operation;
3. Where a non-Irish company is operating in Ireland, directly or indirectly, ensure that the terms of their operation are sufficient to safeguard human rights in Ireland;
4. When appropriate, Irish legislation should establish appropriate criminal and civil liability to sanction companies that have caused or contributed to human rights abuses. Absent such measures, the National Plan should lead towards a legal structure where there are adequate penalties depending on the nature of human rights violations and the company's participation. These could include fines, licence revocation, revocation of state's support or investment, or striking a company from the register;
5. The duties of companies should include obligations to carry out due diligence in the framework of its supply chain and its commercial relations. Companies should take reasonable measures to prevent adverse impacts on human rights and should be held liable in case of non-compliance. Parent companies should have a duty to ensure their subsidiaries' compliance.

The Irish government should establish a requirement of enhanced due diligence with regards to high-risk zones, sectors and products in order to prevent Irish companies from contributing to human rights violations through their activities or their business relationships in sensitive sectors (such as mining, textile, oil, etc.) and zones (such as conflict-prone area or occupied territory).

In order to inform and support businesses in this endeavour, Irish authorities could develop a mapping of high-risk areas, classified by degree of risk and highlighting corresponding reporting and prevention requirements to be taken by companies.

In order to ensure that the trade of ICT technologies such as surveillance technologies do not lead to human rights violations, export-control regulation should be reinforced, transparency and access to information regarding licences requests increased and appropriate monitoring and sanction mechanisms put in place¹⁵.

Proposal: Strengthen transparency

The lack of transparency regarding the structure, activities, policies and impacts of activities is a major obstacle to ensure corporate responsibility. It also prevents the market rewarding investors and consumers of more responsible companies.

Non-financial reporting and the disclosure of “timely and accurate information on all material matters regarding companies' activities, structure, financial situation, performance, ownership and governance” is provided by the OECD Guidelines for Multinational enterprises¹⁶.

In November 2014, the European Union adopted Directive 2014/95 on disclosure of non-

15 See *Surveillance technologies “Made in Europe”*: Regulation needed to prevent human rights abuses, FIDH, December 2014, available at https://www.fidh.org/IMG/pdf/surveillance_technologies_made_in_europe-1-2.pdf

16 OECD Guidelines for Multinational Enterprises, Chapter III. Disclosure, para.1

financial and diversity information by large companies and groups¹⁷. The directive requires such companies to disclose information on their policies and due diligence processes in order to assess social, environmental and human rights risks of their activities. Ireland will be required to transpose it into domestic law by December 2016. A consultation was carried out by the Department of Enterprise Trade and Employment in 2013. This consultation is now closed.

FIDH and FLAC encourage the Department of Foreign Affairs and Trade to ensure that their colleagues in the Department of Enterprise Trade and Employment are cognisant of the National Plan for Business and Human Rights and take it into account in the transposition to ensure the adequate implementation of this Directive and to strengthen non-financial reporting obligations as well as by embedding the following elements in its transposition :

- Human rights due diligence policies and practices ;
- Impacts and risks on human rights related to business activities and supply chain, both in Ireland and abroad, and measures of correction or mitigation of adverse impacts;
- Accountability by the corporate structure and suppliers;
- Increased obligations of information disclosure for companies operating in the oil, gas and mining sectors or in high-risk areas;
- Performance indicators in terms of respect for human rights;
- The involvement of employees and other stakeholders in the development of reports;
- A review system and when appropriate, a penalty system, even financial, including the possibility for a third party to challenge the non-financial report.

Furthermore, Irish authorities should fully guarantee the right to access information. For example, contracts or clauses that may impact respect for human rights should be systematically disclosed by companies. The right of access to information should be extended to private companies' information on their social and environmental impacts. In order to facilitate access to information, non-financial reports should be published on the Internet, which would ease accessibility and reduce publication costs for enterprises.

3. Ensure access to effective remedies for victims of human rights violations

The State's duty to protect requires taking steps to ensure, through judicial, administrative, legislative or other mechanisms that victims of human rights abuses have access to an effective remedy. This includes victims outside Ireland.

Proposal: Facilitate victims' access to Irish courts for violations of human rights by Irish companies

A study commissioned by the European Commission pointed out that when subsidiaries or contractors of European companies violate human rights and environmental legislation of third countries, victims face significant barriers to obtain redress, both in third countries and within the EU¹⁸. Many civil society reports, including the European Coalition for Corporate

17 http://ec.europa.eu/internal_market/accounting/non-financial_reporting/index_en.htm

18 Study of the legal framework on human rights and the environment applicable to European enterprises operating outside the European Union, by Daniel Augenstein, University of Edinburgh, available at http://ec.europa.eu/enterprise/policies/sustainable-business/files/business-human-rights/101025_ec_study_final_report_en.pdf

Justice (ECCJ), of which FIDH is a steering group member, highlight the obstacles faced by victims in accessing justice and issue a series of recommendations, including directed at the European Union¹⁹.

In civil matters, corporate law often constitutes an obstacle to accessing to courts, as victims bear the burden of proof with regards to influence and control of entities within the corporate group.

Cost constitutes an immediate and practical barrier to civil litigation in Ireland. Civil legal aid through the Legal Aid Board is only available to those who satisfy a means test and a merits test which will exclude many. The cost of bringing a case without legal aid is a significant deterrent, particularly when the ‘chill factor’ that they will likely be responsible for all of the costs of all parties to the case if they do not win. This is particularly daunting when an individual is faced with challenging the State or a wealthy corporation. The complexity and delay involved in such proceedings are also barriers to an effective remedy.

The lack of alternative mechanisms such as a statutory regime for protective costs orders in public interest cases, or class or multi-party actions militate against effective redress mechanisms, something that the National Plan should examine and address.

In criminal matters, foreign plaintiffs face many obstacles related to the establishment of the territorial jurisdiction of Irish courts. Similarly Irish plaintiffs can be denied justice through obstacles in other jurisdictions. FIDH and FLAC recommend a simplification of the conditions by which criminal proceedings may be initiated against Irish natural/legal persons or present on Irish territory when involved in human rights violations abroad. On the other hand, Ireland could seek to remove barriers that exist in other countries to effective redress for those living in Ireland, particularly where such obstacles could be removed at a regional level.

FIDH and FLAC welcome the extension of categories of persons subject to extra-territorial jurisdiction in the Prevention of Corruption (Amendment) Act 2010 to many companies. However companies who only have a business presence in Ireland are not covered and the National Plan is an opportunity to review the effectiveness of this legislation and to improve it. Similarly, the provision of extraterritorial jurisdiction in relation to human trafficking in the Criminal Law (Human Trafficking) Act 2008 is welcome. The National Plan should be used as an opportunity to assess the effectiveness of both of these Acts and to identify any barriers to enforcement of such legislation and any gaps in protection of the victims.

Proposal : Ensure the effectiveness of the OECD National Contact Point

The UN Guiding Principles set out effectiveness criteria for non-judicial grievance mechanisms, which must be legitimate, accessible, predictable, equitable, transparent, consistent with rights.

In order to improve the functioning of the Irish National Contact Point, FIDH and FLAC

19 Gwynne Skinner, Robert McCorquodale, Olivier De Schutter, « [The Third Pillar : Access to Judicial Remedies for Human Rights Violations by Transnational Corporations](#) », ECCJ, CORE, ICAR, December 2013.

suggest²⁰ :

1. Increase the NCP's accessibility: ensure financial and technical resources are available to enable complainants or their representatives located abroad to participate in hearings, to enable NCP representatives' field visits when appropriate, in particular to establish mediation. Additional financial resources are also required for the establishment of an appropriate monitoring mechanism. The NCP should use all the tools at its disposal to encourage companies' adherence to the Guidelines.
2. Strengthening the legitimacy and credibility of the NCP to ensure they are impartial and accountable: The OECD Guidelines do not require a particular structure for NCPs. However, FIDH and FLAC believe that the credibility of the Irish NCP will be greater by integrating various stakeholders (NGOs and/or independent experts) and an independent oversight body. Furthermore, in order to improve the predictability of procedures, the NCP should set specified time frames for each phase of the handling process and make every effort to adhere to them. In particular, the Irish NCP should at least abide by the indicate timelines stated in the OECD Procedural Guidance. Parties should be regularly informed about the progress of the case, any upcoming steps and the procedure. For cases that have been pending for an unduly long period of time, the NCP should either make a concerted effort to bring the parties together or failing that, issue a final statement with recommendations, as appropriate²¹. In addition, the NCP should fully publish the specific instances issued (both the initial assessment and the final statement), in order to enable parties to know the reasoning and avoid arbitrary and systematic decisions.
3. **Enhancing the NCP's effectiveness** through a monitoring mechanism for specific instances, including the possibility of public monitoring procedures for companies that would not have complied with the terms of the agreements and resolutions or recommendations of the NCP. In addition, further ways to strengthen its role in mediation and arbitration should be explored. For example, the participation of companies to mediation processes under the auspices of the NCP should be mandatory, and disciplinary powers should be conferred on the NCP.

In summary, FIDH and FLAC welcome the development of Ireland's National Action Plan and reiterate the importance of an inclusive and transparent process including all stakeholders at home and abroad as well as the establishment of monitoring and evaluation mechanisms, involving civil society, in order to ensure an effective implementation.

The Irish government is encouraged to adopt a national action plan coherent with its human rights obligations and policy commitments in the matter. Ireland has a duty to protect human rights and prevent adverse impacts caused by third parties. Regulatory and policy measures should be included in its NAP to ensure States-owned entities, state agencies and enterprises operating at home or operating abroad exercise human rights due diligence. Similarly, Ireland

20 For more recommendations, please refer to the work of OECD Watch, of which FIDH is a member. See notably OECD Watch, "[OECD Watch Submission to the 2014 Annual Meeting of the National Contact Points](#)", June 2014.

21 See "[OECD Watch Submission to the 2014 Annual Meeting of the National Contact Points](#)", June 2014.

should ensure that trade and investment agreements to which the EU is party or which are being negotiated do not cause or contribute to human rights violations.

It is worth reminding that the State's duty to protect requires access to remedies for victims of corporate-related human rights violations. In doing so, any access to Irish courts should be facilitated both in criminal and civil matters and non-judicial mechanisms such as the OECD National Contact Point should be strengthened.

Regarding the process, FIDH and FLAC recommend that the plan be reviewed and adjusted regularly. Such plan should be seen as a part of a broader strategy to actively implement the United Nations Guiding Principles and to support the work of the UN Working Group on Business and Human Rights and the upcoming discussions of the open-ended intergovernmental working group to be established following a resolution of the Human Rights Council and tasked with the elaboration of an international instrument on business and human rights.

Finally, FIDH and FLAC welcome the opportunity to submit its recommendations and remain available to be part of further development of the plan.