

MAKE IT YOUR BUSINESS

How Ireland can ensure businesses respect human rights and the environment



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f FRONT LINE DEFENDERS
the international association for the protection of human rights defenders

 **glaN**
GLOBAL LEGAL ACTION NETWORK

 **OXFAM**
Ireland



christian aid

STRONGER TOGETHER
CONGRESS
Irish Congress of Trade Unions

 **Friends of the Earth**

nwc National Women's Council

act:onaid

The Irish Coalition for Business and Human Rights (ICBHR) is a coalition of civil society organisations and academic experts working collaboratively to progress corporate accountability, based on respect for human rights and the environment.

The key purpose of the coalition is to collaborate and advocate strategically to achieve:

- Mandatory, gender responsive human rights and environmental due diligence legislation in Ireland;
- Ireland's support for the development of a UN binding treaty on business and human rights, with a gender and human rights defender perspective.

Members of the Coalition

Members of the Coalition include:

Centre for Business and Society of University College Dublin, Christian Aid Ireland, Comhlámh, DCU Business School, Fairtrade Ireland, Friends of the Earth Ireland, Front Line Defenders, Global Legal Action Network, Irish Congress of Trade Unions, Latin American Solidarity Centre, National Women's Council of Ireland, Oxfam Ireland, Proudly Made in Africa, Trinity College Dublin Centre for Social Innovation, Trócaire, and Dr. Rachel Widdis, School of Law, Trinity College Dublin.

Observers are Action Aid Ireland, ESCR-Net, TerraJusta and Save Our Sperrins. The Irish Coalition for Business and Human Rights is a representative network of the European Coalition for Corporate Justice (ECCJ).

This report draws from legal analysis and an outline legislative proposal developed by Dr Rachel Widdis (School of Law, Trinity College Dublin) for Irish corporate accountability legislation on behalf of the ICBHR.

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Acronyms

BHRRC	Business & Human Rights Resource Centre
CFREU	Charter of Fundamental Rights of the EU
CMC	Coal Marketing Company
COPINH	Civic Council of Popular and Indigenous Organisations of Honduras
EACOP	East African Crude Oil Pipeline
ECHR	European Convention on Human Rights
ECCJ	European Coalition for Corporate Justice
ESB	Electricity Supply Board
EU FRA	European Union Agency for Fundamental Rights
GLAN	Global Legal Action Network
ICBHR	Irish Coalition for Business and Human Rights
ILO	International Labour Organisation
NCP	National Contact Point (OECD)
NGO	Non-governmental Organisation
OECD	Organisation for Economic Cooperation and Development
OHCHR	Office of the High Commissioner for Human Rights
Rome II	EU Council Regulation No 864/2007 on the law applicable to non-contractual obligations
SLAPP	Strategic Lawsuits Against Public Participation
SMEs	Small and medium enterprises
SPDC	Shell Petroleum Development Company of Nigeria
UN Binding Treaty	Revised Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises
UNGPs	UN Guiding Principles on Business and Human Rights
UN SDGs	UN Sustainable Development Goals
UNWG	UN Working Group on the issue of human rights and transnational corporations and other business enterprises



Community members from San Pedro Ayampuc & San Jose del Golfo, La Puya, peacefully protesting against the El Tambor gold mine. Photo: Daniele Volpe

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The Global Impact of Corporate Harm



EU and Irish companies and their links to human rights and environmental impacts worldwide



ISRAELI SETTLEMENTS

Airbnb Ireland

Tourism in occupied territory

- Occupation
- Conflict
- International humanitarian law

> See page 34

PAKISTAN

KiK Textilien (Germany)

Fire in Textile Factory

- 258 deaths
- Inadequate safety

> See page 23

Oil projects

- Informed consent
- Land rights
- Loss of livelihoods
- Environmental damage
- Climate change

> See page 52

UGANDA & KENYA

Tullow Oil and TotalEnergies
(Ireland/UK/France)

KEY STATS



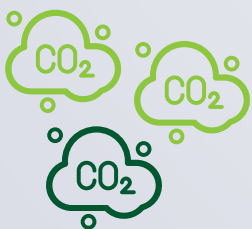
81% of Irish people want **legally binding regulations** in Ireland for Irish companies acting unethically in low-income countries. Only 11% believe Irish companies should be able to self-regulate and apply their own standards.



Half of the top 60 companies in Ireland scored **less than 20 percent** on embedding respect for human rights in their operations, in a study conducted by Trinity College. These companies include many multinationals as well as Ireland's ten-largest state-owned enterprises.



Last year, **227 land and environmental defenders were murdered** - an average of more than four people a week. This made 2020 the most dangerous year on record for people defending their homes, land, livelihoods and ecosystems.



Just **90 companies**, including the largest oil, coal and gas companies, are responsible for **two thirds of all global carbon emissions** to date.

KEY STATS



In the Niger delta, after decades of exploitation, oil pollution **clean-up costs are estimated at US\$520 million**. If started today, the restoration of the local environment would take **25 years** to complete.



1,138 people – mostly women – died in the **Rana Plaza building collapse** in Bangladesh. Large European textile companies were the main buyers of the factories in the building.



Texaco (now Chevron) dumped over **18.5 billion gallons of toxic water** into the Amazon rainforest in Ecuador from 1964 - 1992, contaminating 2 million acres of the Amazon.



Over **3,000 people died** instantly in the disastrous industrial gas leak in Bhopal in India in 1984. The chemical plant which exploded was owned and operated by a subsidiary of Union Carbide, an American corporation.

Foreword

Every now and again, all too rarely, moments arrive offering hope for systematic change in the protection of human rights defenders, instead of the band-aids that are applied through emergency measures and individual advocacy when they are at risk.

During my 16 years leading Front Line Defenders, I saw first-hand how irresponsible business operations contribute to, and sometimes directly cause, dangers faced by human rights defenders. Many of the hundreds of defenders killed each year are targeted because of their opposition on human rights grounds to business projects; others are criminalised or subjected to Strategic Lawsuits Against Public Participation (SLAPPs) by actors with deep pockets and powerful connections.

Human rights defenders who I have spoken with in the past year as part of my mandate as UN Special Rapporteur on the situation of Human Rights Defenders have told me that the prevalence of impunity and corruption tends to ensure that, in the countries where these attacks are happening, the material and intellectual authors are rarely brought to justice.

Such is the gravity of the situation I believe that the introduction of mandatory human rights due diligence for business enterprises is one of those moments offering hope of systematic change. Ten years on from the publication of the UN Guiding Principles on Business and Human Rights, it is sadly apparent that voluntary guidelines are not fit for purpose, as the number of attacks against human rights defenders in relation to business-related abuses has only risen.

Obliging business to undertake due diligence can help stem this tide of violations. This can also work for business; defenders may act as a type of early warning system to alert business of potentially greater human rights (and business) risks coming down the tracks which the enterprise can act early to account for or mitigate.

I am delighted to see this report and the draft legislation being put forward by the Irish Coalition for Business and Human Rights. In a very promising development, all EU member states will be obliged to bring in some form of due diligence over the coming years, and I believe Ireland can play a key role in setting high standards in the quality of the legislation. Given the priority Ireland gives to, and

its long-standing support for, human rights defenders, it would seem natural that Irish legislation includes a strong emphasis on human rights defenders, which would also help normalise their inclusion in similar legislation throughout the EU.

The memorial monument to murdered human rights defenders in Iveagh Gardens in Dublin was constructed with the support of, and in partnership with, the Irish Department of Foreign Affairs. One of my priorities as Special Rapporteur is to push more states to act on the shameful scandal of people being killed for defending the rights of others.

While due diligence legislation will not be a panacea, experience tells me that, if robust, it can have a profound impact on the safety and security of human rights defenders. I urge the Irish government to introduce strong, norm-setting legislation and, in doing so, complement the beautiful artwork of the memorial monument with action of practical support to human rights defenders at risk.

Mary Lawlor

UN Special Rapporteur on the situation of Human Rights Defenders



Berta Cáceres was an internationally renowned human rights defender who was murdered in 2016 after a long struggle to stop construction of an internationally financed hydroelectric dam in Honduras. Her daughter, Bertha Zúniga Cáceres, now continues her mother's struggle, calling for greater regulation of European companies to prevent crimes like this from happening again.



During the last years of her life, my mother, Berta Cáceres, was appointed General Coordinator of the Civic Council of Popular and Indigenous Organisations of Honduras (COPINH). COPINH has the aim of defending the territorial and fundamental rights of the indigenous Lenca people.

COPINH actively campaigned against concessions granted by state bodies after the coup d'état in 2009. These illegal concessions enabled the exploitation of communal land and resources in indigenous territories throughout the country. They violated the special rights of indigenous peoples to be consulted in a free, prior, and informed manner.

One of the most active struggles was defending the Gualcarque river, where the Honduran company DESA tried to impose the "Agua Zarca" hydroelectric project by force. Following the Honduran State's refusal to listen to the complaints of local people, a road blockade was set up by the community. As this effectively prevented the construction of the project, the company, in alliance with the Honduran State, deployed repression, harassment, and violence against the communities, COPINH, and especially against Berta Cáceres.

From 2013 until the last days of her life, Berta condemned the financing and logistical support provided by European banks and companies to DESA. After my mother's murder in March 2016, these financial and business entities disassociated themselves from the crime. However, the impact of the crime and the public outcry was so great that they temporarily froze their funding. Following the arrests of members of DESA,

and their prosecution for their involvement in the crime, the German company, and the Dutch and Finnish banks ultimately withdrew from the project.

The life of Berta Cáceres is irreplaceable. One of the most important indigenous and social leaders of Honduras was vilely murdered, and the Honduran courts have recently found the president of DESA guilty for co-collaboration in ordering her murder. Together with COPINH, I seek full justice for my mother. Despite knowing that she will not return, I deeply wish that no one else has to live through the pain of such a crime.

The situation in Honduras is not unique. This type of crime can be seen repeatedly across several Latin American countries and in other regions of the world. Therefore, as Lenca people, we support the demand that there should be greater regulation of European companies, banks, and investments, including those based in Ireland, to avoid the repetition of abuses like what happened to my mother.

European companies must apply the same human rights standards that are applied in Europe when they operate in countries such as Honduras, where the lives of those who defend their territories are seriously threatened. As such, we urge that Ireland shows leadership by introducing strong and effective corporate accountability legislation.

Bertha Zúniga Cáceres is leader of the Civic Council of Popular and Indigenous Organisations of Honduras (COPINH)

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The community of La Puya, resisting the El Tambor gold mine in Guatemala. Photo: Daniele Volpe

1. Executive Summary

We need to end corporate abuses of human rights and the environment – to change the rules of the game so that we can build a fairer, more sustainable world.

New corporate accountability legislation is needed to put an end to corporate human rights violations such as forced labour, land grabs, attacks on human rights defenders, violence against women, denial of people's fundamental rights at work, deforestation, dumping of toxic waste, oil spills, unchecked CO2 emissions, and biodiversity destruction.

Many of these examples of business-related harms are stark, having caused devastating impacts on people and the environment. For instance, the collapse of the Rana Plaza building in Bangladesh in 2013 resulted in the deaths of over 1,100 mainly female garment workers. Large European textile companies were the main buyers of the factories in this building.

In April 2010, a spill from British Petroleum's Deepwater Horizon rig released millions of gallons of crude oil into the Gulf of Mexico. The resulting oil slick was visible from space, covering an area of 65,000 square kilometres, almost the size as the Republic of Ireland. Eleven workers lost their lives.

In today's global economy, corporations hold vast power and are often able to evade real accountability for serious harms like these. The complexity of corporate structures and elaborate supply chains compound the difficulty in holding those responsible to account and for impacted communities to seek justice. The uncomfortable truth is that many European companies are linked to human rights abuses and environmental harm throughout their global value chains often facing few serious obstacles.¹

This report explores the devastating impact of business-related human rights abuses. It details the impact on communities in some of the poorest countries of the world, which has been exacerbated by the Covid-19 pandemic, and outlines, in particular, the impact on women and on human rights defenders. Furthermore, the report examines the lack of a strong regulatory framework to prevent rights violations and provide accountability and effective remedy when harm occurs.

Detailed case studies are included in the report of multinational companies, some of which are based in Ireland, that are involved in appalling human rights violations and environmental harm.

“ Indigenous communities next to the mine have suffered from chronic poor health, contaminated water, and have faced fear and intimidation when they have tried to oppose the multi-billion dollar mining industry.

As a broad civil society coalition, bringing together organisations working with human rights defenders, overseas development organisations, and trade unions, we witness first-hand these impacts on the communities with whom we work. From this experience, the Irish Coalition for Business and Human Rights (ICBHR) sets out a proposal for transformative change, calling on the Irish government to introduce new corporate accountability legislation. We set out our collective position on the essential elements for a new Irish law to prevent harms and provide meaningful accountability and access to justice.

Human Rights abuses and Irish businesses

Irish companies have a responsibility to respect human rights, workers' rights, and environmental standards wherever they operate. The State also has a duty to protect against human rights abuses by business and to ensure access to remedy, through effective policies, legislation, regulations, and adjudication.

However, a number of businesses based in Ireland have been linked to human rights abuses around the world, including state-owned companies. These cases, some of which are highlighted in this report, demonstrate the urgent need for proper regulation of how Irish and Ireland-based businesses operate – both at home and abroad.

For example, over decades the state-owned Electricity Supply Board (ESB) has imported millions of tons of coal sourced from the infamous Cerrejón mine in Northern Colombia, despite years of well-documented environmental and human rights abuses associated with it. Indigenous communities next to the mine have suffered from chronic poor health, contaminated water, and have faced fear and intimidation when they have tried to oppose the multi-billion dollar mining industry.² Many Irish people would not realise that much of the coal burned in Moneypoint Power Station, Co. Clare has been drawn from a supply-chain littered with serious abuses.

Ireland's tax, trade, and investment policies have also seen it become a hub for some of the biggest and most profitable companies in the world, including the top five global software companies, 14 of the top 15 medical technology companies, all of the top ten pharmaceuticals companies and eight of the top ten industrial automation companies.³ Yet recent research from Trinity College Dublin's Centre for Social Innovation showed that half

of the top 60 companies in Ireland, including many of these multinationals, as well as Ireland's ten-largest state-owned enterprises, scored less than 20 percent on their human rights policies. Moreover, 34 percent scored zero on embedding respect for human rights in their operations.⁴

Voluntary approaches have failed

For too long, governments have relied on voluntary approaches when it comes to ensuring businesses refrain from abusing human rights and damaging the environment in their global operations.

Ten years ago, the UN agreed a set of key 'Guiding Principles' on Business and Human Rights (UNGPs).⁵ These guidelines provide a framework for how states and businesses should meet their obligations and responsibilities to respect and protect human rights, and to provide remedy for abuses that occur.

For states, the UN Guiding Principles suggests a smart mix of measures – national and international, mandatory and voluntary – to foster respect for human rights among corporate actors. This includes introducing systematic 'due diligence' checks, whereby companies must identify and remedy abuses right throughout their supply chains and operations.

However, these checks have largely been encouraged through voluntary guidance rather than made mandatory through binding legislation. Asking corporations to effectively police themselves internationally has failed to systematically prevent abuses from happening. Voluntary approaches, guidelines, and codes of conduct haven't ended modern forms of slavery in the production of our clothes, or stopped deforestation and destruction of the environment, or prevented the killings of human rights defenders.

While some responsible businesses have complied with the guiding principles and taken responsibility for adverse human rights impacts, many others have simply ignored them, as the framework is voluntary by nature.

“ Asking corporations to effectively police themselves internationally has failed to systematically prevent abuses from happening.



The Heinda tin mine in southern Myanmar, run by a Thai firm together with a state owned Myanmar company. Communities have reported that pollution from the mine has affected the communities' water for drinking, domestic use, and irrigation. Photo: Garry Walsh

A recent European Commission study shows that only one in three businesses in the EU are currently assessing the impact of their operations on human rights and the environment.⁶

In Ireland, research conducted under Ireland's National Plan on Business and Human Rights 2017-2020⁷, a whole of government initiative which seeks to give effect to the UNGPs; a 2019 'Baseline Assessment' of progress to date⁸, and a Review of Access to Remedy (2020)⁹, similarly recognised this significant gap, and specifically recommended consideration of a system of mandatory human rights due diligence in Ireland.

Making it mandatory: new Corporate Accountability legislation

Right across Europe, there is growing recognition that voluntary systems have failed, with a clear shift now towards firmer legal requirements. France, Germany, and Norway have all introduced legislation for mandatory human rights due diligence, with the European Commission developing a similar, EU-wide legislative proposal.¹⁰

Ireland should build on these initiatives by introducing a new, stronger system of corporate accountability for companies based or operating here. This report sets out what such a system should look like, building on experience in other jurisdictions, academic research, and the testimony of affected communities around the world.

First and foremost, the law must ensure that organisations embed human rights in their policies and practices - what's termed **human rights and environmental due diligence**. This means companies working proactively to ensure that they are not involved in human rights and environmental harm throughout their operations. This can include through their direct activities, or indirectly; for example, through the actions of their subsidiaries, suppliers, investments, or through other business relationships. Companies must assess human rights risks along the entire value chain of activities - from processing raw materials to producing end-user products. As made clear in the UN Guiding Principles, European textile giants cannot ignore working conditions and human rights harms in the factories where their clothes are produced.

In a 'due diligence' system, companies will essentially have to show that they took every reasonable step to avoid involvement with any human rights abuse or environmental damage. If harm still occurs, a company can then be held liable if it is found to have caused or contributed to the harm. If they cannot prove they effectively implemented due diligence steps to identify, prevent, and mitigate abuse, then they can be held accountable. Due diligence requirements will be proportional to the size of businesses. As such, it will not be particularly onerous or burdensome for small and medium enterprises to undertake human rights due diligence.

- **Prevention:** effective legislation will take a primarily preventative approach. Its goal is to ensure that companies take adequate measures to identify and prevent adverse human rights and environmental impacts before they occur.
- **Accountability:** If abuses still happen, and the company did not undertake effective due diligence, then they can be held responsible. They could face financial penalties, civil liability, and potentially criminal charges for serious harms.
- **Remedy:** The law should also ensure that affected communities can effectively access Irish courts when their rights have been violated. This could involve suing the company to seek compensation, as well as other forms of remedy.



Right across Europe there is growing recognition that voluntary systems have failed, and a clear shift towards firmer legal requirements. France, Germany and Norway have all introduced legislation for mandatory human rights due diligence, and the European Commission is developing a similar, EU-wide legislative proposal.

The key elements of the proposed law, which should:



1. **Establish a new legal duty** for businesses to conduct effective due diligence and prevent adverse impacts on human rights and the environment;



2. **Cover all businesses**, and apply throughout their own activities and value chains;



3. **Protect people and planet**, requiring respect for all internationally recognised human rights and key environmental standards;



4. **Ensure accountability**, holding companies liable if they cause or contribute to human rights and environmental harms;



5. Deliver **effective remedy**, with real access to justice for affected communities;



6. Be **gender-responsive**, recognising the often disproportionate impact of human rights harms on women;



7. Include early, on-going, meaningful and safe **engagement with affected communities**, civil society and trade unions;



8. Address **reprisals against communities** for defending human rights.

A growing number of leading international businesses have supported calls for such mandatory human rights due diligence measures, arguing for the need to level the playing field and ensure that irresponsible companies cannot gain a competitive advantage by ignoring their human rights and environmental responsibilities. For instance, a group of 101 international investors representing over \$4.2 trillion in assets, has called on governments to introduce due diligence legislation.¹¹ A level playing field provides businesses with certainty as to what their obligations are, as well as ensuring that businesses taking a leadership role are not disadvantaged.

Moreover, there is significant public support in Ireland for greater corporate accountability. According to a recent IPSOS/MRBI opinion poll, 81 percent of Irish people would want an Irish company that is acting unethically in a low-income country to be subject to legally binding regulations in Ireland. Only 11 percent believe Irish companies operating unethically in low-income countries should be able to self-regulate and apply their own standards.¹²

Introducing corporate accountability legislation is not anti-business, it's about responsible business. Our call for a stronger regulatory framework is to ensure that the pursuit for profit does not violate human rights and destroy the environment.

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Decades of Pollution – Shell in Nigeria

Shell and its subsidiaries are responsible for environmental devastation in the Niger Delta through decades of oil spills. It is having a devastating effect on both the environment and on the health and livelihoods of local people.¹

- **Sector:** Oil
- **Human rights issues:** health, loss of livelihoods, environmental damage

Profile of companies involved: Royal Dutch Shell is the largest European oil company.² Headquartered in the Netherlands, Shell has a market capitalisation of \$152 billion USD.³

Local subsidiary Shell Petroleum Development Company of Nigeria (SPDC) is the operator of a local joint venture. SPDC operates in the Niger Delta in an oil mining area of around 31,000km² – an area over twice the size of Northern Ireland.

Community affected: More than 30 million people live in the oil-rich Niger Delta. This area is home to the Ogoni people and contains an important coastal marine and wetland ecosystem. Although the oil under people's feet is worth billions of euros, the majority of the region's population live in poverty.⁴

Case detail: Since the 1950s, an estimated eleven million barrels of oil have been spilled in the Niger Delta, and new spills are still occurring weekly.⁵

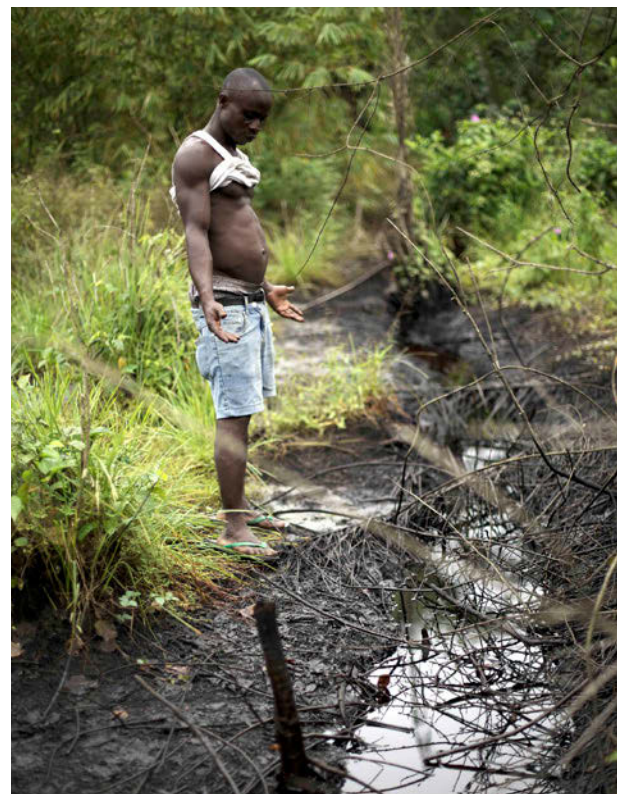
These spills have caused widespread pollution and have left villages uninhabitable.⁶ Contamination levels in the water is 900 times above World Health Organisation standards.⁷ According to Friends of the Earth, 16,000 children die every year as a result of the pollution, and life expectancy in the Niger Delta is ten years less than in the rest of Nigeria.⁸

"The oil is in everything – it's in the air we breathe, in our drinking water and in the food we eat. Our people eat, drink and breathe crude oil; that's why they die young" said Eric Dooh to Friends of the Earth Netherlands of the situation in his village Goi.⁹

Eric was one of four plaintiffs in a 13-year case that in 2021 resulted in a landmark judgement finding that Royal Dutch Shell breached its duty of care by not doing enough in response to the oil spills.¹⁰ Two of the original defendants died during the lengthy time it took for the case to proceed.¹¹

Human rights due diligence: The oil spills are largely due to the result of wear and deterioration of pipelines. Shell is responsible to prevent or repair the deterioration of its pipes. However, the United Nations Environment Programme has declared the methods that Shell has been using for cleaning oil spills as ineffective and inadequate.¹²

Royal Dutch Shell should be working with SPDC to closely monitor any oil spills, to replace old and damaged pipelines and to undertake cleaning operations after spills. Royal Dutch Shell could suspend or cease operations if prevention and mitigation measures were found to be insufficient.



Oil spill in Kebgara in the Niger Delta. Photo: Luka Tomac/Friends of the Earth International

2. The impact of corporations on human rights and the environment

“Now more than ever, as big decisions are made about our future, companies need to address environmental, social and governance risks holistically and move beyond business-as-usual.”

– **UN Secretary-General Antonio Guterres**¹³

The actions of irresponsible businesses are having devastating impacts across the world. The ongoing failure by states to prevent corporate human rights abuses and environmental harm, in particular in their global operations, and to hold corporations responsible for their actions, is having a negative impact on people and the planet.

As the climate crisis unfolds, corporations are taking control of huge areas of land in poorer developing countries to generate profits through extractive industries and mega-development projects, often at the expense of human rights and the environment.¹⁴ Many projects carried out ostensibly in the name of economic development, including by extractive industries and agribusiness, have resulted in high levels of environmental destruction, human rights abuses, and

violence.¹⁵ The economic benefits of these projects often fail to reach the most marginalised communities most impacted by them.

Corporate actors are extracting profitable resources in developing countries — including commodity crops, timber, minerals, and fossil fuels, often to produce cheap products for consumers in Europe. The proliferation of long, diffuse supply chains mean that many corporations can easily ignore the human rights and environmental harm of subcontractors or others with whom they have a business relationship, while profiting from the low costs.

An extensive 2019 European Parliament study on abuses by European-based multinational companies in countries outside the EU, found that “cases involve allegations of gross human rights abuses such as murder and complicity



Deforestation aerial photo. Rainforest jungle in Borneo, Malaysia, destroyed to make way for oil palm plantations
Photo Credit: Rich Carey/Shutterstock

“ Corporate actors are extracting profitable resources in developing countries – including commodity crops, timber, minerals, and fossil fuels, often to produce cheap products for consumers in Europe.

to murder, war crimes and crimes against humanity, but also issues related to health, environmental justice and several labour rights related issues”.¹⁶

These cases include global brands domiciled and headquartered in EU Member States that have been involved in oil spills in Nigeria¹⁷, child labour in the Democratic Republic of Congo¹⁸, child labour in sourcing cocoa¹⁹, toxic waste dumping in Chile²⁰, deforestation²¹, ignoring the right to Free, Prior and Informed consent by Indigenous Peoples²², reprisals against human rights defenders²³, and financing extractives and development projects that violate the rights of indigenous communities.²⁴ Some of these cases are detailed throughout this report.

When affected communities try to seek justice and remedy for harms caused, often hundreds, even thousands of those affected die before even the first steps in litigation are decided. The stark asymmetry

in power between hugely profitable global companies and some of the world’s poorest communities makes mounting legal challenges even more difficult. This is also a problem with deep links closer to home, as companies and financial institutions based in the EU are often gaining enormous profits while disregarding human rights and care for the environment. This is particularly so in countries with lower production and staff costs, weak governance and weaker human rights and environmental regulation.²⁵

Complex global supply chains and intricate organisational structures are also part of a picture whereby companies have failed to address abuses that they have caused, contributed to, or are directly linked to.²⁶ Without urgent regulation of global corporate actors, we can no longer refer to these incidents as tragedies, but rather inevitable occurrences that will continue to happen unless irresponsible corporations are held to account.

The Rana Plaza disaster

Large European textile companies were the main buyers of the factories in the Rana Plaza building in Bangladesh which collapsed in 2013, resulting in the deaths of 1,138 mainly female garment workers and serious injury to over 2000 people. This followed warnings about the safety of this building. None of the five factories operating in Rana Plaza had a trade union, thus workers were unable to refuse to work in the building after large cracks had appeared in it.²⁷

Eight years on, the murder charges against those involved have yet to come to trial.²⁸ Although companies that bought from these factories did not own the operation, the Clean Clothes Campaign considered they were “complicit participants in the creation of an environment that ultimately led to the deaths and maiming of thousands of individuals” because of their business practices in dealing with suppliers.²⁹

Rana Plaza disaster campaigners on Oxford Street in London.
Photo: Trades Union Congress



2.1 The Human Rights record of Business in Ireland

While Ireland is well known for its success in attracting foreign direct investment, Irish companies also have extensive activities overseas and global value chains.³⁰ In recent years, several of these companies have been linked to human rights abuses abroad, including state owned companies, as highlighted by the UN Committee on the Elimination of Racial Discrimination in 2019.³¹

For example, for twenty years the state-owned Electricity Supply Board (ESB) has purchased coal sourced from a mine in Northern Colombia with a long and well-documented history of serious human rights abuses, in particular affecting people of African descent and indigenous peoples.³²

Another example is of Airbnb Ireland UC. The UN recently published a database on businesses connected to illegal Israeli settlements in the occupied Palestinian territory, which lists companies engaged in economic activities connected with these illegal settlements, inextricably linked with human rights abuses.³³ One of these companies is Airbnb Inc., which provides an online platform for accommodation in the illegal settlements. Hosts and purchasers of these listed accommodations in the settlements contract with the Dublin-registered company Airbnb Ireland UC.³⁴

A further example is Dublin-based San Leon energy plc. In 2018, a complaint was filed before Ireland's National Contact Point (NCP) for the Organisation for Economic Cooperation and Development (OECD) by the Global Legal Action Network (GLAN) concerning the oil exploration activity of San Leon Energy in Western Sahara without seeking the consent of those living on the land.³⁵

More broadly, there is evidence of a low level of Irish companies checking and taking responsibility for human rights and environmental harms in their operations. In a recent human rights benchmarking study, Trinity College Dublin Centre for Social Innovation analysed 60 of the largest firms operating in Ireland. They found 34 percent of publicly-listed companies scored zero against every human rights due diligence indicator, with 72 percent failing to disclose whether they assess salient risks and impacts.³⁶ None of Ireland's ten-largest state-owned enterprises made such a disclosure.



Mining Operations at the Cerrejón mine in Colombia.
Photo: Steve Morgan / Greenpeace

This suggests very low commitment levels to human rights and the environment in practice and leaves the door open for future human rights disasters and the destruction of the environment by companies based in Ireland. Tragedies like that at Rana Plaza occur when companies fail to do their due diligence, identify problems, and heed warnings before it's too late.

This is particularly important given the fact that Ireland is a base for the top five global software companies, 14 of the top 15 medical technology companies, 18 of the top 25 financial services companies, all of the top ten pharmaceuticals companies, and eight of the top ten industrial automation companies.³⁷

2.2 Attacks on communities and human rights defenders

Human rights defenders who stand up to corporate human rights and environmental abuses often face brutal consequences, ranging from killings, violent attacks and gender-based violence, to judicial harassment and arbitrary detention.

In 2019, an average of over four land and environmental defenders were killed every week,³⁸ and the level of corporate related attacks is shocking. The Business & Human Rights Resource Centre (BHRRC) documented

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over 600 attacks against human rights defenders working on business-related human rights issues in 2020.³⁹

In her most recent report on the killings of human rights defenders, the UN Special Rapporteur on the Situation of Human Rights Defenders notes that, “environmental human rights defenders and those protesting land grabs or those defending the rights of people... by objecting to Governments that are imposing business projects on communities without free, prior and informed consent, are particularly vulnerable to attack”.⁴⁰ In fact, a significant number of attacks against human rights defenders are linked to a lack of meaningful engagement by corporations with affected-communities. Of the 604 attacks recorded by the BHRRC in 2020, more than a third stemmed from a lack of consultation or the failure to secure free, prior, and informed consent of affected communities.⁴¹

Indigenous Peoples face significant risks when speaking out against corporate actors. They are overrepresented on statistics on killings and attacks⁴² and are often subjected to discriminatory smear campaigns and other racist attacks. According to the former UN Special Rapporteur on the Rights of Indigenous Peoples, the underlying causes of reprisals against indigenous defenders include the failure to ensure they have the right to own and control their territories, as laid out in the UN Declaration on the Rights of Indigenous Peoples, as well as the failure to obtain their free and informed consent prior to implementing a project which may affect their lands, territories, or resources.⁴³

Globalisation and neoliberal policies have led to the economic disempowerment of women, and women human rights defenders also face gendered attacks and threats when protesting and claiming their rights.⁴⁴ Attacks on women are rising year on year, particularly on indigenous women, as their activism has been met with a toxic mix of online abuse, physical attacks, and sexist rhetoric by political leaders.⁴⁵ Women often face additional and different risks such as sexual violence, smear campaigns, misogynistic public shaming, and online harassment.⁴⁶

In addition, the COVID-19 pandemic has taken a toll on human rights defenders, making it harder for them to continue their important work. By having to shelter in a single location during the pandemic, this has also limited their security options. Frustratingly, many defenders were subject to restrictive measures while many companies continued to operate and many business-related attacks against defenders continued. There were reports of companies using the pandemic as a cover to dismiss labour rights defenders, as well as an excuse to lobby for lower regulation.⁴⁷ Sadly, attacks against human rights defenders have continued throughout the pandemic, with even more defenders being killed in 2020 than the year before.⁴⁸

“ Indigenous Peoples face significant risks when speaking out against corporate actors. They are overrepresented on statistics on killings and attacks and are often subjected to discriminatory smear campaigns and other racist attacks.



Rosalina Dominguez (49) is from the Rio Blanco community who are resisting the construction of a hydro-electric dam. Seven human rights defenders have been killed protesting the dam's construction, including indigenous leader Berta Caceres, and at present the project remains stalled after Chinese, Dutch and Finnish investors pulled out in response to the violence. Photo: Garry Walsh

2.3 Environmental damage and Climate Change

Many companies are causing or contributing to extensive environmental damage through their own operations or global value chains, creating a huge environmental footprint worldwide. National governments and international institutions have, thus far, failed to properly regulate the corporate contribution to climate change and biodiversity loss.

Some of the most egregious examples of corporate environmental harms are stark. For instance, the oil slick from the British Petroleum Deepwater Horizon spill into the Gulf of Mexico was visible from space. It covered an area of 65,000 square kilometres, almost the same size as the Republic of Ireland.

In the Niger delta, after decades of exploitation, oil pollution clean-up costs are estimated at US\$520 million. If started today, the restoration of affected livelihoods and the local environment in the delta would take a quarter of a century to complete.⁴⁹

“ The full enjoyment of many rights such as the right to food, the right to water, the right to a healthy standard of living and the rights of indigenous peoples are directly connected to the environment. Equally, environmental damage can occur without direct or immediate harm to human beings.

As well as individual cases of environmental damage and pollution, unregulated corporate power has played a major role in the climate and biodiversity crises that we are facing. Fewer than 100 companies are responsible for two thirds of cumulative global carbon emissions,⁵⁰ while strings of lawsuits in the US outline the role played by such companies in downplaying the impact of fossil fuels on the climate.⁵¹ As such, the role of corporations needs to be addressed as part of effective responses to climate change, biodiversity loss and as a protective measure against viruses. We have an important opportunity now to transform the dominant business model based on infinite growth and profit at all costs.

Furthermore, human rights and the environment are interconnected, with adverse impacts often closely linked. The full enjoyment of many rights such as the right to food, the right to water, the right to a healthy standard of living and the rights of indigenous peoples are directly connected to the environment. Equally, environmental damage can occur without direct or immediate harm to human beings.⁵²

Essentially, both human rights and the environment deserve protection in and of themselves. As such, recognising the interconnectedness of human rights and the environment, and in order to avoid gaps in protection, both are required to be addressed through corporate due diligence.⁵³

2.4 The Gendered impacts of corporate harm

Business-related human rights abuses impact women in distinctive, intersectional, and often disproportionate ways. For instance, women are over-represented in precarious work with poor working conditions and are vulnerable to exploitation and abuse, including sexual abuse.

Entrenched gender inequalities also mean that women are over-represented in export-orientated manufacturing and the agri-food sector, both sectors being characterised by very poor working conditions in many low-income countries.⁵⁴

When water sources are polluted by business activities women often need to travel farther to collect water, and when children get sick due to polluted water, women's care and domestic work consequently increases.

Women are also more vulnerable to corporate land grabs. For example, indigenous women, who often have fewer formal rights to land, are vulnerable to eviction and dispossession to make way for large-scale development projects.⁵⁵ Globally, less than 15% of all landholders are women.⁵⁶

In addition to the risks of displacement and dispossession faced by women, the consequences also have a disproportionate impact on women. For example, following being forcibly evicted from their homes in the context of a business-related land grab, women often will carry the additional responsibility of caring for their family who are coping with loss of their livelihood, dispossession of the family home, and potential trauma.⁵⁷

Furthermore, studies have shown that gender-based violence is widespread in many global value chains of multinational companies. For instance, sexual harassment in the garment sector has been reported as an ongoing problem; one survey of workers in a garment factory in Bangladesh's capital Dhaka, found that 80% said they had experienced or witnessed sexual harassment or abuse at work.⁵⁸ In the extractive industry, sexual violence by security guards has been identified as an endemic problem.⁵⁹

To meaningfully address these abuses of women's rights in global value chains, human rights due diligence must be gender-responsive.

“ Women are also more vulnerable to corporate land grabs. For example, indigenous women, who often have fewer formal rights to land, are vulnerable to eviction and dispossession to make way for large-scale development projects. Globally, less than 15% of all landholders are women.

Devastating factory fire – German textile company KiK in Pakistan

Fire in Pakistani garment factory that was producing jeans for a German textile company killed over 250 people. Victims sought justice through European courts, but the case failed on procedural grounds.¹

- **Sector:** Garments and textiles
- **Human rights issues:** health and safety, labour rights, loss of life and livelihoods

Profile of companies involved: Operating approximately 3,500 stores across central and eastern Europe, KiK is Germany's largest discount textile chain. In 2019, KiK had a revenue of €2.13 billion. KiK contracted Ali Enterprises, a Pakistani textile company operating a factory in Karachi, Pakistan.

Community affected: Millions of workers in Pakistani garment factories face exploitation and labour rights issues such as being paid below minimum wage, being forced to work overtime with insufficient breaks and being prevented from joining independent trade unions.²

Case detail: In 2012, the Ali Enterprises factory in Karachi, Pakistan, burned to the ground killing 258 workers, making it the deadliest factory fire ever.³ At the time, most of the factory output was jeans for KiK.⁴

One survivor recounted the experience to the BBC: *"There was an immediate scramble for the exit - leading to chaos. People piled on top of each other - some got crushed as there was just one way out and so many people. Everybody was screaming and pushing - it was pure panic and fear. I thought I was going to die."*⁵

There were inadequate fire safety measures in the factory, including bars on windows and exits, and a lack of stairs, emergency exits, fire extinguishers and fire alarms.⁶

In 2015, four of the victims initiated a civil case against KiK in Germany. The German courts applied Pakistani law, as this was where the harm had occurred. The court dismissed the action in January 2019, deciding that according to Pakistani law the statute of limitation had expired.⁷



As a result of public pressure surrounding the case, KiK agreed a negotiated compensation settlement with the survivors out of court.⁸

Human rights due diligence: As the factory's main client, KiK should have been in a position to demand fire safety improvements at the Ali Enterprise factory. KiK had been ordering at least 70 per cent of the factory's production over a number of years and therefore would likely have been aware of the fire safety risks.⁹

If KiK had carried out due diligence to identify, prevent, cease and mitigate the risk to human life at production factories within its business relationships, it could have used its leverage to enforce adequate health and safety standards at the factory, push the factory owners to reduce the risks to workers' lives and safety and this could have prevented the lethal fire.

2.5 COVID-19: Exacerbating existing supply chain inequities

“It should have been obvious, but it appears to have been a revelation to many: the workers who sew our masks in factories, who staff essential services and transport, and who farm the land, or care for the sick, amidst the crisis, are essential to our survival. Yet, they are often the ones most vulnerable and at-risk to human rights abuses – often on temporary or abusive contracts, with low wages and few or no safety nets, and exposed to health and safety risks.”

- UN Working Group on Business and Human Rights⁶⁰

“In 2020, our production was severely affected by Covid-19 lockdown. Since August 2020, factory management has almost doubled our production target. For instance, I used to produce 160-170 pieces of underwear per day before 2020. Now I must produce at least 250 pieces per day. However, the factory management does not allow us to do overtime anymore... If any of us fail to produce this number of clothes, we face severe verbal abuse from the management”

- Garment worker in Bangladesh⁶¹

The COVID-19 pandemic has revealed the deep injustice of our global models of business and the potential for abuse of human rights. Some of the poorest workers of the world were the first to lose their employment, without any social welfare safety net. At the same time, some major companies were refusing to pay suppliers for goods already produced, which left factories unable to pay wages.⁶² Millions of workers at the end of complex supply chains, often women, lost their employment without compensation and others were forced to work in unsafe conditions to survive.⁶³

Businesses make vast profits from working transnationally and employing workers on poor salaries with minimal employment protection, before selling the end products in wealthier economies. They have protected their interests during the pandemic at the expense of these same workers, thus exposing an injustice at the heart of this profit-making model.

One study on the impact of the pandemic on garment workers has shown that nearly 80 percent of workers who lost employment were not paid full severance pay, and over two-thirds were paid nothing at all. For those who have managed to retain employment, incomes have fallen by 11 percent on average. This is very significant, given that many garment workers were already earning wages below the poverty line and had no savings before the pandemic. As a result, debt is a growing problem, with over 60 percent of workers having borrowed money during the pandemic.⁶⁴

The 2021 International Trade Union confederation ‘Global Rights Index’ has documented how governments and employers have exploited the pandemic by: dismissing workers who exposed vital information about the spread of the virus in workplaces; violating collective bargaining rights; increasing surveillance of workers and undermining the right to privacy; and restricting free speech and assembly.⁶⁵

The treatment of supply chain workers, migrant workers, and those in precarious work, mostly women, represents an unsustainable and unjust business model of profit at the expense of human rights. These cases demonstrate why corporations need to be legally required to assess and address human rights impacts across their value chains and not just with their immediately contracted employees.

66 | The treatment of supply chain workers, migrant workers, and those in precarious work, mostly women, represents an unsustainable and unjust business model of profit at the expense of human rights.

The pandemic has also shone a stark light on the links between environmental change and ecosystem disturbance and the potential for viruses.

The International Panel of Experts on Sustainable Food Systems has noted that “the spread of pathogens is exacerbated by climate change, ecosystem destruction and land use change, deforestation, biodiversity loss, and the removal of essential protective barriers. The ‘efficiencies’ of global trade have paved the way for increasingly uniform farming systems and removed the firebreaks of biodiversity”.

What is a Value Chain?

Products that we buy are often made from various parts and materials sourced from all over the world. A mobile phone, for example, may be produced by a Chinese company using materials from Central Africa while other services like design, manufacturing, packaging, and marketing might be done in the USA.

From each of these steps, companies extract value from the product. That is why this set of activities is referred to as the value chain. Given that value chains often extend globally, encompassing companies based in different countries, when violations of human and environmental rights occur, several economic actors may bear the responsibility.

2.6 Lack of access to justice for communities affected by corporate harm

Despite the devastating impacts that corporate activities can have on communities, survivors of human rights violations consistently struggle to access justice. Their right to remedy is choked off by obstacles.⁶⁶ Frequently, attempts to seek justice are often unsuccessful as poor communities are pitted in a struggle against well-funded companies.

Within civil proceedings, seeking justice is a long difficult process with many barriers. It may take years or even decades to even get agreement on a court’s jurisdiction over a case. For example, in a case involving claims of exposure to asbestos by workers in South Africa taken against a UK parent company, approximately 1,000 of the 7,500 claimants had died before it was settled that a UK court would hear the case.⁶⁷

In one case from the 1980s, Boliden, a Swedish company, paid a local Chilean company, Promel, to export industrial waste to Chile. Promel disposed of it without removing the arsenic, and this caused devastating health effects for people living near the site, including cancers and neurological disorders.⁶⁸ In 2013, victims took legal action against Boliden in the Swedish courts, arguing that Boliden had breached a duty to ensure that the sludge was appropriately processed by Promel, but eventually lost their case. In March 2018, after the claimants appealed, the court decided to apply Swedish law and



Flavia and her son Joel. Flavia’s family were violently evicted from their homes in the Polochic valley in Guatemala. They were evicted by a wealthy plantation owner who wanted to grow sugar cane. Photo: Manuel Morillo.

dismissed the appeal on the basis that the claim for damages had been filed too late and the cause of action was time-barred. As such, Boliden has not faced legal consequences for this case.⁶⁹

For the indigenous communities in the *Aguinda v Chevron* cases, Texaco (now Chevron) dumped over 18.5 billion gallons of toxic water into the rainforest, contaminating two million acres of the Ecuadorian Amazon over the period from 1964 to 1992. This is one of the world's greatest environmental disasters, with pools of oily sludge still present in the Amazon. Despite this, twenty-eight years of litigation, including judgment obtained in Ecuador and proceedings in EU Member States, failed to yield compensation or satisfactory remediation of the lands. Indigenous communities continue to face health impacts, including cancer, lung disease, and chronic skin lesions.⁷⁰

Similarly, after more than thirty years of litigation, justice has been denied for the victims of the disastrous industrial gas leak in Bhopal in India in 1984. The chemical plant which exploded was owned and operated by a subsidiary of Union Carbide, an American corporation.⁷¹ Bhopal has been described as "the world's worst industrial disaster, which saw 40 tons of toxic methyl isocyanate gas released into the air, killing over 3,000 instantly and condemning hundreds of thousands to a future of prolonged pain, cancer, stillbirths, miscarriages, lung and heart disease and the drawn out deaths of everyone around them".⁷²

No clean-up operation of the Bhopal chemical waste – which was already being dumped into the local community before the explosion – has ever been conducted and ongoing devastating health impacts on second and third generations are reported by residents.⁷³ Union Carbide never admitted legal liability for Bhopal and tried to avoid legal proceedings in Indian courts, while Dow Chemical, which took over Union Carbide in 2001, continues to deny any responsibility for the loss of lives and subsequent environmental contamination.⁷⁴

These cases illustrate the significant barriers to affected communities, and that current regulatory frameworks are patently unsatisfactory for communities to seek justice. Most cases fail on procedural grounds due to jurisdiction issues across borders and time limits. Essentially, the legal complexity and cost of trying to seek remedy across borders can make obtaining justice close to impossible for most affected communities. This is a major gap in how states regulate corporate activities with respect to human rights.⁷⁵

In addition, the embedding of discriminatory systems within institutions, including the courts and judiciary, can operate to exclude women, indigenous people and people from poorer communities from justice mechanisms. Further barriers include not being equal before the law, lack of legal fees and failure to follow up on the reported crime by authorities.⁷⁶ Women also face the issue of unsuitable remedies in a context whereby remedial mechanisms adopt gender-neutral processes that do not take account of the specific harms experienced by women.⁷⁷

Along with the power that corporations hold, the complexity of corporate structures and complex supply chains compound the difficulty in holding corporations accountable. The uncomfortable truth is that many European companies are linked to human rights abuses and environmental harm throughout their global value chains in the countries where they operate every single day, and they face few or no obstacles.⁷⁸

Addressing the accountability gap will entail a range of solutions, including legislation at the global, regional, and national levels. An important priority for Ireland should be the development of corporate accountability legislation that contains a strong liability and enforcement regime and improved access to remedy rules.

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Why is it so difficult for people to access justice for corporate harm?

Lack of state regulation and legal accountability & lobbying power of corporations

- The growth of large transnational corporations, with major revenues, lobbying power and influence, operating across states, poses major accountability challenges;
- Governments may be unable or unwilling to enforce human rights regulations in relation to the activities of corporations, and at times perpetrate human rights violations themselves, in order to keep or attract investment;
- There is a lack of global legally binding measures to regulate corporations with respect to human rights and the environment.

Complexity of corporate structures, difficulties in establishing parent company liability and legal barriers

- **Global value chains:** Corporations can ignore the human rights and environmental harm of subcontractors or others with whom they have a business relationship, and profit from the low costs. At the same time, they are often not using their leverage to change practice, nor ceasing the relationship if the practice continues. Currently, they are not legally obliged to implement human rights due diligence in their activities or along their value chains.
- **The complexity of corporate structures:** a globalised economy enables transnational corporations to evade accountability for human rights violations. Large companies can separate the rich parent company in the EU from the subsidiary that carries out the company's activities in other parts of the world.⁷⁹ The company law doctrines of limited liability and separate legal personality are argued to operate as a 'shield'.⁸⁰ This enables parent companies to deflect or avoid claims by ring-fencing risk at the level of a subsidiary lodged in a third country.⁸¹
- This means that, when victims try to bring a case in their country, they are pursuing a subsidiary - which will typically not have the resources to offer them remedy - and in the courts in the country of that subsidiary, where practical problems mean they often cannot get a fair trial. As such, victims are denied justice, even though rich EU companies are the ones who take the profits from their subsidiaries and who have the power, resources, and means necessary to provide remedy. They are also often the ones designing and promoting the human rights and sustainability policies for their corporate group and global subsidiaries.⁸²

Challenges when taking cases through EU courts:

- To overcome such issues, cases have been taken against parent companies and their foreign subsidiaries in courts in Europe. EU Member States have an obligation to provide effective remedy under Article 13 of the European Convention on Human Rights (ECHR) and under Article 47 of the Charter of Fundamental Rights of the European Union (CFREU). However, while the numbers of cases against EU parent companies continue to grow, few have succeeded, and in practice access to justice remains stubbornly distant and elusive.
- **Applicable law:** When cases are taken against parent companies in the EU, "the law of the country in which the damage occurs" is applied in litigation (by virtue of Article 4 of the Rome II Regulation). This is a major challenge to remedy where the harm has occurred in countries where there may be lower human rights legal protection for the rights of victims.

For example, **time limits to take actions** with complex mass claims can impede access to justice when local laws are applied. This was the situation in case of KiK, whereby the German court rejected the case on the basis that the claims were time-barred under Pakistani law.⁸³ In addition, some harms such as environmental harms may not be evident for years, so time limits should start when the damage becomes apparent.

- **Collective actions are not possible** in Ireland and many EU jurisdictions. This means a small number of victims have to take a case, and wait for an outcome which may be very lengthy. Meanwhile other claimants waiting for this outcome may then be time-barred from taking their own cases⁸⁴. Lack of collective actions is a barrier to justice, and requires action on the recommendations of the Review of Administration of Civil Justice 2020.⁸⁵ Furthermore, collective action should be a right.

Unfair 'burden of proof' required from victims:

- **Civil litigation is used to seek remedy because other routes are either unavailable or do not function as they should.** In many of these cases, there is clear inequality between the parties involved in litigation. At present, the **burden** is on the person who has been harmed to make an arguable case, against a much better resourced large corporation. The people suffering the harm are faced with gathering technical and other evidence to pursue a very long costly complex case, often in an EU state, without access to legal aid, and only if collective actions and funding are even possible in that state.
- **Lack of access to information, often held by corporations, to support victims' claims.**⁸⁶ Victims of human rights violations can find it difficult to access evidence of the company's activities. This undermines their ability to build a successful case, particularly when the burden of proof is on them. In addition, it is complex for victims to have detailed knowledge of a large multinational corporation with a web of legally separate companies, joint ventures, and tiers of suppliers and subcontractors. These issues are significantly more difficult when communities living in poverty are challenging large corporations with well-funded legal teams.
- Where states do not meet their obligations to regulate and protect, and where businesses do not meet their responsibility to respect human rights, affected communities may be denied access to justice. As such, this gap needs to be addressed.



Flores Mira Lopez, 59, from Azacualpa in Honduras. A Canadian-owned mining company wants to dig up the graveyard of her local community in order to access gold deposits underneath. Flores Mira opposed the exhumation of her father's remains by the local mining company, and the community has managed to stop the exhumations through a successful legal challenge. Photo: Garry Walsh

Lethal Dam Collapse – Vale and TÜV SÜD in Brazil

Hundreds were killed in an avalanche of waste when the Brumadinho dam collapsed in 2019. Four months earlier it had been certified as safe by the local subsidiary of German company TÜV SÜD.¹

- **Sector:** Mining
- **Issues:** Health and safety, loss of life, environmental damage, loss of livelihoods

Profile of companies involved: Brazilian company Vale SA operated the Brumadinho dam.² Vale is a leading global company in iron ore and nickel production. In the decade from 2008 to 2017, it recorded approximately US\$57 billion in profits.³

TÜV SÜD is headquartered in Munich, Germany.⁴ TÜV SÜD has subsidiaries worldwide, including **Bureau de Projetos e Consultoria Ltda in Belo Horizonte (Brazil)**.⁵

Community affected: In Minas Gerais state in Brazil, 944,000 people live in communities in 18 cities along the banks of the Paraopeba River downstream from Brumadinho, which was hit by the toxic mud that flowed 305 kilometres downriver until it reached the city of Felixlândia.⁶

Case detail: The Brumadinho dam in south-eastern Brazil burst in January 2019, just four months after it was certified as safe by the Brazilian subsidiary of TÜV SÜD.⁷ The dam collapse was Brazil's deadliest mining accident, resulting in an avalanche of waste that killed 270 people.⁸

11.7 million cubic metres of toxic waste and mud were released⁹, contaminating the Paraopeba river and nearby water systems and lands. This has affected the livelihoods of an estimated 944,000 people¹⁰ and the drinking water of thousands.¹¹

"Even starting over is hard. Everything has been destroyed. Our land is completely covered [in mud]. And we can't use what is left of productive land because we depend on water." Farmer affected by the dam collapse¹²

Court rulings, individual lawsuits and a remedy agreement for families who lost loved ones have been achieved. Yet the process of comprehensive redress to all affected communities, including for lost livelihoods and ecosystems in the region, is ongoing.¹³

Additionally, five survivors are pursuing a legal action through the German courts, accusing TÜV SÜD of having contributed to the dam breach.¹⁴

Human rights due diligence: If TÜV SÜD's Brazilian subsidiary had not deemed the dam stable, it would have been a warning to Vale and the Brazilian authorities, who could have initiated the necessary safety measures. This may have prevented the disaster from occurring.

Meaningful human rights due diligence would require companies like TÜV SÜD to take all reasonable measures to ensure their subsidiaries have appropriate safety measures in place, and adequately assess any risks that might threaten people's right to life and livelihoods, or cause damage to the environment.



Photo: CIDSE

3. The Legal and Policy context: moving beyond voluntary principles

“I can see the immense capacity of business to give leadership. But the corporate sector per se is bottom-line oriented. It can be very corrupt and it is not very principled. That is why I don’t think it is sufficient just to have voluntary codes of behaviour. I am in favour of legislation which helps to ensure that there is an even playing field and rewards those who play by the rules.”

– **Mary Robinson, former President of Ireland and former UN High Commissioner for Human Rights**⁸⁷

This section examines the legal and policy context related to business and human rights at three levels: the global, EU and Ireland.

At present, the global framework is inadequate to effectively address environmental and human rights harms related to business activities. The reliance predominantly on voluntary measures internationally has failed to prevent serious harms from occurring. Asking businesses to effectively police themselves has failed to systematically address human rights and environmental issues. Voluntary approaches, guidelines and codes of conduct haven’t effectively prevented harms nor provided for effective accountability and remedy.

In this context, the EU and Ireland should implement a legal framework to establish a robust, enforceable due diligence standard for businesses to prevent and address their adverse impacts on human rights and the environment in their own operations, business relationships and global value chains. A systematic transformation in corporate behaviour is needed and binding legislation is key to meeting this ambition.

3.1 Gaps in the global framework

“Mandatory human rights due diligence will lead to better outcomes for people affected by business activity... To achieve the desired outcomes, legislation would also need to be backed by adequate enforcement and accountability mechanisms, including access to remedy for victims when companies fail to exercise human rights due diligence and harm to people and planet occur.”

- UN Working Group on Business and Human Rights⁸⁸

Through existing international treaties, states are required to protect individuals and groups from human rights abuses, including by entities such as corporations. It is well established in human rights law that state obligations include a duty to regulate the conduct of private groups or individuals to ensure that they do not violate the rights of others, and to ensure access to remedy.

However, there is a gap in the current system, whereby national Governments primarily seek to regulate corporate activity at home, whilst often ignoring the serious harm those corporate actors may contribute to abroad. The UN Guiding Principles on Business and

Human Rights (UNGPs), agreed in 2011, represented a landmark moment of states accepting that this is no longer acceptable or sustainable. However, national and international laws have not yet caught up to give real effect to these principles.

Increasingly, UN Treaty bodies are raising issues of business and human rights in their concluding observations. However, there remains no internationally legally binding instrument that focuses specifically on the impact of business enterprises on human rights and the environment and that addresses the specific gaps in accessing remedy that affected communities face in the context of transnational operations.

The Irish Coalition for Business and Human Rights has strongly supported the development of a UN binding treaty to regulate the activities of transnational corporations and other business enterprises with respect to human rights and the environment, along with partners and allies from the Global South who have led this call.⁸⁹ The Treaty is currently being negotiated at the UN, but has yet to be actively supported by the EU or Ireland.⁹⁰

According to the UNGPs, states should consider a smart mix of measures – national and international, mandatory and voluntary – to foster business respect for human rights. This includes laws requiring business to respect human rights, and ensuring other laws, including corporate law, do not undermine human rights, and providing guidance to business.⁹¹ However, regulation has largely developed in the form of voluntary guidance, with implementation of these voluntary, soft law guidelines being limited.

After a decade, it is evident that voluntary implementation by businesses has been neither widespread nor effective in addressing human rights harms, even amongst large, sophisticated companies established and operating within the EU. The 2020 EU Commission study on due diligence in the supply chain found that only one in three businesses in the EU are currently undertaking due diligence on human rights and environmental impacts.⁹²

The 2020 Corporate Human Rights Benchmark, which assesses 230 of the largest publicly traded companies in the world on a set of human rights indicators, reveals poor levels of implementation of the UN Guiding Principles on Business and Human Rights. Nearly half of the companies assessed (46.2%) failed to show any evidence of identifying or mitigating human rights issues in their supply chains.⁹³ Furthermore, assessments and benchmarks of the implementation of human rights due diligence by companies point consistently to the fact that only 20% of companies claim to carry out due diligence.⁹⁴

Essentially, voluntary implementation by states and by business is insufficient, and while there is no general international legal regime concerning corporate liability for human rights abuses, protection of rights and prevention of abuses is left unaddressed in practice.

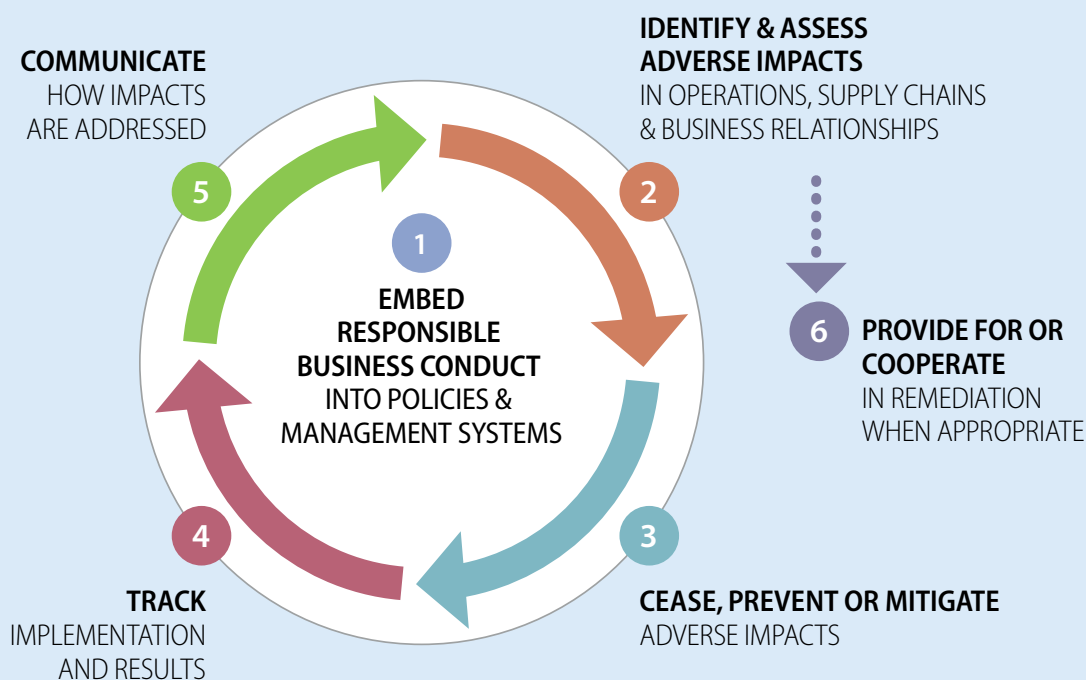


Sharon Ikimat on her way to collect water near Kapese, Turkana, Northern Kenya. Indigenous Turkana communities are living in extreme poverty in this drought affected area, adjacent to large installations where oil is being extracted from beneath the soil. Photo: Garry Walsh / Trócaire

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What is Human Rights and Environmental Due Diligence?

FIGURE 1. DUE DILIGENCE PROCESS & SUPPORTING MEASURES



Source: OECD Due Diligence Guidance for Responsible Business Conduct

The aim of human rights and environmental due diligence is to ensure that the rights of individuals and communities are respected and the environment is protected from a company's actions in their own operations, within their value chains and within their business relationships.

Due diligence is a central and crucial component of the corporate responsibility to respect human rights as set out in the UN Guiding Principles on Business and Human Rights. The concept engages a fundamental shift from a narrower focus on the interests of shareholders to an approach acknowledging broader rights holders.

Effective due diligence should require companies to map their value chain in order to **identify, assess, prevent, cease, mitigate, monitor and account for, address and remediate** adverse human rights and environmental impacts. These being impacts which they may cause, contribute to or be directly linked to both through their own activities and as a result of their business relationships. Businesses should assess impacts throughout their entire supply chain, going beyond the first tier, and expect the same from their business partners and suppliers.

Due diligence extends over all human rights, and applies to all enterprises regardless of their size, sector, operational context, ownership, and structure. It should reflect the risk of severe impacts, the nature, and context of the operations of the business, and is expected to vary in complexity with the size of the business enterprise.

3.2 Europe: shifting away from voluntary principles

Across Europe, there is already strong recognition of the need for change and there is an emerging paradigm shift away from voluntary principles towards mandatory requirements for business related to human rights and the environment. It is clear that laws prompting basic disclosure, as well as laws which target a single issue such as just child labour or only modern slavery, while steps in the right direction, have issues in practice and are, therefore, insufficient.⁹⁵

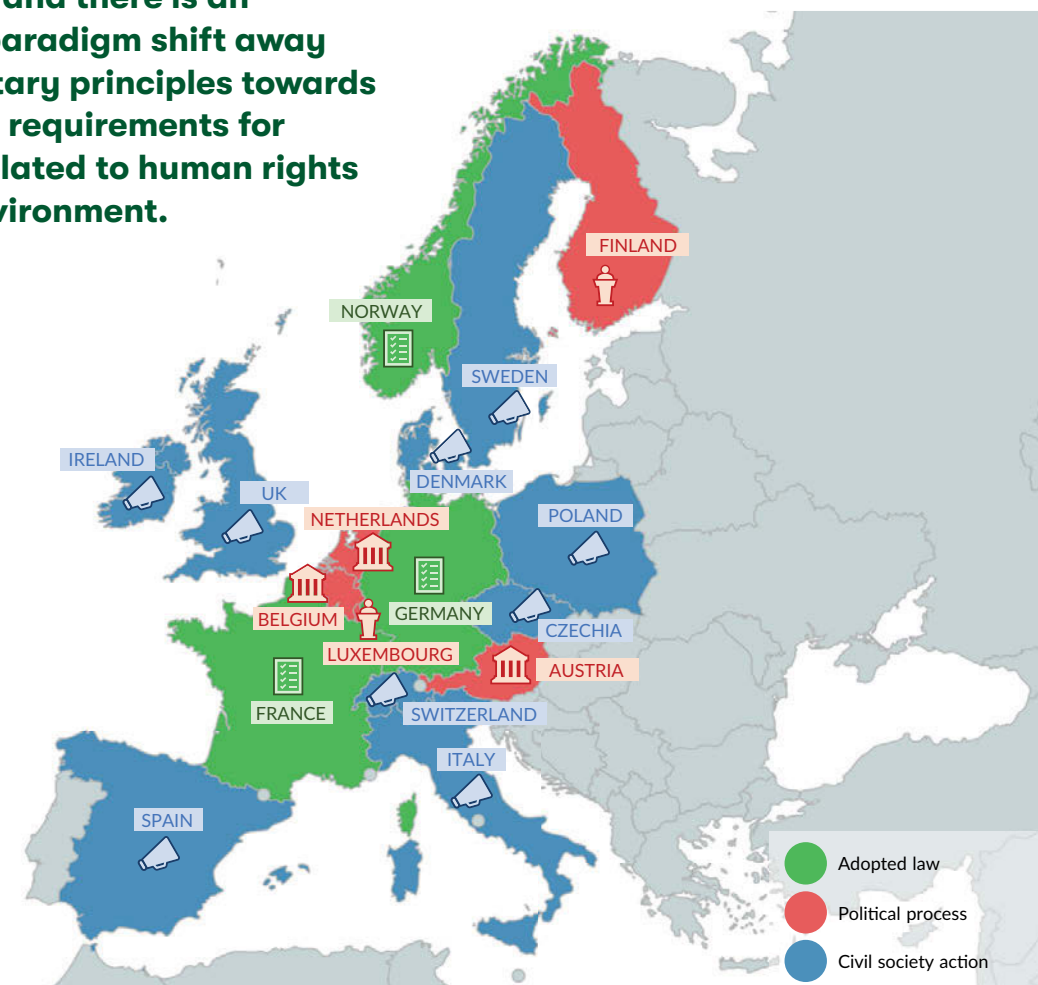
Passed following the collapse of the Rana Plaza building in Bangladesh, the French 'Duty of Vigilance' Law of 2017 was the first time that an EU member state established a legal duty on companies to act to prevent human rights abuses related to their operations, those of their subsidiaries, subcontractors and suppliers, both domestically and abroad, and publicly account for the steps taken.

Since then, across Europe, states have started to develop similar legislation to the French law. Germany and Norway introduced laws in 2021, and parliamentary processes are underway in Austria, Finland, Belgium, the Netherlands, and Luxembourg. Further proposals are being advanced by civil society across multiple European states.

In addition to these legislative shifts, there have been significant advances related to corporate accountability and access to justice through European courts in recent years. The judgements of the UK Supreme Court, in *Vedanta* (2019) and *Okpabi* (2021), point to 'the pendulum moving in the direction of corporate accountability'⁹⁶, regarding civil litigation, particularly in common law jurisdictions.⁹⁷

These decisions bring the potential of remedy, affirming that a parent company may owe a duty of care to communities negatively impacted by the operations of a foreign subsidiary. While these cases are ground-breaking, significant barriers still remain regarding access to justice. Yet it is clear that there is considerable growing momentum towards stronger corporate regulation through these legal precedents in parallel with shifts in the policy and legislative sphere.

66 Across Europe, there is already strong recognition of the need for change and there is an emerging paradigm shift away from voluntary principles towards mandatory requirements for business related to human rights and the environment.



<https://corporatejustice.org/publications/map-corporate-accountability-legislative-progress-in-europe/>

Booking holidays in an occupied territory – Airbnb Ireland in the West Bank

Airbnb generates profits from tourism to illegal Israeli settlements in the occupied West Bank. The company facilitates bookings to properties located on land that has been confiscated from Palestinians.¹

- **Sector:** Tourism
- **Issues:** occupation, conflict, international humanitarian law

Profile of companies involved: Airbnb, Inc. is a US-based company and is the global leader in providing an online market for vacation rentals. It has over 5 million listings worldwide, covering over 100,000 cities.²

For customers in most countries, including Israel and occupied Palestinian territory, it runs its business through **Airbnb Ireland UC** which is a Dublin-domiciled company.³

Community affected: The State of Israel has maintained a military occupation of the West Bank for over 50 years. Through the construction of illegal settlements, Israel has transferred over 600,000 of its citizens onto Palestinian land.⁴ The UN and most states maintain that Israeli settlements in the West Bank, including East Jerusalem, are illegal under international law.⁵ The establishment of settlements has facilitated the widespread dispossession and displacement of Palestinian communities.⁶

Case detail: In 2018, Awni Shaaeb learned that Israeli settlers had built a house on his family's land in the West Bank and that it was now available to rent by tourists on the Airbnb.com platform.

The piece of land had been used to grow wheat, barley and chickpeas. In 1975, the Israeli settlement of Ofra was established by seizing part of these farmlands. As a result, Shaaeb and his family can no longer tend to crops or even visit the parcel of land.⁷

"For someone to occupy your land, that's illegal. For someone to build on your land, to rent it out, and profit from it – that is injustice itself." Awni Shaaeb⁸

Despite settlements being illegal under international law, Airbnb allows tourism-related businesses which are based in Israeli settlements to use its platform to advertise their services to potential customers around the world.⁹

Following considerable public pressure from human rights organisations, in November 2018, Airbnb announced that they had decided to remove "approximately 200" listings in Israeli settlements in the occupied West Bank¹⁰.

However, following a counter lobby from the State of Israel and legal challenges, Airbnb reversed its decision in 2019.¹¹ The reversal of the company's decision was met with condemnation by human rights groups and in 2020, the office of the UN High Commissioner for Human Rights included Airbnb on a list of 112 companies involved in activities connected to illegal Israeli settlements.¹²

Human rights due diligence: By marketing its services in Israeli settlements, Airbnb may find it impossible to mitigate or avoid being connected to human rights abuses, because the activities take place on unlawfully seized land, under conditions of ongoing discrimination, and are connected to serious violations of international law. Furthermore, Airbnb cannot avoid Israel's discriminatory military legislation that effectively prevents them from renting properties to Palestinian residents of the West Bank.¹³

A meaningful human rights due diligence process would identify these serious risks, the inability to meaningfully mitigate against them and would essentially preclude any commercial or financial activities connected to Israeli settlements.



Israeli settlers seized land that belong to Awni Shaaeb (70) and there is now an Airbnb listing on the settlement on his land. Photo: Human Rights Watch.

3.3 EU Sustainable Corporate Governance Legislation

“We refuse to accept that deforestation or forced labour are part of global supply chains. Companies will have to avoid and address harm done to people and planet in their supply chains. The new rules will give victims a legal right to access support and to seek reparations, and will ensure fairness, a level playing field and legal clarity for all businesses, workers and consumers.”

– Lara Wolters, MEP and Rapporteur⁹⁸

In addition to national laws being introduced by individual European countries, the EU itself is currently advancing an initiative looking at introducing mandatory human rights due diligence in legislation. Growing support at the regional level for such measures is evident across the EU Council, Parliament, EU Agency for Fundamental Rights, and Council of Europe.

A 2020 study instituted by the EU Commission on due diligence through supply chains surveyed stakeholders and examined regulatory options for human rights due diligence. A significant majority, 73% of stakeholder respondents, were supportive of the introduction of a general requirement at EU level. This would require companies to undertake human rights due diligence in their own operations and throughout their supply chains, coupled with civil or criminal liability and/or fines, as the most effective regulatory option.⁹⁹

In 2020, the EU Commissioner for Justice committed to an EU-wide initiative, including mandatory human rights and environmental due diligence legislation, which will include liability, enforcement mechanisms, and access to remedy provisions for communities affected by corporate abuse.¹⁰⁰ This Sustainable Corporate Governance Initiative is a follow-up to the European Green Deal, and was listed among the deliverables of the Action Plan on a Circular Economy, the Biodiversity strategy, and the Farm to Fork strategy.

Feeding into this Sustainable Corporate Governance proposal, the European Parliament adopted a Resolution with recommendations on Corporate Due Diligence and Corporate Accountability in March 2021.¹⁰¹ It called on the Commission to present legislation ensuring companies address and are held accountable for human rights, environmental and governance risks, and impacts in their own activities and value chains, including sanctions for non-compliance and civil remedies. The European Parliament's rationale included levelling the playing field for businesses, a harmonised standard, and legal certainty. The resolution was passed with support from a large majority across parties in the European Parliament, including all Irish MEPs. It sent a strong signal to the European Commission on what key elements the European Parliament expects in the upcoming legislation.

The Sustainable Corporate Governance proposal is under development, and is likely to require individual EU member states, such as Ireland, to give effect to the proposal through legislation at the national level. Transposing law from EU to national level can take time, and it's clear that those EU member states that have already begun work on establishing a domestic legal framework for human rights and environmental due diligence will be ahead of the pack and best placed to respond to developments at EU level. As such, the national-level work of consulting with stakeholders, capacity building, conducting legal review, debating key principles in parliament and preparatory work in Government Departments should begin immediately.



Right: Adilia Castro (48), protests against the illegal detention of members of the community of Guapinol in Honduras, who were imprisoned for defending their community's river against corporate exploitation. Photo: Giulia Vuillermoz

3.4 The Irish context: Significant gaps remain

“The Irish Government has taken a minimalist approach... which favours voluntarism and promotional efforts aimed at encouraging state-owned or private companies to respect human rights.”¹⁰²

– **Dr. Shane Darcy, Irish Centre for Human Rights, NUIG School of Law**

There is currently no overarching legal or regulatory regime to make human rights due diligence and reporting mandatory for businesses in Ireland.

Ireland has committed to implementing the UN Guiding Principles on Business and Human Rights through the ‘National Plan on Business and Human Rights 2017-2020’. However, the plan lacks ambition and does not include recommendations that will drive systematic change to ensure human rights and environmental considerations are key priorities for business. In addition, although the Department of Foreign Affairs established a National Plan Implementation Group¹⁰³, cross-Departmental drive to implement the plan has not been apparent.

The Department of Foreign Affairs commissioned an independent “baseline assessment of legislative and regulatory framework (2019)” as part of a commitment to implement Ireland’s National Plan on Business and Human Rights. The report notes, “the commitments in the National Plan propose a largely voluntary regime, whereby the role of the state is to encourage and support rather than to ensure compliance by way of a mandatory regime”. It recommends that the State considers the adoption of mandatory human rights due diligence and that this ought to be considered as a minimum requirement for state companies.¹⁰⁴ The Programme for Government – Our Shared Future (2020) makes a commitment to “ensure that the Action Plan is further developed to review whether there is a need for greater emphasis on mandatory due diligence”.

In 2020, a ‘Review of Access to Remedy in Ireland’ commissioned by the Department of Foreign Affairs evaluated how best to ensure remedy for potential victims of human rights abuses abroad by companies domiciled in Ireland. It focused on legal, procedural, or financial barriers, and consideration of those who face additional barriers to remedy, including women. It states, “there is a significant accountability gap, propagating a context in which abuses will recur, combined with legal and practical barriers inhibiting remedy for potential victims overseas”.¹⁰⁵

It identified existing barriers and gaps, and makes clear recommendations to enable judicial remedy, and enhance non-judicial remedy. Specifically, it recommends to “commence consideration of regulation of human rights and environmental due diligence in Ireland, cognisant also of developments in the legislative initiative at EU level”. The conclusions and recommendations of the ‘Review of Access to Remedy in Ireland’ were endorsed by the National Implementation Group on Business and Human Rights.

Furthermore, a recent benchmarking study undertaken by Trinity College Dublin Centre for Social Innovation has shown that the 50 largest publicly-listed companies operating in Ireland, and 10 of the largest state-owned enterprises, performed poorly on undertaking human rights due diligence. The study showed that three quarters of the publicly-listed companies scored below 30% on their human rights due diligence policies and practices, and a third of companies scored zero. The findings for state-owned enterprises were even more dismal, with just one company gaining any points on the human rights due diligence indicators.¹⁰⁶

By developing regulation, the Irish State can address this significant gap. Ireland can join other European states which are moving firmly forward, and states which have already instituted regulation. Statutory obligations in Ireland are the next step, consistent with obligations which the Irish State has already assumed to prevent abuses by private actors.

The development of a new National Plan on Business and Human Rights presents an opportunity for increased ambition, which takes account of the international and EU developments and includes commitment to strong global, EU, and national regulation with respect to human rights and the environment.

66 | By developing regulation, the Irish State can address this significant gap. Ireland can join other European states which are moving firmly forward, and states which have already instituted regulation.

4. Towards Corporate Accountability Legislation in Ireland

“In your countries, the right to justice for victims is taken for granted. Please deliver us this courtesy as companies extract profits from the factories where our families work under very cheap – that means unhealthy and dangerous – conditions.”

- **Saeeda Khatoon, Chairperson of the Ali Enterprises Factory Fire Affectedes Association.** Saeeda lost her son in the factory fire in Pakistan in 2012.¹⁰⁷

Responding to the challenges outlined in previous sections requires regulation that effectively prevents human rights violations from occurring and provides accountability in the event that harms still happen. An urgent response is needed to put a stop to corporate harm to people and the planet.

This section sets out the key principles for an effective system of mandatory human rights and environmental due diligence in Ireland, building on work in other EU Member States and at EU level. This explanatory section draws from a detailed proposal developed by Dr Rachel Widdis (School of Law, Trinity College Dublin) for the Irish Coalition for Business and Human Rights (ICBHR), setting out how these principles could be represented in an Irish legal context.

This proposal aims to:

- **Prevent human rights abuses** and environmental harm by companies;
- **Provide accountability** when harm occurs;
- **Ensure access to remedy** for communities affected by companies based or operating in Ireland.

To be effective, corporate accountability legislation in Ireland must be broad in scope, covering human rights and environmental impacts, with effective sanctions and enforcement. Effective due diligence should prevent harm occurring in the first place. Companies should be held liable for harms caused, and, in combination with complementary reforms, the law should ensure that affected communities can access Irish courts to seek remedy when their rights have been violated.

Pitfalls in design of due diligence systems can result in ‘tick the box’ approaches,¹⁰⁸ and risks of superficial compliance.¹⁰⁹ This is evident from experience of the operation of the Modern Slavery Act in the UK¹¹⁰. As such, this proposal sets out a substantive due diligence model. It aims to articulate the standard of proposed regulation of corporate human rights and environmental due diligence in Ireland, including parameters of duties, reporting, enforcement, liability, and access to remedy.

There is public support in Ireland for introducing such binding legislation to regulate business conduct overseas. According to a recent opinion poll, 81 percent of Irish people would want an Irish company that is acting unethically in a low-income country to be subject to legally binding regulations in Ireland. Only 11 percent believe Irish companies operating unethically in low-income countries should be able to self-regulate and apply their own standards.¹¹¹

66 | According to a recent opinion poll, 81 percent of Irish people would want an Irish company that is acting unethically in a low-income country to be subject to legally binding regulations in Ireland.

Mandatory human rights due diligence on its own won't be a panacea for all issues related to corporate accountability and exploitation. To address the inequality at the heart of the global economic system requires substantial structural changes, a redistribution of power away from institutions dominated by the interests of countries of the global north, and concurrent global reforms in the areas of taxation, trade, and corporate transparency.

However, systematically enforced effective human rights and environmental due diligence will have a substantive impact on the human rights conduct of corporate actors, particularly addressing the most egregious human rights harms and environmental damages.

The key elements of the proposed law are as follows:

1. **Establish a new legal duty** for businesses to conduct effective due diligence and prevent adverse impacts on human rights and the environment;
2. **Cover all businesses**, and apply throughout their own activities and value chains;
3. **Protect people and planet**, requiring respect for all internationally recognised human rights and key environmental standards;
4. **Ensure accountability**, holding companies liable if they cause or contribute to human rights and environmental harms;
5. Deliver **effective remedy**, with real access to justice for affected communities;
6. Be **gender-responsive**, recognising the often disproportionate impact of human rights harms on women
7. Include early, on-going, meaningful and safe **engagement with affected communities**, civil society and trade unions;
8. Address **reprisals against communities** for defending human rights.



Berta Cáceres was killed in her home in March 2016. She was an outspoken champion of the rights of indigenous people. She was murdered for opposing the construction of the Agua Zarca hydro-electric dam in Honduras. Photo: Giulia Vuillermoz

Explained:

Corporate Accountability Legislation



What businesses will be covered by due diligence?

- All companies in Ireland (all sectors/all sizes), including non-Irish enterprises doing business in Ireland.
- Responsibility across borders for company's own activities and activities throughout their global value chain.



What standards will apply?

Human Rights: internationally recognised human rights standards.

Environment Damage: environmental impacts defined in a broad manner referring to international environmental standards.



How will harms be prevented?

Businesses will have to conduct **due diligence** which mainly aims to prevent human rights and environmental harm from occurring. Steps include:

- Identify and assess impacts,
- Prevent and mitigate risks,
- Cease and remedy abuses,
- Monitor implementation,
- Document & communicate actions and results.

Due diligence is **proportional**: to size, sector of activity, capacity, resources and leverage. E.g. larger companies have larger requirements.

Special considerations:

- **Gender:** due diligence needs to be Gender-responsive,
- **Conflict:** enhanced care in situations of conflict or occupation,
- **Meaningful engagement:** with communities, workers, trade unions, civil society, women's organisations, human rights defenders and indigenous peoples.



How could companies be held accountable?

Civil Liability: for victims to take cases in Irish courts for remedy. A business could be held liable for harms caused or contributed to by entities which it controls or has the ability to control.

Criminal Liability: to ensure accountability for the most severe abuses and impacts.

Effective Remedy: affected communities access meaningful remedy, including financial compensation, rehabilitation, and environmental restoration.

Public Enforcement:

- Penalties and sanctions for companies, (that are proportionate, effective and dissuasive),
- Independent oversight body with powers of investigation, suspension, fines, exclusion from state aid & public procurement.

Poisoned air and violent evictions – ESB and Coal Marketing Company’s links with the Cerrejón mine in Colombia

State-owned ESB has imported millions of tonnes of coal sourced from the Cerrejón mine in Colombia. Over decades, thousands of indigenous people have been forcibly displaced, causing extensive environmental damage and pollution, affecting the health of hundreds of thousands of people.¹

- **Sector:** Coal
- **Issues:** health, loss of livelihoods, forcible displacement, environmental damage, climate change

Profile of companies involved:

The **Electricity Supply Board (ESB)** is Ireland’s state energy company. It is 95% owned by the Irish government, with the remaining 5% owned by its employees. With an asset base of approximately €9.6 billion, it supplies energy and gas to over two million clients on the island of Ireland.²

Cerrejón is a coal mining company based in La Guajira, Colombia and is one of the largest open-pit coal-export mining operations in the world. The company is involved in the exploration, extraction, transportation, shipping and export of coal. In 2019 alone it exported 26.3 million tonnes of coal.³ European countries are the largest buyers of Cerrejón coal, accounting for 43% of total sales.⁴ The company is owned by a consortium consisting of BHP Billiton, Anglo American, and Glencore, some of the richest companies in the world.⁵

Cerrejón’s sales are managed through the Dublin-domiciled **Coal Marketing Company (CMC)**, a legally separate entity which is owned by the same consortium. CMC was established in 2003.⁶

Community affected: The La Guajira region of Colombia has a population of 902,000 people with a poverty rate of 65%. 45% of the local population are indigenous and a further 8% are of Afro-Colombian descent.⁷ La Guajira is the ancestral homeland of the indigenous Wayúu people, and many Wayúu communities have been displaced to make way for the mine.

Case detail:

“We are sacrificing our lives, the lives of our elderly and of our children for the commodity of the company and for those who live in Europe”.

Community member from Provincial⁸

Large scale mining in La Guajira began in 1975⁹, and the original inhabitants of the area have been forced to bear the social, economic, cultural, environmental and spiritual costs of the mine, while receiving little benefit from the profits generated.

Now a huge expanse of barren land, the Cerrejón coal mining area covers 690 km² - about three quarters the size of County Dublin.¹⁰

Over the course of its four decades of operation, The Cerrejón mine has been linked to the expulsion of up to 35 indigenous and Afro-Colombian communities.¹¹ At times, evictions have been carried out with armed guards, tear gas, and metal projectiles.¹²

The mine is also hazardous and nearby communities have been inhaling poisonous dust for decades and air, soil and water supplies have been contaminated.¹³ Toxic pollutants have caused a multitude of health issues, including eye damage, heart disease and premature births.¹⁴ Over 336,000 people have developed respiratory complications that are directly attributable to the mine.¹⁵



The Cerrejón open-cast coal mine. Photo: Greenpeace / Steve Morgan

Despite these serious human rights issues, ESB has imported millions of tonnes of coal from Cerrejón for over 20 years. The bulk of the coal burned at Moneypoint power plant in Co. Clare since 2001 has come from this mine.¹⁶

In 2019, the UN's Committee on the Elimination of Racial Discrimination recommended that Ireland "consider stopping purchasing coal from the Cerrejón mine"¹⁷, while in September 2020, several prominent UN human rights experts called for some of the mining operations to be suspended as they had "seriously damaged the environment and health of the country's largest indigenous community".¹⁸

Human rights due diligence:

ESB has failed to take the necessary actions to identify, mitigate and prevent human rights abuses linked to the Cerrejón mine.¹⁹ While ESB has included commitments towards addressing human rights throughout supply chains in its 2020 sustainability report, it does not have a dedicated human rights policy, nor has it made a public commitment or established processes for the full implementation of human rights standards.²⁰

Instead, ESB has relied on a flawed, industry-funded assessment initiative, 'Bettercoal' - an initiative lacking in transparency and one that has declared itself 'satisfied' with ESB's adherence to environmental and human rights

standards. This is despite the multiple human rights and environmental abuses linked to the mine.²¹

The OECD Due Diligence Guidance clearly states that '[p]articipation in an initiative does not shift responsibility from the enterprise to the initiative for adverse impacts... to which it is directly linked.'

While, ESB has not sourced coal from Cerrejón since 2018, they have an ongoing commercial relationship with Cerrejón, and have made no commitment to end that relationship and stop sourcing coal from the mine.

Had ESB, a state-owned enterprise, been obliged under Irish law to undertake a meaningful and adequate human rights and environmental due diligence process, it would have been required to assess risks in its business relationships, engage with stakeholders, and take measures to prevent or mitigate impacts on the communities in La Guajira and the environment.

An appropriate law would provide for potential liability and access to remedy for the communities in La Guajira in the Irish courts, if CMC, the Irish domiciled subsidiary of the joint venture which owns the mine, caused or contributed to harm to human rights and the environment through its sales and marketing activities around Cerrejón coal.

4.1 Key elements of Irish Corporate Accountability Legislation

1. A new legal duty: human rights and environmental due diligence

Recognising that voluntary systems have been largely ineffective, this legislation would place a binding obligation on business entities to conduct effective human rights due diligence to prevent adverse impacts on human rights and the environment.

Companies should be legally required to identify and assess; prevent, cease and mitigate; monitor, communicate and account for; and address and remediate the potential and/or actual adverse impacts on human rights and the environment that their own activities and those of their value chains and business relationships may pose.

These impacts could range from the pollution of natural resources, sexual violence in the workplace, imposing developments without consent of indigenous communities, evicting communities from their land, or perpetrating attacks on human rights defenders.

Companies would have to know exactly where products, materials, and services are sourced from, the conditions in which they are manufactured or extracted, and the impact this is having for people on the ground. This should be a continuous process of monitoring and assessing actual and potential adverse impacts, integrating and acting upon the findings, tracking responses, and communicating actions taken.

As noted, human rights violations and breaches of social and environmental standards can be the result of a business' own activities, or those of its business relationships or along their value chain, therefore due diligence should encompass the entire value chain. This should include the company's entire corporate structure, and operations conducted through subsidiaries, affiliates, joint ventures, subcontractors, and suppliers. The obligations will be proportional to the businesses' size and activities.

The State should evaluate and propose tools in order to help businesses, including with the traceability of their value chains. This could include innovative information technologies, such as blockchain, that allow all data to be traced, the development of which should be encouraged in order to minimise administrative costs.

Businesses should be required to publicly communicate their due diligence strategy, which should be reviewed

and reported on annually, or more frequently if the context changes. As part of their strategy, businesses should:

- Specify the potential or actual adverse impacts on human rights, the environment and good governance;
- Map their value chain and, with due regard for commercial confidentiality, publicly disclose relevant information about their value chain;
- Adopt and indicate all proportionate and commensurate policies and measures with a view to ceasing, preventing or mitigating potential or actual adverse impacts on human rights, the environment, or good governance;
- Set up a prioritisation strategy.

Due diligence should not be a 'box-ticking' exercise but should consist of an ongoing process and assessment of risks and impacts, which is dynamic and may change on account of new business relationships or changes in the context. Businesses should, therefore, in an ongoing manner monitor and adapt their due diligence strategies accordingly and should ensure that their business strategy and their policies are in line with their due diligence strategy.

Businesses should first try to address and solve a potential or actual impact on human rights, the environment, or good governance in discussion with stakeholders. A business which has leverage to prevent or mitigate the adverse impact should exercise it. A business wishing to increase its leverage could, for example, offer capacity-building or collaborate with other actors. Where a potential or actual adverse impact cannot be prevented or mitigated and the leverage cannot be increased, a decision to disengage from a supplier or other business relationship could be a last resort and should be done in a responsible manner.

For businesses owned or controlled by the State, the fulfilment of their due diligence obligations should require that they procure services from businesses which have complied with due diligence obligations. State support, including through state aid, public procurement, export credit agencies, or government-backed loans, should be contingent on this.

To effectively implement due diligence, the law should clarify procedural obligations for directors, such as to approve due diligence strategy, oversee the quality of the due diligence process, and be equipped to provide meaningful oversight and monitoring of the due diligence process.



Workers on oil palm plantations are harvesting palm fruit, for further processing delivered to palm oil mills. Photo credit: Yogie Hizkia/Shutterstock

Snapshot: What would this legislation require from companies in Ireland?

Hypothetical example: An Irish company has a subsidiary in the Ivory Coast which purchases cocoa. The Irish company has a publicly available Corporate Social Responsibility policy and a Modern Slavery Statement, but it does not conduct human rights due diligence.

An NGO reports child labour on the farms where the cocoa supply bought by the subsidiary is grown. If the company had conducted appropriate human rights due diligence, it could have prioritised child labour as a potential or actual adverse impact, mapped and assessed, consulted and engaged with stakeholders, implemented systems to prevent, required its subsidiary to monitor, and accounted and publicly reported on measures taken. Effective due diligence should have been preventative and harm would not have occurred.

2. **Global responsibility:** It should cover all business and apply throughout their value chains

The Irish legislation should cover all business **incorporated, domiciled, or established** in Ireland, regardless of size, including state-owned commercial businesses and financial institutions. To ensure consistency and a level playing field, the requirement to undertake due diligence should apply to non-Irish enterprises doing business in Ireland, such as those selling goods or providing services. The legislation should cover all sectors, while allowing for additional measures in specific high-risk sectors like extractives and agribusiness where needed.

This legislation aims to ensure that businesses respect human rights in their own operations, as well as across their entire value chains and wider business relationships. This is vital to ensure the legislation's effectiveness and to address the ways in which current ways of doing business can result in the most marginalised communities being exploited.¹¹² For example, this would mean global brands domiciled in Ireland could not ignore the often dangerous conditions of garment workers who produce their clothes, or environmental damage to people's land, rivers, and forests in the extraction of raw materials for manufacturing of products.

“ Particularly in the Irish context, using a threshold of numbers of employees wouldn’t be effective. There are many business enterprises in the State which have a significant scale of assets and business activities, yet only have a small numbers of employees. Indeed some companies operating in Ireland have balance sheets in billions of euro while still having fewer than ten employees

Size of business:

It is particularly important that businesses of all sizes are covered, as limitations in the scope could exclude many companies who have potential harmful impacts in their operations. Therefore, the legislation should cover smaller businesses, as well as larger ones.

Learning from other laws in force in Europe should be applied. For example, the French Duty of Vigilance law applies to companies with more than 5,000 employees in France and 10,000 globally, which is estimated to cover only 0.03% of firms.¹¹³ The German Supply Chains Act includes German companies with over 3,000 employees, which will reduce to less than 1,000 in 2024. Small and medium enterprises (SMEs) account for 99.8% of businesses in Ireland¹¹⁴, and a similar percentage in the EU.

Particularly in the Irish context, using a threshold of numbers of employees wouldn’t be effective. There are many business enterprises in the State which have a significant scale of assets and business activities, yet only have a small numbers of employees. Indeed some companies operating in Ireland have balance sheets in billions of euro while still having fewer than ten employees.¹¹⁵

All businesses, regardless of their size, structure or operations, have a responsibility to respect human rights, as outlined in the UN Guiding Principles on Business and Human Rights, and the legislation must reflect this.

Proportionality:

Due diligence requirements will be proportional to the size of businesses. As such, it would not be particularly onerous or burdensome for SMEs to undertake human rights due diligence. The European Commission study on due diligence requirements through the supply chain has shown that, even for SMEs, the costs of carrying out mandatory supply chain due diligence appears to be relatively low, compared to the company’s revenue. In this study, the additional recurrent company-level costs, as percentages of companies’ revenues, amount to less than 0.14% for SMEs.¹¹⁶

Requirements would be proportionate and commensurate to the likelihood and severity of potential or actual adverse impacts and specific circumstances. This is particularly so related to the sector of activity, context, the size and length of the value chain, size, capacity, resources, and leverage over suppliers and others.

This approach is in line with Principle 14 of the UN Guiding Principles, which requires obligations for small businesses to be proportionate to their size, thus requiring businesses to have in place policies and processes appropriate to their size and circumstances, and which will still address the scale and nature of their risk of potential or actual adverse impacts.¹¹⁷ For example, there are options to develop measures that consider the number of employees, as well as turnover and balance sheet, as factors in applicability.

3. Protecting women: It should be gender-responsive

Legislation should be gender responsive and should take into account the fact that human rights, environmental, and governance risks and impacts are not gender neutral.

The UN Working Group on Business and Human Rights has strongly recommended that states apply a gender lens in implementing the UN Guiding Principles on Business and Human Rights. A gendered response should consider the intersectional nature of discrimination, in the development and implementation of a due diligence strategy. A gendered approach would include identifying differentiated and disproportionate adverse impacts that their operations may have on women and using gender disaggregated data. Business enterprises should always regard sexual harassment and gender-based violence as risks of severe human rights impacts.¹¹⁸

Gender-responsive human rights and environmental due diligence would also include meaningful consultations with affected women and gender experts, the protection of women human rights defenders, and addressing the particular barriers that women face in accessing remedy whilst providing gender responsive reparations. From the outset, and throughout, consultation should include representatives of women workers, gender experts, and



“ A gendered approach would include identifying differentiated and disproportionate adverse impacts that their operations may have on women and using gender disaggregated data. Business enterprises should always regard sexual harassment and gender-based violence as risks of severe human rights impacts.

Left: Mercedes Gomez (65) is an indigenous community leader from Rio Blanco, Honduras. Seven human rights defenders have been killed in this community for protesting the construction of an internationally financed dam project, including indigenous leader Berta Caceres. Photo: Garry Walsh

representative organisations. It must be front and central that this is not a tick box exercise. Furthermore, how remedies are provided should be informed by the impact upon women and the experience of women.¹¹⁹

Furthermore, provision of remedy must be adequate and effective from a gender-perspective. The UN Working Group on Business and Human Rights notes that states must ensure that affected persons have access to gender-transformative effective remedies for business-related human rights abuses. For example, if sexual harassment complaints in factories are not taken seriously, owing to an underrepresentation of women in managerial positions, this imbalance should be addressed.¹²⁰ This may require the participation of women and women's organisations in carrying out legislative, administrative or judicial reform to improve access to effective remedies for business-related human rights abuses and capacity-building for judges and prosecutors to ensure that they operate with gender sensitivity and without discriminatory gender stereotyping when dealing with complaints about adverse impacts on women's human rights.¹²¹

As well as integrating a gender perspective into their due diligence processes, companies should also examine other potential factors of discrimination: many rights-holders face additional risks due to intersecting factors of discrimination based on their gender, ethnicity, race, caste, sexual orientation, disability, age, social status, migrant or refugee status, informal employment status, union involvement, exposure to conflict or violence, poverty, or other factors.

Hypothetical example: an Irish textile company purchases garments from a factory located in South East Asia. The factory only supplies garments to two European companies and as such, the Irish company has significant leverage over the supplier. The Irish company does not undertake human rights due diligence. Reports surface from a local trade union that sexual harassment and gender-based violence are widespread in the factory that the Irish company is sourcing from. Had the Irish company undertaken its due diligence requirement, it should have taken all reasonable measures to identify the abuses of women's rights taking place in the factory.

If a factory is supplying garments only to two European companies, then those two companies have a significant influence and power over that factory. Therefore, those European companies should not be able to claim they have no responsibilities for a working environment in the factory where abuses are taking place.

4. **Meaningful engagement:** with affected communities and stakeholders

If this legislation is to address human rights and environmental abuses, it must require business entities to engage with all stakeholders including affected and potentially affected communities, civil society, and trade unions, including particularly at-risk groups as a key part of the human rights due diligence process.

Engagement with key rights-holders, including local communities, workers, trade unions, civil society, women's organisations, human rights defenders, and indigenous peoples, is one of the most effective ways of identifying actual and potential impacts of the company's operations, as rights-holders are a critical source of information. Such engagement must be effective, meaningful, early, and in good faith with these stakeholders when establishing and implementing companies' due diligence strategies.

Entities may prioritise discussions with the most impacted stakeholders. Given that risks to human rights defenders and affected communities are continually evolving, human rights due diligence, including engagement with rights-holders, must also be viewed as an ongoing process.

Stakeholders who may be disproportionately affected or face additional barriers to engagement with companies include: children and youth; women and girls; people with disabilities; marginalised communities, including migrants; indigenous peoples; persons in situations of conflict or occupation; and human rights defenders. The needs of these stakeholders should be considered when designing the engagement process so that it can be accessible and effective.

In particular, consultations with Indigenous Peoples must be undertaken in accordance with international human rights standards, including free, prior, informed consent and should respect Indigenous Peoples' right to self-determination. The due diligence process should respect and not undermine already existing rights and protections guaranteed to certain groups under local, national, European or international law.

Furthermore, business enterprises should adopt a gender-responsive approach, drawing on gender experts, and conducting meaningful engagement with potentially affected women, women's organisations (including grass-roots organisations), and women human rights defenders.

5. **Protect people and planet:** It should require businesses to respect all internationally recognised human rights and include environmental protections

Preventing Human Rights Harms:

A broad human rights base is necessary for the legislation to be meaningful and effective.

Recognising the universal and indivisible character of all human rights, it should cover all **internationally recognised standards**, understood, at a minimum, as those expressed in the International Bill of Human Rights, consisting of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

The core International Labour Organisation (ILO) Conventions on fundamental rights and principles at work should also be covered, which include:

- Freedom of association and the effective recognition of the right to collective bargaining;
- The elimination of all forms of forced or compulsory labour;
- The effective abolition of child labour; and
- The elimination of discrimination in respect of employment and occupation.

The law should refer to protections in international treaties and conventions ratified by the State and legislation and provisions recognising or implementing. It should also refer to bribery and corruption in places where businesses operate.

Recognising the distinct, disproportionate human rights risks faced by particular groups, including children, Indigenous Peoples, migrants and women, it should include all rights outlined in the UN's nine core international human rights instruments (and Optional Protocols).¹²²

Furthermore, it should include customary international law, International Humanitarian Law, and rights recognised in the European Convention on Fundamental Rights and Freedoms, the European Social Charter, and Charter of Fundamental Rights of the European Union, and the Irish Constitution.

Preventing Environmental Harms:

Comprehensive due diligence legislation must address the fact that many companies are causing or contributing to environmental damage through their own operations or global value chains, creating a huge environmental footprint worldwide. The legislation must provide clear protection for the environment and associated rights and address the role business plays in disproportionately contributing to climate change.

As we have seen in previous sections, without proper regulation, business activity can lead to the pollution and contamination of water, reduced air quality, deforestation and other adverse outcomes that severely limit the enjoyment of human rights. Equally, environmental damage can occur without direct or immediate harm to human beings.

This is particularly important for sectors with a disproportionate environmental impact, such as mining, extractives, and agribusiness. In such instances, remedy for human rights impacts can include environmental rehabilitation and restoration of natural habitats.

To be effective in preventing environmental damage and dangerous climate change, it is essential that environmental protection be integrated into due diligence requirements for business, alongside respect for human rights.

As such, the legislation should include specific requirements for environmental protection and cover all potential or actual adverse impacts on the environment and mechanisms to remedy environmental damage.

“ Comprehensive due diligence legislation must address the fact that many companies are causing or contributing to environmental damage through their own operations or global value chains, creating a huge environmental footprint worldwide.



African Palm is used to create Palm Oil which is found in many every day foods, cosmetics and other products. However it is driving deforestation and land grabs. Photo: Eoghan Rice

Defining Environmental Harms in the Legislation

To be effective in preventing environmental harm, the legislation should provide definitions of the adverse impacts which should be addressed by environmental due diligence. This will be necessary to ensure legal certainty and clarity, given there is no comprehensive body of internationally recognised agreements that regulates the protection of the environment, unlike in the field of human rights.¹²³

As such, environmental impacts must be defined in the legislation in a broad manner so as to fill the gaps in international and European environmental law. Environmental impacts should be defined by reference to international agreements, where these exist, and complemented by a non-exhaustive list of adverse environmental impacts.

This list of environmental impacts should include, but not be limited to, climate change, air, soil and water pollution, production of hazardous waste, deforestation, loss in biodiversity, and greenhouse gas emissions.

The legislation should clearly define these “potential or actual adverse environmental impacts”, and this should cover any violation of national, EU, and internationally

recognised environmental standards, as well as any adverse impact on the environment.

The legislation should reference that a safe, clean, healthy, and sustainable environment is integral to the full enjoyment of a wide range of human rights, including the rights to life, health, food, water and sanitation.

The legislation should set out clear requirements for companies to align with the goals and objectives set out in international environmental agreements, such as the Paris Agreement and the Convention on Biodiversity.

Irish legislation could draw from the European Parliament’s Resolution on Corporate Due Diligence and Corporate Accountability, where business-related adverse impacts on the environment, whether temporary or permanent, “should include, but should not be limited to, production of waste, diffuse pollution and greenhouse emissions that lead to a global warming of more than 1.5°C above pre-industrial levels, deforestation, and any other impact on the climate, air, soil and water quality, the sustainable use of natural resources, biodiversity and ecosystems”.¹²⁴



Oil spill in Kebgara in the Niger Delta. Photo: Luka Tomac/FOE International

Climate Change and a ‘Just Transition’

As well as immediate environmental damages, many businesses are also involved in activities or investments that are disproportionately contributing to climate change, particularly those involved in the fossil fuel industries. The landmark ruling in May 2021 by a Dutch court, that Shell must cut its CO₂ emissions by 45%, is the first time that a private company has been legally obliged to align its policies with the Paris agreement. This sets an important precedent in expanding the scope of obligations on reducing carbon emissions beyond states to also encompass the private sector.¹²⁵

However, it is important to note that the principles of a ‘Just Transition’ are adhered to. A Just Transition secures the future and livelihoods of workers and their communities in the transition to a zero-carbon economy. It is based on social dialogue between workers and their unions, employers, government, and communities. A plan for Just Transition provides and guarantees better and decent jobs, social protection, more training opportunities, and greater job security for all workers affected by climate action.

For example, the Cerrejón mine in Northern Colombia has been owned and operated by a consortium of three mining giants – Anglo American, BHP, and Glencore – for most of the past two decades. Indigenous communities in the La Guajira region, who have faced forced displacement, intimidation, ecological destruction and pollution of air, soil and water, are now left with the very real prospect that the companies who have made enormous profits from the mine will soon try to wash their hands of it, selling up and leaving the affected communities to deal with a badly damaged local environment.

In April 2021, when the Irish Electricity Supply Board (ESB) announced that its Moneypoint power station would become a major base for renewable energy as the country shifts away from coal, little attention was given to what – if any – efforts were made to ensure that local communities in the areas that supplied decades of coal and suffered the related environmental impacts were protected. As the world shifts away from harmful fossil fuels, it is essential that private actors do not simply leave communities to pick up the pieces. A key call from human rights defenders and communities in La Guajira is for a progressive closure plan for the mine with just transition principles at its core.

Operating in situations of conflict or occupation:

The UN Working Group on Business and Human Rights has recommended in its report on ‘Business, human rights and conflict-affected regions’ for states to ensure businesses operate in a conflict-sensitive way. This will require businesses to conduct conflict analysis to understand the root causes and triggers of tensions, and identify the level of human rights abuses in the area.¹²⁶

From this understanding, business must then plan to prevent and mitigate abuses so their activities do not exacerbate tensions, create new ones, or aggravate grievances. A conflict-sensitive approach to human rights due diligence will also require guidance and advice from embassies in order for trade priorities to be coherent with development and peace priorities.

Moreover, in situations where businesses cannot ensure compliance to enhanced due diligence, because either the conditions are connected to serious violations of international law (for example, business activities connected with illegal Israeli settlements in the occupied Palestinian territories) or flagrant breaches of democratic principles (Myanmar), they should not operate there.

To help businesses understand the severity of impacts, the UN Working Group has three criteria:

- Scale (how grave is it?),
- Scope (how many people are affected?),
- Irremediable character (can the impact be remedied at least to the situation before the impact).¹²⁷

As such, the legislation should outline that a heightened standard of care is expected where a business operates in, or sources within its global value chain, from situations of occupation or conflict. Businesses operating in conflict-affected areas will be expected to conduct appropriate human rights, environmental and governance due diligence, respect their international humanitarian law obligations, and refer to existing international standards and guidance including the Geneva Conventions and its additional protocols.

“...the legislation should outline that a heightened standard of care is expected where a business operates in, or sources within its global value chain, from situations of occupation or conflict.”

6. **Accountability:** It should hold companies liable for causing or contributing to human rights and environmental harm

To be effective, a mandatory system of human rights and environmental due diligence requires enforcement measures. Businesses must be liable for harm that they have caused, or that they have contributed to with other entities. This would include if their activities cause, facilitate, or incentivise another entity to cause an adverse impact. It should include harms caused by another entity that they control or have the ability to control.

As such, the legislation should establish a comprehensive system of administrative sanctions, civil remedy, and potential criminal liability for business-related human rights abuses, including penalties commensurate with the nature of the adverse impact. The legislation must not be a 'paper tiger' – it needs strong enforcement and provision for sanctions that are proportionate, effective, and dissuasive.

Administrative penalties:

The law would establish sanctions including fines where a business does not comply with the provisions of the legislation, and does not undertake due diligence. In such cases, there would be prompt deterrent fines, also taking into account if the business continues to fail to comply.

Administrative penalties can be quick and efficient, and can include sanctions or fines calculated on the basis of a business' turnover, withdrawal of licenses, or a ban on tendering for state supports and public procurement.

Civil liability:

On their own, such sanctions do not address the challenge of access to remedy. As such, provision for civil liability is needed in the legislation to ensure that affected individuals and communities can seek remedies from the businesses involved, for example by taking a civil case against the company to sue for damages.

The legislation must enable a business to be held liable for harm if it, or an entity which it controls, has caused or contributed to adverse impacts on human rights or the environment. Civil liability would apply if there was a sufficient link between the harm and the company's actions or omissions, and if the company could not prove that it had taken all reasonable steps and exercised all due diligence that could have prevented the harm, or that the harm would have occurred even if all due care had been taken.

Hypothetical examples where a company could be liable:

- A subsidiary business employs a private security company that then harms local community members;
- An omission, such as failure to identify if adequate fire safety measures are in place or failure to assess a risk of child labour, could result in a company causing harm by omission;
- A company sources a substantial proportion of a clothing factory's output and has the power to pressure the factory on price and delivery times. It makes last-minute changes to a big order but gives no extra time to the factory. This contributes to its supplier pressuring workers into double shifts, with no rest and adding child labour to produce the order in time.

The principle of civil liability for harm caused by third party entities that the company should have prevented is already well-established in existing company, labour, competition and anti-corruption laws, and legislative initiatives.¹²⁸

It is important to note that the exercise of due diligence would not automatically relieve a company from potential liability, and the adequacy of due diligence measures conducted would also be taken into account. Effective HRDD systems should not allow a company to argue that it had formally complied with its due diligence obligation by simply having a due diligence process in place. Instead, they should need to prove whether the harm would have resulted, even if the company had exercised appropriate due diligence. If a minimum effort of procedural rather than substantial compliance sufficed to ensure immunity from liability, companies would rarely move beyond that and legislation would have little, if any, positive effect on the ground.

Criminal liability:

"Although causing or contributing to severe human rights abuses would amount to a crime in many jurisdictions, business enterprises are seldom the subject of law enforcement and criminal sanctions. Private claims often fail to proceed to judgment and, where a legal remedy is obtained, it frequently does not meet the international standard of 'adequate, effective and prompt reparation for harm suffered'"¹²⁹

UN High Commissioner for Human Rights

Strong criminal liability is needed to ensure accountability for the most severe abuses and impacts. Criminal liability in the legislation would enable the Irish State to pursue charges where severe human rights violations and environmental harms have happened or for repeated infringements; for example, forced labour or severe ecological damage such as an oil spill.

Criminal charges could be based on a 'failure to prevent' such severe harms, that a company or another entity under their control, had caused or contributed to. However, a company wouldn't be liable if they could show that they had taken all reasonable steps and exercised all due diligence which could have prevented the harm.

The 'failure to prevent' model in the UK Bribery Act 2010, is considered a success,¹³⁰ and has already been extended in the UK to offences of failure to prevent tax evasion in the Criminal Finances Act 2017.¹³¹ In Ireland, similar 'failure to prevent' offences are already provided in the Criminal Justice (Corruption Offences) Act 2018. A 'failure to prevent' offence could build on these models, to provide for criminal liability for severe harms or repeated violations.

Independent oversight body:

An independent oversight body is required, with resources and power to investigate a company's failure to comply and to conduct human rights and environmental due diligence, including upon complaint by a third party. It may give an entity time to act and also have

power to order injunctive action. Along with powers of investigation, it could oversee suspension, fines, exclusion from state aid, and public procurement.

It could be responsible for a range of functions, including: informing on best practice, issuing non-binding guidelines, maintaining disqualification lists; communicating on the effectiveness of implementation of the regulation; providing a central point for storing due diligence plans and reports (publicly accessible without charge); publicly identifying on a regular basis businesses which have complied with procedural due diligence obligations and those which have not done so.¹³²

Preventative relief:

As detailed in the case studies throughout this report, cases against businesses are often very long in duration. While these cases are proceeding over many years, often harms and damages are still ongoing. As such, the legislation should provide preventative relief, to make it possible for those affected to stop violations and damage from continuing. Otherwise, harm may be irreversible by the time a case comes to court.



Ground-breaking yet still falling short: French & German laws¹³³

In recent years, France and Germany have introduced laws introducing mandatory human rights due diligence. These laws are ground-breaking and represent a significant shift away from voluntary measures towards binding measures in law. Ireland should follow the examples set by the French and German laws, but also build and strengthen in areas where the approaches are weak.

Positive elements to replicate:

- A paradigm shift: away from purely voluntary corporate social responsibility to binding human rights and environmental obligations for companies;
- Responsibility for activities overseas: both laws enshrine the responsibility for due diligence by companies not just for their own activities, but also along supply chains as a matter of principle;
- People and planet: both laws include human rights as well as environmental standards;
- Fines: the German law includes financial penalties for companies which fail to fulfil their obligations;¹³⁴
- Civil liability: under the French law, victims of human rights violations can sue for damages, for the harm

that due diligence would have permitted it to avoid;¹³⁵

- Implementation: under the French law, companies must develop and disclose a plan, which must be effectively implemented.¹³⁶

Significant gaps Ireland can improve upon:

- Applies to very few businesses: both laws don't apply to all business. They only cover businesses over a certain threshold of number of employees (both in thousands).¹³⁷ This limits the applicability of the law to only a very small percentage of businesses;
- Not the full chain: both laws cover responsibility for some elements of global value chains, but not the full extent including all subsidiaries, direct and indirect suppliers and other business relationships. The duties under the French law apply to French companies in their own activities, companies they control, and suppliers and contractors with whom they have an 'established commercial relationship'. Given that a large proportion of human rights violations occur precisely at the beginning of value chains, an Irish law needs to be comprehensive and include the full value chain in order to have an impact for communities on the ground.¹³⁸
- No criminal liability: neither law includes a criminal offence for severe or repeated violations.

CASE STUDY

Nadiko Lopei Alim from Turkana, Northern Kenya, who lives close to oil installations built by Tullow Oil through communal land where community consent is in question.
Photo: Garry Walsh



Oil projects in East Africa

TotalEnergies in Uganda

TotalEnergies is involved in oil projects in Uganda. Tens of thousands are at risk of displacement as a major new oil pipeline is being built.¹

Company profile:

TotalEnergies is a French energy company involved in oil, natural gas and electricity. It employs over 100,000 staff and is active in more than 130 countries.² It has a market capitalisation of \$118 billion.³

Case detail:

Significant commercial quantities of oil were discovered under Uganda's Lake Albert in 2006 by Tullow Oil. These oil reserves constitute the fourth largest reserves in sub-Saharan Africa.⁴ TotalEnergies joined Tullow Oil in the Lake Albert joint venture in 2011.⁵

The oil infrastructure projects around Lake Albert have been subject to significant allegations of human rights issues.⁶ Communities claim they have faced violence, social disruption, and inadequate relocation processes.⁷ Furthermore, human rights defenders and those who speak out criticising oil development projects are

reportedly facing a growing number of threats.⁸ This is in the context of a wider harassment of civil society groups from the Ugandan authorities.⁹

Tullow Oil sold its stake in the oil projects in Uganda to TotalEnergies in 2020 for \$575 million.¹⁰ However, TotalEnergies, is set to begin construction in 2021 of a massive crude oil pipeline to transport oil from Uganda to Tanzania's coast. At a distance of 1,440 kilometres and at an estimated cost of \$5 billion, the East African Crude Oil Pipeline (EACOP) will be the longest heated oil pipeline in the world.¹¹

The pipeline route will pass through diverse ecosystems and populated areas.¹² It will run through over 400 villages in Uganda and Tanzania, potentially resulting in the displacement of tens of thousands of people.¹³ Over 14,000 households across Uganda and Tanzania could lose the land they rely on for farming and livestock.¹⁴

Human Rights Due Diligence:

As TotalEnergies is a large French company, they have been required under the French Duty of Vigilance law since 2017 to develop a 'vigilance plan' to assess human rights issues. Friends of the Earth France, Survie and 4 Ugandan civil society organisations have taken a legal case against TotalEnergies, claiming that they have failed to comply with their corporate duty of vigilance.¹⁵ The case failed in 2020 on procedural grounds related to jurisdiction issues regarding French civil and commercial

courts. However, the court did not give a judgement on whether TotalEnergies is complying with its vigilance duties. The NGOs involved are considering filing an appeal to the French Supreme Court.¹⁶

Under pressure from local communities and civil society groups, TotalEnergies has increased transparency around its oil projects in East Africa but major human rights risks remain.¹⁷

Tullow Oil in Kenya

Tullow Oil has been involved in exploration and extraction of oil in Kenya and the construction of roads and pipelines through the communal lands of Indigenous peoples, where community consent is in question.¹⁸

Company profile:

Tullow Oil was established in Ireland in 1985, is listed on the London and Irish Stock Exchanges and is now headquartered in the UK. It is operational in 11 countries around the world.¹⁹

Case detail:

In 2012, Tullow Oil discovered oil in Turkana, in Northern Kenya, and established a joint venture with Africa Oil and a partnership with the Government of Kenya, which has been extracting and transporting crude oil.²⁰ TotalEnergies later joined the venture in 2018.²¹

Turkana is Kenya's poorest county, with 60% living in extreme poverty. Already a dry and arid region, the effects of climate change are making droughts a frequent and recurring phenomenon.

“We see oil being transported every day, and what we are saying is that we think it is helping somebody else, and we are just sitting here watching”

– Nadiko, local indigenous pastoralist from Kapese in Turkana

Communities have raised their concerns around the free, prior and informed consent for the usage of communal land for oil installation sites, truck roads and pipelines.²² The livelihoods of the majority of indigenous Turkana communities depend upon community lands to carry out traditional forms of migratory pastoralism.

Human rights Due diligence

Tullow has recognised that it has a responsibility to seek free, prior and informed consent from communities affected by their operations in Turkana.²³ Through its Environmental and Social Impact Assessments, Tullow has also recognised that there are significant human rights risks in its Turkana operations, including long term loss of community land, loss of homesteads, and other impacts.²⁴

Had human rights due diligence been mandatory under law, Tullow would have had a legal requirement to undertake a due diligence process prior to beginning operations in Kenya and Uganda. Human rights due diligence is primarily preventative in nature.

“Turkana is Kenya’s poorest county, with 60% living in extreme poverty. Already a dry and arid region, the effects of climate change are making droughts a frequent and recurring phenomenon.”

7. Enabling Effective Remedy: remedy must be made possible, and the law enforced

The primary aim of due diligence is preventing harm to rights holders occurring in the first place. However, where harms do occur, it is essential to provide access to remedy to address the imbalance between powerful corporate actors and affected communities. As explored in previous sections, currently it can be extremely difficult to hold companies to account in the host state (where the violation occurred) or in the corporation's home state, or to hold parent companies accountable for the actions of subsidiaries and business partners.

The legislation should enable and support the provision of remedy in Ireland. It should provide for meaningful remedy, including financial compensation, rehabilitation, and environmental restoration.

To ensure affected communities can access remedy, it is crucial to have fair procedures and low barriers to participation. As such, for this legislation to be effective, existing barriers to remedy in Ireland must be addressed through complementary legal reforms. Rights-holders must be able to submit claims through a representative or collectively.¹³⁹ The State needs to provide for adequate and comprehensive legal aid and review bars on other ways to fund taking a case.

Companies must provide grievance mechanisms, ensuring safe and responsive means to raise issues. Time limits to take civil cases must be reasonable, existing barriers and obstacles to judicial remedy must be removed, and State based non-judicial mechanisms enhanced.¹⁴⁰

Fair burden of proof:

A recent study by the European Parliament found that the burden of proof resting on the shoulders of claimants is one of the main obstacles to accessing justice for victims of corporate abuse¹⁴¹. This explains why the European Union Fundamental Rights Agency has recommended re-distributing the burden of proof between claimants and defendants more fairly, especially when victims have to prove that a company is controlled by another one.¹⁴²

Effective legislation should ensure that the burden of proof is reversed insofar as the obligation would be on the company to show clearly that they didn't cause or contribute to harms. Reversing the burden of proof in cases of corporate harms is essential given the significant power disparities involved. For example, normally a local farming community might have to prove that an oil company polluted their land - under this legislation, the oil company would have to prove it did not cause or contribute to the harm.

The burden of proof would also be shifted from a victim to a business to prove that they did not have control over a business entity involved in the human rights abuse and that they took all due care to avoid the harm in question. For example, a company would have to provide evidence to show that they didn't exercise control over a subsidiary, rather than the victim having to provide evidence that they did.

In addition, defendant companies would be obliged under this legislation to share evidence that they otherwise might not have to, on the basis that for some harms it just wouldn't be possible for affected communities to have this material. For example, if a community accuses a mine of pumping a toxic chemical into their river - the community may estimate that the company is pumping a certain quantity per day into the water, but it is extremely unlikely that they would have access to detailed information to prove this. As such, under this legislation the company would be compelled to produce detailed evidence to corroborate or debunk what the complainants are alleging.

Time limits:

Time limits for bringing legal actions must be reasonable and sufficient, taking into account the particularities of transnational legal cases. The limit should be appropriate for complex mass claims, and when the claimants know or can reasonably be expected to know the facts, impacts and can exercise their rights. In addition, some harms such as environmental harms may not be evident for years, so time limits should start when the damage becomes apparent.

Applicable law:

The issue of applicable law is a major challenge to remedy when the harm has occurred in countries where there may be lower human rights legal protection. Where private international law requires the application of the law of the State where the harm occurred, relevant elements of the law should be considered as overriding mandatory provisions, in line with the EU's Rome II regulation.¹⁴³

What do we mean by effective remedy?

When companies' actions contribute to or cause environmental damage or human rights violations, affected individuals and communities – including indigenous people, should have access to remedy. Remedy could include financial or non-financial compensation, reinstatement, public apologies, restitution, rehabilitation, or a contribution to an investigation.

To be fair and effective, remedy should not only compensate for the damage but also ensure that the harmful actions will not be repeated, and that the original situation is restored. Remedy is not enough if it allows the company to continue with the actions that caused harm in the first place.

Experts agree that financial remedy remains largely ineffective for those affected by corporate abuses¹⁴⁴. Remedy can be provided by the companies responsible, often after those affected engage in long negotiations or can be compelled by a court of justice.

8. Address Reprisals: against human rights defenders

Affected communities, including human rights defenders, can play an important role in helping companies to identify human rights impacts, whether that be through direct engagement with companies or by providing information through media campaigns, public advocacy, whistle-blower mechanisms, etc.

However, given that many human rights defenders and other actors face retaliation for speaking out about corporate related human rights abuses,¹⁴⁵ any legislation on human rights and environmental due diligence needs to carefully consider both how that legislation can address risks of reprisals, as well as how the process of undertaking due diligence can be made safe.

Legislation should aim to prevent retaliation against human rights defenders and other actors. Companies should be obligated to assess risks of retaliation as part of the risk analysis phase of the human rights due diligence process so that any identified risks can be considered in the mitigation and prevention phase.

Human rights defenders must also be included in planned engagement activities so that they can make companies aware of risks that they face, as well as potential strategies for mitigating those risks. Given

that engagement with companies can put participants at further risk, the process of engagement should be undertaken in such a way that it does not worsen their situation. Guidance which accompanies the legislation, detailing how to address reprisals, should be developed and include measures such as using strong digital security practices, allowing for anonymous reporting and consulting rights-holders about their security needs.

Any state body responsible for oversight of the law must also be obliged to address potential risks of retaliation against complainants. They should have policies outlining how they will address this risk, through mechanisms such as proactive risk assessments and processes for anonymous and/or confidential complaints. There should also be in-house expertise on reprisal risks, in order that they do not accidentally put complainants at further risk through poor management of cases.

Finally, as part of the development of legislation on human rights and environmental due diligence, meaningful consultations with human rights defenders should be conducted.

“...any legislation on human rights and environmental due diligence needs to carefully consider both how that legislation can address risks of reprisals, as well as how the process of undertaking due diligence can be made safe.



Juana Zuniga (38) gives a speech at a demonstration demanding the release of the 'Guapinol 8' water defenders in Honduras. Her husband, José Abelino Cedillo Cantarero, is one of these defenders who have been imprisoned without trial since August 2019 for defending their community's river against corporate exploitation. Photo: Giulia Vuillermoz



5. Conclusion

“The most powerful, and insufficiently transparent and accountable, economic organisation of our time is the multinational company... the larger challenge before us is to ask the deeper question about why and how some of these organisations earn such extraordinary profits, and why they wield such power over the lives of citizens.”

– **President Michael D. Higgins**¹⁴⁶



Protesters at the People's Climate March in New York in 2014.
Photo: maisa_nycw

Yet at the same time, there is an emerging shift taking place which has the potential to prevent abuses and hold business accountable. European countries are beginning to move away from a light-touch voluntary approach which has failed to prevent serious harms to communities. Indeed, as countries increasingly move to introduce stronger binding measures, and the EU develops common standards, there is a key opportunity now for Ireland to take the lead and introduce strong and effective legislation with teeth.

Introducing new, effective **Corporate Accountability Legislation** in Ireland could be a game-changer for communities on the front line of human rights abuses. Yet to be truly effective, it is essential that this legislation goes beyond a 'checkbox' approach and has strong provisions to prevent violations from occurring, holds companies accountable when harms do happen, and provides effective remedy for affected communities.

Ireland is a country that has benefitted hugely from the positive effects of opening our economy to globalisation. Yet now it is crucial that Ireland also plays a role in addressing the negative harms of corporate globalisation and supports transformative change.

We are a country known as much for our championing of human rights as for being a country that is business-friendly. By introducing strong and effective Corporate Accountability Legislation, we can uphold our responsibility to hold business to account and, by doing so, also hold true to the human rights principles we champion globally.

This moment is a crucial one for accountability for human rights abuses connected to business activities. Devastating human rights abuses connected to many of the raw materials and products consumed by people in Ireland are ongoing, serious environmental damages and large-scale pollution by corporate actors continue to take place, and communities and human rights defenders that oppose exploitation and pollution of their resources are facing intimidation and murder.

From the sweatshops of garment factories in Asia, to the rivers polluted by oil spills in the Niger Delta, to the graves of murdered activists in Central America, and to the communities in Northern Kenya experiencing regular droughts resulting from climate breakdown, the urgency of the problem at hand could not be clearer. It is now time for Ireland to take meaningful and transformative measures and play our part in addressing this global problem of corporate harm and impunity.

Annex 1: Definitions and Terms

- **'Potential or actual adverse impact on human rights':** any potential or actual adverse impact that may impair the full enjoyment of human rights by individuals or groups of individuals in relation to human rights, including social, worker and trade union rights.
- **'Potential or actual adverse impact on the environment':** means any violation of internationally recognised, EU and Irish environmental standards.
- **'Business relationships':** Subsidiaries and commercial relationships throughout an undertaking's value chain, *including suppliers and sub-contractors*, which are directly linked to the entity's business operations, products or services.
- **'Value Chain':** means all activities, operations, business relationships and investment chains of an undertaking. It includes entities with which the undertaking has a direct or indirect business relationship, upstream and downstream, and which either: (a) supply products, parts of products or services that contribute to the undertaking's own products or services, or (b) receive products or services from the undertaking.
- **'Due Diligence':** requires entities to identify, assess, prevent, cease, mitigate, monitor, communicate and account for, the potential and/or actual adverse impacts on human rights, the environment and good governance that their own activities and those of their value chains and business relationships may pose.
- **Burden of proof:** It is for the undertaking to prove the defence, not the claimants. Entities that prove that they took all due care to avoid the harm, or that the harm would have occurred even if all due care had been taken, should not held liable for that harm.
- **Duty of care:** A legal obligation to avoid causing harm, and arises where harm is 'reasonably foreseeable' if care is not taken. The elements of negligence in tort law are the existence of a duty of care, and breach of that duty causing harm. The tests include that the damage is foreseeable and not too remote; there is sufficient proximity between the parties, and that it is fair just fair and reasonable to impose a duty of care.
- **Control:** 'control' means the possibility for an undertaking to exercise decisive influence on another undertaking, in particular by ownership or the right to use all or part of the assets of the latter, or by rights or contracts or any other means, having regard to all factual considerations, which confer decisive influence on the composition, voting or decisions of the decision-making bodies of an undertaking.
- **Contribute:** 'contribute to' means that an undertaking's activities, in combination with the activities of other entities, cause an impact, or that the activities of the undertaking cause, facilitate or incentivise another entity to cause an adverse impact. The contribution has to be substantial, meaning that minor or trivial contributions are excluded. Assessing the substantial nature of the contribution and understanding when the actions of the undertaking may have caused, facilitated or incentivised another entity to cause an adverse impact can involve the consideration of multiple factors.

The following factors can be taken into account:

- the extent to which an undertaking may encourage or motivate an adverse impact by another entity, i.e., the degree to which the activity increased the risk of the impact occurring,
- the extent to which an undertaking could or should have known about the adverse impact or potential for adverse impact, i.e., the degree of foreseeability,
- the degree to which any of the undertaking's activities actually mitigated the adverse impact or decreased the risk of the impact occurring.

The mere existence of a business relationship or activities which create the general conditions in which it is possible for adverse impacts to occur does not in itself constitute a relationship of contribution. The activity in question should substantially increase the risk of adverse impact.

Annex 2: Company Responses

In the preparation of this report, the companies mentioned in the case studies throughout the report were given the opportunity to respond to the content of what has been outlined in each case study. A number of companies engaged in this research provided a response when contacted, and their full detailed responses are published here in full.

<https://www.trocaire.org/documents/make-it-your-business-annex/>

End Notes

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Case Study End Notes

Decades of Pollution – Shell in Nigeria

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Devastating factory fire – German textile company KiK in Pakistan

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Case Study End Notes

Lethal Dam Collapse – Vale and TÜV SÜD in Brazil

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Booking holidays in an occupied territory – Airbnb Ireland in the West Bank

- 1 In the preparation of this report, the companies mentioned in these case studies were given the opportunity to respond to each case study. Please see the linked annex here to read the full response of each company that responded.
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Case Study End Notes

Poisoned air and violent evictions – ESB and Coal Marketing Company’s links with the Cerrejón mine in Colombia

- 1 In the preparation of this report, the companies mentioned in these case studies were given the opportunity to respond to each case study. Please see the linked annex here to read the full response of each company that responded.
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Case Study End Notes

Oil projects in East Africa

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