

# Submission to the consultation on the Second National Plan on Business and Human Rights (2024-2027)

*September 2023*

Centre for Criminal Justice and Human Rights (CCJHR)

School of Law

University College Cork

[www.ucc.ie/en/ccjhr/](http://www.ucc.ie/en/ccjhr/)



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## Introduction to the CCJHR

The Centre for Criminal Justice and Human Rights (CCJHR) is based at the School of Law, University College Cork. The Centre was established in 2006 to contribute to national and international debates in areas implicating human rights and criminal justice in various contexts. The Centre promotes cutting-edge interdisciplinary research, innovative programmes of legal education and training, and strategic partnerships with governments, statutory bodies, and civil society organisations worldwide.

## Introduction to submission:

In developing the second-generation plan, we believe that identifying and focusing on areas of priority will be beneficial in ensuring the effectiveness and impact of the second phase of the National Action Plan (NAP). While all the recommendations from the 2021 Review<sup>2</sup> are important, we identified recommendations that we considered would make the most impact and that are urgent in the current business and human rights landscape. We relate our response to the first guiding question to the 3 pillars: protect, respect and remedy. We address remedy first and combine our response regarding protect and respect. We thereafter addressed the second and third questions. We explain why the selected issues from the 2021 review are important and why they should be prioritised. We provide a summary at the end of our submission.

## Responses to the Guiding Questions

- 1. Are there any recommendations from the 2021 Review that our Departments should focus on when developing a second-generation plan?**

### Remedy

Globally, it is estimated that two-thirds of the world's population lives without access to justice.<sup>3</sup> The problem is exacerbated in fragile states and especially in the context of business and human rights where there is an imbalance of power between multinationals and victims.<sup>4</sup> In that context, individuals are often pitched against large, multinational entities with complex

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<sup>1</sup> Contribution prepared on behalf of CCJHR by Professor Olufemi Amao, Professor of Company Law and Sustainability, School of Law, University College Cork.

<sup>2</sup> Human Rights Unit, Department of Foreign Affairs, *Review of Implementation of National Plan on Business and Human Rights 2017-2020* (December 2021). Available at: [www.dfa.ie/media/dfa/ourrolepolicies/humanrights/Review-of-Implementation-of-National-Plan-on-Business-and-Human-Rights-2017-2020---for-website.docx.pdf](http://www.dfa.ie/media/dfa/ourrolepolicies/humanrights/Review-of-Implementation-of-National-Plan-on-Business-and-Human-Rights-2017-2020---for-website.docx.pdf). All hyperlinks last accessed: 13<sup>th</sup> Sept 2023

<sup>3</sup> *Evaluation of UNDP Support of Access to Justice* (2023). Available at <http://web.undp.org/evaluation/evaluations/thematic/a2j.shtml>.

<sup>4</sup> See generally Olufemi Amao, *Corporate social responsibility, human rights and the law: Multinational corporations in developing countries* (Taylor & Francis, 2011); 'Multinational Corporations' in J. Schechinger, A. Nollkaemper & I. Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (Cambridge University Press, 2017) 799-821.

structures and supply chains. The 2021 Review correctly pinpointed access to remedy as a critical area. Cases involving multinational businesses in most cases are cross-border in nature posing additional significant challenges such as establishing jurisdiction and applicable law. It is notable that Ireland is a major hub for a significant number of global multinational corporations<sup>5</sup> hence in a unique position to impact on access to remedies in the business and human rights context.

Ireland's ongoing commitments to access to remedy are framed around mediation (augmented by the procedure in the OECD Guidelines), exploration of international best practices and exploration of potential remedies for potential victims based overseas. These are commendable steps but more needs to be done, especially in the face of increasing abuse of human rights in the global supply chain and the critical issue of modern slavery manifesting in international businesses.

Access to State-based judicial remedies for foreign victims and extraterritorial jurisdiction need to be explored further, especially with regard to civil cases. The experiences of other countries with access to foreign victims such as the Netherlands, UK and Canada could be instructive in exploring access. An approach that mirrors the duty of care approach in the UK *Vedanta* case<sup>6</sup> could be considered. The decision provided a pathway for access to justice for foreign victims of abuse by subsidiaries of multinationals in the UK. Exploring the possibility of such a pathway in Ireland would necessarily require engagement with the judiciary, the Oireachtas, legal practitioners and research institutions, especially Universities, in navigating how such access could be improved or facilitated in Ireland.

In addition, the second-generation plan could take cognizance of the example of the Netherlands NAP<sup>7</sup> by prioritising the provision of information regarding opportunities for access in the Irish jurisdiction and also actively monitoring cases with corporate human rights liability-related component that comes to the Irish courts.

Further, we noted the recommendation by Dr Rachel Widdis regarding 'extending failure to prevent model in Ireland beyond economic crimes, to failure to prevent human rights abuses.'<sup>8</sup> Prioritising the introduction of the failure to prevent human rights abuses framework in the legal framework for accountability is bound to have a significant and positive impact on corporate accountability as experience in other areas of law has shown.<sup>9</sup>

In addition, most cases relating to corporations' human rights abuses usually affect a significant number of victims. Therefore, facilitating an accessible collective action process is important and should be prioritised. This was also one of the key conclusions from the review by Dr Widdis

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<sup>5</sup> Central Statistics Office, *Multinationals: An Irish Perspective* (2 Nov 2022). Available at: [www.cso.ie/en/releasesandpublications/ep/p-bii/businessinireland2020/multinationalsanirishperspective/](http://www.cso.ie/en/releasesandpublications/ep/p-bii/businessinireland2020/multinationalsanirishperspective/).

<sup>6</sup> *Vedanta Resources PLC & Anor v Lungowe & Ors* [2019] UKSC 20.

<sup>7</sup> Netherlands Ministry of Foreign Affairs, *National Action Plan: Business & Human Rights* (July 2022). Available at: [www.government.nl/binaries/government/documenten/publications/2022/11/8/national-action-plan-business-and-human-rights/22\\_387+NAP+Bedrijfsleven+%26+Mensenrechten\\_EN\\_def.pdf](http://www.government.nl/binaries/government/documenten/publications/2022/11/8/national-action-plan-business-and-human-rights/22_387+NAP+Bedrijfsleven+%26+Mensenrechten_EN_def.pdf).

<sup>8</sup> Dr Rachel Widdis 'Review of Access to Remedy in Ireland', Independent review commissioned by the Department of Foreign Affairs under the National Plan on Business and Human Rights 2017-2020. Available at [www.dfa.ie/media/dfa/ourrolepolicies/humanrights/FINAL-Access-to-Remedy-in-Ireland-June-2021.pdf](http://www.dfa.ie/media/dfa/ourrolepolicies/humanrights/FINAL-Access-to-Remedy-in-Ireland-June-2021.pdf), pp 30-31.

<sup>9</sup> See for example 'failure to prevent bribery' in section 7 of the Bribery Act 2010 (UK).

mentioned above. The focus should be on how collective action could be achieved within the Irish legal framework.

### **Protect and Respect**

In the face of global climate change challenges, sustainability and the achievement of the United Nations' Sustainable Development Goals (SDGs) have become important benchmarks for tackling emergent global challenges. The review correctly recognised the importance of sustainability as part of Ireland's strategy.

In order to improve on the foundation that has been laid in the first NAP, and in order to maximise the impact of the next phase we recommend the prioritisation of further exploration of the link between sustainability and the UN Guiding Principles on Business and Human Rights (UNGP). The first NAP correctly made a commitment to address goals 1, 5 and 8 in the NAP. This effort is ongoing. The achievement of specific SDG goals via the NAP could be widened.

### **The developments in the EU and at the international level**

As suggested in the 2021 review, Ireland should engage with all significant developments regarding business and human rights at the international level. However, to maximise impact, it is recommended that two of the developments at the EU level should be of priority in the short to medium term. The EU's Corporate Sustainability Reporting Directive and the EU Corporate Sustainability Due Diligence Directive (CSDDD) are important not only from a state policy perspective but because of their far-reaching implications for businesses in Ireland and their global operations. Key steps that could be taken in Ireland to align and shape these developments are as follows.

Similar to States such as Germany, Ireland could consider moving ahead of EU legislation by putting in place a domestic framework on the issues of due diligence and sustainability reporting. Such a move will be comparable to what was done in Germany with regard to the German Supply Chain Due Diligence Act (LkSG) (2023). (See further, our response to question 3 below).

An important dimension that is related to the development in the EU, but in the broader scope of ESG (Environmental, social, and corporate governance) is the need to develop additional expertise in these emergent areas to help businesses and other stakeholders manage effectively the regulatory regime emerging in the areas. The ESG agenda is directly linked with human rights and the nexus between the two requires the development of expertise and capacity to navigate the nexus and achieve the objectives of the concepts.

### **Irish Company Law and Corporate Governance: Stakeholder focus**

One of the key challenges to companies' ability to engage with issues relating to business and human rights and for responsibility to be imposed on corporations is the prevailing framework of company law. This is not only the case in Ireland but in many jurisdictions globally. The challenge is linked to the purpose of the company directors' duties and corporate

accountability.<sup>10</sup> However, the increasing emphasis on sustainability, societal impacts, long-term value creation and the impact of Covid-19 means the stakeholder approach continues to gain traction globally. Limited aspects of the stakeholder approach have featured in the company law framework of some countries like Germany, France and Japan. However, to meet the complex challenges that have emerged with regard to sustainability, business and human rights, there needs to be a bolder reorientation of company law and corporate governance to be more stakeholder-focused. Ireland can make an impact globally by taking a lead on this critical aspect of corporate law and governance.

### **Small and Medium-sized Enterprises (SMEs)**

The discourse on business and human rights has largely focused on multinational corporations because of their significant global reach and their potential for large-scale impacts on human rights. However, it is important to take into account the crucial and sometimes consequential roles that Small and Medium-sized Enterprises (SMEs) play in the context of business and human rights. It is also worth noting that SMEs played limited roles in the development of the UNGP principles. It is recommended that a greater focus on SMEs, their impact and needs in the Irish context should be made a priority in the next phase of the NAP. The government and large businesses would need to work together in navigating the roles of SMEs. They could work together in developing standards in the supply chains, raising awareness and training.

### **Incentive strategy: procurement**

It is recognised globally that one of the most important ways that governments could directly influence corporate behaviour is through their procurement practices.<sup>11</sup> Governments can employ their purchasing power to promote human rights by including specific human rights criteria in the procurement process. This would nudge businesses (large or small) to adopt responsible practices consistent with the UNGP. Expanding the scope of procurement practices to promote human rights in business activities should be a priority on an ongoing basis.

## **2. How should the implementation of Ireland's second National Plan be monitored? Is the 'Implementation Group' model a good way forward?**

The Implementation group had done a creditable job in the implementation of the first national plan. However, in order to meet the expanding scope of NAP in the second phase and the scope and expertise required in focusing on some of the priorities identified, it will be pertinent to review and redesign the framework for monitoring in the second national plan.

The review correctly recommended a revision of the terms of reference of the implementation group and its structures. The review further suggested the establishment of: '(i) a multi-stakeholder consultative forum with an implementation oversight role and (ii) an interdepartmental structure charged with implementation which can draw on external expertise

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<sup>10</sup> Olufemi Amao, 'Rethinking bank directors' duties in the aftermath of the financial crisis: the legal basis of the *sui generis* nature of bank directors' duties' (2016) 30(3) *Australian Journal of Corporate Law* 235-258.

<sup>11</sup> See generally Olga Martin-Ortega & Claire Methven O'Brien (Eds.) *Public procurement and human rights* (Edward Elgar Publishing, 2019).

as required'. However, we would recommend examining the possibility of ensuring that the interdepartmental structure in its implementation task takes a sectoral approach in order to be able to address the peculiarity of a particular industry or sector. The structure could take the form of technical committees put in place to achieve specific objectives in particular sectors.

In addition, the expansion of the structures to include the greater participation of SMEs should be made a priority.

**3. Are there any other developments in the sphere of business and human rights that should be considered in the developments of Ireland's second national plan?**

Due diligence is an important, if not the most important tool at the moment for achieving accountability as envisaged by the UNGP. It is notable that some countries have been proactive in this regard by implementing domestic due diligence law irrespective of developments at the EU or international level. France, Germany and Norway for instance, have already implemented due diligence legislation. Aspects of due diligence could also be found in the law in the Netherlands (with regard to child labour) and in the UK Modern Slavery Act. There are proposed due diligence legislation in Austria (Supply Chain Act and Social Responsibility) and Belgium (corporate duty of vigilance and care in value chains).

We think that Ireland could follow this practice by introducing a standalone legislation focusing on due diligence in the supply chain. Such a law would require companies to identify, prevent, mitigate, and account for how they address their potential and actual adverse human rights impacts.

It is notable that since 2020 there have been some campaigns by Trócaire and the Irish Coalition for Business and Human Rights (ICBHR) in Ireland for mandatory due diligence.

We are of the opinion that in view of developments in other countries mentioned above and Ireland's ambition for sustainability, exploring the potential to introduce legislation in this area that may even go beyond the effort at the EU level should be made a priority.

**Summary of Recommendations:**

Summary of areas recommended for prioritisation:

**Summary of response to Question 1:**

1. Access to State-based Judicial Remedies for foreign victims and extraterritorial jurisdiction needs to be explored further, especially regarding civil cases.
  - a. A duty-of-care approach could be considered.
  - b. Consider prioritising the provision of information regarding opportunities for access in the Irish jurisdiction and also actively monitoring cases with corporate human rights liability-related component that comes to the Irish courts.

2. Prioritise engagement with relevant government bodies in exploring the introduction of the ‘failure to prevent human rights abuses concept’ in the legal framework for accountability.
3. Prioritise engagement with relevant government bodies on exploring the possibility of a domestic framework on due diligence.
4. Prioritise facilitating access to collective action.
5. Prioritise exploration of the link between sustainability, SDGs and the UNGP.
6. Prioritise the further development of expertise on ESG (Environmental, social, and corporate governance) and sustainability.
7. Prioritise reorientating the Irish company and corporate governance structure to be more stakeholder focused.
8. Greater focus on SMEs and their impact and needs in the Irish context.
9. Explore the inclusion of specific human rights criteria in the procurement process.

**Summary of response to Question 2:**

1. Recommend examining the possibility of ensuring that the interdepartmental structure in its implementation task takes a sectoral approach.
2. Greater participation of SMEs in the implementation process should be made a priority.

**Summary of response to Question 3:**

1. Explore the introduction of standalone legislation focusing on due diligence in the supply chain.

**END**