



Irish National Action Plan for Business and Human Rights

Submission to the Department of Foreign Affairs and Trade

February 2015

Chambers Ireland is the largest business network in the State. With members in every geographic region and economic sector in Ireland, we are well positioned to understand the concerns of businesses and represent their views. In addition, Chambers Ireland is a member of the International Chamber of Commerce and the Association of European Chambers of Commerce and Industry.

Chambers Ireland commends the commitment from the State and the Department of Foreign Affairs and Trade to promoting the protection of human rights and welcomes the drafting of a National Action Plan for the Guiding Principles on Business and Human Rights. We also welcome the opportunity to contribute to the public consultation process initiated by the Department as to how best a National Action Plan can be developed to promote responsible and ethical behaviour of businesses both in Ireland and abroad.

What are the Guiding Principles for Business and Human Rights?

The UN Guiding Principles are founded on the three principles of Protect, Respect and Remedy. These principles, which are commonly referred to as the Three Pillars, provide a global standard for preventing and addressing the risk of adverse impacts on human rights linked to business activity.

It is our view that the obligations of the business community fall primarily under the two Pillars of Respect and Remedy. The Guidelines make a number of suggestions for the business community, such as;

- A commitment in company policy to respect human rights, regardless of where they are operating
- The use of Due Diligence Reporting in supply chain management
- The provision of access to remedies, both by the State and by the business community, should human rights abuses take place

Ethos of Chambers Ireland

The ethos of the Chamber of Commerce movement has always been that the cause of human rights is best served by increasing communication, commerce and interdependence between nations. We believe that international trade supports economic development which in turn promotes equitable social development and the increased recognition and protection of human rights.

Chambers Ireland is also a member of the International Chamber of Commerce. Given the context of this submission, it is worth noting the origins and *raison d'être* of this organisation. Founded in 1919, a handful of industrialists, financiers and traders decided to create an organisation that would represent business everywhere. These entrepreneurs were determined to bring economic prosperity to a world that was still reeling from the devastation of World War I. They founded the International Chamber of Commerce and called themselves "the merchants of peace". Nearly a century later, the International Chamber of Commerce is an international leader in the promotion of ethical business conduct, anti-corruption and corporate social responsibility. We believe that it is approaches to human rights protection and peace building which are driven by the global business community themselves that are most effective at protecting human rights and promoting economic and social development. With this in mind, there are a number of key areas that are appropriate to address.

Protect

The role of government is to provide the basic national and international framework of laws and regulations so that society can function. The duty of the State to protect – in conjunction with the additional duties to respect and promote human rights – remains the most important factor in ensuring that all people are free to enjoy their human rights. This is because only the State has the capacity to develop a positive national position on human rights that can set the tone and direction for all other actors within their borders.

The respective obligations of states and enterprises should be seen as intrinsically linked and mutually supportive, particularly since citizens and enterprises engagement with human rights is directly affected by the actions of the states in which they operate. It is at this juncture that the business community can best play its part in respecting human rights.

It is important that the National Action Plan and the State's role in its delivery is founded on the principle of supporting Irish businesses to meet their obligations in terms of protection

of human rights, and not become an unwieldy, over burdensome, costly, layer of additional regulation.

While incentivised compliance has much to recommend it in principle, in practice it can very often generate situations of unfair competition between enterprises. This could manifest itself when companies competing for access to a State provided support or service (such as licensing, state supports, or trade missions) are requested to prove their credentials in terms of compliance with predetermined standards through some form of reporting mechanism. Very often, it is companies with greater resources to allocate to generating a more cosmetically appealing report that benefit from incentivised compliance approaches rather than those companies who genuinely excel in their practices. The additional costs to the companies to access the services or participate in initiatives such as trade missions may become at best a box-ticking exercise and at worst a de facto barrier to participation for companies who cannot demonstrate their compliance as effectively as their peers.

The use of social clauses (which may involve human rights due diligence reporting) particularly in public procurement has been discussed as a way of encouraging greater engagement with the Guiding Principles for Business and Human Rights. There would be concerns as to how this requirement would impact SMEs and their ability to compete with larger and better resourced corporations. While it does not need to cost an SME funds to implement responsible practices, a requirement for monitoring and reporting on an ongoing basis could become a drain on resources for smaller companies. The introduction of social clauses for human rights due diligence may require some form of reporting, which ultimately would preclude SMEs from competing with larger, better resourced companies. There is also a risk that the introduction of social clauses as incentives would undermine the integrity of the Guiding Principles. It is important that the National Action Plan focuses on adding value rather than increasing bureaucracy

Ensuring that companies recognise and meet their responsibilities and obligations should be at the core of a National Action Plan. This can be best served by promoting a dialogue between the state and the business sector rather than by introducing additional administrative burdens. Though a basic concept, the 'language of human rights' can be somewhat abstract. Making information available to business in an easily accessible format will be the key to inculcating an increased appreciation of the relevance of the Guiding Principles to the business community. Providing relevant and up to date information on specific markets or industry sectors where potential human rights abuses may present themselves will allow businesses to adjust their strategies or operational procedures in advance in order to prevent any violations.

A significant challenge for the National Action Plan on Business and Human Rights is to engage companies who do not yet prioritise ethical and responsible conduct (and

consequently the protection of human rights) within their business strategy. It is important that compliant companies do not suffer

Respect

Chambers Ireland supports and encourages ethical behaviour in the business community. It is our belief that responsible entrepreneurship is the driving force for sustainable economic development. It is for this reason that the Chamber network has been so well placed to promote Corporate Social Responsibility. Our annual CSR awards, now in their twelfth year, celebrate the efforts of the business community in Ireland makes to enhance the environment in which they operate. While human rights and corporate social responsibility are not interchangeable terms, the manner in which CSR has developed in Ireland over the past decade can provide a model for how the relationship between business and human rights can develop in the years to come. Responsible behaviour and 'doing the right thing' has been shown to be good for business in the long run. Promotion of these benefits should be the priority of the National Action Plan.

In addition, as an example of the business community showing leadership in the promotion of responsible business practices, Chambers Ireland has made a number of tools, developed by the International Chamber of Commerce, freely available on its website for companies who are interested in developing anti-corruption policies and engaging in responsible supply chain management. These tools include an "Anti Corruption Clause" for contracts, a Guide to Responsible Sourcing, Guidelines on Gifts and Hospitality and the International Chamber of Commerce Rules on Combating Corruption. Disseminating these simple templates and tools allows a company to develop internal processes to ethically meet the challenges of international commerce at little or no cost. This methodology can also be applied to develop a more comprehensive understanding of the importance of human rights in a globalised economy and the development of industry standards.

The Guiding Principles for Business and Human Rights plays a role domestically in promoting awareness of risks to human rights and encouraging responsible business conduct. However, there is a significantly reduced risk of human rights abuses occurring in Ireland in comparison to other parts of the world. Therefore, the content of the National Action Plan is probably most relevant to Irish companies with operations and supply chains abroad. From this perspective, the National Action Plan should consider taking into account geographical and sector specific indicators, as companies operating abroad are more likely to be exposed to human rights risks by virtue of where in the world they are operating. As mentioned, Chambers Ireland believes that the cause of human rights is best served by increasing communications, trade and interdependence between trading partners. It is vital that the State continues to undertake trade missions to all corners of the world, even those with poor human rights records. By continuing to trade and do business with all countries, we can play a role in driving economic growth which we believe will generate a greater dialogue on the importance of equality and human rights.

Chambers Ireland would advocate that conducting due diligence and Human Rights Impact Assessments can be useful as a strategic tool for companies. Human Rights reporting can be helpful in determining strengths and weaknesses and can help companies pre-emptively deal with environmental, political and social risks. By promoting more awareness of the potential human right harms that a business may be exposed to, entrepreneurs will more able to address these matter before any harm occurs. There are also a number of benefits to the business that can result from positively engaging in human rights reporting, such as establishing open relationships with stakeholders, securing the social licence to operate, minimizing adverse risks and exploring opportunities to address a local need and improve the quality of life for local inhabitants. However due diligence reporting and human rights impact assessments must not be made mandatory. The additional administrative burden that would be imposed on Irish businesses would impede competitiveness and drain scare resources and capacity. Again, there is the issue of relative burden, as larger companies would be in a better position to dedicate resources to reporting on their policies.

As part of a National Action Plan, it may be more suitable to provide templates and case studies to support companies in their efforts to develop human rights focused policies. This would encourage the business community to positively engage with promoting the protection of human rights without the need of requiring mandatory reporting.

Due diligence reporting specifically in supply chain management has been highlighted as area where the business community should be more engaged in. Companies should make every effort to manage their supply chains responsibly. However, the complexity involved in modern industry, with multiple supply chains and global linkages should be not underestimated. Even for those companies who wish to prioritise responsible sourcing, it can be very difficult to manage and control all aspects of their supply chains, which now exist horizontally as well as vertically. In 2014, the European Commission proposed a draft regulation which would establish an EU system for voluntary self-certification for responsible importers of tin, tantalum, tungsten and gold from conflict-affected and high-risk areas.¹ Chambers Ireland would support efforts geared towards encouraging responsible sourcing and preventing any trade in minerals that may intensify or perpetuate armed conflicts in third countries. However, the requirement for due diligence in supply chain management should not come at the cost of competitiveness, either from the perspective of Irish exporters or from the perspective of emerging economies in these countries. Both Irish and EU institutions should consider programmes on the ground that could be equally effective in reaching the policy aim in question, such as supporting good governance, education, improving conditions in the mining sector or supporting political stability in conflict zones.

¹ Proposal for a Regulation of the European Parliament and of the Council setting up a Union system for supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict-affected and high-risk areas - COM/2014/0111 final - 2014/0059 (COD)

Extraterritorial obligations apply in Ireland with regard to certain serious crimes, including the bribery of foreign officials. An OECD [report in December 2013](#) raised serious concerns about Ireland's failure to prosecute a single case in twelve years under the legislation arising from the OECD Anti-Bribery Convention, and the undue length of time it was taking to investigate those cases which are currently open. The Irish government is currently taking steps to update the anti-corruption framework. Irish multi-nationals operating in developing countries will be faced with the difficult task of imposing western anti-bribery frameworks in countries which do not have a robust anti-bribery culture or legal framework. The Bill also gives Ireland jurisdiction over foreign bribery offences committed by Irish companies and nationals operating abroad. Head Five of the Criminal Justice (Corruption) Bill 2012 notes that in respect of alleged bribery of a foreign public official, it will be a defence to show that the gift, consideration or advantage was required by the law of the state of the foreign public official.

While steps to strengthen our anti-corruption legislation are very welcome, the National Action Plan should be mindful of the often very difficult and complex political situations that arise in developing countries. While the requirement of "gifts" may not be required by the law in a state, in many circumstances, such "gifts" are required as part of custom, which can be so socially entrenched that they are on a similar footing to the law of the land. Holding Irish companies to a much higher standard than domestic operators will put these businesses at a distinct competitive disadvantage. We would suggest that that it might be more beneficial for officials from the DFAT posted in developing countries to work with the business community and local government officials in trying to bring about greater awareness of the benefits of having an anti-corruption framework in place.

Remedy

The final pillar of the Guiding Principles concerns both the state and business duty to provide a remedy. The Guiding Principles state that if a right is violated, victims must have access to an effective remedy, either through judicial or non-judicial means. The Guiding Principles specifically note that "business enterprises should establish or participate in effective operational level grievance mechanisms for individuals and communities who may be adversely impacted". They also add that for a non-judicial grievance mechanism to be effective, it should be legitimate, accessible, predictable, equitable, and transparent and rights compatible.

Chambers Ireland has long promoted the use of Alternative Dispute Resolution processes as an option for businesses seeking to resolve conflict. We are of the view that ADR can be a useful tool for both the state and the business community to address human rights abuses, both in Ireland and extra-territorially. For example, mediation offers a flexible and accessible mechanism for parties in a dispute, (or those who want to prevent a dispute from arising) to constructively manage their situation. It recognises that the conflict is more likely

to be solved amicably when both parties are directly involved in the process. ADR processes generally tend to be more efficient and more cost-effective

The European Court of Human Rights has established principles in respect of the relationship between ADR and the right to a fair trial held in Article 6 of the European Convention on Human Rights.² The European Court of Human Rights has found that parties can waive their right to a trial and opt for a privatised method of dispute resolution, so long as the waiver is supported by minimum procedural guarantees. For example, each party has the right to opt out of mediation and instead revert to the courts at any stage of the proceedings. Traditionally, it has been insisted that human rights abuses require judicial-based remedial processes, preferably through the courts. Indeed, for certain extreme forms of human rights abuse, the courts may well be the most appropriate forum. However, mediation and other ADR processes can also provide a complimentary means to remedy.³ The capacity of mediation to support inclusion, participation, empowerment and attention to vulnerable individuals and groups can encourage the further advancement of human rights. However, the use of ADR in human rights disputes also faces challenges. Any non-judicial grievance mechanism would need to address questions as to how it can redress power imbalances between both parties and how it could balance the need for some confidentiality with legitimate demands for greater transparency.

The government published the Draft General Scheme for the Mediation Bill in 2012. Chambers Ireland has lobbied for the enactment of this legislation as a means to providing a legislative basis for mediation in Ireland. Mediation and ADR are proven to be good for business and citizens as they provide efficient and cost effective access to justice. In the same fashion, non-judicial mechanisms and ADR processes could also prove an effective way of providing an accessible and rights-compatible mechanism for remedy. We would suggest that the National Action Plan would include a commitment by the government to enact the Mediation Bill and promote the use of ADR as a means to address potential human rights abuses.

The Guiding Principles on Business and Human Rights are designed to enhance current international legal obligations. They should not be used as an excuse to impose further obligations on the business community. Ensuring that the Guiding Principles remain voluntary is vital if they are to be effective in promoting a culture of respect for human rights in society. A commitment to responsible business conduct requires consensus and conviction within a company. Voluntary business principles have the advantage of offering flexibility to companies so they can tailor their approach to particular conditions. Voluntary approaches also inspire many companies to go beyond the regulatory baseline, thereby often eliminating the need for further legislation.

² http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2004_1/schiavetta/

³ http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_56_rees.pdf