



Christian Aid Ireland submission:¹

Government of Ireland consultation on a National Action Plan for Business and Human Rights

1 March 2015

Christian Aid Ireland is a development organisation, working globally in over 40 countries. We work for profound change that eradicates the causes of poverty, striving to achieve equality, dignity and freedom for all, regardless of faith or nationality. We are part of a wider movement for social justice. We provide urgent, practical and effective assistance where need is great, tackling the effects of poverty as well as its root causes.

Christian Aid Ireland welcomes this opportunity to provide input to the Irish government's National Action Plan. Ireland's commitment to human rights is already internationally recognised, and the development of a National Action Plan on Business and Human Rights is an opportunity to enhance this reputation further by becoming a recognised global leader in this area.

Human rights are central to our work, and this submission highlights some of our key concerns with regards to where business and human rights intersect, particularly in developing and countries affected by violence and ongoing conflict. In order to reflect the experience of these countries, our submission is supplemented and informed by case studies of three of Christian Aid's partners: ABColombia in Colombia, Al-Haq in Israel/Palestine and the Zimbabwe Environmental Lawyers Association (ZELA) in Zimbabwe.

1. General principles: the international legal framework

The era of declaratory corporate social responsibility (CSR) is over. It is no longer enough for governments to act as though promoting CSR initiatives somehow absolved them of their obligations to govern in this domain, and to do so in the public interest. It is no longer

¹ This submission was prepared by Hannah Grene, Barncat Consulting with input from Christian Aid staff.

enough for companies to claim they respect human rights; they must know and show that they do. And it is no longer enough for rights-holders merely to harbour the hope that governments and companies will fulfil their respective obligations; they are entitled to demand remedy for harm done.

John Ruggie, former UN Special Representative on business and human rights, London, 4
September 2013

The UN Guiding Principles represent the current globally agreed baseline in the field of business and human rights. They have provided momentum for state-led and civil society initiatives concerned with business and human rights around the world. However despite this renewed energy, the failure of states to fulfil their duty to protect human rights has led to much frustration from communities suffering most from human rights violations related to business. In particular those furthest away from the centres of power and decision-making are those most likely to experience violations and those least able to inform the business and human rights agenda as it develops. This frustration has underlined the call by some for an inter-governmental UN business and human rights treaty-making process.

A National Action Plan needs to be more than just a round-up of CSR initiatives and current government activities which touch upon responsible business. It is crucial that respect for human rights by business be firmly grounded in a legal framework, rather than through self-regulation and voluntary initiatives.

To ensure the full protection of human rights, the government should include specific references in the National Action Plan to international humanitarian law, international customary law, relevant elements of public international law, and to existing policy, agreements and guidelines, as well as to legally binding international human rights law.

The Irish government should make explicit the obligation of businesses to respect international law, including in cases where national law or local practice may be in conflict with international human rights or humanitarian law (Guiding Principle 23). Christian Aid Ireland welcomes the advice issued by the Department of Foreign Affairs and Trade on investment in Israeli settlements in the Occupied Palestinian Territory (OPT) as an attempt to provide guidance in this area. We would further suggest that staff in the Irish embassies abroad be supported by a body like the Irish Human Rights and Equality Commission to offer advice to businesses who may have doubts as to whether a particular local law or practice is in conformity with international human rights law.

Finally, any measures to ensure business respect for human rights are meaningless without appropriate reporting requirements and consequences to comply. This is clearly stated in Guiding Principle 1, and elaborated upon in Guiding Principles 2-6. We would urge the

Government to require human rights due diligence procedures where appropriate, and to use both legal and economic consequences to hold companies to account for their actions.

Case study one: Israel/ Palestine and the work of Al-Haq

Christian Aid works for an end to impunity for violations of international law in Israel and the occupied Palestinian territory (IOPT). An area in which we see positive results is that of business and human rights, specifically working to ensure companies are not profiting out of sustaining conflict. Promoting business and human rights presents an opportunity to transform conflicts and unravel the structures that entrench violence, lead to de-development and cause untold suffering.

Established in 1979 as the first Palestinian human rights organisation, Al-Haq is internationally respected for their work on documenting and seeking to bring an end to human rights violations in the OPT, regardless of the identity of the perpetrators.

With the rise of focus on the role of business with regard to human rights, Al-Haq are increasingly challenging the role played by corporate actors in the occupied Palestinian territory and their potential complicity in violations of international law. Through this engagement, says Al-Haq's director Shawan Jabarin, 'it has become more and more evident that one of the main reasons for the perpetuation of the conflict and the occupation is that of business interests and the profits reaped from the occupation.'

Two lessons can be drawn from Al-Haq's engagement to date with business and human rights in Palestine to date. The first is the difficulty of balancing economic growth with underlying human rights principles. Shawan Jabarin explains: 'With economic incentives being used as the carrot for furthering the negotiation process, the Palestinian leadership must proceed with caution and not allow the lure of short-term economic reward to undermine long-term economic sovereignty. Herein lies the paradox of achieving economic stability within the context of an underlying conflict; because as long as the occupation continues, the TNCs and Israeli business interests continue to reap the profits of Palestinian oppression. When it comes to non-replenishable natural resources, the urgency of action becomes even more profound, as the profits to be made today may not be available to the Palestinian economy in the decades to come.'

Case study one continued.

The second is the rallying point which the Guiding Principles are providing for Al-Haq and other human rights organisations around the world for their work with regard to business and human rights. Jabarin says of the UN Working Group on the Guiding Principles: 'With business and human rights being a global issue, we do not expect Palestine to dominate the agenda, but by addressing cross-cutting themes such as the extractive industries and business and conflict zones, as well as access to remedy, the Palestinian struggle can be interjected into the broader discourse. This discourse is the ideal platform for highlighting transnational corporation-related challenges that we share with much of the developing world.'

Al-Haq have contributed to addressing these shared concerns by developing a template for language on international humanitarian and human rights law to be included in States' National Action Plans, a template which Christian Aid have drawn on for this submission. Jabarin concludes: 'As long as we are able to continue with this work, there will be no more business as usual.'

This case study draws on Shawan Jabarin's article 'Business and Human Rights in Palestine: A Case Study on the Illegal Exploitation of Palestinian Natural Resources' in This Week in Palestine February 2014.

2. Tax, business and human rights

The problem is not the 12.5% tax rate....The problem is that for many years now Ireland has supplemented that rate...with a range of schemes that look to all the world to be designed to facilitate tax avoidance by huge multinationals in return for a pittance of a reward to Ireland. But...the costs to other countries, including developing countries, have been immense.

Philip Alston, UN Special Rapporteur for extreme poverty and human rights, Christian Aid conference, Dublin, February 2015

Tax is increasingly recognised as an important human rights priority. The former UN Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona, devoted her final report in 2014 exclusively to fiscal and tax policy as a determinant in the enjoyment of human rights. At a recent Christian Aid conference in Dublin, her successor as UN Special Rapporteur Philip Alston laid out the various ways in which tax policy intersects with human rights. Taxes not only provide resources to enable the state to fulfil its human rights obligations; they also serve to redistribute wealth and further social equality; they can demonstrate transparency and accountability, and they show where the true priorities of a

government lie. Finally, tax policies can impact on a state's duties with regard to international assistance and co-operation. According to Magdalena Sepúlveda Carmona's report: 'Providing an avenue for high-net-worth individuals and transnational corporations to evade tax liabilities...could be contrary to obligations of international assistance and cooperation, because it can directly undermine the ability of another State to mobilize the maximum available resources for the progressive realization of economic, social and cultural rights.'²

According to Guiding Principle 3 (b), States should 'ensure that other laws and policies governing the creation and ongoing operation of business enterprises do not constrain but enable respect for human rights'. Businesses clearly have a responsibility to respect human rights by not engaging in aggressive tax avoidance, and states have a responsibility to protect human rights by not facilitating such practices.

Christian Aid have been actively campaigning for tax justice for development, and Christian Aid Ireland has engaged extensively with the Department of Finance on these issues. We very much welcomed the decision last year to conduct a 'spillover' analysis of Irish tax policies on developing countries, and provided detailed recommendations to the consultation.

Following on from the results of the spillover analysis, the Irish government should be in a strong position to lead on developing the link between tax, business and human rights. The National Action Plan should therefore address tax issues. Any issues of concern identified in the forthcoming spillover analysis should be dealt with as a matter of urgency. We are concerned, however, that the spillover analysis may not have addressed the issues at the level of depth and detail which we would have recommended.

While Christian Aid welcomed the closing of the 'double Irish' loophole, we note Government proposals to develop a 'knowledge development' box and urge the Government to ensure adequate safeguards are in place to ensure that it is not vulnerable to similar aggressive tax avoidance schemes.

3. Ensuring business respect for human rights in conflict-affected areas

Millions of euro worth of tin, tantalum, tungsten and gold enters the EU every year from high-risk and conflict-affected areas, including parts of countries such as Afghanistan, the Central African Republic, Colombia, the eastern DRC, Myanmar, and Zimbabwe.

Global Witness, February 2015

² Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona, May 2014.

As laid out in Guiding Principle 7 on business and human rights, the heightened risk of human rights abuses while operating in conflict-affected areas requires that States be particularly vigilant in ensuring that business enterprises are aware of the potential for human rights related risk. Given that the host State may be unwilling or unable to protect human rights in conflict-affected areas, it is incumbent on the home State to ensure their business enterprises are aware of the serious risks involved. Ireland should ensure that it provides the necessary guidance to Irish businesses seeking to operate in conflict-affected areas, and refrains from incentivising business in such areas without proper human rights due diligence. At present, for example, a tax incentive is available for employees of Irish companies working in the Democratic Republic of Congo, without any obligation on companies concerned to report on how they ensure respect for human rights in that difficult context - despite grave reports of sexual and gender-based violence, as well as other human rights violations.

Currently, there is no legislation that prohibits the import of conflict minerals into Europe. In March this year, the European Commission announced a proposal “setting up an E.U. system of self-certification for importers of tin, tantalum and tungsten, their ores, and gold originating in conflict-affected and high-risk areas.” The Commission has stated that the new rules would require that any company choosing to comply with OECD due diligence requirements will be added to a “responsible smelters and refiners list,” which, in theory, will help purchasers find reputable agents to work with.

At time of writing, the EU Parliament is currently in the final stages of drafting an EU Regulation on Conflict Minerals, after which it will go to the Council under the co-decision procedure. It is voluntary, meaning companies can choose whether to comply. It is open only to direct importers of ores and metals, thereby leaving out minerals found in manufactured and part-manufactured products. And, it covers only a handful of the natural resources driving conflict and human rights abuses worldwide. The draft Regulation is weaker than the original proposal and Christian Aid, together with other civil society partners, have been campaigning for states to make the reporting requirement mandatory, rather than voluntary. The current draft legislation does not meet Principle 7 d) of the Guiding Principles where States should help ensure businesses are not involved in violations by ensuring that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses. Ireland should develop its own legislation setting out a mandatory reporting requirement businesses working with conflict minerals.

Case study two: Zimbabwe

In 2012, the Zimbabwe Environmental Law Association (ZELA) partnered with the Danish Institute of Human Rights (DIHR) and Social Accountability International (SAI) to implement the 'Pillars in Practice', a project designed to give concrete suggestions and recommendations for implementing the Guiding Principles in the mining sector.

The mining sector has perhaps the greatest potential to contribute to Zimbabwe's economic recovery, stabilization and eventual growth. However, the mining sector in Zimbabwe has been plagued by allegations of gross human rights abuses of communities and mine workers. Violations of communities' rights include their civil, political, environmental, economic, social and cultural rights. Workers' rights violations include unsafe working conditions and low wages.

For ZELA, the UN Guiding Principles 'represent the highest possible affirmation of the need for businesses to be "rights-aware"' and as such provide an entry to addressing violations in the mining sector.' ZELA consulted with government, businesses and civil society to raise awareness of the Guiding Principles and to develop a Country Guide on Business and Human Rights for the mining sector. The Business Guide is aimed at helping business to avoid any negative impact on human rights in their operations in Zimbabwe, and can also be used as a tool for other stakeholders seeking to engage with businesses.

ZELA is now developing a programme of work with the Zimbabwe Human Rights Commission (ZHRC) which will strengthen the Commission's capacity to handle complaints of environmental, socio-economic and cultural rights violations in mining communities. This will address the most crucial and often the most neglected pillar of the Guiding Principles: access to remedy for victims of human rights abuses. ZELA will build on the success of the Pillars to Practice project by expanding their focus in 2015 to development finance, agri-business and the retail sector.

4. Policy coherence

It is the opinion of this Committee that the Trade Agreement in its present form fails to provide for monitoring of the human rights clause and thus presumes protection of human rights rather than proves their protection. The Committee finds that the provisional application and potential ratification of this Trade Agreement could be interpreted as condoning reported ongoing abuses.

Political Contribution on the Proposal for a Council Decision on the conclusion of the Trade Agreement between the European Union and Colombia and Peru, December 2014, Joint Committee on Jobs, Enterprise and Innovation³.

Policy coherence across government requires the Department of Foreign Affairs and Trade to harness the relevant strengths of all government departments in support of our international agenda, and at the very least ensure that the policies of one government department do not undermine our foreign policy objectives. If our foreign policy is to be guided by principles of justice, international law, and human rights law then government policy in all departments needs also to reflect this. This is also reflected in Guiding Principle 8 which states that 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.

Free trade agreements and investment treaties test our commitment to policy coherence and our commitment to human rights. These agreements and treaties have come under mounting criticism on the grounds that they ignore or pay lip-service to the human rights and environmental obligations of host countries and do not take into account adverse impacts on local communities affected by the investment- despite commitments within some agreements to do so. Such incoherence was exposed when the Irish government ratified a Free Trade Agreement with Colombia and Peru despite strong civil society concerns expressed and an important contribution from the Oireachtas Committee on Jobs, Enterprise and Innovation on human rights concerns. Christian Aid Ireland is deeply concerned that despite these grave human rights concerns the Irish government ratified this agreement when it is widely accepted that the human rights mechanisms within the treaty will not adequately safeguard human rights.

³ http://opac.oireachtas.ie/AWData/Library3/Political_Contribution_Com2011569_134923.pdf

The potential conflict that exists between trade objectives and aid objectives is one of the many areas that could threaten the government's commitment to greater policy coherence for development. For example, while a 'whole of government' approach, as described in the One World, One Future document, could mean joint overseas missions including Department of Jobs Enterprise and Innovation, the Department of Foreign Affairs and Trade, and the Industrial Development Authority, how the priorities of any such mission would be established is critical from a development perspective. We would like to see a coherent government policy underpinned by human rights law being the driving force behind such a mission, ensuring that any investment opportunities for Irish companies also deliver sustainable development outcomes and do not ignore human rights concerns.

Case study three: Colombia

There are many serious human rights concerns in Colombia: 5.5 million people are internally displaced by an internal conflict, among the highest figures in the world; 2013 78 human rights defenders, including community, indigenous and afro-descendant leaders, were killed; conflict has claimed at least 220,000 lives since 1958, with more than four of every five civilian; from 2001 to 2009 on average 54,410 women per year, 149 per day, or six women per hour, suffered from sexual violence in Colombia, many of them in the context of the conflict.

The case of Cocomopoca: COCOMOPOCA is made up of 43 Afro-Colombian communities in Chocó who under Law 70 (1993) made an application for collective ownership of their land title. They struggled for 12 years to have their land rights recognised. Their land title for 73,000 hectares was handed to them in a blaze of publicity as part of the Plan de Choque (a forerunner to Law 1448). After receiving the title they discovered a mining concession had been granted within their territory to Anglo Gold Ashanti, a company registered on the British Stock Exchange. This concession was granted without prior consultation with the communities which, in Colombian law, contravenes their fundamental rights.

The full extent of concessions granted to MNCs in COCOMOPOCA's territory is not known. None have undertaken the prior consultation process required by Colombian law. The community has tried to obtain this information, it is costly and time consuming and they could not have attempted it without the support of the Church. But they were constantly told to go to different offices in different parts of the country. There is a genuine lack of transparency in the information available to communities.

They finally obtained some information through a right of petition. In January 2014, according to this information it is believed that the AGA group has been awarded up to 21 mining titles that overlap with Cocomopoca territory, amounting to up to 17,303 hectares. AGA, however, has told an ABColombia member organisation that: “there are a total of 14 mining titles in the name of AngloGold Ashanti (AGA) that partially or completely overlap with the collective land of this ethnic community.” Nevertheless, we must note that the titles in question are managed by Glencore, with which AGA has a Joint Venture. Given the joint venture agreement the mining activity undertaken on this land is embarked upon by Glencore”.

This situation puts in jeopardy the sustainability of their livelihoods. They have been forced into the position of having to legally challenge a multinational corporation. This process is ongoing.

Chocó’s strategic position has made it a key region for drugs and arms trafficking and since the 1980s various armed actors have clashed over the control of the territory. For those living in Chocó, this violence has led to human rights abuses, forced displacement, economic blockades, restriction of movement and forced recruitment into armed groups.

Many of those living in Cocomopoca territory say they believe that violence has intensified due to the stores of natural resources and the subsequent economic interest in the area, and a number of community leaders have reported receiving death threats.

Impunity is a major obstacle to their security in this situation and a challenge to the space that this community has for defending their rights. Without the support of the Catholic Church through the Diocese of Quibdó and the NGO Tierra Digna, who provide legal support to the community, there would have been no way this community could have been afforded sufficient protection or expertise to pursue the case through the court system.

COCOMOPOCA are not alone in this situation, with many other communities encountering similar problems. This experience of Cocomopoca highlights the need for rigorous human rights due diligence.

5. Regard for gender issues within business and human rights

Women carry out 60 per cent of the world's labour, yet receive only 10 per cent of total income.

Christian Aid, Partnership for Change: Strategic Framework 2012-2017

The Guiding Principles are founded on the principles of equality and non-discrimination, in line with other human rights frameworks, and specifically acknowledge the different risks that may be faced by men and women.⁴ Inequality and discrimination against women is a root cause of gender based violence. Consequences of gender based violence include economic loss, social isolation and marginalisation, lost education, social and political participation opportunities, in addition to psychological and physical suffering up to and including death, perpetuating the cycle of poverty⁵.

We must however not only consider the risks of human rights abuses– such as gender based violence at work, but also the systemic reasons why women are frequently not enjoying full and equal rights at work. Women often benefit substantially less from any economic gains from business activity in developing countries. While the majority of the land in sub-Saharan Africa is worked by women, women frequently lack land titles and are excluded from decision-making processes, making them more vulnerable to unfair land acquisition. This problem is exacerbated by the fact that women are less likely than men to find employment in extractive or agri-business sectors. When women do work, they are often paid less than men, and are more likely to be balancing household duties with work outside the home. Through the National Action Plan, the government has an opportunity to reflect on these factors and to encourage Irish companies to consider the gender impact of their activities in developing countries. For example, Progressio UK have called upon multinational companies to develop linkages into the local economy as service providers. By using local businesses as service providers, women can be empowered as key economic actors to provide services such as catering, accommodation, and community shops⁶.

Business needs to give particular consideration to gender when operating in countries with levels of conflict. For example the link between the conflict around extractives and the high

⁴ UN Guiding Principles on Business and Human Rights, General Principles, p1.

⁵ *Ending Violence against Women and Girls Programming Essentials*, UN Women, June 2013

⁶ <http://business-humanrights.org/en/working-group/events-including-un-forum/un-forum-on-business-and-human-rights/third-annual-un-forum-on-business-and-human-rights-geneva-1-3-dec-2014/materials-launched>

levels of sexual violence continuing in the DRC has been well documented. The extractives industry is also associated with sexual exploitation and prostitution. ABColombia has recommended that mandatory reporting by companies includes information on any alleged or documented sexual violence or exploitation incidents in relation to extractive company personnel.⁷

6. Human rights defenders

Protecting human rights defenders, a key concern for Christian Aid, is often closely linked to the struggle to protect against human rights abuses by business, particularly with regard to land dispossession, the extractives industry and conflict.

Ireland has been at the forefront in implementing the EU Guidelines on Human Rights Defenders, with the Department of Foreign Affairs and Trade developing its own guidelines for Embassy officials on human rights defenders. Christian Aid acknowledges the excellent work done by embassies in this regard, and would call on all embassies to proactively support the work of human rights defenders and use the EU Guidelines.

Recommendations

1. The National Action Plan should be developed and implemented with cross-government involvement to provide policy coherence. The National Action Plan should set out specific actions and targets to identify the department in government responsible for implementation of those actions, the timeframe for delivery, and the process of evaluation and review and how business and civil society will be involved.
2. Ireland's existing human rights obligations should inform the National Action Plan. The Irish Government should include specific and explicit references in the National Action Plan to international humanitarian law, international customary law, relevant elements of public international law, and to existing policy, agreements and guidelines, as well as to international human rights law.
3. The Irish government should make explicit the obligation of businesses to respect international law, including in cases where national law or local practice may be in conflict with international human rights or humanitarian law.
4. Officials in the Irish embassies abroad should be supported by bodies such as the Irish Human Rights and Equality Commission to offer advice to businesses who may have doubts as to whether a particular local law or practice is in conformity with international human rights law.

⁷ ABColombia, Colombia: Women, Conflict-Related Sexual Violence and the Peace Process, Recommendations

5. Human rights obligations should be central to Bilateral Investment Treaties and Free Trade Agreements. Investor protections should be contingent on companies' adherence to international labour, human rights and environmental standards. Where human rights concerns have not been addressed such agreements should not be signed or ratified. Irish government should develop and set out clear and specific human rights guidelines for Irish companies doing business in conflict affected countries in order to ensure they do not violate human rights and engage in rigorous due diligence.
6. The Government should require human rights due diligence procedures, particularly in conflict affected countries and countries supported by Irish Aid either bilaterally or through Irish NGOs, and should use both legal and economic consequences to hold companies to account for their actions. Legal measures might include greater responsibility for Irish companies with regard to their overseas supply chain, and requirements for human rights due diligence, ensuring that business enterprises must demonstrate that they have implemented the necessary measures to prevent human rights abuses. Economically, the Government should make appropriate human rights due diligence a requirement for public procurement, public-private partnerships, for export licences and for any state investment or support.
7. If the process within the European Union and the forthcoming EU Regulation on Conflict Minerals fails to deliver strong, binding regulations on responsible sourcing of conflict minerals, Ireland should show leadership in this area by doing so itself. Ireland should develop strong, binding regulations on responsible sourcing of conflict minerals. This should include provisions to ensure that companies across the entire supply chain should put in place processes that help them identify, mitigate, and publicly report on risks in their supply chains. The scope of companies covered by the proposed scheme should be broad and not only from a limited number of primary importers, but also include companies that first place component parts or finished products containing those materials on to the EU market.
8. The National Action Plan should make explicit the link between tax, business and human rights. This should include government recommendations to businesses not to engage in aggressive tax avoidance as part of their CSR commitments and human rights responsibilities. The government should also advise that companies negotiating tax incentives do so in fully transparent manner, and in the full knowledge of all government departments in the host country.
9. Greater transparency in the tax affairs of multinational companies promotes accountability of both states and companies. The government should actively promote and support initiatives that enhance transparency such as full publicly

accessible country by country reporting, and the introduction of publicly accessible registers of the owners of companies.

10. Any issues of concern that emerge from the spillover analysis should be dealt with as a matter of urgency.
11. Through the National Action Plan, the Government should encourage Irish companies promote gender equality, ensure they do not exacerbate levels of gender based violence and give full consideration to all gender impact of their activities in developing countries.
12. The National Action Plan should emphasise that human rights defenders and other civil society actors have an important and legitimate role in implementing the Guiding Principles. All Irish embassies should continue to implement and build on both the EU Guidelines and the Department of Foreign Affairs and Trade internal guidelines on human rights defenders.

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