



Submission to the Department of Foreign Affairs and Trade on its preparation of a National Action Plan on Business and Human Rights

March 2014

Introduction

Amnesty International a global movement of more than 3.2 million people working in more than 150 countries around the world in support of human rights. We are independent of any political ideology, economic interest or religion. We do not support or oppose any government or political system. Our sole concern is the protection of the fundamental human rights guaranteed by the Universal Declaration of Human Rights. Amnesty International Ireland is the Irish section of Amnesty International, and has over 15,000 members and supporters. Amnesty International is interested in Ireland's National Action Plan on Business and Human Rights due to its research and experience in working with business and human rights issues over more than a decade.

Business has the potential to be a force for good. Businesses make a positive contribution to society – nationally and globally – for instance through job creation and the development of new medicines and technology that save or enhance the quality of lives. But around the world, economic players, especially transnational companies that operate across national boundaries, have gained unprecedented power and economic influence. Globalisation of business, industry and trade is presenting new and complex challenges for the protection of human rights. Amnesty International has investigated and documented the serious impact companies can have on the human rights of the individuals and communities affected by their operations. Companies cause harm by directly abusing human rights, or by colluding with others who violate human rights. Despite this potential to cause significant harm, there are few effective mechanisms at national or international level to prevent corporate human rights abuses or to hold companies to account. This means those affected by their operations – often already marginalised - are left powerless, without the protection to which they are entitled, or meaningful access to justice.

Since the UN Human Rights Council's unanimous endorsement of the UN Guiding Principles on Business and Human Rights in June 2011, there has been a conspicuous failure by most States to take the tangible steps necessary for their effective implementation. Just four States have published national action plans to implement the Guiding Principles (UK in September 2013, the Netherlands in December 2013, Denmark in March 2014, and Finland in September 2014). Today, the situation remains critical: human rights defenders working in the context of business activities are extremely vulnerable; impunity continues to prevail; and access to justice for victims of corporate-related abuses remains, in the vast majority of cases, elusive.

Robust National Action Plans on Business and Human Rights can potentially add important building blocks to the emerging global architecture for effectively addressing corporate-related human rights abuses. The areas that must be prioritised for action in national plans include: corporate legal accountability for human rights abuses committed abroad (i.e.

outside the company's home state borders); access to state-based remedies by individuals and communities affected by corporate human rights abuses; legal protections for vulnerable groups; and, the mandatory transparency and reporting of information relevant to corporate human rights risk and impact assessment.

Therefore AI welcomes Ireland's commitment to developing a National Action Plan on Business and Human Rights (NAP), and the call for submissions issued by the Department of Foreign Affairs and Trade (DFAT) as it commences preparation of this NAP. We submit the following recommendations to DFAT regarding the content and process of developing the NAP.

1. Explain why a NAP is necessary

AI urges that in developing this NAP, DFAT take the opportunity to generate public, political and, of course, business sector awareness of business and human rights norms and standards, and why a NAP is needed for Ireland.

This need for a clear articulation of Ireland's domestic approach to Business and Human Rights norms is sharpened by the increased Government attention to trade and investment, and promoting the activities of Irish companies abroad to this end. As the Minister for Jobs, Enterprise and Innovation has stated: "Pioneering companies such as those who travelled to the Gulf are fighting for new markets in these economies, and if we are to deliver the export-led growth that will support our jobs recovery, Government must stand behind them with the supports they need. [...] We are in the business of improving and intensifying these supports for multinationals and exporting companies, not undermining them."¹ It is important that this NAP clearly outline how it will be explained to Irish companies how business and human rights can, and in fact must, go hand in hand. It must fully reflect that the Irish State has a duty under international human rights law to protect human rights from abuse by third parties, including business enterprises. It must clearly outline that Ireland is obliged to, and will, fulfil the UN Guiding Principles' duty to take "appropriate steps to prevent, investigate, punish and redress such abuse [by business enterprises] through effective policies, legislation, regulations and adjudication".

The UN Guiding Principles, designed to operationalise the UN "Protect, Respect and Remedy Framework", were intended to serve as a floor for action – reflecting minimum state obligations and corporate responsibilities for human rights abuses, and establishing principles relating to the human right to a remedy for corporate abuses. However it was clear from the outset that the Guiding Principles alone would not be sufficient to effectively bridge the "governance gap" identified by the former UN Special Representative on business and human rights, Professor John Ruggie, as the root cause of the current business and human rights predicament. They must be complemented by effective national regulatory measures, including with extra-territorial effect, to address on an immediate basis the continuing human rights protection gaps. As Professor Ruggie stated in his final report to the UN Human Rights Council, the Guiding Principles "mark the end of the beginning" by providing "a common global platform for action, on which cumulative progress can be built". The reality today is that governments and businesses alike have failed to make the Guiding Principles meaningful. Corporate lobbyists have done everything possible to ensure the principles remain entirely voluntary. The Guiding Principles have not been the game-changer they could

¹ "Opinion: raising human rights issues during a trade mission would represent a token gesture while achieving nothing", Irish Times, 23 January 2014, available at www.irishtimes.com/business/economy/employment/trade-missions-are-not-the-place-to-raise-human-rights-1.1664407?page=1.

have been. The people whose homes have been demolished by company bulldozers, or whose livelihoods are destroyed by oil spills, are as powerless as ever.

Therefore, Ireland must play its role in ensuring that the activities of Irish-based companies investing in third countries or engaged in business there (including through their subsidiaries, supply chains and key business relationships) do not infringe, or contribute to infringing, upon human rights. This is important for Ireland and Irish businesses, but it is also important that Ireland's NAP be a model for other states to follow.

2. Do not overstate the business case

We urge that the business case for human rights observance not be overstated in the NAP. Irish businesses will need to be incentivised to meet their responsibilities under the Guiding Principles and any resistance/bemusement overcome. However, the business case for respecting human rights is unclear. It is evident that often the positive is true, that abusing human rights can be very profitable for companies. Linking human rights with successful business also risks undermining the moral argument that businesses are a part of wider society, and should respect the Universal Declaration of Human Rights. They should not be allowed to get away with abusing human rights even when this is profitable. It also underplays the State's right and duty to impose controls on the activities of businesses to prevent and/or redress human rights abuses. The NAP's content and its implementation should be firmly grounded in international legal standards that are relevant to business and human rights – in addition to the Guiding Principles - including all relevant international human rights law.

3. Gather baseline information

In the process of developing the NAP, DFAT should undertake a baseline assessment and gap analysis. A report jointly published by the International Corporate Accountability Roundtable (ICAR) and the European Coalition for Corporate Justice (ECCJ) in November 2014, *Assessments of Existing National Action Plans (NAPs) on Business And Human Rights*, assesses each of the four existing NAPs (this report and other assessments of existing NAPs contain other important information which should inform Ireland's NAP development). One important cross-cutting conclusion is: "Possibly the most significant weakness in the drafting processes of all four existing NAPs was the consistent failure to conduct national baseline assessments (NBAs) to inform the content of the NAPs." In conducting such a baseline assessment, DFAT must actively seek and willingly receive information relevant to the NAP's remit – allegations of corporate abuse as well as examples of good practice. It must ensure that it consults and meets with a broad range of stakeholders including local civil society and rights-holders in places where Irish companies operate.

The NAP should also clearly set out the laws that exist to ensure that corporate actors are being held to account for committing illegal or criminal acts that lead to human rights abuses abroad. It should identify known actual or potential legal enforcement gaps in holding companies to account for illegal conduct under existing law. It should also identify known gaps in criminal accountability that exist between Ireland legal regimes and those of other states in relation to corporations.

4. Ensure the participation of all relevant Government departments and agencies in preparing the NAP

The Guiding Principles cover a very wide range of issues which span the policy responsibilities of a number of Government Departments and agencies. It is critical that all are involved early in the design and development of Ireland's NAP, so that the baseline information and gap analysis generated is comprehensive; actions and responsibility for

delivering on actions are correctly identified and accepted; and there is less potential for role confusion later.

5. Ensure effective State regulation of corporate actors, particularly with respect to operations conducted abroad

The NAP should, of course, outline voluntary mechanisms that companies can take to embed this new approach. But it should also identify existing and additionally needed legally binding measures that can strengthen the regulation of companies, particularly when operating abroad. This would reflect the emerging recognition of the need for States to ensure that their companies are not involved in human rights abuses in other countries. The ongoing failure by States to hold corporate actors domiciled in their territory accountable for human rights abuses committed abroad represents a key gap in protection which the NAP must seek to address. Without measures to remedy this failure, the gap in human rights protection against abuses by business will never be closed. Corporate entities are currently able to operate across State borders with ease, while State borders simultaneously present institutional, political, practical and legal barriers to corporate accountability and redress for the victims of corporate human rights abuses. In order to effectively address this gap, there is a need for States to enforce and adopt regulatory measures at the national level that have extraterritorial effect.

6. Require businesses to undertake human rights due diligence throughout their global operations

Effective regulatory measures put in place by States can take a number of forms. One concrete measure is for States to legally require their businesses to undertake human rights due diligence throughout their global operations. Since, as Professor Ruggie has stated, “the responsibility to respect is the baseline expectation for all companies in all situations” and “to discharge the responsibility to respect requires due diligence”, it follows that all companies should carry out human rights due diligence particularly where there is a high risk of human rights abuses.

An immediate and important step towards mandatory due diligence for all companies would be for States to require that state-owned-enterprises and businesses receiving any form of public support conduct human rights due diligence. States should not provide support if this is not done. Amnesty International has been among those calling on national export credit agencies (ECAs) to require that businesses conduct human rights due diligence as a condition for receiving support. States must ensure that they are not complicit in the commission of human rights abuses by corporations. Although this principle is referenced in the Guiding Principles, in practice little is currently being done by States to give effect to it. Similarly, Irish law should require mandatory disclosure by corporations of information relevant for determining potential or actual negative human rights impacts as a result of their operations. The NAP could start by assessing how legislation could be developed.

7. Ensure access to justice for victims of corporate abuse, particularly with respect to judicial and state based mechanisms in Ireland as companies’ home State

In order to ensure that the human right to an effective remedy is properly respected in cases of corporate abuse, there must be effective access to State-based judicial and non-judicial remedies. These can be supplemented, but not replaced, by corporate-level grievance mechanisms. The NAP should set out clear actions to ensure that existing laws that hold companies accountable for illegal acts are properly enforced. In particular, the NAP should seek to ensure and improve the ability of rights-holders to access remedies in Ireland as the home State where corporate actors are domiciled.

Individuals and communities currently face a number of hurdles when trying to seek redress for business-related human rights abuses. The problem is particularly acute for rights-holders who suffer abuses caused or contributed to by companies incorporated outside their State and attempt to seek justice in the companies' home States. Amnesty International's research has identified four major obstacles to remedies which Ireland's NAP should consider and address: 1) challenges presented by the complexity of corporate structures and how these are often used to evade accountability; 2) barriers to access to information for victims; 3) imbalances in power and influence between corporate actors and victims and the overall impact that this has on justice; and 4) legal procedural hurdles that can be used to defeat extraterritorial claims, such as the principle of forum non conveniens.

8. Ensure attention to protecting the rights of specific groups, particularly women, children, Indigenous Peoples and human rights defenders

The NAP should provide clear and specific guidance in relation to protecting and respecting the rights of members of specific marginalised or at risk groups. Such guidance should draw upon the recommendations made by relevant UN Special Procedures. Women and children are obviously to be included. Given the significant and increasing risks faced by Indigenous peoples and human rights defenders in the context of many corporate activities, the NAP should ensure that members of these groups are also included in efforts relating to persons in vulnerable situations. As noted in the Guiding Principles, some human rights or societal groups may be at greater risk than others in particular industries, countries or contexts, and therefore should be the focus of heightened attention.

9. Ensure integration of human rights into business policy and standards

The NAP should ensure that it is not focussed just on action after the commission of human rights abuses, but also on prevention and risk assessment/mitigation. The Guiding Principles call on States to "set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations". In order that this happens in practice, the NAP should identify mechanisms to ensure that the language, norms and approaches outlined in international standards on business and human rights are effectively integrated into Irish business standards and processes, including for such businesses in their overseas operations, rather than being seen as a tick-box exercise, afterthought or 'add on'.

This applies also to Government policies, standards and statements on business (including trade and investment). We note and welcome the commitment to developing this NAP in the recently published review of Ireland's foreign policy, *The Global Island: Ireland's Foreign Policy for a Changing World*. However the section entitled 'Our Prosperity' covering trade, investment and business overseas, and other areas of the review covering such issues, make little or no reference to human rights. It is important that this NAP outline that Irish Government policies, standards and statements on business should and will embed the language of human rights so this new normative framework is seen as really mattering and being driven from a place of true commitment.

10. Consider how to address the human rights impact of Irish corporate taxation policy

Discussion has recently begun internationally and nationally here in Ireland of the interrelatedness between human rights and taxation policy. In her 2014 report to the UN Human Rights Council, the then United Nations Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona, outlined how the state duty to 'protect' provided in the Guiding Principles requires regulation of businesses so that they do not participate in or facilitate tax abuse. She also outlined that the responsibility of businesses to respect human rights may be breached by tax avoidance insofar as it has a negative human

rights impact. Her successor, Philp Alston, in his address entitled “Tax Policy is Human Rights Policy: The Irish Debate” to a February 2015 Christian Aid Ireland conference in Dublin, outlined the many ways in which corporate taxation policy and human rights are intertwined. The NAP should thoroughly review this area and include measures as are appropriate.

11. Build clear and measurable objectives and actions, time frames, indicators and monitoring into the NAP

Without clear and measurable objectives and actions, and time frames and indicators for each, it will be impossible to measure progress and drive implementation. Identifying budgets will also be important. It will also be important to clearly identify which agency is responsible for which action so there is role clarity, and acceptance of and capacity for those roles, from the outset. Regarding business enterprises themselves, there should be mandatory transparency and reporting of information relevant to corporate human rights risk and impact assessment. Regarding monitoring and evaluation of the NAP, it will be important that a specific central body is charged with such and be given the necessary resources, expertise and skills to perform its task. This is also an opportunity to ensure that Ireland’s National Contact Point under the OECD Guidelines on Multinational Enterprises is reviewed and strengthened. Reports on implementation of the NAP should be regularly published, at least on an annual basis.

12. Ensure regular review of the NAP

The NAP should not be viewed as an immutable long-term plan. As international standards evolve and fresh assessments are conducted of other NAPs, Ireland’s NAP should be regularly reviewed and updated, especially where there is potential for ongoing enhancement of national laws, procedure and standards.

13. Identify and provide development and capacity-building for government and business

Unless development and capacity-building actions are built into the NAP, and based on actual needs analyses among the wide range of actors in government and the business sector likely involved in its implementation, lack of capacity and knowledge will inevitably become an obstacle to its implementation. This extends to accountancy professionals, legal professionals and the judiciary.

14. Support a new UN treaty

Since the Guiding Principles were adopted, for the communities and individuals whose rights are violated, little has changed. The Guiding Principles are not binding; nor are the widely referenced, but equally poorly implemented, OECD Guidelines for Multinational Enterprises. The voluntariness approach has not worked. Amnesty International therefore supports the development of a treaty on business and human rights because we believe States must fulfil their duty to protect people against all human rights abuses, including those caused by corporate abuse and negligence. That does not mean disregarding or dismantling the Guiding Principles. It means building on them and making some of their key provisions mandatory.

A treaty could clearly set out what the State duty to protect means in the context of business operations, including with regard to parent and controlling companies of multinational groups active in more than one country. It would help to standardise how States relate to business.

A treaty should require each State to enact laws to make corporate human rights due diligence mandatory, and introduce sanctions and legal liability for companies that fail to act responsibly. EU States and others have been skeptical about the need for a new treaty. Ireland and its fellow EU member States voted against the UN Human Rights Council 2014 resolution establishing an Inter-Governmental Working Group with an open-ended mandate to

work on the elaboration of such a treaty. Amnesty International urges that in the context of developing this NAP, Ireland supports the principle and object of a new treaty and commit to participation in discussions thereon with a positive and open mind.

15. Support development of a Council of Europe recommendation on business and human rights

Amnesty international also urges that Ireland support the development of a Council of Europe recommendation on business and human rights. The Committee of Ministers of the Council of Europe instructed in January 2013 the CDDH to elaborate – in co-operation with the private sector and civil society – a non-binding instrument to address gaps in the implementation of the UN Guiding Principles at the European level, including with respect to access to justice for victims of corporate human rights abuses. An expert group is currently working under CDDH to elaborate this non-binding instrument in the form of a recommendation. AI believes that a recommendation will make a significant contribution to addressing corporate-related human rights abuses if sufficiently robust and forward-looking.

In its Declaration on the UN Guiding Principles on Business and Human Rights, adopted on 16 April 2014, the Committee of Ministers recognised the importance for States to take appropriate steps to protect against human rights abuses by business enterprises. It stressed its willingness to contribute to the effective implementation of the Guiding Principles, as a global baseline, by identifying and proposing appropriate solutions to specific gaps. Amnesty International believes that the elaboration of a non-binding instrument on business and human rights provides the Council of Europe with a unique opportunity to build on the Guiding Principles, developing further some of its sections such as access to remedy, and adopting and expanding on concrete recommendations to Member States in these areas.

It is crucial that this instrument not merely repeats or reiterates the Guiding Principles or other existing instruments. To truly add value, the recommendation should seek to identify and address key issues such as the need for States to remove barriers to remedy in cases of corporate-related human rights abuses, and to adopt regulatory measures to ensure businesses effectively respect human rights throughout their operations and are held accountable when they do not.

Conclusion

Evidence shows that major gaps in national, regional and global protections continue to leave individuals and communities vulnerable to business-related abuses; serious obstacles impede them when they seek redress; and those responsible are only rarely, if ever held to account. The challenge for Ireland therefore is develop a NAP that will ensure that it not only fulfils its obligations under the Guiding Principles on paper, but in practice fulfils its duty to protect against corporate abuse, to ensure that companies meet their responsibility to respect human rights, and to ensure that victims are able to exercise their right to an effective remedy.

To meet this challenge, it is critical that Ireland not only works towards the development and implementation of a gold standard NAP on business and human rights, but continues to build on and elaborate this NAP as new standards emerge. We look forward to this process outlining how business interests and human rights can - and will - go hand in hand

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