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# **Developing a Comprehensive Irish National Action Plan for Implementing the UN Guiding Principles on Business and Human Rights**

Position Paper

October 2014

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# Executive summary

International law, particularly with regard to human rights, has evolved relatively little to accommodate the greatly increased role of transnational business. States are considered the primary duty-bearers under international human rights law, with a duty to ensure that there is no interference (by individuals or corporations) with human rights within their own territory.

However, the size, complexity and influence of corporate entities means that this has not always proved sufficient. While most multinational corporations (MNCs) are headquartered in industrialised countries, many of them have operations in the global South, including in countries whose revenues are dwarfed by those of the MNCs they are tasked with regulating.

Governments may be unable or unwilling to enforce human rights with respect to these corporations, or in some cases, may commit human rights violations themselves in order to attract inward investment and to facilitate commercial activity of MNCs. In the early 1990's in Burma, for example, the military forcibly relocated several villages, inflicting murder, rape and torture in the process, to make way for a new pipeline, managed by a consortium of US and European corporations.<sup>1</sup>

Global supply chains are long and complex, which makes individual state responsibility more difficult to assign. The Rana Plaza disaster in 2013, where 1,120 garment factory workers, were killed when the building collapsed, is a shocking example of how global supply chain competition driven by MNCs, seeking lower prices and faster turnaround, can lead to unsafe working conditions and massive loss of life in weak regulatory environments. Up to 80% of those who were killed were young women, reflecting what has been called the 'deliberate feminization' of the ready-made garment industry, whereby employers prefer to hire women on the basis that they are prepared to work longer hours for lower pay, and are less likely to complain

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<sup>1</sup><http://www.earthrights.org/campaigns/yadana-pipeline>

than their male counterparts, thus increasing the probability of human rights violations.<sup>2</sup>

Given the increasing globalisation of business, it has become clear that respect for human rights by business must be tackled at international level, and the UN Guiding Principles on business and human rights are part of that process. There is also a greater awareness that western, industrialised countries, where most MNCs are located, should do more to regulate the conduct of their multinationals overseas, and **Trócaire welcomes the current commitment by the Irish government to developing a National Action Plan to implement the UN Guiding Principles**. The following is a summary of our recommendations to the Irish Government on priorities to be considered in a comprehensive National Action Plan on Business and Human Rights.

The Irish and EU level commitment to Policy Coherence for Development is particularly relevant with respect to these recommendations. Given the intersecting responsibilities across a range of government departments and semi-state bodies, a “whole of government approach” will be required in the development, roll out and monitoring of an Irish National Action Plan on Business and Human Rights. The recommendations below indicate which department/s would have responsibility for the implementation of a comprehensive plan. Whilst the development of the plan has been assigned to the Department of Foreign Affairs and Trade, our view is **that ultimate oversight and responsibility for the effectiveness of the National Action Plan rest with the Department of the Taoiseach**.

## Recommendations

1. **Gender Focus.** Acknowledging that business activities may have different impacts on women and men, a gender focus should be integrated in all elements of the National Action Plan. (Department of Foreign Affairs and Trade (DFAT))
2. **Strengthened support to government.** The Irish Human Rights and Equality Commission should be adequately resourced and mandated to play its role in supporting the Irish government in its responsibilities with regard to human rights.

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<sup>2</sup>Shamsul Khan, Trade unions, gender issues and the ready-made garment industry of Bangladesh, in *Women's Employment in the Textile Manufacturing Sectors of Bangladesh and Morocco*(Carol Miller and Jessica Vivian, eds. 2002).

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(To Department of Finance, (DoF) Department of Justice, Equality and Law Reform (DJELR))

3. **Investigation of foreign bribery allegations.** Increased efforts should be made to investigate allegations of foreign bribery in a proactive and timely manner, and to ensure that Irish companies are aware of their obligations under the law. (Department of Jobs, Enterprise and Innovation (DJEI), DJELR, DFAT and Enterprise Ireland)
4. **Mandatory Human Rights due diligence and state-owned companies.** The Irish government should require all state owned companies and agencies, in particular those with a significant overseas presence (e.g. Enterprise Ireland, BordBia, ESB International) to demonstrate the highest possible attention to human rights through their policy statements, human rights due diligence<sup>3</sup> and remedial processes, thus providing a leading example to other Irish businesses. (All Relevant Departments and state-owned companies)
5. **Requirement for human rights reporting.** Enterprise Ireland and BordBia should also require that client companies provide environmental, social and human rights reporting. In designing such standards, state agencies can draw upon the three principal elements of a human rights system (a policy statement, a due diligence procedure and a grievance mechanism) listed in Guiding Principle 15 (summarised on p.28 below) and also on the guidelines to be developed by the European Commission following from the EU Directive on non-financial reporting (see p. 28-29 below). The European Commission have also developed separate handbooks for integrating human rights into ICT, oil and gas, and employment and recruitment companies, and for SMEs.<sup>4</sup> (Enterprise Ireland and BordBia).
6. **Trade missions.** Prior to overseas trade missions, an assessment of the potential human rights risks for businesses in the countries in question should be made,

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<sup>3</sup> Due diligence is understood as a business process through which enterprises actively identify, prevent, mitigate and account for how they address and manage their potential and actual adverse human rights impacts on an ongoing basis. The process should include assessing actual and potential impacts throughout their business operations, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Due diligence implies more than just an assessment of risks for the company; the purpose is to understand and address risks and abuses that the company's activities pose to rights holders, including in its supply chain and through its other business relationships. See "How to use the UN Guiding Principles on Business and Human Rights in company research and advocacy: A guide for civil society organisations" and also CIDSE Paper "Human Rights Due Diligence: Policy Measures for Effective Implementation." September 2013

<sup>4</sup> All four guides are available at: [http://ec.europa.eu/enterprise/policies/sustainable-business/documents/corporate-social-responsibility/index\\_en.htm](http://ec.europa.eu/enterprise/policies/sustainable-business/documents/corporate-social-responsibility/index_en.htm)

which would inform whether a trade mission should be undertaken, which businesses should be invited and what steps should be taken to prevent any human rights concerns. Assessment of the potential human rights risks should recognise differentiated impact, risks and vulnerabilities of men and women, boys and girls. (Enterprise Ireland, DJEI and DFAT)

- 7. Government procurement.** Irish government procurement processes should reward human rights reporting and due diligence through use of appropriately weighted scoring systems, and should exclude from tendering processes any company which is complicit in human rights violations. For example, in line with the statement issued by the Government that it does not encourage or support economic and financial activities in the illegal Israeli settlements<sup>5</sup>, the Government should exclude settlement products or companies from public procurement. The Irish government should also examine other public contracts with companies that operate in the occupied Palestinian territories, such as Veolia and Elbit Systems, which have been linked to violations of international law.<sup>6</sup> (The Office of Government Procurement)
- 8. Responsible state investment.** The Ireland Strategic Investment Fund, which replaces the National Pension Reserve Fund, should put in place a responsible investment policy. Trócaire has previously campaigned on the lack of a responsible investment policy for the National Pension Reserve Fund<sup>7</sup>; there is no indication that further ethical guidelines have been put in place for the Ireland Strategic Investment Fund. (DoF)
- 9. Export licences.** Irish companies seeking a licence to export to conflict-affected countries should be required also to show human rights due diligence on the impact of their business activities in that country. (DJEI and DFAT)
- 10. Tax incentives and conflict-prone countries.** The Foreign Earnings Deduction incentivising employees of Irish companies to work in the Democratic Republic of Congo should be abolished, and in future all conflict affected countries should be excluded from such schemes. In the interim as an immediate step companies whose employees are availing of the Foreign Earnings Deduction in the

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<sup>5</sup><https://www.dfa.ie/our-role/policies/international-priorities/middle-east-and-north-africa/opt-ivestment-advice/>

<sup>6</sup> For a fuller discussion, see Trócaire's briefing paper on 'Discouraging corporate involvement with illegal Israeli settlements.

<sup>7</sup> Trócaire Briefing Note, Our pensions, our future – the National Pensions Reserve Fund, June 2010.

Democratic Republic of Congo should be required likewise to undertake a human rights due diligence process. (DoF)

**11. *Trade and investment agreements.*** Ireland should work within the EU to review EU trade-related policy with regard to impact on human rights, to ensure that human rights impact assessments are systematically carried out prior to concluding trade and investment agreements, and to revise human rights clauses in such agreements to explicitly stipulate the suspension or amendment of contractual provisions where these have proved a risk to human rights. Clearly defined monitoring mechanisms need to be put in place to support these clauses, and legal and procedural mechanisms must be established to enable suspension of trade where human rights violations occurs. Human rights concerns must be at the fore when conducting bilateral and multilateral negotiations, including in the current talks on the EU-USA Transatlantic Trade and Investment Partnership (TTIP). Colombia's dismal human rights record, combined with the ineffectiveness of the human rights mechanisms in the trade agreement, make it critical that Ireland must not ratify the EU- Colombia Free Trade Agreement.<sup>8</sup> (Department of the Taoiseach)

**12. *Influencing policies of multilateral institutions.*** Ireland should work to bring about a comprehensive mainstreaming of human rights in the guidelines and operations of the World Bank, IMF and other international institutions. Concerns have been raised by civil society organisations with regard to the failure to adequately assess or mitigate human rights impact by the International Finance Corporation and the World Bank itself.<sup>9</sup> Ireland should include progress on integrating human rights concerns in its annual report on participation in the World Bank and the IMF. Similarly, Ireland should seek to raise human rights concerns within the World Trade Organisation. (DoF, DFAT)

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<sup>8</sup> See Standing Up for Human Rights: Why Ireland should not ratify the EU Trade Agreement with Colombia at [http://www.lasc.ie/sites/default/files/add\\_files/blog\\_files/Submission%20to%20the%20Committee%20for%20Jobs,%20Enterprise%20and%20Innovation%20May%202014.pdf](http://www.lasc.ie/sites/default/files/add_files/blog_files/Submission%20to%20the%20Committee%20for%20Jobs,%20Enterprise%20and%20Innovation%20May%202014.pdf)

<sup>9</sup> See, for example, Debt and Development Coalition Ireland, World Bank-IMF Watch Ireland 2014.

**13. Transposition of EU Directive on non-financial reporting.**

- a. In transposing the new EU Directive on non-financial reporting,<sup>10</sup> all Irish companies with more than 500 employees should be required to report on their practices with regard to environmental, social and human rights concerns. (DJEI)
- b. Ireland should call on the European Commission to develop guidelines standardising such non-financial reporting, based on the UN Guiding Principles, in a timely manner. (DJEI, Department of the Taoiseach)

**14. Reporting of human rights concerns overseas.** Encourage and empower Irish companies to refer to Irish embassies where they have concerns as to their ability to respect human rights in a particular country or context, and instruct embassies to raise concerns with local authorities in such situations. (DFAT)

**15. Remedy procedure for victims.** Ireland should review how best to ensure remedy for potential victims overseas of human rights abuses by Irish companies, ensuring that victims of HR violations are not faced with undue barriers to justice, including legal, procedural or financial barriers. (DJELR)

**16. Strengthen OECD National Contact Point.** The OECD National Contact Point in Ireland should be strengthened and given sufficient independence to function effectively, and efforts should be made to raise awareness of the OECD NCP as a potential grievance mechanism. (DJEI, Department of the Taoiseach)

**17. Implementation, Monitoring and Review of National Action Plan.** The National Action Plan should include timelines for the completion of concrete action, and provisions for a robust monitoring and evaluation system. (Department of the Taoiseach)

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<sup>10</sup> [http://ec.europa.eu/internal\\_market/accounting/non-financial\\_reporting/index\\_en.htm](http://ec.europa.eu/internal_market/accounting/non-financial_reporting/index_en.htm)

## Recommendations Table: A Comprehensive Approach to the Implementation of an Irish NAP on Business and Human Rights

UNGP Pillars	3	Department	Taoiseach	Foreign Affairs and Trade	Justice, Equality and Law Reform	Finance	Jobs, Enterprise and Innovation	Enterprise Ireland/ Bord Bia	State Owned Cos	Office of Govt Procurement
		Recommendation Area								
<b>Protect</b>		Ensuring Gender Focus in the NAP								
		Strengthening support to government via the Human Rights and Equality Commission								
		Investigation of foreign bribery allegations								
		Mandatory Human Rights due diligence, particularly in state-owned companies								
		Requirement for human rights reporting								
		Trade missions								
		Government procurement								
		Responsible state investment								
		Export licences to Irish Companies								
		Tax incentives and conflict-prone countries – eg. DRC								
		Trade and investment agreements – e.g. TTIP, EU-Colombia Trade Agreements								
		Influencing policies of multilateral institutions – eg. IFC (World Bank), WTO								
		Transposition of EU Directive on non-financial reporting								
		EU guidelines standardising for non-financial reporting								
<b>Respect</b>		Reporting of business human rights concerns overseas								
		Remedy procedure for victims								
<b>Remedy</b>		Strengthen OECD National Contact Point.								
<b>Oversight</b>		Implementation, Monitoring and Review of National Action Plan								



## Introduction

As a result of the exposure of gross violations in the supply chains of multinational corporations, the international community has responded over the last decade by introducing a large number of guidelines, principles and codes of conduct in an attempt to put in place a new framework to hold corporations accountable for their actions. However, these largely voluntary initiatives often have considerable shortcomings, being vague, insufficiently universal, and lacking effective grievance mechanisms.

In an attempt to achieve consensus in the international community on business and human rights obligations, the 'Protect, Respect and Remedy' Framework for Business and Human Rights was adopted by the UN Human Rights Council in 2008, after three years' work by Special Rapporteur Professor John Ruggie. In 2011, this Framework was followed by the

Guiding Principles on Business and Human Rights, which aim to 'operationalise' the Ruggie Framework, providing practical recommendations for its implementation.

The Framework and the accompanying Guiding Principles represent a real breakthrough for the international community in the area of business and human rights. An earlier attempt at clarifying the role of business with regard to human rights, the draft Norms, fell apart amid disagreement between the business community, NGOs and Governments. By contrast, the Ruggie Framework has been widely welcomed, although the Guiding Principles have been criticised for not providing a strong follow-up mechanism.<sup>11</sup>

While the Guiding Principles are not a legal instrument, they are remarkable in being the first of the 'soft-law' instruments on business and human rights to be adopted by the UN, thus enjoying near-universal acceptance by states. There are also ongoing discussions around the development of an international treaty. In June 2014, the UN Human Rights Council adopted two resolutions around business and human rights. The first, tabled by Ecuador, will establish a new inter-governmental working group to begin the process of elaborating a legally binding

<sup>11</sup><http://www.hrw.org/news/2011/06/16/un-human-rights-council-weak-stance-business-standards>;  
<http://www.amnesty.org/en/library/asset/IOR40/013/2012/en/c9797553-930a-4ec5-95fb-0c5a0b896125/ior400132012en.html>

instrument on business and human rights. The second, tabled by Norway, furthers the work of the Guiding Principles by extending the mandate of the Working Group on the issue of human rights and transnational corporations and other business entities for another three years and also includes an instruction to the Working Group “to explore and facilitate the sharing of legal and practical measures to improve access to remedy, judicial and non-judicial, for victims of business related abuses, including the benefits and limitations of a legally binding instrument.”<sup>12</sup>

The two processes are not mutually exclusive – the Guiding Principles cover a wide range of areas which would not be touched upon in an international treaty, such as policy coherence and public procurement, whereas a treaty could address what is lacking in the Guiding Principles – an international legal instrument to protect victims of human rights abuses by businesses.<sup>13</sup> It is essential, therefore, that Ireland engages fully and constructively with both processes, and Trócaire welcomes Ireland’s commitment to producing a National Action Plan to implement the Guiding Principles.

<sup>12</sup> <http://business-humanrights.org/en/binding-treaty/un-human-rights-council-sessions>

<sup>13</sup> See further on this: <http://www.cidse.org/content/publications/business-a-human-rights/bahr-in-the-united-nations/un-business-human-rights-framework-developing-an-intergovernmental-process-towards-a-binding-instrument.html>.

## What are the Guiding Principles?

There are three key pillars to the Ruggie Framework as follows:

### PROTECT

- States have an obligation to **protect** human rights. Traditionally, States have a duty to protect against human rights abuses committed within their borders, whether by individuals or other entities. The Framework introduces the concept that States may exercise control to protect against human rights abuses committed by their companies abroad, or ‘extra-territoriality’. This relies on the idea of a *State-business nexus*, whereby: ‘*the closer a business enterprise is to the State...the stronger the State’s policy rationale becomes for ensuring that the enterprise respects human rights*’.<sup>14</sup>

### REPECT

- Businesses have a responsibility to **respect** human rights. This is a lesser responsibility than that of the State but it is important in that it has drawn consensus around two points. First, that businesses have a responsibility to respect the full range of human rights, and secondly, the responsibility of business to respect human rights holds even in cases where the State is unable or unwilling to fulfil their own duties in this regard. Business may

<sup>14</sup> Ibid, p7.

also be held accountable for their complicity in human rights violations by the State itself, such as in the case of Exxon Mobil, who hired units of the Indonesian military to protect their plant in Aceh. Atrocities allegedly committed by the Indonesian military while in the pay of Exxon Mobil include torture, beatings and sexual assault, including of a pregnant woman, and legal proceedings have been ongoing for over a decade in the US with regard to the allegations.<sup>15</sup> This is where the concept of *human rights due diligence* is introduced, whereby business must show that they have considered and mitigated the possibility of their negative impact on human rights, in a manner consistent with the business size and operating context. This means that businesses cannot rely on the defence that they were unaware of the negative impact of their activities, since an appropriate human rights due diligence process should have brought this to light. The Tullow Oil case study below gives an example of why human rights due diligence – not just observing national law – matters.

to a remedy, the principles above are meaningless; and yet, giving concrete effect to this third pillar has often proved the most difficult, particularly where extra-territorial jurisdiction is involved. Nonetheless, many states have made considerable progress in providing remedy for victims of abuses committed beyond their borders, including through the OECD Guidelines for Multinational Enterprises and their National Contact Points.

A UN Working Group has been established to promote and assist States in the implementation of the Guiding Principles. However, it will not directly monitor or receive complaints relating to the Guiding Principles. It is therefore crucial that other means of ensuring the proper implementation of the Guiding Principles are put in place, including through the development of National Action Plans.

## REMEDY

- Both state and business have a responsibility to provide effective **remedy** for victims of business-related human rights abuses. Without recourse

<sup>15</sup> At time of writing, it has been held that the case cannot rely on the Alien Torts Claims Act but can proceed on the basis of the common-law claims of the plaintiffs. See: <http://www.forbes.com/sites/wlf/2013/08/19/post-kiobel-human-rights-suits-vs-corporations-a-new-reliance-on-common-law/>

## Case study: “Consent isn’t really enough”

### Tullow Oil in Turkana, Kenya

As with most oil companies, Tullow are conscious of their public image and publish a Corporate Responsibility (CR) report, as well as a section on corporate responsibility in their annual report. But where some extractive companies are accused of ‘greenwashing’ there are some positive signs that Tullow take their economic, social and governance responsibilities seriously. Their environmental, health and safety scorecard is linked to executive pay - a step taken by only approximately 7% of companies globally.<sup>16</sup> Tullow recently became the first extractive firm to publish their payments to governments on a project-by-project basis, ahead of the requirements of the EU Transparency Directive.<sup>17</sup>

Nonetheless, Tullow has not been able to avoid controversy. Tullow has made significant oil discoveries in the remote northern province of Turkana in Kenya. The Turkana people are chiefly nomads, isolated and marginalised with most efforts to improve their development provided by NGOs and the church, rather than central government.<sup>18</sup> The Turkana people did not feel they had been adequately consulted or considered in the granting of exploration licences in the region to Tullow by the government in Nairobi.<sup>19</sup> Free, prior and informed consent (FPIC) is a key concept in understanding the rights of indigenous peoples, who may not be sufficiently represented by their central government, and is enshrined in ILO Convention No. 169 on Indigenous and Tribal Peoples.

As a result of the granting of the exploration licences Turkana pastoralists’ livelihoods are severely undermined by reduced grazing area, leading to increased risk of over-grazing, and increased risk of resource-based conflict, and they see little compensation in terms of economic growth in the regions. In October 2013, Tullow was forced to suspend its operation in Turkana in northern Kenya, after protests demanding local employment. The plant re-opened two weeks later, following an MOU negotiated between Tullow, central government and local government and stakeholders, and promises by Tullow to invest further in local engagement and social investment.<sup>20</sup> At a conference on East Africa’s Oil and Gas Boom, in a discussion on FPIC Tullow Oil, Chairman Simon Thompson indicated “*from our perspective consent isn’t really enough, we actually need the support of the local community...grudging consent is not enough, we actually need the community to be on our side*” suggesting effective implementation of FPIC would require ongoing support of communities.<sup>21</sup>

Tullow are currently engaged in an exercise with the Institute for Business and Human Rights and the Kenya National Commission on Human Rights to embed human rights due diligence in the oil and gas sector in Kenya.<sup>22</sup> A prior human rights due diligence process, however, might have uncovered some of the underlying concerns of the Turkana people, and pointed to the difficulties of obtaining true free, prior and informed consent from the Turkana people through the Nairobi government.

<sup>16</sup><http://www.greenbiz.com/blog/2013/12/06/executive-compensation-sustainable-pay>

<sup>17</sup> The EU Transparency Directive was passed in 2013, and EU states are required to transpose it into national legislation by 2015. By contrast, many big oil firms are lobbying to overturn similar legislation in the US.

<sup>18</sup> Gregory Akall, ‘Changing Landscapes and Livelihoods in Turkana, Kenya’ at TIDI’s Africa Day Event in Trinity College Dublin, 23 May 2014.

<sup>19</sup> <http://politicsofpoverty.oxfamamerica.org/2014/03/will-oil-bring-promise-peril-communities-turkana-kenya/>;

<http://thinkafricapress.com/kenya/predicting-next-oil-insurgency-precious-case-turkana-county>

<sup>20</sup> Tullow Oil 2013 Annual Report, p26.

<sup>21</sup> <http://politicsofpoverty.oxfamamerica.org/2014/03/will-oil-bring-promise-peril-communities-turkana-kenya/>

<sup>22</sup> <http://www.ihrb.org/about/programmes/nairobi-process.html>

## Developing National Action Plans

The EU member states have committed to producing National Action Plans on the implementation of the Guiding Principles and four EU member states to date have done so - the UK, Netherlands, Denmark and Finland, while Italy has published a background document as a precursor to their National Action Plan. Several more are currently in development.<sup>23</sup> The UN working group on the Guiding Principles are due to launch guidance on creating national action plans in December 2014.<sup>24</sup> A toolkit on preparing national actions plans has also been launched by International Corporate Accountability Roundtable (ICAR) and the Danish Institute of Human Rights.

### A National Action Plan for Ireland

Ireland has an excellent record in engaging with international human rights instruments. Despite this, relatively little attention has been paid to the issue of business and human rights in Ireland to date. This is in contrast with those countries who have already developed a National Action Plan (UK, Netherlands,

Denmark and Finland), whose national agenda on business and human rights is already well advanced. The preparation of a National Action Plan therefore gives Ireland a valuable opportunity to reflect on their approach to business and human rights, to identify any gaps in the legal and regulatory framework, and to put in place initiatives to strengthen the overall government approach.

Although the Guiding Principles do not themselves constitute new international law, they emphasise the importance of a 'smart mix of measures – national and international, mandatory and voluntary – to foster business respect for human rights.' (Commentary on Guiding Principle 3). As the Guiding Principles state, 'States should not assume that businesses invariably prefer, or benefit from, State inaction, and the Institute for Business and Human Rights reiterates this, drawing on their extensive consultations with business: 'States can at times assume that businesses are consistently anti-regulation, when what actually concerns them is uncertainty and unfair competition from companies that are not held accountable for their bad practices.'<sup>25</sup>

It is regrettable that within Ireland's recently launched National Plan on Corporate Social Responsibility, the voluntary approach is relied upon so

<sup>23</sup> Links to all the currently published NAPS are available at: <http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx> Spain and has published a draft National Action Plan, and Norway's NAP is expected by end 2014 (drafts in national language only).

<sup>24</sup> For a full timetable of the Working Group's roadmap to encouraging effective national action plans, see <http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx>

<sup>25</sup> Institute for Business and Human Rights, Human Rights in the Political Economy of States: Avenues for Application, March 2014, p11.

heavily. Indeed, in the National Plan CSR is defined at the outset as strictly voluntary, drawing on a decade-old definition from the European Commission.<sup>26</sup> The European Commission has in fact re-defined their understanding of CSR in 2011 as *'the responsibility of enterprises for their impacts on society'* acknowledging that *'respect for applicable legislation, and for collective agreements between social partners, is a pre-requisite for meeting that responsibility.'*<sup>27</sup> Without proposing any specifics regarding new legislation, therefore, the following briefing suggests various specific ways in which the State can encourage, incentivise and require enterprises to respect human rights and social concerns throughout their practices.

### General Principles

The Guiding Principles adhere to the principle of non-discrimination, 'with particular attention to the rights and needs of, as well as the challenges faced by, individuals from groups or populations that may be at heightened risk of becoming vulnerable or marginalized, and with due regard to the different risks that may be faced by women and men.' (General Principles).

<sup>26</sup>Government of Ireland, *Good for Business, Good for the Community: Ireland's national plan on corporate social responsibility, 2014-2016*, p4, Definition adapted from European Commission Green Paper 'Promoting a European Framework for Corporate Social Responsibility', 18/07/2000.

<sup>27</sup> EC Communication, *A renewed EU Strategy 2011-2014 for Corporate Social Responsibility*, 25 October 2011, p6.

Business activities may have substantially different impacts on the human rights of women and men, boys and girls. Unless these are considered independently, even well-intentioned actions risk worsening the situation for women. As a background paper on women, business and human rights has pointed out: *'Even where companies are following local laws and international treaties that recognise and protect women's rights, many women work in temporary, informal positions in value chains that are not covered by laws or codes of conduct.'*<sup>28</sup>

For example, Oxfam found that women face inequality across supply chains in the cocoa sector. They are paid significantly less than men, have poorer access to markets, assets and cooperatives, and due to domestic commitments are less able to participate in training. An example, of how women are impacted by key issues in supply chains is Arti, a worker in a cocoa factory in Indonesia, who has no contract and earns less than the minimum wage, around €5.40 a day. The UN Guiding Principles advise that businesses should address the heightened risks faced by women throughout value chains when developing due diligence processes. When working conditions are improved for women, positive impacts are also seen in other key areas, such as reduced

<sup>28</sup>Ama Marston, *Women, Business and Human Rights: A background paper for the UN Working Group on Discrimination Against Women in Law and Practice*, p29

instances of child labour in the supply chain.<sup>29</sup>

There is little mention of gender in the NAPs drafted to date. The Netherlands NAP describes an internet tool to provide information about possible social impacts geographically and sectorally, in ‘which colour coding will be used to indicate whether a certain theme (e.g. child labour, discrimination of women) plays a role in a given country or region’. The UK highlights the importance of consulting with various groups that may be differently affected, including women and men, and in considering the possible effects of new project activity on various groups, including women. There is no substantive reference to gender in the Danish National Action Plan.

The consultation paper on UN guidance on drafting National Action Plans, however, takes a more robust approach to integrating gender concerns, highlighting that: ‘a gender-neutral approach to policy-making renders invisible important gender issues and marginalizes women’s experience.’<sup>30</sup> Ireland should ensure that our strong commitment to gender equality in foreign affairs policy is reflected in the NAP on business and human rights, and can draw upon ongoing work in this regard. For example, Ireland is currently developing their second National Action Plan on

Women, Peace and Security, pursuant to UN resolution 1325. The Expert Workshop on integrating a Gender Perspective points out that Resolution 1325: ‘is relevant to business and human rights because Resolution 1325 calls for gender to be used as an analytical tool for rethinking key policy initiatives, ideals, goals and actions, including in relation to economic development and the private sector,’<sup>31</sup> and indeed, the issue of human rights due diligence with regard to extractive industries was raised in the course of a roundtable discussion on women, peace and security hosted by the Irish Consortium on Gender Based Violence in July 2014.<sup>32</sup> A Thematic Template addressing women’s rights currently being developed by ICAR and DIHR to supplement their Toolkit may also be of value in this regard.

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**Recommendation 1: Gender Focus.** *Acknowledging that business activities may have different impacts on women and men, a gender focus should be integrated in all elements of the NAP. (DFAT)*

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<sup>29</sup> <http://www.oxfam.org/sites/www.oxfam.org/files/tb-business-human-rights-oxfam-perspective-un-guiding-principles-130613-en.pdf>

<sup>30</sup> Ibid P4.

<sup>31</sup> *Expert Workshop on Integrating a Gender Perspective into the UN “Protect Respect and Remedy” Framework*, 2009, p5.

<sup>32</sup> Irish Consortium on Gender Based Violence Round table event: Lessons from DRC for Ireland’s National Action Plan (NAP) on Women Peace and Security Galway, 2nd July 2014

## Part One: The State duty to protect human rights

While the first of the UN Guiding Principles outlines the basic principle that states must protect against human rights abuses within their jurisdiction, the second Guiding Principle states that *'States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.'* This goes beyond the enforcement of human rights within their own territories, and highlights the role of the home State (i.e. the state of incorporation of the transnational corporation) in ensuring that their enterprises also respect human rights in their activities abroad.

Recent government strategies have emphasised the promotion of Ireland's economic and trade interests overseas to contribute towards Ireland's economic recovery. The functions of the Departments of Foreign Affairs and Trade were merged, and the role of the Irish Embassy network heavily emphasized in a particular increase in efforts by government and semi-state bodies to increase Irish private sector activity (trade and direct investment by Irish owned companies) in "high growth" developing markets across the Middle East, Asia and also Africa. With respect to the latter, this has been reflected in the Africa Strategy, the Africa Ireland Economic Forum, the

opening in 2012 of an Enterprise Ireland office in South Africa (the first in sub-Saharan Africa), and the announcement in 2014 of a new Irish embassy in Nairobi, Kenya.

Despite its strong human rights record, the Irish government has been reluctant to address human rights issues in the context of Irish business abroad, as clearly illustrated by Minister Richard Bruton's opinion piece on the Government's silence on human rights issues during their trade mission to Saudi Arabia in January 2014. Minister Bruton called upon human rights activists to *'get real'*, saying that: *'Either we are serious about delivering the exports and investment we need to provide employment for our people or we are not.'*<sup>33</sup>

The implication that human rights issues are a distraction from trade policy, rather than principles which should underpin it, is worrying, particularly in the message it gives to Irish companies participating in such trade missions. For example, Taoiseach Enda Kenny's reported remarks in connection to the building of the World Cup stadium in Qatar were: *'My assumption is that those who work internationally on such projects would have proper working conditions and proper facilities, and I expect that to be the way.'*<sup>34</sup> This despite the well-

<sup>33</sup> The Irish Times, 'Trade missions are not the place to raise human rights' (Richard Bruton, opinion), 23 January 2014.

<sup>34</sup> The Irish Times, January 10 2014.



documented evidence that migrant workers on the World Cup are being subjected to serious exploitation, including forced labour.<sup>35</sup> Taoiseach Enda Kenny's remarks may be interpreted as tacit permission to Irish companies to assume, as he does, that human rights are being protected, without undertaking the proper due diligence. According to Nicholas McGeehan of Mafiwasta, however, Irish companies that secure construction contracts for World Cup 2022 in Qatar '*cannot avoid being implicated in projects that use slave labour. There is no doubt about that*'.<sup>36</sup>

How then, can the State ensure that companies are demonstrating respect for human rights throughout their operations, including overseas? The Guiding Principles provide practical applications, which are considered here in the Irish context.

### General State regulatory and policy functions

Guiding Principle 3 sets out the broad outline of States' responsibility to protect, by enforcing law on protecting human rights; ensuring that any other law

concerning business does not limit business respect for human rights; providing guidance for business and encouraging and where appropriate requiring businesses to communicate how they address their human rights impact. (Summary of Guiding Principle 3).

The commentary stresses the role that national human rights institutions can play in ensuring that Guiding Principle 3 is fulfilled. Currently, however, the state of uncertainty and lack of resources surrounding the Irish Human Rights and Equality Commission designate – still undergoing a merger announced three years ago – precludes them from playing any significant role here. Furthermore, when we look at one example where Ireland has committed to regulating the behaviour of its businesses overseas – on bribery of foreign officials – serious concerns remain over Ireland's implementation and enforcement of the legislation.

The Guiding Principles state: 'The failure to enforce existing laws that directly or indirectly regulate business respect for human rights is often a significant legal gap in State practice' and go on to state anti-bribery laws as one possible example. This is clearly the case with Ireland, as is highlighted by the December 2013 OECD report on Ireland's implementation of the Anti-Bribery Convention, which raises serious concerns about Ireland's failure to prosecute a single case in twelve years

<sup>35</sup> Human Rights Watch, Amnesty International, ITUC and the Guardian newspaper have all published investigative reports on the topic. Qatar subsequently appointed an international law firm, DLA Piper, to report on the situation of migrant workers which largely confirmed the facilitation of exploitation of migrant workers by Qatar's labour laws (May 2014).

<sup>36</sup> *Ireland and the United Nations Framework for Business and Human Rights*, NUI Galway, 24 March 2012, cited in Shane Darcy et al, *Business and Human Rights in Ireland*, 2012.

under the legislation, and the undue length of time it was taking to investigate those cases which are currently open.<sup>37</sup> The report commended Ireland for certain actions, including the updating of the Prevention of Corruption Acts in 2010, which now gives Ireland jurisdiction over foreign bribery offences committed abroad by Irish companies and nationals, and the report also commended DFAT for raising awareness amongst their staff of their obligation to report any potential infringement. However, the report also emphasised the importance of engaging more closely with the private sector, and highlighted that: ‘They are also concerned by reports that many Irish business professionals may believe that some degree of unethical behaviour is permissible, if engagement in such activity helps them achieve business growth.’<sup>38</sup> Irish government trade promotion activities could play a much more active role in not only highlighting situations where corruption is likely to be found but also by emphasising that bribery of foreign officials is an offence under Irish law.<sup>39</sup> For example, the ‘Doing Business in Tanzania’ guide produced by the Irish embassy there states that: ‘There have been instances of corruption and lack of transparency in public procurement procedures and potential Irish investors are advised to be aware of

the challenges’<sup>40</sup> but does not go on to state that bribery of foreign officials is an offence under Irish law.

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**Recommendation 2:**  
**Strengthened support to government.** *The Irish Human Rights and Equality Commission should be adequately resourced and mandated to play its role in supporting the Irish government in its responsibilities with regard to human rights. (To Department of Finance, (DoF) Department of Justice, Equality and Law Reform (DJELR))*

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**Recommendation 3:**  
**Investigation of foreign bribery allegations.** *Increased efforts should be made to investigate allegations of foreign bribery in a proactive and timely manner, and to ensure that Irish companies are aware of their obligations under the law. (Department of Jobs, Enterprise and Innovation (DJEI), DJELR, DFAT and Enterprise Ireland)*

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<sup>37</sup> OECD, Phase 3 Report on implementing the OECD Anti-Bribery Convention in Ireland, December 2013.

<sup>38</sup> Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Ireland, December 2013, p42, citing Ernst and Young European Fraud Survey 2011 at footnote 38.

<sup>39</sup> Ibid, p45, para 146.

<sup>40</sup> Embassy of Ireland, Tanzania, ‘Doing Business Guide – Tanzania’ 2013, p13.

## The State-Business nexus

‘States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence.’ (Full text of Guiding Principle 4).

At present, very few of the state owned agencies have any systems with regard to human rights. The case study below looks at one such state owned body, ESB International, as an example- the ESB Group does report on environmental, social and governance issues, but a sustainability audit shows that they do not have any reporting on human rights indicators.

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**Recommendation 4:**  
**Mandatory Human Rights due diligence and state-owned companies.** *The Irish government should require all state owned companies and agencies, in particular those with a significant overseas presence (e.g. Enterprise Ireland, BordBia, ESB International) to demonstrate the highest possible attention to human rights through their policy statements, human*

*rights due diligence<sup>41</sup> and remedial processes, thus providing a leading example to other Irish businesses. (All Relevant Departments and state-owned companies)*

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**Recommendation 5:**  
**Requirement for human rights reporting.** *Enterprise Ireland and BordBia should also require that client companies provide environmental, social and human rights reporting. In designing such standards, state agencies can draw upon the three principal elements of a human rights system (a policy statement, a due diligence procedure and a grievance mechanism) listed in Guiding Principle 15 (summarised on p.28 below) and also on the guidelines to be developed by the European Commission following from the EU Directive on non-financial reporting (see p. 28-29 below). The European Commission*

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<sup>41</sup> Due diligence is understood as a business process through which enterprises actively identify, prevent, mitigate and account for how they address and manage their potential and actual adverse human rights impacts on an ongoing basis. The process should include assessing actual and potential impacts throughout their business operations, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Due diligence implies more than just an assessment of risks for the company; the purpose is to understand and address risks and abuses that the company’s activities pose to rights holders, including in its supply chain and through its other business relationships. See “How to use the UN Guiding Principles on Business and Human Rights in company research and advocacy: A guide for civil society organisations” and also CIDSE Paper “Human Rights Due Diligence: Policy Measures for Effective Implementation.” September 2013

*have also developed separate handbooks for integrating human rights into ICT, oil and gas, and employment and recruitment companies, and for SMEs.<sup>42</sup> (Enterprise Ireland and BordBia).*

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**Recommendation 6: Trade missions.** *Prior to overseas trade missions, an assessment of the potential human rights risks for businesses in the countries in question should be made, which would inform: whether a trade mission should be undertaken; which businesses should be invited and what steps should be taken to prevent any human rights concerns. Assessment of the potential human rights risks should recognise differentiated impact, risks and vulnerabilities of men and women, boys and girls. Participating companies and any other Irish companies with an interest in conducting business in the countries in question should be fully briefed on this assessment.<sup>43</sup> (Enterprise Ireland, DJEI and DFAT)*

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<sup>42</sup> All four guides are available at: [http://ec.europa.eu/enterprise/policies/sustainable-business/documents/corporate-social-responsibility/index\\_en.htm](http://ec.europa.eu/enterprise/policies/sustainable-business/documents/corporate-social-responsibility/index_en.htm)

<sup>43</sup> For example, the UK has a register of business risk for companies available at <https://www.gov.uk/government/collections/overseas-business-risk>

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## “Human Rights Reporting ‘N/A’?”

### Case study: ESB International

ESB International is the international global consulting arm of the ESB Group. It has a significant presence overseas, including in the Middle East and in sub-Saharan Africa.

There is no reason to believe that ESB International is complicit in human rights violations. However, given some of the country contexts in which ESB International is active<sup>44</sup>, a required human rights due diligence process would certainly be appropriate. As a state-owned business organisation, it could serve as an example of how to engage in a meaningful way with human rights issues in some of the more difficult operating environments.

The ESB Group issue an annual Sustainability Report, dealing with environmental, social and governance issues as well as health and safety and human resources. It is commendable that, for the past two years, they have commissioned an independent audit of their reporting against the criteria of the Global Reporting Initiative (GRI), the international benchmark for sustainability reporting. However, their reporting on human rights was minimal, as evidenced by a ‘not reported’ note in 2012 against each of the GRI’s nine human rights indicators, covering investment and procurement practice, child and forced labour, non-discrimination, freedom of association, security practices and indigenous rights. In 2013, the GRI audit did not even list out the human rights indicators, stating instead: ‘*NA. ESB’s primary focus for capital investment is Europe and the vast majority of goods and services are sourced in EU countries. ESB does not address human rights issues explicitly in contracts given the extensive body of legislation that exists within Europe and the ease of access to remedial measures.*’<sup>45</sup>

Given the extensive work done in Africa and the Middle East by ESB International, including in countries with a less than perfect human rights record – it is critical that in the future, the ESB recognises the importance of human rights reporting, particularly in relation to its work overseas.

<sup>44</sup> ESB International, the global consulting arm of the ESB Group has a significant presence in sub-Saharan Africa. It has undertaken projects in South Africa, Lesotho, Mozambique, Malawi, Rwanda, Sierra Leone, Tanzania, Zambia, Zimbabwe, Nigeria, Namibia, Botswana, Benin, Burundi, Cameroon, Gambia, Ghana, and Kenya, and in 2013 established a regional hub in Johannesburg. These projects are typically strategic consultancies to governments, employing one or two Irish consultants, with the exception of a recent project in Tanzania, where ESB International were awarded a \$25 million contract under the US funded Millennium Challenge Account Tanzania Energy Project to supervise construction of an interconnector bringing power to Zanzibar from the mainland. ESBI are also in talks to manage the Botswana Power Company for a limited period, to rescue an organisation beset by allegations of corruption and mismanagement. (See <http://www.irishtimes.com/business/sectors/energy-and-resources/esbi-plugs-in-for-some-tough-work-in-botswana-1.1772903>; <http://www.independent.ie/irish-news/news/esb-international-is-powering-africa-30519521.html>)

<sup>45</sup> ESB Group Sustainability Report 2013, p85.

## State Procurement and Investments

*‘States should promote respect for human rights by business enterprises with which they conduct commercial transactions.’* (Full text of Guiding Principle 6).

At present, there are no human rights related guidelines in Irish public procurement. Ethical guidelines which do exist largely concern transparency and financial probity.

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**Recommendation 7: Government Procurement.** *Irish government procurement processes should reward human rights reporting and due diligence through use of appropriately weighted scoring systems, and should exclude from tendering processes any company which is complicit in human rights violations. For example, in line with the statement issued by the Government that it does not encourage or support economic and financial activities in the illegal Israeli settlements<sup>46</sup>, the Government should exclude settlement products or companies from public procurement. The Irish government should also examine other public contracts with companies that operate in the occupied Palestinian territories, such as Veolia and Elbit Systems, which have*

<sup>46</sup><https://www.dfa.ie/our-role-policies/international-priorities/middle-east-and-north-africa/opt-ivestment-advice/>

*been linked to violations of international law.<sup>47</sup> (The Office of Government Procurement)*

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**Recommendation 8: Responsible State investment.** *The Ireland Strategic Investment Fund, which replaces the National Pension Reserve Fund, should put in place a responsible investment policy. Trócaire has previously campaigned on the lack of a responsible investment policy for the National Pension Reserve Fund<sup>48</sup>; there is no indication that further ethical guidelines have been put in place for the Ireland Strategic Investment Fund. (DoF)*

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## Business and human rights in conflict-affected areas

‘States should warn business enterprises of the heightened risk of being involved with gross abuses of human rights in conflict-affected areas. They should

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<sup>47</sup> For a fuller discussion, see Trócaire’s briefing paper on ‘Discouraging corporate involvement with illegal Israeli settlements’ See also Who Profits, “Elbit Systems”. <http://www.whoprofits.org/company/elbit-systems> [accessed June 2014] AL-HAQ, ‘Veolia Not Awarded Public Transport Tender in The Hague’ (May 2012) [www.alhaq.org/advocacy/targets/accountability/72-hermesveolia/577-veolia-not-awarded-publictransport-tender-in-the-hague](http://www.alhaq.org/advocacy/targets/accountability/72-hermesveolia/577-veolia-not-awarded-publictransport-tender-in-the-hague) [accessed June 2014]

<sup>48</sup> Trócaire Briefing Note, Our pensions, our future – the National Pensions Reserve Fund, June 2010.

review whether their policies, legislation, regulations and enforcement measures effectively address this heightened risk, including through provisions for human rights due diligence”. (Extract from commentary on Guiding Principle 7).

At present, with the exception of the Irish governments advice against Irish business involvement in financial and economic activities in illegal Israeli settlements in the Occupied Palestinian Territories (OPT)<sup>49</sup>, it is unclear to what extent the Irish state acts to warn or monitor Irish businesses that operate in conflict-affected areas – and it even provides an incentive for companies to operate in one such state, the Democratic Republic of Congo. Whilst the recently issued statement discouraging Irish companies from investing in the illegal Israeli settlements is welcome, unfortunately, as noted above, currently the Irish state does not extend this logic to excluding from public procurement companies that are associated with HR violations in Israel and the OPT.

In reviewing Ireland’s implementation of the International Covenant on Civil and Political Rights, the Human Rights committee asked Ireland to ‘provide information on how the Government addresses concerns regarding the activities of private businesses based in the State party that may lead to violations of the Covenant outside the territory of

the State party. Ireland’s response referred to the seriousness with which they take their duties with regard to dual use and military exports, and stated that, ‘prior to issuing any export licence for goods intended for a country where there is civil or military unrest or human rights concerns, the Department of Jobs, Enterprise and Innovation consults with the Department of Foreign Affairs and Trade.’<sup>50</sup> While the licensing process covers the intended use of the product, the company should be required to show more generally that their trading activities in conflict affected areas will respect human rights through a human rights due diligence process.

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**Recommendation 9: Export Licenses** *Irish companies seeking a licence to export to conflict-affected countries should be required also to show human rights due diligence on the impact of their business activities in that country. (DJEI and DFAT)*

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In Budget 2013, the tax reductions for employees of Irish companies on business in the BRICS countries, was extended to nine African countries: Egypt, Algeria, Senegal, Tanzania, Kenya, Nigeria, Ghana or the Democratic Republic of the Congo, and this was

<sup>49</sup> <https://www.dfa.ie/our-role-policies/international-priorities/middle-east-and-north-africa/opt-ivestment-advice/>

<sup>50</sup> ICCPR, Replies of Ireland to the list of issues in relation to the fourth periodic report of Ireland, 5 May 2014,p6.

extended further again in Budget 2015.<sup>51</sup> This was framed by Minister Noonan as part of a 10 point tax reform plan to assist SMEs, with the objective of this particular measure being to: ‘help boost demand for Irish goods and services abroad.’<sup>52</sup> These particular countries were included as a result of a request from the Department of Agriculture, being identified in their Africa Agri-food Development Fund for Africa (AADF) as important trading partners for agricultural exports from Ireland.<sup>53</sup> Some of the countries listed have questionable HR records and the incentivisation of Irish trade with DRC is particularly questionable, given that it is a heavily conflict affected state, where there is an absence of a regulatory environment and extremely low state capacity to enforce existing laws over large parts of the country. At the very least, companies whose employees’ avail of the FED should be required to undertake a human rights due diligence process.

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***Recommendation 10: Tax incentives and conflict-prone countries. The Foreign Earnings Deduction***

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<sup>51</sup> In Budget 2015 announced on 14<sup>th</sup> October 2014, the Foreign Earnings Deduction was extended for another 3 years until the end of 2017 “and qualifying countries are being extended to include Chile, Mexico and certain countries in the Middle East & Asia.”

See <http://budget.gov.ie/Budgets/2015/Documents/2%20Summary%20of%202015%20Budget%20Measures%2014%20Oct%200.09.pdf>

<sup>52</sup> Department of Finance, Assistance for Small and Medium Enterprises, Budget 2013, 2012.

<sup>53</sup> Email correspondence from Department of Revenue, May 15 2014.

*incentivising employees of Irish companies to work in the Democratic Republic of Congo should be abolished, and in future all conflict affected countries should be excluded from such schemes. In the interim as an immediate step companies whose employees are availing of the Foreign Earnings Deduction in the Democratic Republic of Congo should be required likewise to undertake a human rights due diligence process. (DoF)*

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**Ensuring policy coherence**

*“States should ensure that governmental departments, agencies and other State-based institutions that shape business practices are aware of and observe the State’s human rights obligations when fulfilling their respective mandates, including by providing them with relevant information, training and support.” (Full text of Guiding Principle 8)*

As mentioned above, there is sometimes a lack of policy coherence between trade and human rights policy, observable both internationally and in the Irish context. As the Guiding Principles state: ‘There is no inevitable tension between States’ human rights obligations and the laws and policies that they put into place to shape business practices’. However, greater efforts need to be made to ensure that an understanding of human rights obligations and how concretely to observe them is apparent across all government bodies,



and in external relations with multilateral institutions.

*‘States when acting as members of multilateral institutions...should: a) Seek to ensure that those institutions neither restrain the ability of their member States to meet their duty to protect nor hinder business enterprises from respecting human rights; b) Encourage those institutions, within their respective mandates and capacities, to promote business respect for human rights and, where requested, to help States meet their duty to protect against human rights abuse by business enterprises, including through technical assistance, capacity-building and awareness-raising;...(Guiding Principle 10).*

While Ireland is very active internationally in human rights fora, support for human rights measures in trade and economic-related international fora is less clear. While Ireland reports each year on its participation at the World Bank and the IMF, it does not provide detail on how it addresses rights-related issues within these institutions. A key concern for Trócaire is the lack of attention to rights paid by the International Finance Corporation, the private sector investment arm of the World Bank. (See Honduras case study below).

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**Recommendation 11: Trade and investment agreements.**

*Work within the EU to review EU trade-related policy with regard to impact on human rights, to ensure that human rights impact assessments are systematically carried out prior to concluding trade and investment agreements, and to revise human rights clauses in such agreements to explicitly stipulate the suspension or amendment of contractual provisions where these have proved a risk to human rights.*

*Clearly defined monitoring mechanisms need to be put in place to support these clauses, and legal and procedural mechanisms must be established to enable suspension of trade where human rights violations occur. Human rights concerns must be at the fore when conducting bilateral and multilateral negotiations, including in the current talks on the EU-USA Transatlantic Trade and Investment Partnership (TTIP). Colombia’s dismal human rights record, combined with the ineffectiveness of the human rights mechanisms in the trade agreement, make it critical that Ireland must not ratify the EU- Colombia Free Trade Agreement.<sup>54</sup>*  
*(Department of the Taoiseach)*

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<sup>54</sup> See Standing Up for Human Rights: Why Ireland should not ratify the EU Trade Agreement with Colombia at [http://www.lasc.ie/sites/default/files/add\\_files/blog\\_files/Submission%20to%20the%20Committee%2](http://www.lasc.ie/sites/default/files/add_files/blog_files/Submission%20to%20the%20Committee%2)

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**Recommendation 12:  
Influencing policies of  
multilateral institutions.**

*Work to bring about a comprehensive mainstreaming of human rights in the guidelines and operations of the World Bank, IMF and other international institutions. Concerns have been raised by civil society organisations, (including Debt and Development Coalition Ireland, of which Trócaire is a member,) with regard to the failure to adequately assess or mitigate human rights impact by the International Finance Corporation and the World Bank itself.<sup>55</sup> Ireland should include progress on integrating human rights concerns in its annual report on participation in the World Bank and the IMF. Similarly, Ireland should seek to raise human rights concerns within the World Trade Organisation. (DoF, DFAT)*

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on%20May%202014.pdf

<sup>55</sup> See, for example, Debt and Development Coalition Ireland, World Bank-IMF Watch Ireland 2014.

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## **The Human Impact of Failing to Comply with Internal Policies**

### Case study: Dinant and the International Finance Corporation

Trócaire have been working with civil society organizations in the Aguan Valley, a fertile region of Honduras marred by land conflicts between peasant groups and private companies. Structural adjustment programmes in Honduras in the early 1990s led to the Law for the Modernization of the Agricultural Sector which reduced restrictions on the sale of collectively owned land. Over 70% of collectively owned land was sold below market prices between 1992 and 1994. Peasant groups claim that many of the sales were achieved through bribery, threats, intentional division of peasants, coercion and fraud.<sup>56</sup>

The largest of the private companies in the Aguan Valley is the Dinant Corporation. In 2008, the International Financial Corporation (IFC) of the World Bank Group approved a loan of US\$30 million for the Dinant Corporation, and the first 50% was disbursed in November 2009 despite evidence of the underlying land dispute and concerns around human rights violations associated with Dinant activities in the region. Conflicts over land had led to an increasing militarization of the region, escalating into alarming levels of violence and human rights abuses in the period 2008 to 2013. Abuses carried out by the military, police and company private security guards included assassinations, beatings, forced disappearances, kidnapping and torturing (including of male adolescents, sons of peasant leaders), and sexual abuse of women.

An audit carried out in late 2013 by the Compliance Advisor Ombudsman (CAO)<sup>57</sup> revealed that the IFC had failed to comply with its internal policies relating to the environmental and social impact of the company's activities, and had not sufficiently taken into consideration evidence of land claims and the high risk nature of the investment.<sup>58</sup> The second disbursement of US\$15 million is still pending while the IFC works with the company to address issues of concern, but in the meantime, violent evictions have continued to take place. In 2014, a civil society report reported the deaths and disappearances of 129 people on both sides of the conflict between 2008 and 2013, including peasants, human rights defenders, private security guards and members of the Honduran police.<sup>59</sup>

<sup>56</sup> Rights Action, 2013, Human Rights Violations Attributed to Military Forces in the Bajo Aguan Valley in Honduras

<sup>57</sup> CAO (Office of the Compliance Advisor Ombudsman) is an independent post that reports directly to the President of the World Bank Group. CAO reviews complaints from communities affected by development projects undertaken by IFC and MIGA.

<sup>58</sup> CAO Audit Report C-I-R9-Y12-F161

<sup>59</sup> OPDHA, 2014, Informe estadística de muertes violentas relacionado al conflicto de tierras en el Bajo Aguán 2008 – 2013

## Part Two: The corporate responsibility to respect human rights

### Foundational principles

The second part of the Guiding Principles emphasises the corporate duty to respect human rights, and the fact that *‘exists independently of States’ abilities and/or willingness to fulfil their own human rights obligations’* (commentary on Guiding Principle 11). This section does not concern itself with voluntary initiatives which an enterprise may undertake, warning that such activities do not *‘offset a failure to respect human rights throughout their operations’*. Rather, Part Two offers concrete guidance to enterprises as to how to meet their responsibility to respect human rights, including through: *‘a policy commitment to respect human rights; a human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights and processes to enable remediation of any adverse human rights impacts’* (Guiding Principle 15).

Although Part Two is addressed largely to enterprises themselves, the State clearly has a role to play in encouraging, incentivising or requiring best practice by companies in demonstrating their respect for human rights. Some possible measures have already been addressed

in Part One above, and further recommendations are given below.

The new EU Directive on non-financial reporting, mandating environmental, social and human rights reporting, was originally drafted to apply to all European companies with more than 500 employees, but was ultimately limited to those companies with more than 500 employees listed on a national stock exchange, as well as certain public interest companies. Given the nature of the Irish Stock Exchange, this would apply to less than 30 companies.

The transposition of the EU Directive gives the opportunity for Ireland to go beyond the minimum requirements and require that all Irish companies with more than 500 employees should be required to report on environmental, social and human rights concerns. Under the directive, companies will have to disclose information on policies, risks and results as regards environmental matters, social and employee-related aspects (including, for example, gender equality), respect for human rights, anti-corruption and bribery issues, and diversity on the boards of directors.

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**Recommendation 13:  
Transposition of EU  
Directive on non-financial  
reporting.**

- a) *In transposing the new EU Directive on non-financial reporting,<sup>60</sup> all Irish companies with more than 500 employees should be required to report on their practices with regard to environmental, social and human rights concerns. (DJEI)*
  
  - b) *Ireland should call on the European Commission to develop guidelines standardising such non-financial reporting, based on the UN Guiding Principles, in a timely manner. (DJEI, Department of the Taoiseach)*
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**Recommendation 14:  
Reporting of human rights  
concerns overseas.**

*Encourage and empower companies to refer to embassies where they have concerns as to their ability to respect human rights in a particular country or context, and instruct embassies to raise concerns with local authorities in such situations. (DFAT)*

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In their National Action Plan, the UK have acknowledged the difficulties enterprises may face when confronted with a possible conflict between national law or practice and their human rights obligations, and have undertaken to empower their diplomats to raise such concerns with local authorities.

Guiding Principle 23 outlines that enterprise should ‘*seek ways to honour the principles of internationally recognised human rights when faced with conflicting requirements*’, highlighting the possibility of operating in circumstances where national law is absent or perhaps contradictory to human rights law.

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[http://ec.europa.eu/internal\\_market/accounting/non-financial\\_reporting/index\\_en.htm](http://ec.europa.eu/internal_market/accounting/non-financial_reporting/index_en.htm)

## Part Three: Access to Remedy

Part Three of the Guiding Principles cover the range of grievance mechanisms which should be available to victims of human rights abuses, including State judicial and non-judicial mechanisms, and multi-stakeholder and individual enterprise grievance mechanisms.

### State-based judicial grievance mechanisms

As noted above, with the Prevention of Corruption Act 2010, Irish companies (and individuals) may be prosecuted in Irish courts for crimes committed abroad in relation to bribery of foreign officials. This principle of extraterritoriality also applies in Ireland in other areas of serious crime, such as the Human Trafficking Act 2008. However, as we have seen with the Prevention of Corruption Act 2010, lack of assigned resources and a lack of a proactive approach in identifying and pursuing allegations has largely prevented the practical use of such instruments.

In such cases, there is a serious gap between legislation and practice. The Maastricht Principles, drafted by a group of international experts to provide clarity around states' extraterritorial obligations should inform future efforts by Ireland to strengthen their legislation with

extraterritorial application. States have committed to addressing this further in their National Action Plans; the Danish National Action Plan, for example, establishes an inter-ministerial working group on extraterritoriality.<sup>61</sup>

As outlined in the introduction, the way in which businesses operate in a globalised world means that states can no longer ignore the imperative to ensure that their corporations respect human rights, wherever they are operating. In many cases, companies themselves are calling for clarity and guidance to be provided by their home state, as illustrated in the case study from the UK below.

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**Recommendation 15: Remedy procedure for victims.** *Ireland should review how best to ensure remedy for potential victims overseas of human rights abuses by Irish companies, ensuring that victims of HR violations are not faced with undue barriers to justice, including legal, procedural or financial barriers. (DJELR)*

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<sup>61</sup> Danish National Action Plan, available at: <http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx>

## **“A good reputation more than pays for itself”**

Case study: Corporate Support for the UK Modern Slavery Act<sup>62</sup>

The UK is currently developing new anti-slavery legislation, known as the Modern Slavery Bill. The Joint Parliamentary Committee tasked with scrutinising the legislation released a report in April 2014, in which they devoted a chapter to issues concerning slavery in the supply chain of multinational companies. The Joint Committee consulted extensively with companies and stated that they were ‘repeatedly told that legislation could serve to “level the playing field” and raise standards of companies that failed to tackle modern slavery in their supply chains voluntarily.’<sup>63</sup> Many companies saw the benefit of monitoring their supply chain, and the Joint Committee cited IKEA, who told the Committee that ethical supply chains were “absolutely” more profitable, Tesco, who said that a good reputation “more than pays for itself” in the long run, and Marks & Spencer, who told the Committee that trust was “a key part of [their] competitive advantage”. Marks & Spencer added that “legislation could have a valuable role to play in encouraging more companies to take these issues more seriously” and David Arkless [President of Manpower Group] suggested that a “little stimulus” through legislation was all that was required to generate momentum for change. Amazon, IKEA, Marks & Spencer, Primark, Sainsbury’s and Tesco all told the Committee that they could support legislation that was not unduly burdensome.<sup>64</sup>

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<sup>62</sup> See CORE Coalition submission to the UK Joint Committee on Human Rights regarding the Bill at <http://business-humanrights.org/sites/default/files/documents/CORE-Modern-slavery-bill-submission-to-joint-committee-on-human-rights-27-Aug-2014.pdf>

<sup>63</sup> Joint Select Committee on the Modern Slavery Bill, April 2014.

<sup>64</sup> Ibid.

### State-based non-judicial mechanisms

The non-judicial mechanism most commonly cited in the literature surrounding the Guiding Principles is the OECD Guidelines for Multinational Enterprises and its National Contact Point. The OECD Guidelines were updated in 2011 to include a full chapter on human rights, drawing extensively on the UN Guiding Principles. Unlike the Guiding Principles, however, they do have a procedure by which ‘specific instances’ concerning non-observation of the Guidelines can be raised, through the National Contact Point in each OECD state. Crucially, if the ‘host’ State is not an OECD member, concerns can be raised with an OECD adherent ‘home’ State.

The UK, Denmark, and the Netherlands NAPs have made reference to their OECD National Contact Points as part of their framework for providing remedy for victims of human rights abuse by business; however, the UK, Denmark and the Netherlands NAPs are examples of particularly strong and effective NCPs. Indeed, Denmark is the first country to establish its NCP as an independent body by Act of Parliament, and has bestowed it with proactive investigatory powers. In their National Action Plan, the Netherlands has appointed a special representative for four years, to lead a proactive agenda on the OECD Guidelines.<sup>65</sup> In its NAP Finland has

committed to set up a new complaint mechanism for Finnish state owned companies, which citizens, NGOs, and other stakeholders will be able to utilise to report HR violations committed by any state owned company.

By contrast, the role of the NCP in Ireland is one part of a large portfolio of the Bilateral Trade Promotion Unit within the Department of Jobs, Enterprise and Innovation. Quite apart from the lack of resources thus assigned to the NCP role, there is a potential conflict of interest in housing the NCP in this government department. To date, the NCP has considered just two cases, the second of which has been blocked for over three years with no resolution.<sup>66</sup> The NCP has insufficient legal clarity as to its role, which is preventing it from moving forward with the case. The fact that only two cases have been raised with the NCP may also be a cause for concern. The commentary on Guiding Principle 25 states: *Ensuring access to remedy for business-related human rights requires also that States facilitate public awareness and understanding of these mechanisms, how they can be accessed and any support (financial or expert) for doing so.*

<sup>65</sup> Netherlands National Action Plan, p3, available at: <http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx>

<sup>66</sup> [http://oecdwatch.org/cases/Case\\_215](http://oecdwatch.org/cases/Case_215)



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**Recommendation 16:  
Strengthen OECD National  
Contact Point.** *The OECD  
National Contact Point in  
Ireland should be  
strengthened and given  
sufficient independence to  
function effectively, and efforts  
should be made to raise  
awareness of the OECD NCP  
as a potential grievance  
mechanism. (DJEI,  
Department of the Taoiseach)*

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**Recommendation 17:  
Implementation, Monitoring  
and Review of National  
Action Plan.** *The National  
Action Plan should include  
timelines for the completion of  
concrete action, and  
provisions for a robust  
monitoring and evaluation  
system. (Department of the  
Taoiseach)*

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## Conclusion

As the word 'Plan' denotes, a National Action Plan is not intended primarily as a summary of the present means by which a State discharges its duties with regard to business and human rights, but as a set of actions to progress and enhance the business and human rights agenda. In order to ensure continued momentum, it is critical that actions are given timelines, and that an effective monitoring and evaluation system is established. The DIHR/ICAR toolkit suggest various means of achieving this, including by the National Human Rights Institutions. The new Irish Human Rights and Equality Commission might be well-placed to take on this role.

## Appendix: The 31 UN Guiding Principles

1. States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.
2. States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human right throughout their operations.
3. In meeting their duty to protect, States should:
  - (a) Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps;
  - (b) Ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights;
  - (c) Provide effective guidance to business enterprises on how to respect human rights throughout their operations;
  - (d) Encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts.
4. States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence.
5. States should exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights.
6. States should promote respect for human rights by business enterprises with which they conduct commercial transactions.
7. Because the risk of gross human rights abuses is heightened in conflict affected areas, States should help ensure that business enterprises operating in those contexts are not involved with such abuses, including by:
  - (a) Engaging at the earliest stage possible with business enterprises to help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships;
  - (b) Providing adequate assistance to business enterprises to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence;
  - (c) Denying access to public support and services for a business enterprise that is involved with gross human rights abuses and refuses to cooperate in addressing the situation;
  - (d) Ensuring that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses.
8. States should ensure that governmental departments, agencies and other State-based institutions that shape business practices are aware of and observe the State's human rights obligations when fulfilling their respective mandates, including by providing them with relevant information, training and support.
9. States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business

- enterprises, for instance through investment treaties or contracts.
10. States, when acting as members of multilateral institutions that deal with business-related issues, should: (a) Seek to ensure that those institutions neither restrain the ability of their member States to meet their duty to protect nor hinder business enterprises from respecting human rights; (b) Encourage those institutions, within their respective mandates and capacities, to promote business respect for human rights and, where requested, to help States meet their duty to protect against human rights abuse by business enterprises, including through technical assistance, capacity-building and awareness-raising; (c) Draw on these Guiding Principles to promote shared understanding and advance international cooperation in the management of business and human rights challenges.
  11. Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.
  12. The responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.
  13. The responsibility to respect human rights requires that business enterprises:
    - (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;
    - (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.
  14. The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise’s adverse human rights impacts.
  15. In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:
    - (a) A policy commitment to meet their responsibility to respect human rights;
    - (b) A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;
    - (c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.
  16. As the basis for embedding their responsibility to respect human rights, business enterprises should express their commitment to meet this responsibility through a statement of policy that:
    - (a) Is approved at the most senior level of the business enterprise;
    - (b) Is informed by relevant internal and/or external expertise;
    - (c) Stipulates the enterprise’s human rights expectations of personnel, business partners and other parties directly linked to its operations, products or services;
    - (d) Is publicly available and communicated internally and externally to all personnel, business partners and other relevant parties;
    - (e) Is reflected in operational policies and procedures necessary to embed it throughout the business enterprise.

17. In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Human rights due diligence:
- (a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;
  - (b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;
  - (c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve.
18. In order to gauge human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships. This process should:
- (a) Draw on internal and/or independent external human rights expertise;
  - (b) Involve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation.
19. In order to prevent and mitigate adverse human rights impacts, business enterprises should integrate the findings from their impact assessments across relevant internal functions and processes, and take appropriate action.
- (a) Effective integration requires that:
    - (i) Responsibility for addressing such impacts is assigned to the appropriate level and function within the business enterprise;
    - (ii) Internal decision-making, budget allocations and oversight processes enable effective responses to such impacts.
  - (b) Appropriate action will vary according to:
    - (i) Whether the business enterprise causes or contributes to an adverse impact, or whether it is involved solely because the impact is directly linked to its operations, products or services by a business relationship;
    - (ii) The extent of its leverage in addressing the adverse impact.
20. In order to verify whether adverse human rights impacts are being addressed, business enterprises should track the effectiveness of their response. Tracking should:
- (a) Be based on appropriate qualitative and quantitative indicators;
  - (b) Draw on feedback from both internal and external sources, including affected stakeholders.
21. In order to account for how they address their human rights impacts, business enterprises should be prepared to communicate this externally, particularly when concerns are raised by or on behalf of affected stakeholders. Business enterprises whose operations or operating contexts pose risks of severe human rights impacts should report formally on how they address them. In all instances, communications should:
- (a) Be of a form and frequency that reflect an enterprise's human rights impacts and that are accessible to its intended audiences;
  - (b) Provide information that is sufficient to evaluate the adequacy of an enterprise's response to the particular human rights impact involved;
  - (c) In turn not pose risks to affected stakeholders, personnel or to legitimate requirements of commercial confidentiality.

22. Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.
23. In all contexts, business enterprises should:
  - (a) Comply with all applicable laws and respect internationally recognized human rights, wherever they operate;
  - (b) Seek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements;
  - (c) Treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate.
24. Where it is necessary to prioritize actions to address actual and potential adverse human rights impacts, business enterprises should first seek to prevent and mitigate those that are most severe or where delayed response would make them irremediable.
25. As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.
26. States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.
27. States should provide effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms, as part of a comprehensive State-based system for the remedy of business-related human rights abuse.
28. States should consider ways to facilitate access to effective non-State based grievance mechanisms dealing with business-related human rights harms.
29. To make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted.
30. Industry, multi-stakeholder and other collaborative initiatives that are based on respect for human rights-related standards should ensure that effective grievance mechanisms are available.
31. In order to ensure their effectiveness, non-judicial grievance mechanisms, both State-based and non-State-based, should be:
  - (a) Legitimate: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;
  - (b) Accessible: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;
  - (c) Predictable: providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;
  - (d) Equitable: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;
  - (e) Transparent: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake;
  - (f) Rights-compatible: ensuring that outcomes and remedies accord with internationally recognized human rights;

(g) A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms;

Operational-level mechanisms should also be:

(h) Based on engagement and dialogue: consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances.