

Trócaire Response to the Working Outline of Ireland's National Action Plan on Business and Human Rights, 2016-2019

January 2016

Introduction:

As part of the wider process of consultation underway in the development of a draft National Action Plan (NAP) to implement the UN Guiding Principles on Business and Human Rights (UNGPs), 2016-2019, Trócaire welcomes the opportunity to respond to the working outline paper published by the Irish Department of Foreign Affairs and Trade on 10th December 2015.

As compared to the 10 existing NAPs either published or under development by States since the UNGPs were adopted in 2011, Ireland's working outline may be considered favourably in a number of respects. Specifically, in terms of its commitment to a participatory process, to conduct a full National Baseline Assessment, the wide-ranging scope of issues which it highlights, the prominence it gives to the concept of Human Rights Due Diligence, its reference to issues of gender and of Human Rights Defenders, and the mechanisms for implementation, monitoring and review of the NAP which are outlined - as these are areas which the majority of previous NAPs neglected or failed to meaningfully engage with.

Analyses by the International Corporate Accountability Roundtable (ICAR), the Danish Institute of Human Rights, the European Coalition on Corporate Justice and CIDSE, amongst others, finds that **the most significant weaknesses of existent NAPs is that they do not sufficiently explore or utilise mandatory regulatory options to ensure adequate human rights protections, nor the issue of access to remedy.** Action points in many NAPs are primarily focused on actions that involve awareness raising, training, research and other voluntary measures with little concrete action in terms of developing mandatory regulatory approaches. According to ICAR *"this is problematic as regulatory actions are more likely to effectively and efficiently address existing governance gaps."* ICAR also emphasizes that *"Specifically while Pillar III has been widely recognised as an essential pillar of the UNGPs it is either addressed only very briefly or not at all in the existing NAPs."*¹

Puvan Selvanathan, a member of the UN Working Group on Business and Human Rights recently resigned based on his concerns that not enough has been done to prevent negative HR impacts by business operations since the UNGPs were adopted, suggesting that *"if states wish for businesses to respect human rights then what that constitutes must be made mandatory. Otherwise it is just voluntary. Legally required standards compel compliance in business operations to a meticulous degree. Business respects boundaries and business craves clarity. Companies are our own social creations and reflect our own values. They are defined by the rules that we choose to lay down."*²

A review of the Irish working outline suggests a consistency with this wider trend of an over reliance upon voluntary approaches in NAPs at the expense of introducing mandatory measures. As such, whilst there is much to be welcomed within the working outline paper, from a Trócaire perspective

¹ See <http://icar.ngo/analysis/icar-eccj-release-2015-update-of-national-action-plans-assessments/>

² See <http://business-humanrights.org/en/puvan-selvanathan-resigns-from-un-working-group-on-business-and-human-rights-includes-open-letter>

there is also an opportunity in the preparation of the next draft of the Action Plan to give more weight to the importance attached within the UN Protect, Respect, Remedy Framework and its Guiding Principles to a “smart mix” of policy responses that includes not only voluntary measures, but also regulatory requirements for business as appropriate; and particularly the inclusion of requirements for Human rights Due Diligence by state owned businesses as a starting point and in order to set a positive example to other enterprise.³

The following response provides a brief overview of aspects of the working outline of an Irish National Plan on Business and Human Rights (B&HR) which Trocaire welcome, and also aspects which can be further strengthened, or which are omitted in the current draft and should be included.

Summary:

Of the 17 recommendations outlined in Trócaire’s submission during the initial stage of the consultation process (see <http://www.trocaire.org/resources/policyandadvocacy/developing-comprehensive-irish-national-action-plan-implementing-un>), 15 of the relevant issues are mentioned, and a smaller number of these also have immediate and useful actions associated with them, or potential for positive impact, pending further work envisaged in the National Action Plan. Beyond that, there are a significant number of missed opportunities, and some suggested priorities for strengthening the National Action Plan as outlined below.

Positive elements of the Working Outline

- ✓ Action Points 4-7 identify four mechanisms for implementation, monitoring and review of the National Action Plan; first, the establishment of a B&HR Implementation Group; second, the inclusion of B&HR as a regular item at the DFAT NGO standing committee on human rights; third, the addition of monitoring of the NAP to the newly established Interdepartmental Committee on Human Rights and fourth, the commitment to hold a forum on B&HR two years after the adoption of the NAP. These can be used to sustain momentum around action on the NAP and in particular, on some of the potential action points noted below.
- ✓ Action Point 8 commits to commissioning a baseline assessment of the business and human rights framework in Ireland.
- ✓ Action points 9-12 address the issue of foreign bribery and these may, if properly implemented, combat the culture of indifference to this crime currently evidenced by some Irish companies.
- ✓ Action point 22 envisages a more robust role for embassy staff in advising Irish companies on business and human rights questions, although it could go further in instructing embassies to also raise such concerns with relevant local authorities.
- ✓ Action point 26 requires that a human rights assessment is to be provided by trade mission delegations and State agencies and staff involved in trade missions are to be ‘made aware’ of the UNGPs. However, the reference to State agencies and staff with respect to the UNGPs should emphasize that they “respect and implement” these rather than solely being aware of them. It would be useful if this action point also specified that a human rights assessment should be carried out **prior to deciding** to undertake a trade mission to that location.

³ See <http://cidse.org/publications/business-and-human-rights/business-and-human-rights-frameworks/un-business-human-rights-framework-briefing-note.html>

- ✓ Action Point 36 on the SDGs is welcome but should also refer to SDG 16 (i.e. Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.)⁴
- ✓ Gender is given consideration, and the ways in which men and women can be differently affected by business and human rights are referenced. However, only one associated Action Point 40 commits to refer to the Women’s Empowerment Principles in the envisaged Business and Human Rights toolkit. It would be helpful to also see the chapter on HRDs, and its accompanying action points, make specific reference to women HRDs and the additional risks they face, and actions which can be taken to protect and assist them.
- ✓ Action Point 40 regarding the creation of a toolkit for business will be useful, if it is written clearly and concisely and disseminated widely.
- ✓ (Although overall, the working outline paper is not strong in advancing actions associated with Pillar 3) **Trócaire very much welcomes the inclusion of Action Point 49 which commits a review of how best to ensure remedy for potential victims overseas of human rights abuses by Irish companies, with a focus on barriers to justice, including legal, procedural or financial barriers.**

Priority opportunities to further strengthen the Working Outline

Mandatory Human Rights Due Diligence

There are a number of innovative legislative initiatives underway with respect to mandatory HRDD which are worthy of consideration in the context of the development of an Irish NAP. Of particular note are The French Bill on duty of vigilance (devoir de vigilance)⁵ and the Swiss Responsible Business Initiative.⁶ For example, the bill currently before the French Parliament aims to create a requirement for French companies to demonstrate, if sued in civil, commercial, or penal court, that they have put in place preventive systems to avoid causing or contributing to harm in the framework of their economic activity across subsidiaries and sub-contractors. In essence, this means a responsibility to implement due diligence. The Responsible Business Initiative is a popular initiative with the aim of introducing mandatory due diligence for all Swiss companies. The proposed text makes changes to the Swiss Federal Constitution establishing the companies’ obligation to integrate human rights and environmental protection in all their business activities.

- An attempt to begin to map out human rights due diligence (HRDD) is made within the working outline, and the ‘B&HR Implementation Group’ is tasked with establishing HRDD principles for Irish companies. However, in a major omission there is no commitment to mandatory HRDD for State owned companies, only a commitment to ‘promote awareness’ of such in Action Point 15, and the BHR Implementation Group is also to ‘consider’ the promotion of HRDD in the context of State support to business (e.g. through Enterprise Ireland). **It will be crucial that there is further progress on mandatory HRDD in the elaboration of the next draft of the Action Plan in particular with respect to Action Point 15. This commits to “promote awareness” of effective HRDD by State owned or controlled companies but should be strengthened to “require mandatory HRDD by state owned or controlled companies, in particular those with a significant overseas presence.”**

⁴ See <https://sustainabledevelopment.un.org/sdg16>

⁵ Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre. Adopted by the French General Assembly in first reading on 30 March 2015

⁶ Initiative pour des multinationales responsables. Text prepared by the Swiss Coalition for Corporate Justice. Available at <http://konzern-initiative.ch/de-quoi-il-s-agit/texte-initiative/?lang=fr>.

- Action Point 17 should be strengthened by replacing the commitment to “encourage” state owned companies to operate in accordance with IFC Performance standards to “require” this.
- **Businesses with State supports should be required to undertake the appropriate HRDD**, pending the work of the BHR Implementation Group (strengthening of Action Point 19).
- Action Point 21 mentions the (existing) regime with regard to the dual-use export licensing system – this should be strengthened by specifying that **those seeking licences for conflict-affected countries must be required to undertake human rights due diligence**.
- Action Point 30 should also make explicit that Ireland will encourage the implementation of the UNGPs and development of NAPs in its bilateral relations.

Access to Remedy:

- The National Contact Point for the OECD Multinational Guidelines is one of the very few methods of recourse for host State citizens to pursue an action against multinationals in their home countries and yet in Ireland it is not properly mandated, resourced or publicised. The fact that so few cases (only two to date) have been filed with the NCP also highlights the lack of awareness of the mechanism. **Action Point 52 should be strengthened by committing to enhance the independence, legal standing and public image of the NCP.**

Constructive Engagement in the Process to Develop an Internationally Legally Binding Instrument:

- The process towards an international legally binding instrument at the UN HR Council,⁷ if thoughtfully developed, could provide an important additional tool to ensure that businesses respect human rights in the longer term, yet it is not referenced within the Working Outline. It is important that EU member states, including Ireland play a constructive role in discussions within the Inter-Governmental Working Group (IGWG) on the elaboration of such an instrument to ensure access to justice and to effectively stop the occurrence of human rights abuses by businesses.⁸ **Ireland should engage in a constructive manner in all international fora with respect to business and human rights issues, including the IGWG.**

Conflict Affected Countries:

- Action Point 38 reads ‘Provide advice to business enterprises of the **possible risks of human rights situations when operating in conflict affected areas**’. While this is to be welcomed, the Action Point would be stronger if it were **specified who will provide this advice, and how**.
- The NAP should not limit Irelands role to "provide advice" to businesses, but should "provide advice and, whenever appropriate, dissuade through all necessary means" companies to invest in conflict affected areas where they might contribute directly or indirectly to HR violations.
- The Foreign Earning Deduction is not mentioned in the Working Outline – Trócaire recommends that **companies whose employees are availing of the Deduction in conflict affected countries should likewise be required to undertake human rights due diligence.**⁹

⁷ See <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOntNC.aspx>

⁸ See <http://cidse.org/business-a-human-rights/business-and-human-rights-frameworks.html>

⁹ See Recommendation 10 page 24 of the Trócaire submission at <http://www.trocaire.org/resources/policyandadvocacy/developing-comprehensive-irish-national-action-plan-implementing-un>

Trade and Investment:

- As part of its HR obligations, Ireland can and should exercise leverage on the EU and require that in the negotiation mandate, efficient HR protection mechanisms and enforcement mechanisms in case human rights clauses are breached are included. Action Point 25 on trade and investment refers to Ireland's role in 'supporting appropriate implementation of human rights clauses in Free Trade Agreements' – this must be further strengthened e.g. ensuring that human rights clauses in agreements explicitly stipulate the suspension or amendment of contractual provisions where human rights are at risk, and put specified procedures in place for so doing.¹⁰
- The reluctance by EU Member States to meaningfully engage in the ongoing UN HR Council process to develop an international treaty which could help to end ongoing, documented abuses of human rights by businesses contrasts markedly with the political momentum behind the Transatlantic Trade and Investment Partnership (TTIP), which seeks to protect investor rights through the inclusion of a mechanism known as the Investor to State Dispute Settlement (ISDS), or a reformed version of this in an Investor Court System which would enable MNCs to circumvent domestic courts system and sue sovereign states through a confidential arbitration mechanism, raising concerns about the state right to regulate. An excerpt from the European Commission report on a public consultation on inclusion of ISDS in TTIP provides a summary of widespread public concerns as outlined below: *"In these submissions, the ISDS mechanism is perceived as a threat to democracy and public finance or to public policies. It is also considered as unnecessary between the EU and the US, in view of the perceived strength of the respective judicial systems. Such views are largely echoed by most of the trade unions, a large majority of NGOs, Government institutions and many respondents in the "other organisations" category, including consumer organisations. Many among the collective submissions express specific concerns about governments being sued by corporations for high amounts of money which in their view create a "chilling effect" on the right to regulate. In addition, certain replies from trade unions express a generic mistrust with regard to the independence and impartiality of the arbitrators or are concerned that ISDS may create a possibility for investors to circumvent domestic courts, laws or regulations."*¹¹
- Trócaire shares the concerns of a wide range of domestic and international civil society organisations regarding the potential negative impacts of TTIP. There are already existing, significant power imbalances between the capacities of states to meet their duty to protect citizens from human rights abuses by third parties, and the resources of transnational corporations and the scope and impacts of their operations. This is particularly the case in developing countries, though not exclusively. These power imbalances would become even more deeply entrenched if core elements of TTIP, such as an Investor to State Dispute Settlement mechanism (ISDS) (reformed or otherwise), are not challenged and overcome. State capacity and policy space to deal with urgent concerns such as climate mitigation, which have an impact on everyone, but particularly the poorest, would be undermined.¹²

¹⁰ See <http://www.trocaire.org/resources/policyandadvocacy/developing-comprehensive-irish-national-action-plan-implementing-un>

¹¹ See http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf

¹² See <http://www.trocaire.org/resources/policyandadvocacy/TTIP-presentation>

Development and Transposition of Key EU Directives:

- With respect to the ongoing debates on the development of an **EU Directive on the Regulation of Conflict Minerals** about to go into Trialogue stage (negotiations between EU Parliament, EU Commission and EU Council) The Irish government should put forward their concerns that a voluntary regulation wouldn't significantly change the situation of human rights abuses by armed groups in conflict affected countries. The core recommendation must be that companies apply a mandatory Due Diligence process (including the 5 steps of the OECD guidance on due diligence) along the entire supply chain". In practice when transposed, this would mean that all businesses placing on the European market products containing minerals coming from conflict-affected areas would be legally required to ensure that human rights are respected throughout their supply chain, from the raw material to the finished product.¹³
- With respect to Action Point 14, in transposing the **EU Directive on Non-Financial Reporting**, Ireland could strengthen it by requiring **all** Irish companies with more than 500 employees to report on environmental, human rights and social concerns, not just those larger companies which have listings on the Irish Stock Exchange (of which there are only a handful).
- Action Point 24 refers to the transposition of the **EU Directive on Public Procurement**, but does not provide adequate detail. There are useful measures which can be taken to strengthen this directive upon transposition, including by ensuring that regulatory measures are available for the enforcement of Article 18(2), which is aimed at ensuring compliance of suppliers with environmental, social and labour law (including opportunities to increase the level of public procurement of Fairtrade products.)¹⁴ Online tools on risks per product and country of origin can be developed as guidance for procurement professionals as has already been done by the US, Dutch and Danish governments.

Tax Avoidance and Evasion:

- There is no reference to the importance of tackling tax avoidance and evasion as it relates to the realisation of human rights in the working outline. In the subsequent draft the National Action Plan should make explicit the link between tax, business and human rights. This should include government recommendations to businesses not to engage in aggressive tax avoidance as part of their CSR commitments and human rights responsibilities. The government should also advise that companies negotiating tax incentives do so in fully transparent manner, and in the full knowledge of government departments in the host country. Greater transparency in the tax affairs of multinational companies promotes accountability of both states and companies. The government should actively promote and support initiatives that enhance transparency such as full publicly accessible country by country reporting, and the introduction of publicly accessible registers of the owners of companies.¹⁵

¹³ See <http://cidse.org/publications/business-and-human-rights/securing-a-strong-and-effective-eu-regulation-for-supply-chain-due-diligence.html>

¹⁴ Refer to "Fairtrade Public Procurement: A Guide for Procurement Professionals" Irish Fairtrade Network

¹⁵ See <http://www.christianaid.ie/pressoffice/blog/national-plan-business-human-rights.aspx>

Points for clarification

- Action Point 18 relates to the Responsible Investment (RI) policy of the Ireland Strategic Investment Fund (ISIF) and the preceding paragraph refers to the RI policy put in place by its predecessor, the National Pension Reserve Fund. The latter is not readily available – the website refers to the intention to draft a Responsible Investment Policy for the NPRF, but the text is not there, and the procedure for developing a new RI is not clear. **Transparency around the drafting of a new Responsible Investment policy for the Ireland Strategic Investment Fund would be welcome.**
- P25 asserts that ‘following the introduction of revised OECD guidelines in 2011, Ireland developed procedures for implementing the Guidelines *in State owned companies*’. These do not appear to be available online; there is a document from February 2015 which outlines the procedures which complainants should take in filing a complaint to the NCP, but no other procedural documents appear to be available.