

## Executive Summary

This Review of Access to Remedy in Ireland is timely. The context is the adverse impacts of business on human rights and the environment, an accountability gap, increasing litigation, and an anticipated EU legislative initiative concerning Sustainable Corporate Governance including human rights due diligence in 2021. The content considers a wide range of legal, policy, and regulatory areas. It is acknowledged that developments in Ireland will occur within the context of global and also EU level developments. This Review necessarily highlights deficits in the existing framework. It evaluates what progress is required along which dimensions in order to enable and advance remedy for potential victims overseas in Ireland. Input and feedback were sought and welcomed throughout its development.

The circumstances regarding remedy in Ireland are situated within a fast evolving international context. There is realisation that voluntary initiatives, alone, have proven inadequate to prevent negative impacts on human rights and to provide redress. Globally, greater momentum in implementing voluntary initiatives, in combination with instrumental measures is required. In other jurisdictions, cases involve tens of thousands of claimants, and concern allegations of rape, torture, killing, slave labour, and environmental pollution causing damage to livelihoods and health. Rights holders who experience business-related adverse impacts face significant legal, procedural and practical barriers to remedy. Wherever it is sought, the path to remedy is excessively long and arduous. In Ireland, seeking remedy would be yet more onerous for claimants. Certain building blocks of remedy, such as mechanisms of collective redress, are unavailable. Significant legal costs, combined with a lack of available legal aid or third party funding mechanisms, can be expected to inhibit claimants.<sup>1</sup> Some barriers for potential victims overseas may be readily addressed, by providing freely accessible complete information regarding remedies in Ireland, both judicial and non-judicial. Dismantling other barriers will require legislative assessment, which has in several instances been previously recommended, but not actioned.

This review highlights developments in civil litigation and new approaches in criminal law. It proposes the consideration of successful models, which could be adapted for Ireland. It recommends international standards on effective remedy for those facing additional barriers, and specific consideration of gender dimensions. Although the consultation was inhibited by the pandemic, responses indicate that certain Irish entities have developed practices consistent with international standards. To progress, it is crucial that stakeholders are fully engaged, and that capacity is enhanced. Responding to the issues raised will require proactive and sustained measures to reduce legal, procedural, and practical barriers to remedy.

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<sup>1</sup> To the authors knowledge, litigation of the style discussed in this review has not been commenced in Ireland, although business operating in Ireland are being discussed in connection with abuses overseas. See GLAN Complaint to Irish National Contact Point (2018) available at <<https://www.glanlaw.org/single-post/2018/10/24/GLAN-files-complaint-against-Irish-oil-companys-dealings-in-annexed-Western-Sahara>>; Christian Aid investigation of the relationship between the ESB and the Cerrejón mine (2020) available at <https://www.christianaid.ie/resources/undermining-human-rights-ireland-esb-and-cerrejon-coal>.

## Introduction

This is an independent review commissioned by the Department of Foreign Affairs under the auspices of the National Plan on Business and Human Rights 2017-2020.<sup>2</sup> Its purpose is to evaluate how best to ensure remedy for potential victims of human rights abuses by companies domiciled in Ireland, with a focus on legal, procedural, or financial barriers.<sup>3</sup> It included consideration of those who face additional barriers to remedy, including women. It was conducted against the background of Ireland's existing international human rights law obligations,<sup>4</sup> and the UN Guiding Principles on Business and Human Rights.<sup>5</sup>

### *About the Author*

Dr Rachel Widdis is an Adjunct Assistant Professor teaching Business and Human Rights in the School of Law, Trinity College Dublin. Her PhD concerns constructing accountability in business and human rights.<sup>6</sup> She holds Masters degrees in Business and in Law, is an independent non-executive director, and consultant. She previously held positions in Structured Finance in ABN-AMRO Luxembourg, EMEA Business Development in Paris and as a Financial Analyst in Citigroup in London. Her advocacy work has included victims' rights, trafficking in human beings, and as an expert advisor on research in refugee camps. Dr Widdis has been commissioned to develop a proposal for human rights and environmental due diligence in an Irish context for the Irish Coalition for Business and Human Rights.<sup>7</sup>

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<sup>2</sup> ReganStein, Leading Edge, and Department of Foreign Affairs and Trade, 'National Plan on Business and Human Rights; Baseline Assessment of Legislative and Regulatory Framework' (2019) (Baseline Assessment) Recommendation 15 available at: <https://www.dfa.ie/media/dfa/ourrolepolicies/humanrights/Baseline-Study-Business-and-Human-Rights-v2.pdf>; pursuant to National Plan on Business and Human Rights (NAP) available at <https://www.dfa.ie/media/dfa/alldfawebsitemedia/National-Plan-on-Business-and-Human-Rights-2017-2020.pdf>.

<sup>3</sup> Per Recommendation 15 of Ireland's NAP and the independent Baseline Assessment (n 2).

<sup>4</sup> See [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=83&Lang=EN](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=83&Lang=EN).

<sup>5</sup> UN Guiding Principles on Business and Human Rights: Implementing the 'Protect, Respect and Remedy' Framework, available at [https://www.ohchr.org/documents/publications/guidingprinciplesbusinessshr\\_en.pdf](https://www.ohchr.org/documents/publications/guidingprinciplesbusinessshr_en.pdf), taking into consideration recommendations of the UN Working Group on the issue of human rights and transnational corporations and other business enterprises [www.ohchr.org/en/issues/business/pages/reports.aspx](http://www.ohchr.org/en/issues/business/pages/reports.aspx).

<sup>6</sup> This Report draws upon PhD thesis Rachel Widdis, 'Building Accountability in Business and Human Rights: An Investigation of the Development of Foreign Direct Liability Litigation and Feasibility in Ireland' (2020) available at <http://hdl.handle.net/2262/94293>. Rights to original writing and research belong to Rachel Widdis ([widdiscr@tcd.ie](mailto:widdiscr@tcd.ie)).

<sup>7</sup> Irish Coalition for Business and Human Rights members: Trócaire, Trinity Centre for Social Innovation, Trinity Business School, Comhlámh, Front Line Defenders, Fairtrade Ireland, GLAN, Centre for Business and Society (CeBaS) UCD, Oxfam, LASC, Christian Aid, Irish Congress of Trade Unions, Friends of the Earth, NWCI Academics; Rachel Widdis Observers: ESCR-NET, Shift project, Action Aid Ireland, TerraJusta, and Save Our Sperrins [www.icbhr.ie](http://www.icbhr.ie).

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This Review is structured in two parts. The first part, Sections A and B concern the international context. The second part, Sections C to F concern the context of remedy in Ireland.

Section A outlines accountability for business-related adverse impacts on human rights and the environment. Section B highlights international standards on effective remedy, recognising the additional barriers affecting certain groups of rights holders, including women. It synthesises developments within international initiatives, access to remedy in civil and criminal law, and outlines the momentum towards mandatory human rights due diligence.

Section C outlines barriers for potential victims of overseas human rights abuses by companies in Ireland, focusing on existing legal, procedural, and practical barriers to judicial remedy. It considers State based non-judicial remedies, and possible enhancements. The anticipated EU initiative on sustainable corporate governance including human rights due diligence is considered. Section D incorporates reflections from the consultation process and feedback. Section E presents Conclusions. Section F contains the Recommendations flowing from the Review, including potential next steps or further analysis.

## Methodology and Scope

The Review was completed by independent consultant Dr Rachel Widdis. The content considers a wide range of legal, policy, and regulatory areas. Within limits, it is not possible to address in detail all the aspects raised within the Review.

It included a consultation, seeking input from over 80 stakeholders,<sup>8</sup> including State services, commercial entities, and associations including organisations representing affected communities.<sup>9</sup> Consistent with its terms, the commercial entities are mainly large operating enterprises.<sup>10</sup> For all entities, feedback was sought on: Protection and Prevention; Remedy and Barriers to remedy; Experience of legal, practical, and procedural barriers; Barriers in cross border cases; and Developments. A draft report was circulated to relevant State Departments and related agencies for comment. Feedback also was gained during four presentations, to the National Implementation Group on Business and Human Rights, sub-group and plenary. Input and feedback from these consultative processes feeds into the Review and the recommendations flowing from it.

The Human Rights Unit within the Department of Foreign Affairs has supported and facilitated this Review throughout its development.

The participation of a sample of stakeholders was very valuable in its development. With thanks, they are listed with their consent in the Appendix.

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<sup>8</sup> A/HRC/41/43 'Gender dimensions of the Guiding Principles on Business and Human Rights - Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises' (23 May 2019) para 60 identifies that key players including States, business enterprises and civil society organizations/human rights defenders should contribute to realizing effective remedies. Available at [https://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/41/43](https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/41/43).

<sup>9</sup> The nature of the review points to trading companies which have operations or significant supply chains overseas. Although financial institutions and asset managers may have human rights impacts linked to financing and investments, for present purposes, these were not included.

<sup>10</sup> Enterprise Ireland <https://www.enterprise-ireland.com/en/about-us/our-clients/sme-definition.html>.

## Table of Acronyms

BHR	Business and Human Rights
BIICL	British Institute of International and Comparative Law
Brussels I (recast)	EU Council Regulation No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CERD	Convention on the Elimination of all Forms of Racial Discrimination
CFREU	Charter of Fundamental Rights of the European Union
CRC	Convention on the Rights of the Child
CSR	Corporate Social Responsibility
ECHR	European Convention on Fundamental Rights and Freedoms
ENNHRI	European Network of National Human Rights Institutions
EU FRA	European Union Agency for Fundamental Rights
FDL	Foreign Direct Liability
HRDD / HR&EDD	Human Rights Due Diligence / Human Rights and Environmental Due Diligence*
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Commission of Jurists
IHREC	Irish Human Rights and Equality Commission
ILRC	Irish Law Reform Commission
OHCHR	Office of the High Commissioner for Human Rights
MPA	Multi-party Action
NAP	National Action Plan
NCP	National Contact Point under the Organisation for Economic Cooperation and Development Guidelines on Multinational Enterprises
NFRD	EU Directive 2014/95/EU on disclosure of non-financial and diversity information by certain large undertaking and groups
NGO	Non-governmental Organisation
NHRI	National Human Rights Institution
NPBHR	National Plan on Business and Human Rights
OECD	Organisation for Economic Cooperation and Development
Rome II	EU Council Regulation No 864/2007 on the law applicable to non-contractual obligations
UN Binding Treaty	Revised Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises
UNGPs	UN Guiding Principles on Business and Human Rights
UN SDGs	UN Sustainable Development Goals
UNWG	UN Working Group on the issue of human rights and transnational corporations and other business enterprises

\* Depending on source and time, Human Rights Due Diligence is also referred to as Human Rights and Environmental Due Diligence,.

## A. INTERNATIONAL: Legal and Policy Context

Whereas the *raison d'être* of human rights law was directed at abuses by States and their agents, it now encompasses protection by states, from adverse impacts upon rights from private actors including companies. In parallel, the expectations which society has of business have changed.<sup>11</sup> Human rights, rooted in the dignity of individuals, have superior status,<sup>12</sup> In Dworkin's words, rights are 'trumps.'<sup>13</sup> Business may affect a wide range of human rights, both positively and negatively.<sup>14</sup> The field of business and human rights (BHR)<sup>15</sup> is concerned with protection of rights and rights holders from business-related adverse impacts. For example, it considers how revenues are generated, throughout business operations. Rights and the role of law are at the centre of BHR,<sup>16</sup> and differentiate its thrust from the field corporate social responsibility (CSR).<sup>17</sup>

Accountability and remedy for resulting harms may be administrative, judicial or non-judicial. Cases concerning business-related impacts upon rights in EU Member States include allegations of gross

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<sup>11</sup> UNGPs (n 5); Edelman Trust Barometer stating 'not only are the stakes high for business, but so are the expectations that it will act.' available at <https://www.edelman.com/trustbarometer>; US Business Roundtable, 'Statement on the Purpose of a Corporation' (August 2019) available at <https://opportunity.businessroundtable.org/wp-content/uploads/2019/08/Business-Roundtable-Statement-on-the-Purpose-of-a-Corporation-with-Signatures.pdf>. See also Justine Nolan, 'All Care, No Responsibility?' in Lara Blecher, Nancy Kaymar Stafford, & Gretchen C. Bellamy (eds.) *Corporate Responsibility for human rights impacts. New Expectations and Paradigms* (ABA Book Publishing 2014) 3, 15.

<sup>12</sup> See for example, John Rawls, *A Theory of Justice* (Harvard University Press 1971), 114-115; Henry Shue, *Basic Rights* (Princeton University Press 1980); Jack Donnelly, 'The Concept of Human Rights' in *Universal Human Rights in Theory and Practice* (Cornell Paperbacks 2013).

<sup>13</sup> Ronald Dworkin, 'Rights as Trumps' in Jeremy Waldron (ed), *Theories of Rights* (OUP 1985).

<sup>14</sup> Terms used: 'Business' 'entity' and 'enterprise' are generic terms which are used to capture corporation, company, and firm; A 'parent company' is distinguished from 'subsidiary', a legally separate entity. The terms 'abuses' and 'adverse impacts' are used. In a formal sense, private actors do not 'violate' human rights, because they are not (generally) directly bound by international human rights treaties. See Revised Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises' (Revised Draft) art 1(2) available at [www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG\\_RevisedDraft\\_LBI.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf). Under the UNGPs (n 5) an 'adverse human rights impact' occurs when an action removes or reduces the ability of an individual to enjoy his or her human rights. The 'host state' is the state in which the relevant business activities of a subsidiary of a multinational corporation occur. In general terms, the 'home state' of a multinational corporation is the state in which the parent corporation of the concerned group is incorporated. For the purposes of this Review, the default rule in Article 4 of the Brussels I (recast) regime is that the courts in the country where the defendant is domiciled has jurisdiction. For present purposes soft law includes all international instruments defined as codes, guidelines, or principles (excluding treaties), and codes of conduct both developed at international level and at the level of companies or sectors whether by individual corporations, NGOs, or multi-stakeholder groups. See OHCHR 'The Corporate Responsibility to Respect Human Rights: An Interpretive Guide' (2012) available at [https://www.ohchr.org/Documents/publications/hr.pub.12.2\\_en.pdf](https://www.ohchr.org/Documents/publications/hr.pub.12.2_en.pdf). See also Robert McCorquodale and Lise Smit and Stuart Neely and Robin Brooks, 'Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises' (2017) 2 BHRJ 195, 199.

<sup>15</sup> See Anita Ramasastry, 'Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability' (2015) 14(2) *Journal of Human Rights* 237.

<sup>16</sup> The premise is that rights and obligations co-exist as two sides of the same coin. See Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006) chapter 2.

<sup>17</sup> The responsibility to respect is unrelated to philanthropic or other voluntary outreach activities.



abuses such as complicity to murder to environmental justice.<sup>18</sup> In context, a 2014 study found that over half of companies listed on the FTSE 100, CAC 40, and DAX 30 had been identified in allegations or concerns regarding adverse human rights impacts.<sup>19</sup> The recent *KiK* case illustrates the complexity of issues involved.<sup>20</sup> In outline, 258 workers died in a fire in a textile factory producing goods for this German retailer in Pakistan. In proceedings in Germany against KiK, the claimants alleged that it had breached its duty of care to ensure that its supplier in Pakistan had adequate fire safety measures in place. KiK maintained that it had charged an independent auditing company with monitoring the factory and had three reports indicating that fire safety was adequate.<sup>21</sup> In 2019 a German court ruled that the claims were time-barred under Pakistani law, as applicable in the proceedings.

Although the conduct of business can in principle affect all human rights,<sup>22</sup> there is no general international legal regime concerning corporate liability for human rights abuses.<sup>23</sup> Globally, relevant human rights based causes of action are absent.<sup>24</sup> Concurrently, there is recognition that voluntary means alone are insufficient to ensure corporate respect for human rights,<sup>25</sup> and that instrumental means

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<sup>18</sup> Policy Department for External Relations Directorate General for External Policies of the Union PE 603.475 ‘STUDY Access to legal remedies for victims of corporate human rights abuses in third countries’ (2019) <[www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO\\_STU\(2019\)603475\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf)>; European Agency for Fundamental Rights (EU FRA) ‘Business-related human rights abuse reported in the EU and available remedies’ (2019) available at [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2019-business-and-human-rights-focus\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-business-and-human-rights-focus_en.pdf). Jennifer Zerk, ‘Corporate liability for gross human rights abuses: Towards a fairer and more effective system of domestic law remedies’, 8 identifies the main categories of circumstances in which businesses can become implicated in gross human rights abuses: as primary perpetrators; supplying equipment or information utilised in abuses; doing business with regimes with poor human rights records or with known rights abusers. <https://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf>.

<sup>19</sup> IPIS, ‘The Adverse Human Rights Risks and Impacts of European Companies: Getting a glimpse of the picture’ available at [http://corporatejustice.org/documents/ahrri\\_report\\_final-2.pdf](http://corporatejustice.org/documents/ahrri_report_final-2.pdf).

<sup>20</sup> *Jabir and others v KiK Textilien und Non-Food GmbH* Case No. 7 O 95/15, case report available at [www.ecchr.eu/fileadmin/Fallbeschreibungen/CaseReport\\_KiK\\_Pakistan\\_August2019.pdf](http://www.ecchr.eu/fileadmin/Fallbeschreibungen/CaseReport_KiK_Pakistan_August2019.pdf). See also <https://www.ecchr.eu/en/case/kik-paying-the-price-for-clothing-production-in-south-asia/>

<sup>21</sup> ‘The Human Price: Certified Safe, a Factory in Karachi Still Quickly Burned’ <https://www.nytimes.com/2012/12/08/world/asia/pakistan-factory-fire-shows-flaws-in-monitoring.html>; <https://www.ecchr.eu/en/case/after-factory-fire-in-pakistan-proceedings-against-auditor-in-italy/>; Philip Wesche and Miriam Saage-Maaß, ‘Holding Companies Liable for Human Rights Abuses Related to Foreign Subsidiaries and Suppliers before German Civil Courts: Lessons from *Jabir and Others v KiK*’ 16 (2016) Human Rights Law Review 370.

<sup>22</sup> A/HRC/8/5 Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (SRSG) John Ruggie, para 6 available at [https://ap.ohchr.org/documents/alldocs.aspx?doc\\_id=14100](https://ap.ohchr.org/documents/alldocs.aspx?doc_id=14100); UNGPs (n 5); Cees van Dam, ‘Tort Law and Human Rights: Brothers in Arms on the Role of Tort Law in the Area of Business and Human Rights’ (2011) 2 JETL 221, 243; Beth Stephens ‘The Amoral of Profit: Transnational Corporations and Human Rights’ (2002) 20 Berkeley Journal of International Law 45.

<sup>23</sup> For example; EU Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims art 5; Optional Protocol on the sale of children, child prostitution and child pornography (OPSC) art 3(4); Council of Europe Convention on the Protection of the Environment through Criminal Law (adopted 1998, not yet in force) art. 9; UN Convention against Corruption art. 26; UN Convention on the Suppression of Financing of Terrorism; UN Convention against Transnational Organized Crime art. 5.

<sup>24</sup> See Stephens (n 22) 41.

<sup>25</sup> See Corporate Human Rights Benchmark 2019 and 2020 available at <https://www.corporatebenchmark.org/>; Business and Human Rights Resource Centre (BHRCC) [www.business-humanrights.org/en/company-policysteps/policies](http://www.business-humanrights.org/en/company-policysteps/policies); Danish Institute of Business and Human Rights [www.humanrights.dk/tools/human-rights-](http://www.humanrights.dk/tools/human-rights-)

are required. It should be not assumed that business and business leaders are inactive or resistant. Traidcraft notes that 69% of UK business leaders agreed that companies should be accountable for harms caused abroad.<sup>26</sup> From inside and out, pressure is mounting. Media, investor and consumer attention on business-related adverse impacts continues to intensify.<sup>27</sup> Increasingly, businesses are expected to ‘walk their talk’.<sup>28</sup> Concurrently, initiatives and regulation are multiplying at global and EU levels.<sup>29</sup> Amongst references to the ‘the current jungle’ of global business and human rights regulation,<sup>30</sup> there is a marked evolution in voluntary corporate codes of practice, and transnational private regulation.<sup>31</sup> The increasing positive engagement of business is significant and is not, and should not, be discounted.<sup>32</sup>

Gaps in regulation and access to remedy propagate a context in which abuses occur and may recur. Access to remedy is a right, as is widely recognized under international human rights law and national laws.<sup>33</sup> As it stands, to access remedy reference is to international human rights law obligations with states as duty bearers;<sup>34</sup> voluntary measures; soft law; or leveraging crossover aspects from criminal or

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[indicators-business](#); Shift Project [www.ungpreporting.org/database-analysis/explore-disclosures/](http://www.ungpreporting.org/database-analysis/explore-disclosures/); International Corporate Accountability Roundtable (ICAR) <https://www.icar.ngo/>.

<sup>26</sup> Traidcraft, (27 November 2015) available at [www.traidcraft.co.uk/campaign-blog-entry/two-thirds-of-british-business-leaders-agree-with-us](http://www.traidcraft.co.uk/campaign-blog-entry/two-thirds-of-british-business-leaders-agree-with-us). See also Economist Intelligence Unit, ‘The Road from Principles to Practice: Today’s Challenges For Business in Respecting Human Rights’ (2015), 12 available at <https://www.eiuperspectives.economist.com/strategy-leadership/road-principles-practice>.

<sup>27</sup> *inter alia*, Investors for Human Rights Alliance <https://investorsforhumanrights.org/>; Sherpa <https://www.asso-sherpa.org/category/strategic-litigation>>

<sup>28</sup> See generally Judith Schrempf-Stirling and Florian Wettstein, ‘Beyond Guilty Verdicts: Human Rights Litigation and Its Impact on Corporations’ Human Rights Policies’ (2017) 145(3) Journal of Business Ethics, 545. See also ‘Charges filed against French group Auchan for misleading practices after Rana Plaza collapse’ [www.asso-sherpa.org/charges-filed-french-group-auchan-misleading-commercial-practices-rana-plaza-collapse](http://www.asso-sherpa.org/charges-filed-french-group-auchan-misleading-commercial-practices-rana-plaza-collapse); ‘Samsung’s Indictment in France: Fighting Transnational Corporation’s Human Rights’ Violations Through Consumer Law’ (4 September 2019) available at <https://freedomfund.org/blog/samsungs-indictment-in-france-fighting-transnational-corporations-human-rights-violations-through-consumer-law/>; [www.hrw.org](http://www.hrw.org).

<sup>29</sup> *inter alia*, Swiss Coalition for Corporate Justice <<https://corporatejustice.ch/coalition/>>; German legislative initiative <https://germanwatch.org/de/download/14745.pdf>.

<sup>30</sup> Tori Loven Kirkebø and Malcolm Langford, ‘The Commitment Curve: Global Regulation of Business and Human Rights’ (2018) 3(2) Journal of Business and Human Rights 157.

<sup>31</sup> Examples include; Extractive Industry Transparency Initiative <https://eiti.org/>; Fair Labour Association [www.fairlabor.org/](http://www.fairlabor.org/); Fairtrade [www.fairtrade.net/](http://www.fairtrade.net/); International Code of Conduct for Security Providers [www.icoca.ch/](http://www.icoca.ch/). See Nicola Jägers, ‘Will transnational private regulation close the gap?’, in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge 2013), 295; Nolan, ‘All Care, No Responsibility?’ (n 11) 15.

<sup>32</sup> For example, see <https://www.business-humanrights.org/en/latest-news/list-of-large-businesses-associations-investors-with-public-statements-endorsements-in-support-of-mandatory-due-diligence-regulation/>.

<sup>33</sup> *inter alia*: UDHR art. 8; International Covenant on Civil and Political Rights (ICCPR) art. 2(3); Convention against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (CAT) arts. 13 and 14; Convention for the Elimination of Racial Discrimination (CERD) art. 6; Convention on the Rights of the Child (CRC) art. 39; European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) arts. 5(5), 13 and 41; Charter of Fundamental Rights of the European Union (CFREU) art. 47.

<sup>34</sup> International Human Rights Law places two sets of obligations on states: direct (vertical) obligations for their own actions; and indirect (horizontal) obligations to protect rights holders within their jurisdiction against adverse impacts or abuses by non-state actors.



tort law. In practice, holding corporate groups to account is a significant challenge.<sup>35</sup> Victims face substantive, procedural, and practical barriers.<sup>36</sup> Scholars indicate that a judicial finding of corporate liability occurred in just 3 out of 40 related cases brought before European courts between 1990 and 2015.<sup>37</sup> As litigation against multinational corporations in Europe continues to increase,<sup>38</sup> policymakers, regulators and courts are grappling with fundamental questions of attribution of liability in complex commercial enterprises with widely varying decision making structures.<sup>39</sup> For regulators, delivering effective remedies involves ‘a balance of preventive, deterrent and redressive measures’.<sup>40</sup>

Developments in international soft law instruments concerning the impact of business on human rights are evidence of augmented expectations upon States, as well as commercial and other organisations. Initiatives include the UN Global Compact (2000),<sup>41</sup> the UN Guiding Principles on Business and Human Rights (2011) (UNGPs),<sup>42</sup> OECD Guidelines for Multinational Enterprises (2011),<sup>43</sup> and ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (2017).<sup>44</sup> An

<sup>35</sup> See Amnesty International, ‘Clouds of Injustice: Bhopal Disaster 20 years on’ available at [www.amnesty.org/en/documents/ASA20/015/2004/en/](http://www.amnesty.org/en/documents/ASA20/015/2004/en/); Mahmud Hossain Opu ‘Rana Plaza trial stuck in limbo after five years’ (8 December 2018) *Dhaka Tribune* available at [www.dhakatribune.com/bangladesh/court/2018/12/08/](http://www.dhakatribune.com/bangladesh/court/2018/12/08/).

<sup>36</sup> Stephens (n 22) 54. See also Stephen Ratner, ‘Corporations and Human Rights: A Theory of Legal Responsibility’ (2001) 111(3) *Yale Law Journal* 443; Surya Deva, ‘Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who Should Bell the Cat’ (2004) 5 *Melb. J. Int’l L.* 38-39; Gwynne Skinner, Robert McCorquodale and Oliver De Schutter, ‘The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business’ (2013) 1 available at <http://icar.ngo/wpcontent/uploads/2013/02/The-Third-Pillar-Access-to-Judicial-Remedies-for-Human-Rights-Violation-by-Transnational-Business.pdf>; International Commission of Jurists (ICJ), ‘Needs and Options for a New International Instrument in the Field of Business and Human Rights’ (2014) available at <https://business-humanrights.org/en/pdf-needs-and-options-for-a-new-international-instrument-in-the-field-of-business-and-human-rights>; European Commission Directorate General for Justice and Consumers ‘Study of due diligence through supply chains’ (January 2020) 229 available at <https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en>.

<sup>37</sup> Liesbeth Enneking, ‘Judicial Remedies: The issue of applicable law’ in Juan José Rubio and Katerina Yiannibas (eds) *Human Rights in Business Removal of Barriers to Access to Justice in the European Union* (Routledge 2017) 41 detailing that of the 20 civil cases within the total of 40, 7 were brought in the English courts.

<sup>38</sup> *ibid* Enneking. See also Peter Muchlinski and Virginie Rouas, ‘Foreign direct-liability litigation’ in Lara Blecher, Nancy Kaymar Stafford, & Gretchen C. Bellamy (eds), *Corporate Responsibility for human rights impacts. New Expectations and Paradigms* (ABA Book Publishing 2014).

<sup>39</sup> Caroline Kaeb, ‘The Shifting Sands of Corporate Criminal Liability under International Criminal Law’ (2016) 49 *The Geo. Wash. Int’l Law Review* 351, 352.

<sup>40</sup> A/HRC/72/162 ‘Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises’ (July 2017) para 40 stating ‘... if any one of these elements is missing, it will undermine the overall effectiveness of remedies’, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N17/218/65/PDF/N1721865.pdf?OpenElement>. See also David Kinley and Junko Tadaki ‘From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law’ (2004) 44 *VJIL* 935 on the continued conceptual and structural evolution required to address the accountability of non-state actors within international law generally, particularly human rights law.

<sup>41</sup> UN Global Compact available at [www.unglobalcompact.org/what-is-gc/mission/principles](http://www.unglobalcompact.org/what-is-gc/mission/principles).

<sup>42</sup> UNGPs (n 5). See section D Consultation.

<sup>43</sup> The 2011 revision includes a dedicated human rights chapter available at <http://mneguidelines.oecd.org/2011HumanRights.pdf>. See section D Consultation.

<sup>44</sup> Available at [https://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/---emp\\_ent/---multi/documents/publication/wcms\\_094386.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf)

escalation is evident, including in the UN OHCHR Accountability and Remedy Project (ARP),<sup>45</sup> Council of Europe Recommendation on human rights and business (2016),<sup>46</sup> European Commission Corporate Social Responsibility Action Plan 2011-2014,<sup>47</sup> and Gender Action Plan 2016-2020.<sup>48</sup> The EU Action Plan on Human Rights and Democracy 2020-2024, includes a range of commitments relating to business and human rights.<sup>49</sup> The robust European Union Agency for Fundamental Rights (EU FRA) Opinion in 2017<sup>50</sup> was followed by its 2019 Report on business-related human rights abuses in the EU and available remedies,<sup>51</sup> an EU Study on access to legal remedies for victims of corporate human rights abuses in third countries in 2019,<sup>52</sup> and EU Commission Study on due diligence through supply chains in 2020.<sup>53</sup>

Soft law and policy initiatives have an important contribution to maintain in the on-going drive towards respect for human rights becoming ingrained within business.<sup>54</sup> The most influential global policy instrument is the UN ‘Protect, Respect and Remedy’ Framework. It is operationalised in the UNGPs, which are not legally binding.<sup>55</sup> They are structured in three ‘Pillars’ which are conceived as distinct but complimentary: the state duty to protect; the corporate responsibility to respect;<sup>56</sup> and access to remedy for victims.<sup>57</sup> The UNGPs are to be implemented via National Action Plans (NAPs).<sup>58</sup> However, provisions for implementing access to remedy in existing NAPs are identified as generally very weak.<sup>59</sup> With justification, Pillar III (Remedy) is referred to as ‘the forgotten pillar’.<sup>60</sup> As the UN Working Group on the issue of human rights and transnational corporations and other business enterprises

<sup>45</sup> OHCHR, ‘Accountability and Remedy Project: Improving accountability and access to remedy in cases of business involvement in human rights abuses’ (2014) available at [www.ohchr.org/EN/Issues/Business/Pages/OHCHRaccountabilityandremedyproject.aspx](http://www.ohchr.org/EN/Issues/Business/Pages/OHCHRaccountabilityandremedyproject.aspx).

<sup>46</sup> Council of Europe Committee of Ministers ‘Recommendation on human rights and business’ CM/Rec(2016)3; available at [www.coe.int/en/web/human-rights-rule-of-law/-/human-rights-and-busine-1](http://www.coe.int/en/web/human-rights-rule-of-law/-/human-rights-and-busine-1).

<sup>47</sup> European Commission, ‘A Renewed EU strategy 2011-14 for Corporate Social Responsibility’ 2 COM (2011) 681 final available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52011DC0681>.

<sup>48</sup> <https://op.europa.eu/en/publication-detail/-/publication/62f7aa16-c438-11e7-9b01-01aa75ed71a1>.

<sup>49</sup> <https://ec.europa.eu/transparency/regdoc/rep/10101/2020/EN/JOIN-2020-5-F1-EN-ANNEX-1-PART-1.PDF>.

<sup>50</sup> European Agency for Fundamental Rights (EU FRA) ‘Opinion on improving access to remedy in the context of business and human rights at the EU level’ (2017) Annex, 70 <http://fra.europa.eu/en/opinion/2017/business-human-rights>.

<sup>51</sup> EU FRA ‘Business-related human rights abuse’ 2019 (n 18).

<sup>52</sup> EU ‘Access to legal remedies’ 2019 (n 18).

<sup>53</sup> EU 2020 Study (n 36).

<sup>54</sup> Kirkebo and Langford (n 30).

<sup>55</sup> A/HRC/8/5 (n 22) 4 [5], do not purport and were not intended to create new international law obligations,

<sup>56</sup> It is noted that the distinction between legal obligations on states and moral responsibilities on business is characterised as ‘momentous’ by Florian Wettstein, ‘Normativity, ethics, and the UN guiding principles on business and human rights: A critical assessment’ (2015) 14(2) Journal of Human Rights, 166. See also Nolan, ‘All Care, No Responsibility?’ (n 11) 12.

<sup>57</sup> Pillar III presents access to remedy as shared by both states and corporations.

<sup>58</sup> See European Coalition for Corporate Justice (ECCJ), ‘A Critical Assessment of National Action Plans on Business and Human Rights’ available at [www.corporatejustice.org/news/2245-a-critical-assessment-of-national-action-plans-on-business-and-human-rights-2017-update](http://www.corporatejustice.org/news/2245-a-critical-assessment-of-national-action-plans-on-business-and-human-rights-2017-update).

<sup>59</sup> A/HRC/41/43 (n 8) para 83.

<sup>60</sup> Amnesty International and the BHRCC, ‘Creating a paradigm shift: Legal solutions to improve access to remedy for corporate human rights abuse’ (September 2017) available at <https://www.amnesty.org/en/documents/pol30/7037/2017/en/>.

(UNWG) identifies, ‘a fundamental shift towards the remedy pillar is required.’<sup>61</sup> Governance gaps in the States where subsidiaries or entities within the value chain of multinational corporations operate foster both potential abuses and barriers to remedy.<sup>62</sup> As corporate accountability progresses along a pathway which increasingly emphasises the role of hard law in remedy,<sup>63</sup> two vectors can be expected to exert influence. The first is momentum for the introduction of mandatory human rights due diligence (HRDD) in multiple EU Member States,<sup>64</sup> following the introduction of a generally robust legislative framework in France in 2017.<sup>65</sup> For the UN Working Group, human rights due diligence is the ‘primary expectation of behaviour’ for business.<sup>66</sup> The EU Commission committed to introducing an EU legislative initiative on sustainable corporate governance including human rights due diligence in 2021, indicating it would be across sectors, include provisions for corporate liability, and seek to ensure access to remedy for victims of abuses.<sup>67</sup> Secondly, the on-going development of a UN binding treaty on business and human rights.<sup>68</sup>

## **B. INTERNATIONAL: Remedy and Barriers**

### **B.1. The Right to Remedy**

The right to access to remedy imposes a duty upon states to respect, protect, and fulfil this right.<sup>69</sup> Providing remedial mechanisms is not sufficient. The aim of remedies is to put the affected party in the position they would have been in had the harm not occurred, and States are advised to consider means to reduce legal, practical, and other barriers that could lead to a denial of remedy.<sup>70</sup> Businesses have an independent but complementary role in realizing access to remedy. Further, in conducting their defence, corporations should not ‘...create a chilling effect on the legitimate exercise of such remedies.’<sup>71</sup> Under the UNGPs, if a business enterprise itself identifies that it has caused or contributed to adverse impacts,

<sup>61</sup> A/HRC/41/43 (n 8) para 83.

<sup>62</sup> OCHCR ARP (n 45) para 4.

<sup>63</sup> EU ‘Access to Legal Remedies’ (n 18) 6 analysis of 35 cases filed in EU Member States concerning alleged corporate abuses in third countries; Nolan, ‘All Care, No Responsibility?’ (n 11) 12.

<sup>64</sup> EU 2020 Study (n 36). See also ECCJ <http://corporatejustice.org/news/9189-evidence-for-mandatory-human-rights-due-diligence-legislation-in-europe>.

<sup>65</sup> *loi* no 2017-399, 27 March 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre: JO 28 March 2017, texte no. 1 (French Duty of Vigilance Law) requires certain French companies to implement due diligence in respect of their own activities, those of companies they control, and of suppliers and contractors with whom they have an established commercial relationship.

<sup>66</sup> A/73/163 Report of the UNWG concerning human rights due diligence (16 July 2018) para 16 available at <https://digitallibrary.un.org/record/1639520?ln=en>.

<sup>67</sup> Webinar available at <https://responsiblebusinessconduct.eu/wp/2020/04/30/european-commission-promises-mandatory-due-diligence-legislation-in-2021/>.

<sup>68</sup> (n 14).

<sup>69</sup> A/HRC/72/162 (n 40) para 14. Concerning a right to remedy, see (n 33).

<sup>70</sup> UN CESCR General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities (10 August 2017) E/C.12/GC/24 para 44 available at: <https://www.refworld.org/docid/5beaecba4.html>; A/72/162 (n 40) para 54.

<sup>71</sup> UN CESCR General Comment No.24 (n 70) para 44; A/72/162 (n 40) paras 36-37.

it should provide for, or cooperate in, remediation through legitimate processes.<sup>72</sup> For adverse impacts which are directly linked to its operations, products or services by a ‘business relationship’,<sup>73</sup> an enterprise is not required to provide for remediation, though it may take a role in doing so.<sup>74</sup>

## **B.2. Elements of Effective Remedy**

Effective remedies combine preventive, redressive and deterrent elements, conceived as interrelating and mutually reinforcing.<sup>75</sup> Different situations require different remedies,<sup>76</sup> or remedies to be combined together.<sup>77</sup> Rights-compatible remedies<sup>78</sup> are accessible, affordable, adequate, and timely.<sup>79</sup> The UNWG has issued detailed guidance on rights-compatible remedy across five forms.<sup>80</sup> Sanctions may be civil, administrative or criminal and may include fines, confiscation of assets, criminal prosecution of corporate entities and executives, termination of licences, and exclusion from public procurement.<sup>81</sup> In practice, the most frequently sought remedy for business-related human rights abuses is compensation.<sup>82</sup> While primarily within civil proceedings,<sup>83</sup> states should facilitate claims within related criminal proceedings.<sup>84</sup> Compensation to rights holders is expected to be ‘proportional to the harm and to make provision for both pecuniary and non-pecuniary redress.’<sup>85</sup> To facilitate access to remedy, mechanisms for collective redress (class actions) should be available,<sup>86</sup> and legal standing should include representative action by not-for-profit bodies and associations.<sup>87</sup> Whether proceedings in private law are apt to seek remedy for human rights abuses is debated.<sup>88</sup> In practice, the question is having a possible

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<sup>72</sup> Through human rights due diligence or input from stakeholders, grievance mechanisms, and judicial or non-judicial mechanisms. UNGP 22; Commentary 21;29 (n 5); OCHCR (n 14) 10; A/HRC/72/162 (n 40) para 67.

<sup>73</sup> OCHCR ‘interpretive guide’ (n 14) Q 27 ‘Business relationships’ refers to relationships with ‘business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services.... beyond the first tier, and minority as well as majority shareholding positions in joint ventures.’

<sup>74</sup> UNGP 22, Commentary (n 5). OCHCR ‘interpretive guide’ (n 14) 23.

<sup>75</sup> A/HRC/72/162 para 40 (n 40).

<sup>76</sup> A/HRC/41/43 (n 8) para 39.

<sup>77</sup> A/72/162 (n 40) para 38. See paras 18-25 concerning the centrality of rights holders in the entire remedy process; paras 38-54 concerning restitution, compensation and rehabilitation necessary for effective remedy.

<sup>78</sup> UNGA resolution 60/147 ‘Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law’ (Basic Principles) annex 2(c) and paras 11-25 available at [https://legal.un.org/avl/pdf/ha/ga\\_60-147/ga\\_60-147\\_ph\\_e.pdf](https://legal.un.org/avl/pdf/ha/ga_60-147/ga_60-147_ph_e.pdf); A/72/162 (n 40) para 32; A/HRC/41/43 (n 8) para 81.

<sup>79</sup> A/HRC/32/19/Add.1 (May 2016) annex paras 15-16 re reducing costs of claims and providing diversified sources of funding to claimants available at <https://undocs.org/A/HRC/32/19/Add.1>; A/HRC/41/43 (n 8) para 32.

<sup>80</sup> A/72/162 (n 40) paras 38-54; para 44. Non-repetition may include pre-emptive measures such as injunctions.

<sup>81</sup> ARP (n 45); A/HRC/32/19/ (n 79) policy objective 19; EU FRA 2017 (n 50) 41-42; A/72/162 (n 40) para 52.

<sup>82</sup> See <https://www.business-humanrights.org/en/corporate-legal-accountability/case-profiles/complete-list-of-cases-profiled>.

<sup>83</sup> Or via an non-State-based grievance mechanism or an ad hoc private settlement of the dispute.

<sup>84</sup> EU FRA (n 50) Opinion 12.

<sup>85</sup> A/72/162 (n 40) para 45.

<sup>86</sup> EU FRA (n 50) Opinion 2.

<sup>87</sup> UNGPs (n 5) 28-31. EU FRA 2017 (n 50) Opinion 2.

<sup>88</sup> For example, Beth Stephens, ‘Conceptualizing Violence under International Law: Do Tort Remedies Fit the Crime?’ (1997) 60 Alb. L. Rev. 579, 581–87; Jan Wouters and Cedric Ryngaert, ‘Litigation for Overseas Corporate Human Rights Abuse in the European Union: The Challenge of Jurisdiction’ (2009) 40 Geo. Wash. Int’l L. Rev., 956, 961; Linda Laplante, ‘Human Torts’ (2017) 39(1) Cardozo Law Review 245.

route to remedy or no route at all.<sup>89</sup> While awards of compensation within civil proceedings are indeed rare,<sup>90</sup> parties who take proceedings appear to have greater potential to achieve a private settlement.<sup>91</sup>

### **B.2.1. Rights Holders, Marginalised Groups & Additional Barriers**

It is recognised that certain groups of rights holders face additional impediments and barriers to remedy including women,<sup>92</sup> groups who have been marginalised, indigenous peoples,<sup>93</sup> and human rights defenders.<sup>94</sup> Rights holders and human rights defenders face risks of, *inter alia*, intimidation, strategic lawsuits against public participation,<sup>95</sup> arbitrary detention, and murder.<sup>96</sup> States are expected to take positive and affirmative action to provide access to effective remedies across State judicial and non-judicial mechanisms to women,<sup>97</sup> children,<sup>98</sup> migrants, minority ethnic groups, indigenous peoples, and persons with disabilities.<sup>99</sup> States are expected to ensure, and explicitly commit to, protections from victimisation or re-traumatisation of victims.<sup>100</sup> It is well documented that corporate activities affect women in different and interrelated ways.<sup>101</sup> Studies, reports and consultations identify the distinct impacts on women of, *inter alia*, systemic discrimination, situations of conflict, environmental pollution, and specific gender related risks to human rights defenders.<sup>102</sup>

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<sup>89</sup> OHCHR ARP (n 45) ‘Although causing or contributing to severe human rights abuses would amount to a crime in many jurisdictions, business enterprises are seldom the subject of law enforcement and criminal sanctions’. See also Widdis (n 6) chapter 2.

<sup>90</sup> (n 37); EU ‘Access to Legal Remedies’ (n 18) 19-20 ‘Out of the 35 cases concerning allegations of human rights abuses in third countries by EU based companies, 12 cases were dismissed (2 of which were partially settled), 17 are still ongoing (1 of which was partially settled), 4 cases were fully settled out of court with payments of compensation, and only 2 cases led to a successful outcome for the claimants’.

<sup>91</sup> Schrempf-Stirling and Wettstein (n 28); Michael D. Goldhaber, ‘Corporate Human Rights Litigation in Non-U.S. Courts: A Comparative Scorecard’ (2013) 3 UC Irvine Law Review, 132.

<sup>92</sup> CEDAW general recommendation No.33 paras. 3, 8-10 and 13; A/72/162 (n 40) para 26-30.

<sup>93</sup> Human Rights Council (2018) ‘Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Guatemala’ A/ HRC/39/17/Add.3.

<sup>94</sup> Human Rights Council (2019) ‘Situation of women human rights defenders - Report of the Special Rapporteur on the situation of human rights defenders’, A/HRC/40/60.

<sup>95</sup> See Trócaire ‘Women taking the lead: Defending Human Rights and the Environment’ (2020) <<https://www.trocaire.org/documents/women-taking-the-lead-defending-human-rights-and-the-environment-2/>>; BHRCC ‘Human Rights Defenders and Business: January 2020 Snapshot’ available at <https://dispatches.business-humanrights.org/hrd-january-2020/index.html>, ‘Between 2015 and 2018, 12 carbon majors brought at least 24 lawsuits against 71 environmental and human rights defenders for a total \$904m of damages’.

<sup>96</sup> *ibid* Trócaire ‘Women taking the lead’ 11.

<sup>97</sup> CEDAW (n 92); A/HRC/41/43 (n 8) para 51-61.

<sup>98</sup> Committee on the CRC, General Comment No 16 (2013) on State Obligations regarding the Impact of the Business Sector on Children’s Rights, 6 2nd sess, UN Doc CRC/C/GC/16 (17 April 2013) available at [https://www.unicef.org/csr/css/CRC\\_General\\_Comment\\_ENGLISH\\_26112013.pdf](https://www.unicef.org/csr/css/CRC_General_Comment_ENGLISH_26112013.pdf)

<sup>99</sup> EU FRA (n 50) Opinion 5; A/72/162 (n 40) para 25.

<sup>100</sup> A/HRC/41/43 (n 8) para 81; Basic Principles (n 78) para 10.

<sup>101</sup> CEDAW general recommendation No. 33 (n 92) paras 8-10 regarding factors affecting access to justice; A/72/162 (n 40) para 28; CESCR general comment No 24 (n 70) para 8 stating ‘Women are disproportionately affected by the adverse impact of business activities’.

<sup>102</sup> See A/HRC/41/43 (n 8) paras 11-21 summarising the UNWG consultations; EU FRA 2019 (n 18) found abuses linked with businesses based in the EU and operating abroad (directly or through supply chains) mainly concerned



The effectiveness criteria of remedies should be informed by the impact upon women, the intersectional nature of discrimination faced by women, and the experience of women in barriers to accessing and enforcing remedies.<sup>103</sup> In Ireland, recommendations for gender responsive respect for human rights by business have been made by Trócaire.<sup>104</sup> The UNWG recommends States to apply a gender lens in implementing the UNGPs. Further, it has recommended business enterprises to ‘Adopt a gender lens to discharge their responsibilities under pillars II and III and embed access to effective remedies in their policy commitments and human rights due diligence processes’.<sup>105</sup> Regarding gender as a cross-cutting issue, it has provided a three-step framework: gender-responsive assessment, gender-transformative measures and gender-transformative remedies.<sup>106</sup> Issues concerning women and effective remedy have been mapped for States to consider in developing NAPs<sup>107</sup> which should be taken into consideration.<sup>108</sup>

### **B.3. Enhancing Access to Remedy**

As it stands, the legal landscape within national systems is assessed as failing all parties:

[T]he present system of domestic law remedies is patchy, unpredictable, often ineffective and fragile. It is failing victims who are unable in many cases to access effective remedies for the abuses they have suffered. It is failing some States because of the implications of current patterns of use of remedial mechanisms for capacity-building and legal development. And it is failing many companies, which are obliged to operate in an environment of great legal uncertainty and where participants are not competing on anything approaching a level playing field with respect to legal standards and levels of legal and commercial risk<sup>109</sup>

There are two primary levers to enhance access to remedy. Firstly, States can address domestic laws to counteract avoidance of appropriate accountability,<sup>110</sup> including by lowering barriers, rendering judicial remedies more accessible, and ensuring sanction in criminal law.<sup>111</sup> Secondly, States can address the

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environmental rights and working conditions, followed by cases of discrimination, incidents affecting the right to life and to remedy; Human Rights Council (2019) (n 94).; Trócaire ‘Women taking the Lead’ (n 95).

<sup>103</sup> A/HRC/41/43 (n 8) paras 82 and 61. See generally <https://www.ohchr.org/EN/Issues/Business/Pages/GenderLens.aspx>.

<sup>104</sup> ‘Women taking the lead’ (n 95). See also Hughes (2020) ‘Towards a Transformative Treaty on Business and Human Rights’ <https://www.trocaire.org/wp-content/uploads/2020/10/Irish-Coalition-on-Business-and-Human-Rights-Towards-a-Transformative-Treaty-on-Business-and-Human-Rights-1.pdf>

<sup>105</sup> A/72/162 (n 40) ‘Recommendations’ para 86 (b); 87(e).

<sup>106</sup> A/HRC/41/43 (n 8) para 5, framework and Annex.

<sup>107</sup> Danish Institute for Human Rights (November 2018) 57 available at <https://www.humanrights.dk/publications/women-business-human-rights>. See also Gender and Development Network (GADN) and Corporate Responsibility Coalition (CORE), Why National Action Plans on Business and Human Rights Must Integrate and Prioritise Gender Equality and Women’s Human Rights, November 2015, available <https://www.business-humanrights.org/en/big-issues/gender-business-human-rights/research-analysis/>.

<sup>108</sup> Gender-responsive business principles and resources including; Due Diligence Guidance for Responsible Business Conduct (2018); The Women’s Empowerment Principles (WEPs) including a Gender Gap Analysis Tool; The UNDP Gender Equality Seal certification; The Gender Equality in Codes of Conduct (2017) and Gender Equality in Social Auditing (2018); UN Private Sector Action for Women’s Health and Empowerment (2017).

<sup>109</sup> Zerk (n 18) 7.

<sup>110</sup> UNGP 26, Commentary (n 5).

<sup>111</sup> EU FRA 2017 (n 50) Opinions 1 through 5, and 10 through 12.



legal and practical obstacles to access to remedy in a transnational context.<sup>112</sup> As it stands, accessing remedy in a particular forum is impacted by substantive law, jurisdiction, applicable law, and the procedural and practical circumstances of the forum.<sup>113</sup>

### B.3.1. Legal Obstacles

The company law doctrines of limited liability and separate legal personality are argued to operate as a ‘shield’,<sup>114</sup> for example, enabling parent companies to deflect or avoid claims from those impacted by ringfencing risk at the level of a subsidiary lodged in a third country.<sup>115</sup> The obligations contained in human rights treaties cannot apply to commercial entities unless they are considered as ‘subjects’<sup>116</sup> of international law.<sup>117</sup> Apart from implications on the status of human rights *qua* rights,<sup>118</sup> this has significant practical ramifications. It is States, under their treaty obligations, which implement the protection of rights holders from private actors.<sup>119</sup> All EU Member States are bound to provide access to effective remedy under Article 13 of the ECHR,<sup>120</sup> and under Article 47 of the CFREU.<sup>121</sup> However, outside their territory or jurisdiction, the nature of States’ obligations to protect is complex and controversial.<sup>122</sup> As it relates to remedy, this has two aspects: whether a state should seek to apply its laws extraterritorially to protect against adverse human rights impacts;<sup>123</sup> and regulation enacted in a state which has ‘extraterritorial effects’.<sup>124</sup>

Under the UNGPs, States are to set the expectation that all business enterprises domiciled in the jurisdiction respect human rights, wherever they operate. However, the position adopted was that the

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<sup>112</sup> UNWG ‘all roads to remedy’ approach, A/72/162 (n 40) para 55 and ff; ICJ, ‘Needs and Options’ (n 36); EU ‘Access to legal remedies’ (n 18); OCHCR ARP (n 45) para 4; EU FRA (n 50) Opinions 6 to 9.

<sup>113</sup> Enneking ‘Judicial Remedies’ (n 37) 47.

<sup>114</sup> Surya Deva, ‘Fictitious Separation, Real Injustice: Why and How to Tame the Twin Principles of Corporate Law?’ in Amnesty International, ‘Injustice Incorporated, Corporate Abuses and the Human Right to Remedy’ (2014) 24 available at [www.amnesty.org/en/documents/POL30/001/2014/en/](http://www.amnesty.org/en/documents/POL30/001/2014/en/).

<sup>115</sup> CESC No 24 (n 70) 42; Peter Muchlinski, ‘Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance and Regulation’ (2012) 22(1) Business Ethics Quarterly, 146.

<sup>116</sup> Ian Brownlie, *The British Yearbook of International Law* (OUP 1984), 51.

<sup>117</sup> See Stephens ‘The Amoralism of Profit’ (n 22); Clapham (n 16) 76 and ff. ICJ (n 36) 19 stating there is no doctrinal impediment to imposing direct obligations on corporations.

<sup>118</sup> Kinley and Tadaki (n 40) 5.

<sup>119</sup> It is established that states have positive obligations to protect against rights infringements by private actors.

<sup>120</sup> (n 33) as confirmed in *Lopez Ostra v Spain* (Merits) App no 16798/90, A/303-C (1995) 20 EHRR 277; *Osman v United Kingdom* (Merits) App no 23452/94 (1998) 29 EHRR 245, 305. See also EU FRA (n 50) 70.

<sup>121</sup> CFREU art. 6 (n 33). Human rights are part of the general principles of EU law, *Internationale Handelsgesellschaft* [1970] (Case 11-70) ECLI:EU:C:1970:114.

<sup>122</sup> *Soering v United Kingdom* Application No 14038/88, 7 July 1989; *Rantsev v Cyprus & Russia* Application No 25965/04, 7 January 2010. See also *Golder v United Kingdom* Application No 4451/70, 21 February 1975; *Ilascu & Others v Moldova & Russia* Application No 48787/99, 8 July 2004 [331]; *Bankovic & Others v Belgium & Others* Application No 52207/99, Admissibility, 12 December 2001 [68]; *Markovic and Others v Italy* Application No 1398/03, Merits, 14 December 2006; *White v Sweden* Application No 42435/02, 19 December 2006; *Al-Skeini and Others v United Kingdom* Application No 55721/07, Merits and Just Satisfaction, 7 July 2011 [131].

<sup>123</sup> A/HRC/32/19/Add.1 box 3 (n 79). “‘extraterritorial jurisdiction’.... refers to the ability of a State, through various legal, regulatory and/or judicial mechanisms, to prescribe and enforce laws ... outside its own territory.”

<sup>124</sup> General Comment No. 24 (n 70) para 31; EU ‘Access to Remedies’ (n 18) 231 stating: ‘...It is increasingly recognised that the limitations posed by traditional notions of territorial jurisdiction and separate corporate identity need to be updated to address the impacts of globalised supply chains and complex corporate groups.’

extraterritorial application of the State duty to secure human rights against abuses by corporations remains ‘unsettled’ in international law.<sup>125</sup> This position contrasts with support for a more expansive approach to positive obligations on States from the UN treaty bodies concerning the ICCPR,<sup>126</sup> ICESCR,<sup>127</sup> CERD<sup>128</sup> and CRC.<sup>129</sup> Recognising that scholars remain divided on the issue,<sup>130</sup> the position is cogently summarised as ‘a consensus that states are allowed (and some argue, obliged) to regulate the adverse human rights and environmental impacts of their multinational corporations that occur outside their territories.’<sup>131</sup> Notwithstanding, States can enhance protection and remedy by enacting home state regulation with extraterritorial effect.<sup>132</sup> EU States, including Ireland, have employed this model with success for financial style crimes.<sup>133</sup> The question becomes to extend beyond economic crimes to protect human rights, as discussed in the context of Ireland in Section C.<sup>134</sup>

#### B.4. Judicial Remedies

For business-related harms, the mechanism most employed within the EU is judicial remedy. It is far more frequently sought than non-judicial remedy.<sup>135</sup> Overall, enhancing access to remedy requires addressing domestic provisions ‘to counteract the avoidance of appropriate accountability’,<sup>136</sup> rendering

<sup>125</sup> See UNGP 2 Commentary (n 5). Substantial scholarly commentary rejects this stance, see Olivier de Schutter, ‘Towards a New Treaty on Business and Human Rights’ (2016) 1(1) *Business and Human Rights Journal* 44, 45; Daniel Augenstein, ‘Torture as Tort? Transnational Tort Litigation for Corporate-Related Human Rights Violations and the Human Right to a Remedy’ (2018) 18:3 *Human Rights Law Review* 593.

<sup>125</sup> A/HRC/32/19/Add.1 (n 79) box 3. “extraterritorial jurisdiction” in the context of public law regulation and enforcement, refers to the ability of a State, through various legal, regulatory and/or judicial mechanisms, to prescribe and enforce laws with respect to companies and business activities outside its own territory.’

<sup>126</sup> UNHRC General Comment No. 31 ‘Nature of General Legal Obligations Imposed on States Parties to the Covenant’ para 13.

<sup>127</sup> (n 33); CESCR General Comment No. 14 ‘The Right to the Highest Attainable Standard of Health’ para 39; General Comment No. 15 ‘The Right to Water’ para 31; General Comment No. 24 ‘(n 70) paras 30-33.

<sup>128</sup> See CERD Concluding Observations/Comments re Canada’ (25 May 2007) CERD/C/CAN/CO/18 para 17.

<sup>129</sup> CRC General Comment No. 16. Paras 38-43 (n 98).

<sup>130</sup> See for example, Marko Milanovic, ‘From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties’ (2008) 8(3) *Human Rights Law Review* 413; Claire Methven O’Brien, ‘Are European States Responsible’ in Angelica Bonifanti (ed) *Business and Human Rights in Europe* (Glawcal 2019); Daniel Augenstein and David Kinley, ‘Beyond the 100 Acre Wood, ‘In which international human rights law finds new ways to tame global corporate power’ (2015) 19(6) *Int’l Journal of Human Rights* 828.

<sup>131</sup> EU 2020 Study Commission ‘study of due diligence through the supply chain’ (n 36) 223.

<sup>132</sup> In this model, the impact outside the national territory is indirect, circumventing concerns of overreach and international comity. See generally De Schutter (n 125) 52; Wouters and Ryngaert (n 88) 956.

<sup>133</sup> *inter alia* Bribery Act 2010 (UK); Criminal Finances Act 2017 (UK); Sanctions and Anti-Money Laundering Act 2018 (UK) Modern Slavery Act 2015 (UK) available at [www.legislation.gov.uk/ukpga/2018/13/contents](http://www.legislation.gov.uk/ukpga/2018/13/contents); French Duty of Vigilance Law (n 65); Ireland Criminal Justice (Corruption Offences) 2018 available at <http://www.irishstatutebook.ie/eli/2018/act/9/enacted/en/html>

<sup>134</sup> A/HRC/41/43 (n 8) para 78; Celia Wells, ‘Corporate failure to prevent economic crime – a proposal’ (2017) *Crim LR* 6; Liz Campbell, ‘Corporate Liability and the Criminalisation of Failure’ (2018) 12(2) *Law and Financial Markets Review* 58; Widdis (n 6) chapter 2.

<sup>135</sup> EU FRA (n 18); 2019, Figure 3. Judicial remedy (73%), with NCP’s just 6%, and NHRIs (3%)

<sup>136</sup> UNGP 26, Commentary (n 5).

judicial remedies more accessible, providing and enforcing provisions in criminal justice,<sup>137</sup> and reducing obstacles to remedy in a transnational context.<sup>138</sup>

#### B.4.1. Remedy in Criminal Law

There are well-documented issues with remedies for business-related harms within criminal law at international and at national levels.<sup>139</sup> At international level, a focus on individuals and exclusion of legal entities is a barrier.<sup>140</sup> For example, the jurisdiction of the International Criminal Court is limited to natural persons, although this may include executives of corporate entities in their personal capacity.<sup>141</sup> The exercise of universal jurisdiction over international crimes<sup>142</sup> in domestic courts mainly relates to natural persons,<sup>143</sup> and universal civil jurisdiction is considered permissible but not practiced.<sup>144</sup> Cogent arguments that corporate liability is an established general principle of international law<sup>145</sup> are supported in the recent decision of the Supreme Court of Canada in *Araya*.<sup>146</sup> In national law, there is positive evolution in provision for corporate criminal liability.<sup>147</sup> However, even when provided for ‘on paper’, prosecutorial discretion, resources,<sup>148</sup> and problems with attribution of liability in more

<sup>137</sup> EU FRA 2017 (n 50) Opinions 1 through 5, and 10 through 12.

<sup>138</sup> ICJ, ‘Needs and Options’ (n 36); EU (n 18); ARP (n 45) para 4; EU FRA 2017 (n 50) Opinions 6 through 9.

<sup>139</sup> ICJ, ‘Final Report of the Expert Panel on Corporate Complicity & Legal Accountability Vol 2 Criminal Law and International Crimes’ (2009); Joanna Kyriakis, ‘Corporate Criminal Liability and the Comparative Law Challenge’ (2009) *Neth. Int’l L. Rev.* 333; Zerk (n 18); Kaeb (n 39); A/HRC/32/19 (n 79) para 4; EU FRA 2017 (n 50) Opinions 10-12; Amnesty & ICAR ‘Corporate Crime Principles’ (2016) available at <https://www.commercecrimehumanrights.org/wp-content/uploads/2016/10/CCHR-0929-Final.pdf>;

<sup>140</sup> Cogently argued to be a procedural matter related to the construction of jurisdiction under specific instruments, rather than one of substantive law. Jurisdiction over legal persons was not rejected in principle, but was abandoned due to concerns of time and complementarity, see Brief of David J. Scheffer as Amicus Curiae in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491) 31 available at [www.scotusblog.com/wp-content/uploads/2017/07/16-499-tsac-david-j-scheffer.pdf](http://www.scotusblog.com/wp-content/uploads/2017/07/16-499-tsac-david-j-scheffer.pdf).

<sup>141</sup> Rome Statute of the International Criminal Court (entered into force on 1 July 2002) 2187 UNTS No. 38544.

<sup>142</sup> ICJ, ‘Needs and Options’ (n 36); Zerk (n 18) 42. See *Prosecutor v Furundzija* ICTY IT-95-17/1-T (Dec 10, 1998); Universal criminal jurisdiction is accepted under customary international law, see *Prosecutor v Tadic* (Appeal Jurisdiction) IT-94-1 AR72 [62] (Oct 2, 1995) (Appeal Judgement) IT-94-1- (15 July 1999).

<sup>143</sup> Trial International, ‘Make way for Justice #3: Closing the Net on Impunity’ (2017) available at <https://trialinternational.org/latest-post/make-way-for-justice-3-closing-the-net-on-impunity/>; EU ‘Access to Remedy’ (n 18); Simon Baughen, *Human Rights and Corporate Wrongs, Closing the Governance Gap* (Elgar 2015), 36 stating: ‘a survey of criminal proceedings to date against corporations or corporate officers shows there has been only a handful of convictions against individuals’.

<sup>144</sup> Steven Roper, ‘Applying Universal Jurisdiction to Civil Cases: Variations in State Approaches to Monetizing Human Rights Violations’ (2018) 24(1) *Global Governance*, 115 stating: ‘Universal jurisdiction can at best be considered a nascent norm where a tipping point and internalization have yet to occur’.

<sup>145</sup> Kyriakakis (n 139) 334-339. The decisions in the *Kiobel* and *Jesner* cases in the United States are extensively critiqued. On balance, more consistent with scholarly comment is the dissenting judgment of Sotomayor J in *Jesner v Arab Bank plc* No. 16-499 584 U.S. (2018).

<sup>146</sup> *Nevsun Resources Ltd v Araya*, 2020 SCC 5.

<sup>147</sup> In introducing offences to comply with the Rome Statute many states provided for criminal liability of legal entities often not distinguishing between liability of natural and legal persons. See Kyriakakis (n 139) 334-335.

<sup>148</sup> Skinner, McCorquodale and De Schutter (n 35) 38.

complex corporate entities continue to depress accountability and remedy.<sup>149</sup> New approaches are required and successful models can be adopted, as discussed further in section C.3.1.

#### B.4.2. Approaches to Civil Liability

There is a growing trend in litigation against corporations for their involvement in human rights harms. While recognised as not ideal,<sup>150</sup> actions in civil law are being leveraged as a ‘proxy’ as human rights based causes of action are unavailable.<sup>151</sup> Litigation may concern harms related to subsidiaries, or over overseas suppliers,<sup>152</sup> or use other bases.<sup>153</sup> Foreign Direct Liability (FDL) litigation is the primary mechanism for seeking remedy in Europe for the impacts of multinational corporations upon victims overseas.<sup>154</sup> In FDL style cases, cross border civil claims are taken against parent companies in their home state, alleging breach of a duty of care, and harm, related to the operations of subsidiaries.<sup>155</sup> Such a duty of care owed by a parent company may arise, *inter alia*, in circumstances where the parent intervenes in a relevant area, or leverages its superior knowledge, influence, or control over group entities.<sup>156</sup> The related legal principles have been under development for decades, particularly in the English courts. They are gaining in coherence and potential impact,<sup>157</sup> particularly with the judgment of the UK Supreme Court in *Vedanta* handed down in 2019.<sup>158</sup> The *Okpabi* case is in adjudication in the UK Supreme Court.<sup>159</sup> Decisions on the merits are awaited in *Vedanta*, and in the Dutch Shell

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<sup>149</sup> Many states still do not, or only partially, provide for corporate criminal liability, see ICJ ‘Needs and Options’ (n 3635) 17. Amnesty & ICAR (n 139). For the implications of key feature of domestic law regimes for access to remedy see A/HRC/32/19 (n 79) Figure 1. EU FRA (n 50) Opinion 10.

<sup>150</sup> ICJ, ‘Needs and Options’ (n 36) 18 private law is a ‘a highly imperfect tool that is used for lack of a suitable alternative under public law’.

<sup>151</sup> Torts are pleaded to ‘indirectly’ vindicate human rights. See Scott (n 122) 62. See also William Binchy ‘Tort Law in Ireland: A Half Century Review’ (2016) 56 Irish Jurist 199, 203; Robert Stevens, *Tort and Rights* (OUP 2007); van Dam (n 22) 243. Laplante (n 88) 245, identifies that early in its development it was apparent that ‘the wrong in tort lawsuits relates back to the violation of a primary right’; Widdis (n 6) chapter 3.

<sup>152</sup> See the *KiK* case (n 20), based on a supply contract as opposed to subsidiaries. Application of Article 4(1) Council Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ L 351 (2012) (Brussels I recast).

<sup>153</sup> Based on common law property, see *Saúl Luciano Lliuya v RWE AG* Case No. 2 O 285/15 Essen Regional Court. See also Wesche and Saage-Maaß (n 21); Madhav Mohan, ‘The Road to *Song Mao*: Transnational Litigation from Southeast Asia to the United Kingdom’ (2014) AJIL Unbound <doi:10.1017/S2398772300009661>.

<sup>154</sup> Following a tightening of jurisdictional standards in the United States, see (n 145).

<sup>155</sup> Enneking, (n 37) 47.

<sup>156</sup> *Chandler v. Cape plc* [2012] EWCA Civ. 525 (Arden LJ) [80]. This is direct as opposed to vicarious liability, and is conceptually different from veil piercing.

<sup>157</sup> Shubnaa Srinivasan, ‘Current trends and future effects in transnational litigation against corporations in the United Kingdom’ in in Lara Blecher, Nancy Kaymar Stafford, and Gretchen C. Bellamy (eds), *Corporate Responsibility for human rights impacts. New Expectations and Paradigms* (ABA Book Publishing 2014); Richard Meeran, ‘Access to Remedy: the United Kingdom experience of MNC tort litigation for human rights violations’ in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge 2013).

<sup>158</sup> *Vedanta Resources Plc v Lungowe* [2017] EWCA Civ 1528 (CA). [2019] UKSC 20 [54-56],[60].

<sup>159</sup> *Okpabi v Royal Dutch Shell Plc* [2017] EWHC 89 (TCC) (HC); [2018] EWCA Civ 191 (CA). See ICJ and Core, and Core in *Okpabi* UKSC 2018/0068 <<https://www.icj.org/uk-supreme-court-should-recognize-shells-responsibilities-for-devastating-rights-impacts-of-niger-delta-oil-spills-say-ngos/>>.

Nigeria cases.<sup>160</sup> In Canada, the *Hudbay*,<sup>161</sup> *Garcia*,<sup>162</sup> and *Araya*<sup>163</sup> cases are providing valuable precedent. It is anticipated that in time these cases will advance accountability. They represent important opportunities promote a hard law edge to soft law instruments,<sup>164</sup> and to promote evolving international standards. Further, the legal concepts are portable across jurisdictions.<sup>165</sup>

However, FDL style cases are not feasible unless procedural and practical circumstances of the forum are adequate to enable litigation. Adverse circumstances may thus result in a denial of access to justice in both the host and the home state.

#### **B.4.3. Jurisdiction & Applicable Law**

Grounding jurisdiction in the home state of the parent company is a significant challenge in FDL cases.<sup>166</sup> While the doctrine of *forum non conveniens* is no longer a barrier,<sup>167</sup> national rules for determining jurisdiction remain a significant hurdle for claimants. A combination EU Regulation Brussels I (recast) and national civil procedure rules govern joining a subsidiary to proceedings against the ‘anchor’ defendant.<sup>168</sup> The right to a fair trial under the ECHR<sup>169</sup> has a potential role in litigation, particularly in States where claimants face significant procedural or practical barriers to remedy. Notably, altering Brussels I (recast) for business-related human rights is advocated, including adding a provision for *forum necessitatis* in civil claims sufficiently connected to the forum which risk a denial

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<sup>160</sup> See Cees van Dam, ‘Preliminary judgments Dutch Court of Appeal in Shell Nigeria case’ available at [www.ceesvandam.info/default.asp?fileid=643](http://www.ceesvandam.info/default.asp?fileid=643).

<sup>161</sup> [2013] ONSC 1414.

<sup>162</sup> *Garcia v Tahoe Resources Inc.* [2017] BCCA 39.

<sup>163</sup> (n 146).

<sup>164</sup> See ICJ and Core (n 159).

<sup>165</sup> Widdis (n 6).

<sup>166</sup> Enneking, (n 37); Muchlinski and Rouas (n 38). Meeran (n 157157) 385 highlighting that In the course of the *forum non conveniens* dispute alone in *Lubbe v Cape plc* [2000] 1 WLR 1545, 1,000 of the 7,500 claimants died. Even if a forum of necessity is provided for in a state, a wide margin of appreciation has been accorded concerning the application of domestic provisions. See *Nait-Liman v Switzerland* (Grand Chamber) App no 41615/07 (6 July 2010) [218]-[220]. See also Burkhard Hess and Martina Mantovani, ‘Current Developments in Forum Access: Comments on Jurisdiction and Forum Non Conveniens – European Perspectives on Human Rights Litigation’ (January 29, 2019) MPILux Research Paper 2019 (1) available at <https://ssrn.com/abstract=3325711>.

<sup>167</sup> Brussels I (n 152) in *C-281/02 Osuwa v Jackson* [2005] ECR I 1383. ‘Access to Remedies’ (n 18) 206.

<sup>168</sup> *ibid* Brussels I recast Article 6(1) provides: ‘If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Article 18(1), Article 21(2) and Articles 24 and 25, be determined by the law of that Member State’.

<sup>169</sup> ECHR (n 33). See Arnaud Nuyts, ‘Study on Residual Jurisdiction’ (2007) available at [http://ec.europa.eu/civiljustice/news/docs/study\\_residual\\_jurisdiction\\_en.pdf](http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf); Daniel Augenstein and Nicola Jägers, ‘Judicial Remedies: The issue of jurisdiction’ in Juan José Rubio and Katerina Yiannibas (eds) *Human Rights in Business Removal of Barriers to Access to Justice in the European Union* (Routledge 2017), 29–30; EU (n 18) 230 noting that ‘the Victims’ Rights Directive has fallen short of ensuring that victims of corporate crimes are afforded access to justice’.



of justice.<sup>170</sup> In general, the laws of the country of harm are applied in litigation.<sup>171</sup> The operation of this rule under EU Regulation Rome II<sup>172</sup> may negatively impact remedy, and has been argued to inhibit development of law in the forum,<sup>173</sup> and to lead to inconsistent results.<sup>174</sup> For business-related human rights claims, adding a choice of law provision to Rome II is advocated. Potentially, this would allow claimants to choose the law of the forum where a defendant, such as a parent company, is domiciled.<sup>175</sup>

#### **B.4.4. Practical Barriers to Judicial Remedy**

Experience shows that seeking remedy is excessively long, costly, and arduous.<sup>176</sup> The pathway to remedy is beset with barriers, and additionally so for women, vulnerable or marginalised groups.<sup>177</sup> In the *Aguinda v Chevron* case, twenty eight years of litigation, including judgment obtained in Ecuador, failed to yield compensation or satisfactory remediation of the lands for the indigenous communities.<sup>178</sup> Claimants face barriers of funding, legal and technical expertise, deciphering the structure of multinational groups and accessing information held within it, while language and distance complicate cases. Flowing from this, the risk of denial of justice weighs heavily in jurisdictional proceedings.<sup>179</sup>

#### **B.5. Non-Judicial Remedies**

Ensuring access to remedy requires that non-judicial remedies, including company level grievance mechanisms, are effective. National human rights institutions are expected to support non-judicial remedies in providing practical supports.<sup>180</sup> Non-judicial grievance mechanisms should meet the effectiveness criteria in the UNGPs.<sup>181</sup> To respond to the intersectional nature of discrimination faced by women, these should be interpreted in a gender responsive manner. It is crucial that information on

<sup>170</sup> EU Parliament ‘Report on corporate liability for serious human rights abuses in third countries’ (2015/2315(INI)) available at [www.europarl.europa.eu/doceo/document/A-8-2016-0243\\_EN.html?redirect](http://www.europarl.europa.eu/doceo/document/A-8-2016-0243_EN.html?redirect). EU FRA 2017 (n 50) Opinion 4 and Opinion 9; EU ‘Access to Remedies’ (n 18) 111. See also Draft Opinion of the Committee of Foreign Affairs for the Committee of Legal Affairs to the recommendations to the [EU] Commission on corporate due diligence and corporate accountability (2020/2129(INL)) <[https://www.europarl.europa.eu/doceo/document/AFET-PA-655782\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/AFET-PA-655782_EN.pdf)>.

<sup>171</sup> Applying the *lex loci damni*, *inter alia*, to substantive issues, burden of proof, and rules governing damages.

<sup>172</sup> Council Regulation (EU) No 864/2007 on the law applicable to non-contractual obligations [2007] OJ L 199. (Rome II) art 4(1).

<sup>173</sup> *Inter alia* Hess and Mantovani (n 166); Van Dam (n 160).

<sup>174</sup> Leveraging the exceptions within Rome II (n 172) is anticipated to increasingly feature in litigation. See Enneking (n 37) concerning transboundary torts, art 7 and *Lluyia v RWE* (n 153). Also concerning human rights due diligence as an overriding mandatory provision under art 16 and international standards under art 17.

<sup>175</sup> See (n 170). See also Ekaterina Aristova, ‘Tort Litigation against TNCs in the English Courts: The Challenge of Jurisdiction’ (2018) 55(2) *Utrecht Law Review* 6, 21.

<sup>176</sup> See (n 37); EU ‘Access to Legal Remedies’ (n 18). See Manuel A. Gómez, *The Global Chase: Seeking the Recognition and Enforcement of the Lago Agrio Judgment Outside of Ecuador*, (2013) 1(2) *Stanford Journal of Complex Litigation* 429.

<sup>177</sup> See section B. CEDAW general recommendation No.33 (2015) (n 92); A/HRC/41/43 (n 8) para 51-61, para 52 (e) para 82; A/72/162 (n 40) para 86 (b); 87(e); EU FRA (n 18) 2.9 and (n 50) 24-33.

<sup>178</sup> For an outline, see Manuel A. Gómez, *The Global Chase: Seeking the Recognition and Enforcement of the Lago Agrio Judgment Outside of Ecuador*, (2013) 1(2) *Stanford Journal of Complex Litigation* 429.

<sup>179</sup> *Vedanta* [2016] EWHC 975 (TCC) [90]-[97];[169]-[198]; (SC) (n 158) [102]; *Garcia* (n 162) [30],[128]-[129].

<sup>180</sup> EU FRA 2019 (n 18) 3.

<sup>181</sup> UNGP 31 (n 5) being legitimate, accessible, predictable, equitable, transparent, rights-compatible, a source of continuous learning, and based on dialogue and engagement.



mechanisms and aids is accessible, including adapted to those facing additional barriers. EU research in 2019 found ‘...in none of the 30 countries [studied]... was there government-provided, publicly available online guidance for how to access remedy in cases of business and human rights violations.’<sup>182</sup>

## **B.6. Impact of Disclosure and Transparency Initiatives on Remedy**

Directive 2014/95/EU on disclosure of non-financial and diversity information by certain large undertaking and groups (NFRD)<sup>183</sup> is scheduled for review.<sup>184</sup> Any resultant revisions may adopt a more prescriptive approach to addressing human rights risks.<sup>185</sup> At state level, existing reporting initiatives may target certain human issues, such as modern slavery or child labour, but regulation can be considered as fragmented,<sup>186</sup> and enforcement may often relate only to compliance with reporting itself.<sup>187</sup> In terms of preventing abuses occurring, it is legislation which is ‘stringent’, rather than based on ‘reporting’, which appears to underpin changes in corporate practice.<sup>188</sup>

## **B.7. Human Rights Due Diligence within the UNGPs**

Under the UNGPs, conducting human rights due diligence (HRDD) is a key element in the responsibility of business enterprises to respect human rights. The concept of HRDD in the UNGPs aims to prevent and mitigate human rights impacts in which an business might become involved.<sup>189</sup> It differs from the familiar notion of commercial due diligence in that it is aimed at risks to ‘rights holders’ beyond the business enterprise. It extends over all human rights, and applies to all enterprises regardless of their size, sector, operational context, ownership and structure.<sup>190</sup> The HRDD responsibility of business covers both impacts the business may cause or contribute to through its own activities, and which may be directly linked to its operations, products or services by its business relationships. It

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<sup>182</sup> EU FRA 2019 (n 18) 3, citing the example of the Belgian NAP which provided for a hub with details on access to remedy in cases of business-related human rights abuse.

<sup>183</sup> Council Directive 2014/95/EC of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups with EEA relevance [2014] OJ L 330, 1–9 (NFRD).

<sup>184</sup> As a regulatory approach it is not considered in sync with the proactive thrust of mandatory human rights due diligence. See Karin Buhmann, ‘Neglecting the proactive aspect of human rights due diligence? A critical appraisal of the EU’s Non-Financial Reporting Directive as a Pillar One avenue for promoting Pillar Two action’ (2018) 3(1) Business and Human Rights Journal 25. See also Justine Nolan, ‘Hardening Soft Law: Are the Emerging Corporate Social Disclosure Laws Capable of Generating Substantive Compliance with Human Rights?’ (2018) Brazilian Journal of International Law No. 18-63, 10-18; ECCJ (n 64).

<sup>185</sup> A 2020 assessment of the sustainability disclosures of 1,000 European companies suggests the NFRD is not meeting its objective of ensuring business transparency around ESG (environmental, social and governance) challenges and risks, available at <https://www.allianceforcorporatetransparency.org/database/>. See also ECCJ available at <http://corporatejustice.org/news/8490-review-of-eu-non-financial-reporting-framework>.

<sup>186</sup> See Ingrid Landau, ‘Human Rights Due Diligence and the risk of Cosmetic Compliance’, Melbourne Journal of International Law, Vol 20, Issue 1, July 2019 221. See also McCorquodale et al (n 14) 202; Marcia Narine, ‘Disclosing Disclosure’s Defects: Addressing Corporate Irresponsibility for Human Rights Impacts’ (2015) 47(1) Columbia Human Rights Law Review 84.

<sup>187</sup> For example, Art 19a (5) and (6) of the NFRD (n 183183).

<sup>188</sup> Comparing 25 FTSE 100 implementation, Genevieve LeBaron and Andreas Rühmkorf ‘Steering CSR Through Home State Regulation: A Comparison of the Impact of the UK Bribery Act and Modern Slavery Act on Global Supply Chain Governance’ Global Policy 8:3 (2017).

<sup>189</sup> See also OCHCR ‘interpretive guide’ (n 14) key concepts, 6.

<sup>190</sup> UNGP 14 and 17 and Commentary (n 5); OCHCR, ‘an interpretive guide’ (n 14) 4.

includes four proactive elements: identifying actual and potential human rights impacts; assessing and acting on the findings; engaging in tracking responses; and communicating how impacts are addressed. It is to be an on-going process, which should reflect the risk of severe impacts, the nature and context of the operations of the business,<sup>191</sup> and is expected to vary in complexity with the size of the business enterprise.<sup>192</sup> The process as a whole drives at companies engaging in proactive monitoring to ensure respect for human rights,<sup>193</sup> and has been widely adopted in related instruments.<sup>194</sup> The impact of the UNGPs is subject to their voluntary implementation, by States and by business. After nearly 10 years, voluntary implementation of HRDD is low and it is slow. In 2019, 49% of the 200 companies assessed in the Corporate Human Rights Benchmark scored zero against every human right due diligence indicator.<sup>195</sup> The UNWG has engaged a project to ‘take stock of achievements to date, assess existing gaps and challenges’, and to launch a 10 year roadmap ‘for implementing the UNGPs more widely and more broadly between now and 2030’.<sup>196</sup>

The UNGPs have undoubted value, and were conceived to be part of a ‘smart mix’ of voluntary and instrumental measures. The momentum is towards mandatory regulation of HRDD, applying across sectors, and incorporating both sanctions and legal remedies to for rights holders.<sup>197</sup> In 2017, the French ‘Duty of Vigilance’ Law established a duty on companies develop, and to effectively implement, a Plan to act to prevent human rights abuses both domestically and abroad, and to publicly account for steps taken.<sup>198</sup> Across the EU, pressure is mounting for mandatory regulation of HRDD.<sup>199</sup> Consolidating support is evident across the EU Council, and Parliament, EU FRA, Council of Europe,<sup>200</sup> UN Treaty bodies, and the UNWG.<sup>201</sup> In the 2020 EU study on due diligence, the regulatory option supported by 73% of stakeholder respondents as most effective, was introduction of an EU level requirement for

<sup>191</sup> Ibid UNGP 19 and Commentary. What action is appropriate will depend on the ‘leverage’ a business has over an entity causing harm to influence a change in its practices.

<sup>192</sup> UNGP 17 (b). UNGP 14 (n 5). OCHCR ‘an interpretive guide’ (n 14) 24-25.

<sup>193</sup> The UNGPs do not envisage that conducting HRDD will provide a complete defence should violations occur.

<sup>194</sup> *inter alia* OECD Guidelines for Multinational Enterprises: ‘Responsible Business Conduct Matters’ available at [http://mneguidelines.oecd.org/MNEguidelines\\_RBCmatters.pdf](http://mneguidelines.oecd.org/MNEguidelines_RBCmatters.pdf); ILO 2017 revised Declaration on Multinational Companies available at [www.ilo.org/global/about-the-ilo/newsroom/news/WCMS\\_547615/lang-en/index.htm](http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_547615/lang-en/index.htm); ISO 26000 Guidance on Social Responsibility.

<sup>195</sup> CHRB 2020 available at <https://www.worldbenchmarkingalliance.org/publication/chrb/?keyFindings>.

(n 25) 8. See also McCorquodale et al (n 14). Similarly, a survey of 152 companies by Norton Rose Fulbright and the British Institute of International and Comparative Law (BIICL) found that over 50% of companies surveyed had never undertaken a specific human rights due diligence process <https://human-rights-due-diligence.nortonrosefulbright.online/>. For more see [www.business-humanrights.org/en/company-policy-steps/policies](http://www.business-humanrights.org/en/company-policy-steps/policies); [www.ungpreporting.org/database-analysis/explore-disclosures](http://www.ungpreporting.org/database-analysis/explore-disclosures); <http://www.icar.ngo/>.

<sup>196</sup> ‘Business and Human Rights: Towards a decade of global implementation’, see

<https://www.ohchr.org/EN/Issues/Business/Pages/UNGPsBizHRsnext10.aspx>.

<sup>197</sup> EU FRA 2017 (n 50); EU ‘Access to Remedy’ (n 18). Nolan (n 184) 10-18; Buhmann (n 184) 27.

<sup>198</sup> (n 65).

<sup>199</sup> See ECCJ <http://corporatejustice.org/policy-evidence-mhrdd-november-2018-final.pdf>; (n 64).

<sup>200</sup> (n 46); for example ‘Conclusions on the EU and Responsible Global Value Chains’ (12 May 2016) available at [www.consilium.europa.eu/en/press/press-releases/2016/05/12/conclusions-on-responsible-global-value-chains](http://www.consilium.europa.eu/en/press/press-releases/2016/05/12/conclusions-on-responsible-global-value-chains); Parliament ‘Report on corporate liability for serious human rights abuses in third countries’ (2015/2315(INI)) available at [www.europarl.europa.eu/doceo/document/A-8-2016-0243\\_EN.html?redirect](http://www.europarl.europa.eu/doceo/document/A-8-2016-0243_EN.html?redirect).

<sup>201</sup> CESCR (n 70); CRC (n 98); A/HRC/32/19 (n 79); A/73/163 (n 66).

companies to undertake HRDD in their own operations and throughout their supply chains, coupled with civil or criminal liability and/or fines.<sup>202</sup> Legislative initiatives are moving forward at EU level, and in civil society and legislative proposals in Member States.<sup>203</sup> As regulation for HRDD advances, its formulation is critical to its potential impact for rights holders, to promote a more level playing field, and to avoid the risk of superficial compliance.<sup>204</sup> It can be concluded that there is a significant accountability gap, propagating a context in which abuses will recur, combined with legal and practical barriers inhibiting remedy for potential victims overseas.

## C. IRELAND

Ireland is reputed as an open economy, which is increasingly knowledge based. Its success has been linked to membership of the EU single market, successful promotion of Ireland as a location for Foreign Direct Investment (FDI), and its educated workforce.<sup>205</sup> Notably, there is also extensive commercial activity by companies domiciled or headquartered in Ireland overseas. According to the CSO ‘In 2016 Irish multinationals employed over 856,000 persons in Foreign affiliates and generated Turnover of €192.6 billion. By contrast, Foreign multinationals employed just over 293,100 persons in affiliates in Ireland and generated Turnover of €345.0 billion.’<sup>206</sup>

### C.1. Human Rights Obligations and Infrastructure

The State has assumed obligations which are relevant to the operations of Irish connected business, stemming from ratification of the core United Nations human rights treaties,<sup>207</sup> ECHR,<sup>208</sup> CFREU,<sup>209</sup>

<sup>202</sup> EU 2020 Study (n 36) 239. The study examined 4 (main) regulatory options : 1: No policy change (baseline scenario); 2: New voluntary guidelines / guidance; 3: New regulation requiring due diligence reporting; 4: New regulation requiring mandatory due diligence as a legal duty of care (plus various sub-options). See also 154.

<sup>203</sup> Webinar (n 67). See BHRCC (17 December 2019) stating ‘Since the French law was introduced a dozen European countries are discussing mandatory HRDD legislation’ available at <https://www.business-humanrights.org/en/high-hopes-for-mandatory-human-rights-due-diligence-in-2020-0>.

<sup>204</sup> A/73/163 (n 66) [25(c)], [28], 1 [73(c)]; Landau (n 186) 234; ECCJ (n 64); McCorquodale et al (n 14).

<sup>205</sup> See IDA ‘why invest in Ireland’ stating: ‘Ireland’s performance as a hub for Foreign Direct Investment is unrivalled. Ireland has a proven track record as a successful location for world leading established and high growth multinational companies from around the world. One third of multinationals in Ireland have had operations in the country for over 20 years, illustrating the longevity, resilience and commitment of these companies to Ireland’. According to the IDA, ‘Ireland is home to many of the world’s leading high-performance companies including ‘the top five global software companies, 14 of 15 top medical tech companies, 18 of 25 top financial services companies, 10 of 10 top pharma companies, and 8 of 10 industrial automation companies’ available at <https://www.idaireland.com/invest-in-ireland>. Information on foreign direct investment in Ireland see <https://dbei.gov.ie/en/What-We-Do/Trade-Investment/Foreign-Direct-Investment-FDI-/>.

<sup>206</sup> CSO ‘Business in Ireland, Multinationals: An Irish Perspective’ <https://www.cso.ie/en/releasesandpublications/ep/p-bii/businessinireland2016/multinationalsanirishperspective/>

<sup>207</sup> Universal Periodic Reviews in 2011 and 2016. See Compilation Report of the UPR 2016.

<sup>208</sup> International treaties and conventions do not have direct effect in Irish domestic law. The ECHR does not have direct effect, and was incorporated into domestic law by the European Convention on Human Rights Act 2003 available at <[www.irishstatutebook.ie/eli/2003/act/20/enacted/en/print.html](http://www.irishstatutebook.ie/eli/2003/act/20/enacted/en/print.html)>. See also Gerard Hogan, Gerard Whyte, David Kenny and Rachael Walsh, *Kelly: The Irish Constitution* (5th edn, Bloomsbury Professional 2018) 5.3.141. Under section 2 of the Act courts are obliged to interpret, in so far as is possible, any rule of law, whether it derives from the common law or statute, in a manner consistent with Ireland’s obligations under the ECHR..

<sup>209</sup> See (n 4); (n 33). Ireland is obliged to report to the treaty bodies on implementing the respective treaties.

and other international instruments relevant to business and human rights including the core conventions of the ILO.<sup>210</sup> Ireland has been characterised as an overall ‘obedient state’ regarding international human rights law,<sup>211</sup> though the impact may be nuanced.<sup>212</sup> As the supreme source of fundamental rights in Ireland,<sup>213</sup> ‘the Constitution continues to dominate the space in which legal advocacy and judicial thinking is concerned with human rights’.<sup>214</sup> Under the Voluntary Review of progress on the UN Sustainable Development Goals (SDGs),<sup>215</sup> the Baseline Assessment identified challenges in goals relevant to business and human rights. To date, Ireland has not delivered a national statement at sessions of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights. The European Union has, to date, represented the views of EU Members States, including Ireland, at sessions of the open-ended intergovernmental working group. Ireland has contributed to the EU approach through its permanent missions in Brussels and Geneva.<sup>216</sup> This review concerns access to remedy for potential victims overseas of human rights abuses by companies domiciled in Ireland. As the Baseline Assessment identified, ‘A thorough review of remedies which focuses chiefly on meaningful access to remedies is therefore an important step in advancing remedies in the Irish context.’<sup>217</sup>

### C. 1.1. National Plan on Business and Human Rights 2017-2020

After a consultative process,<sup>218</sup> the National Plan on Business and Human Rights (NPBHR) was published in 2017.<sup>219</sup> It affirms that the State has ‘long valued and championed human rights and this is

<sup>210</sup> Forced Labour Convention (ILO No. 29) 39 UNTS 55; Freedom of Association and Protection of the Right to Organise Convention (ILO No. 87); Right to Organise and Collective Bargaining Convention (ILO No. 98) 96 UNTS 257; Equal Remuneration Convention (ILO No. 100), 164 U.N.T.S. 303; Abolition of Forced Labour Convention (ILO No. 105), 320 UNTS 291; Discrimination (Employment and Occupation) Convention (ILO No. 111), 362 U.N.T.S. 31, ratified 1999; Convention concerning Minimum Age for Admission to Employment (ILO No. 138) UNTS 297; Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO No.183).

<sup>211</sup> Marie Luce Paris, ‘The ECHR: Implementation Mechanisms and Compliance’ in Suzanne Egan (ed) *International Human Rights: Perspectives from Ireland* (Bloomsbury Professional 2015) 99.

<sup>212</sup> Suzanne Kingston and Liam Thornton, ‘A Report on the Application of the *European Convention on Human Rights Act 2003* and the European Charter of Fundamental Rights: Evaluation and Review (2016) 52 available at <<https://www.lawsociety.ie/globalassets/documents/committees/hr/echrreport30july2015.pdf>.

<sup>213</sup> In Ireland, the impact of IHRL is seen as a ‘strong-form’. See Colm O’Cinnéide, ‘Irish Constitutional Law and Direct Horizontal Effect – A Successful Experiment?’ in *Human Rights in the Private Sphere: A Comparative Study* (Vol 1) Oliver and Fedtke (eds) (Routledge Cavendish, 2007) 213, 214.

<sup>214</sup> See Egan et al (n 211) 78.

<sup>215</sup> Government of Ireland, ‘The Sustainable Development Goals National Implementation Plan 2018-2020’ (April 2018); Government of Ireland, ‘Ireland - Voluntary National Review 2018: Report on the Implementation of the 2030 Agenda to the UN High-level Political Forum on Sustainable Development’ (June 2018).

<sup>216</sup> See also Shane Darcy ‘Embedding Business & Human Rights in Ireland: Legislating for Human Rights Due Diligence’ available at <https://ssrn.com/abstract=3506384>. See also Hughes (2020) ‘Towards a Transformative Treaty on Business and Human Rights’ [https://www.trocaire.org/wp-content/uploads/2020/10/Irish-Coalition-on-Business-and-Human-Rights\\_Towards-a-Transformative-Treaty-on-Business-and-Human-Rights-1.pdf](https://www.trocaire.org/wp-content/uploads/2020/10/Irish-Coalition-on-Business-and-Human-Rights_Towards-a-Transformative-Treaty-on-Business-and-Human-Rights-1.pdf).

<sup>217</sup> Baseline Assessment (n 2) 51.

<sup>218</sup> For example, submissions from Amnesty International (March 2014); Trócaire, (October 2014). See also IHREC; FLAC, IBEC and Christian Aid Ireland submissions (March 2015) available at [www.ihrec.ie/documents/submission-irelands-national-action-plan-business-human-rights/](http://www.ihrec.ie/documents/submission-irelands-national-action-plan-business-human-rights/).

<sup>219</sup> (n 2).

reflected in our foreign policy which reaffirms our commitment to the universality, indivisibility and interrelatedness of all human rights.<sup>220</sup> The National Plan has been criticised for emphasising ‘promotional aspects’ at the expense of substantive engagement.<sup>221</sup> It is cogently characterised as a ‘light touch’ and ‘soft recommendatory approach’,<sup>222</sup> coupled with ‘lethargy in implementation.’<sup>223</sup> The NPBHR provides for a Business and Human Rights Implementation Group,<sup>224</sup> and sets out initial priorities for it.<sup>225</sup> The National Plan itself tasks the Implementation Group, which is comprised of members of civil society, business and government, with ‘developing timeframes for delivering and reporting on each of the actions which have been assigned to it.’ The Baseline Assessment of the Legal and Regulatory Framework in 2019 was a significant step forward.<sup>226</sup> It points to achievements since the launch of the National Plan, and highlights commitments remaining to be actioned.<sup>227</sup> The revision of the National Plan on Business and Human Rights should be robust in its impact.<sup>228</sup> Consistent with commentary, it is hoped that the new Plan will start in the right place and go up several gears.<sup>229</sup>

## **C.2. State Based Non Judicial Mechanisms**

### **C.2.1. Irish Human Rights and Equality Commission**

The Irish Human Rights and Equality Commission (IHREC) is the national human rights institution (NHRI). It operates under the Public Sector Equality and Human Rights Duty, and is an independent public body which accounts to the Oireachtas.<sup>230</sup> Under section 10 (1) of the Human Rights and Equality

<sup>220</sup> NAP (n 2) 5. See also See ‘Ireland Connected: trading and investing in a dynamic World’ [http://www.merriestreet.ie/merriestreet/en/imagelibrary/20170308\\_ireland\\_Connected.pdf](http://www.merriestreet.ie/merriestreet/en/imagelibrary/20170308_ireland_Connected.pdf).

<sup>221</sup> Ciara Hackett, Ciarán O’Kelly, and Clare Patton, ‘The Case of the Irish National Contact Point for the OECD Guidelines for Multinational Enterprises: Challenges and Opportunities for the Business and Human Rights Landscape in Ireland’ available at <https://ssrn.com/abstract=3645083>.

<sup>222</sup> Darcy (n 216).

<sup>223</sup> *ibid* Darcy, 5.

<sup>224</sup> Under the NAP, 9 ‘The department of Foreign affairs and trade is the lead unit and will provide the secretariat for the Business and Human Rights implementation group. Minutes of meetings of the Business and Human Rights Implementation Group are available at <https://www.dfa.ie/our-role-policies/international-priorities/human-rights/business-and-humanrights/>

<sup>225</sup> See ‘Initial priorities for the Business and Human Rights implementation group’, ‘The State Duty to Protect Human Rights’ and ‘The Corporate Responsibility to Respect Human Rights’ 10 <https://www.dfa.ie/media/dfa/alldfawebsitemedia/National-Plan-on-Business-and-Human-Rights-2017-2020.pdf>

<sup>226</sup> (n 2).

<sup>227</sup> NAP (n 2) Recommendation No. 15 is to review of how best to ensure remedy for potential victims overseas of human rights abuses by Irish companies, with a focus on legal, procedural or financial barriers to justice.

<sup>228</sup> Darcy (n 216) highlights a number of relevant statements including ‘It is time to discuss the role of human rights in business’ *Irish Independent* (7 November 2014); Ireland Statement, Human Rights Council, 26th session, 16 June 2014, available at <https://www.dfa.ie/media/dfa/alldfawebsitemedia/ourrolesandpolicies/int-priorities/humanrights-national-statement-general-debate-items-2-3.pdf>; Government of Ireland, ‘One World, One Future; Ireland’s Policy for International Development’ (2013), 21; Government of Ireland, ‘The Global Island: Ireland’s Foreign Policy for a Changing World’ (2015).

<sup>229</sup> Baseline Assessment (n 2) ‘Gaps and Recommendations’ 12. At 13, noting that Ireland is a participant State in the Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies During Armed Conflict, but is not a party to several relevant initiatives including the Extractive Industries Transparency Initiative (EITI), International Code of Conduct for Private Security Providers Association (ICoCA).

<sup>230</sup> See UN ‘Principles relating to the Status of National Institutions’ General Assembly resolution 48/134 of 20 December 1993 (Paris Principles) available at <https://nhri.ohchr.org/EN/AboutUs/Pages/ParisPrinciples.aspx>



Commission Act 2014: ‘The functions of the Commission shall be (a) to protect and promote human rights and equality, (b) to encourage the development of a culture of respect for human rights, equality, and intercultural understanding in the State, (c) to promote understanding and awareness of the importance of human rights and equality in the State, (d) to encourage good practice in intercultural relations, to promote tolerance and acceptance of diversity in the State and respect for the freedom and dignity of each person, (e) to work towards the elimination of human rights abuses, discrimination and prohibited conduct.’<sup>231</sup> The exercise of its powers, is a decision for the IHREC at its discretion, consistent with the priorities in its Strategic Statement 2019-2021:

- (1) ‘Protect the rights of individual persons who face the greatest barriers to justice;
- (2) Influence legislation, policy and practice;
- (3) Engage with key organisations to address discrimination and human rights abuses;
- (4) Raise the quality and broaden the extent of the dialogue on human rights and equality issues.’<sup>232</sup>

The competencies of the IHREC under statute include potentially powerful legal functions, such as the power to apply to the higher courts to appear as an *amicus curiae* in proceedings involving or concerning human rights or equality.<sup>233</sup> It may make legislative observations.<sup>234</sup> In specified circumstances, it can provide legal representation,<sup>235</sup> and can issue ‘parallel reports’ to international treaty monitoring bodies.<sup>236</sup> The IHREC made valuable submissions to the development of the National Plan on Business and Human Rights in 2015.<sup>237</sup> The IHREC engages with international networks including the European Network of National Human Rights Institutions (ENNHRI).<sup>238</sup> The ENNHRI webpage links to a report of the European Union Agency for Fundamental Rights (EU FRA), ‘Strong and Effective National Human Rights Institutions’ (2020),<sup>239</sup> which makes reference to the role of NHRIs

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<sup>231</sup> <http://www.irishstatutebook.ie/eli/2014/act/25/section/10/enacted/en/html#sec10>.

<sup>232</sup> <https://www.ihrec.ie/about/strategicpriorities/>. See also [www.ihrec.ie](http://www.ihrec.ie).

<sup>233</sup> Recent activity includes cases relating to ‘data privacy remedies, prisoners’ rights, children’s rights, the rights of asylum seekers and non-EU nationals to live/work in Ireland and the bringing of complaints pursuant to the Employment Equality Acts 1998–2015.’ See <https://www.ihrec.ie/our-work/legal-activity/amicus-curiae-power/>.

<sup>234</sup> <https://www.ihrec.ie/legislative-observations/>.

<sup>235</sup> See s.10(1); s.10((2)(e)-(g); s.40 and 41 Irish Human Rights and Equality Commission Act 2014 available at <http://www.irishstatutebook.ie/eli/2014/act/25/section/10/enacted/en/html#sec10>. The website states, ‘The Commission through its legal functions can also provide practical assistance, including under specific circumstances, legal representation, to persons in vindicating their rights under human rights and anti-discrimination legislation, in particular under the *Employment Equality Acts 1998–2015*, the *Equal Status Acts 2000–2015*, the *European Convention on Human Rights Acts 2003 and 2014*, and more generally in relation to the protection and promotion of human rights and equality.’

<sup>236</sup> <https://www.ihrec.ie/reports-international-bodies/>.

<sup>237</sup> <https://www.ihrec.ie/?s=business>.

<sup>238</sup> IHREC in the context of this Review, October 2020. The IHREC in its feedback indicated an interest in the activities of NHRIs in other jurisdictions.

<sup>239</sup> EU FRA 2020, 32. Available at <https://fra.europa.eu/en/publication/2020/strong-effective-nhris>

Noting that in 2017, the EU FRA called for ‘Paris Principles-compliant NHRIs to be part of a comprehensive system for access to remedy’ (Opinion 13) (n 50); In 2019 (n 18), the EU FRA focus paper highlighted persistent issues in access to remedy in the area of business and human rights. It noted the role of non-judicial mechanisms, including NHRIs can support victims, with advice, accepting cases and possibly taking cases. With regard to NHRIs, the focus paper notes ‘[the] role of non-judicial mechanisms, such as National Human Rights Institutions



in facilitating access to justice in ‘relatively novel’ areas including business and human rights.<sup>240</sup> The EU FRA reports that ‘NHRIs are being considered for enhanced mandates in the UN’s work in the business and human rights context’<sup>241</sup> While fuller examination is outside the scope of this Review, the EU FRA refers to involvement of NHRIs in business and human rights since 2010,<sup>242</sup> via also OECD engagement, and to the UNWG 2019 global survey of NHRIs on their involvement in access to remedy in cases of business abuse of human rights.<sup>243</sup> Further, it refers the potential role of NHRIs within the UN binding treaty.<sup>244</sup> It is apparent that the European Network of NHRIs is already active in the field of Business and Human Rights. The Working Group on Business and Human Rights of the European Network of National Human Rights Institutions<sup>245</sup> states:

‘As the reach and impact of business enterprises has amplified across the world, there has been increased debate in recent years about their roles and responsibilities with regard to human rights. The Edinburgh Declaration sets out collective commitments of National Human Rights Institutions (NHRIs) to engage proactively with corporate human rights responsibility and abuses, including with reference to the UN Guiding Principles on Business and Human Rights. Through our Business and Human Rights Working Group, we facilitate collaborate work on this topic.’<sup>246</sup>

The ENNHRI has, *inter alia*, recommended that the European Commission develop and adopt an EU-level Action Plan on Business and Human Rights,<sup>247</sup> and has made submissions to the European Commission on the human rights aspects of the EU Non-Financial Reporting Directive.<sup>248</sup> The ENNHRI has participated in negotiations on the UN binding treaty, and issued related statements in 2018 and

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or Ombud institutions, that can support victims – not only in accepting cases but also in providing support and advice, and possibly taking cases before judicial mechanisms’.

<sup>240</sup> *ibid* EU FRA 2020 Section 3.3.1.

<sup>241</sup> *ibid* 32.

<sup>242</sup> *ibid* 70 ‘Since 2001, ENNHRI (at the time known as the European Group of NHRIs) has had observer status on the Council of Europe Steering Committee on Human Rights and contributes to key human rights issues, such as the rule of law, civic space, *business and human rights* and migration’ (emphasis added).

<sup>243</sup> See OECD (7 July 2012) ‘OECD and NHRIs join forces’; UN Human Rights Office (2019), Access to Remedy – Responses.

<sup>244</sup> EU FRA 2020 (n 239) 32;89. See also the statement on behalf of the Global Alliance of National Human Rights Institutions concerning Articles 12,13 and 14 available at <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session6/Pages/Session6.aspx>

<sup>245</sup> Current members Business and Human Rights Working Group include the NHRIs of: Armenia, Croatia, Denmark, Finland, France, Georgia, Germany, Great Britain, Luxembourg, Netherlands, **Northern Ireland**, Portugal, Scotland and Slovakia. (emphasis added) available at <http://ennhri.org/our-work/topics/business-and-human-rights/>.

<sup>246</sup> <<http://ennhri.org/our-work/topics/business-and-human-rights/>>. See also Edinburgh Declaration [https://www.ohchr.org/Documents/AboutUs/NHRI/Edinburgh\\_Declaration\\_en.pdf](https://www.ohchr.org/Documents/AboutUs/NHRI/Edinburgh_Declaration_en.pdf).

<sup>247</sup> <http://ennhri.org/news-and-blog/ennhri-recommends-new-european-commission-to-develop-and-adopt-eu-level-action-plan-on-business-and-human-rights/>

<sup>248</sup> <http://ennhri.org/news-and-blog/nhris-underline-human-rights-issues-in-revised-eu-non-financial-reporting-directive/>.

2020, alongside NHRIs from EU Member States.<sup>249</sup> Information from the EU FRA and ENNHRI, indicates considering business and human rights would arguably be in keeping with NHRI's in other EU jurisdictions.<sup>250</sup> The potential influence of the Irish Human Rights and Equality Commission on business and human rights may span facilitating knowledge transfer and supporting access to remedy, as well as influencing the development of legislation, policy and practice.

### C.2.2. Irish National Contact Point

Ireland has adopted the OECD Guidelines for Multinational Enterprises,<sup>251</sup> and established a National Contact Point (NCP). The NCP is located in the Trade Policy Unit of the Department of Enterprise, Trade and Employment.<sup>252</sup> NCPs promote the OECD Guidelines, handle enquiries and contribute to the resolution of issues that arise relating to implementation of the Guidelines in 'specific instances', a grievance or complaints mechanism.<sup>253</sup> For present purposes, the interest is in the impact of the NCP on access to remedy, how well this functions, and how it could be improved. Data indicates a low level of incidents are addressed to NCPs.<sup>254</sup> Just four complaints have been made to the Irish NCP, information on which is accessible via its recently updated website,<sup>255</sup> and the OECD website.<sup>256</sup> Under the specific instances mechanism, NCPs are obliged to provide a platform for discussion and assistance where there is alleged non-observance of the OECD Guidelines. The process is focused on facilitating consensual resolution including via conciliation or professional mediation.<sup>257</sup> If the Irish NCP accepts a case which requires mediation, it will contract a professional mediator. The process is open to any individual or organisation (including NGOs, trade unions) to lodge a complaint. It is a voluntary platform, and the NCP cannot compel any company to engage.<sup>258</sup>

<sup>249</sup> <http://ennhri.org/news-and-blog/ennhri-issues-statement-on-the-development-of-business-and-human-rights-treaty/>.

<sup>250</sup> Indicative searches <https://www.ihrec.ie/?s=business+and+human+rights>; <https://www.ihrec.ie/?s=remedy>; <https://www.ihrec.ie/?s=business+and+human+rights>; <https://www.ihrec.ie/?s=UNGP>; <https://www.ihrec.ie/?s=treaty+on+business>; <https://www.ihrec.ie/?s=due+diligence>;

<sup>251</sup> (n 43). A dedicated human rights chapter IV was added in 2011 available at <https://mneguidelines.oecd.org/themes/human-rights.htm>.

<sup>252</sup> <https://dbei.gov.ie/en/What-We-Do/Trade-Investment/Trade-Policy/OECD-Guidelines-for-Multinational-Enterprises/>.

<sup>253</sup> For assessment of indicators under procedures, organisations and communication of the Irish NCP see <https://www.oecdwatch.org/ncp/ncp-ireland/>.

<sup>254</sup> EU FRA (n 18) 2.7; (n 50) Opinion 14.

<sup>255</sup> <https://enterprise.gov.ie/en/What-We-Do/Trade-Investment/OECD-Guidelines-NCP/>.

<sup>256</sup> [http://mneguidelines.oecd.org/database/searchresults/?q=\(NCP:\(Ireland\)\)](http://mneguidelines.oecd.org/database/searchresults/?q=(NCP:(Ireland))); <http://mneguidelines.oecd.org/database/instances/ie0004.htm>. GLAN (n 1) filed a complaint before Ireland's NCP against San Leon Energy PLC in October 2018. San Leon is headquartered in Dublin. The complaint alleges the company failed to ensure that it has the consent of the Western Saharan people before drilling for oil on their land.

<sup>257</sup> The stages of the process are initial assessment, employ of good offices to examine and seek resolution, and conclusion via statement or report including recommendations from the NCP. If the parties reach resolution at the conclusion of the process, the NCP will make the results publicly available. THE NCP may follow up with a statement on its recommendations.

<sup>258</sup> If a complaint is submitted in multiple jurisdictions against the same group, a lead NCP is agreed between the NCPs contacted.

The Irish NCP may be considered to be in a transitional phase as it prepares for a peer review in 2021. This process, designed to support NCPs in making improvements, involves an assessment by a team of experienced NCPs of all aspects of functioning, including information provision, promotion, and handling of complaints. It is positive that this process is being engaged. The NCP webpage has recently been updated, which is expected to increase utility for stakeholders, and includes enhanced guidance on the complaints process,<sup>259</sup> and links to the extensive sectoral guidance and best practice sharing of the OCED, including on Due Diligence for Responsible Business Conduct.<sup>260</sup> Practice indicates that structure is part of the challenge for the Irish NCP.<sup>261</sup> For example, the Ireland NCP is within a small number of NCPs which are hosted within one government department.<sup>262</sup> While it is not unique in this, and informal communication with state services and Departments is engaged, structure is a factor identified by the OECD as running risks, *inter alia*, of lack of connection with other ministries and external stakeholders, perception of a lack of impartiality, and an obstacle to visibility.<sup>263</sup>

Commentators cogently highlight that the performance of the Irish NCP could be enhanced by referring back to the core criteria of ‘functional equivalence’: visibility, accessibility, transparency and accountability.<sup>264</sup> Engagement with actors in business, law, and civil society in Ireland is advocated. Similarly, measures increasing transparency of the activity of the NCP. Raising visibility and opportunities for knowledge transfer, such as attendance at conferences is encouraged.<sup>265</sup> More is possible, as is evident from other NCPs.<sup>266</sup> However, the NCP can only go as far in promoting the OECD Guidelines in Ireland as its structure and resourcing permits it to. In this, as the OECD notes in its Progress Report:

NCPs have a huge potential to affect change, both through their promotional work and through the handling of cases. Limitations in NCP activities are not for lack of willingness from the

<sup>259</sup> <https://enterprise.gov.ie/en/Publications/Publication-files/OECD-Flyer-on-Specific-Instance-Complaints.pdf>.

<sup>260</sup> See also <http://mneguidelines.oecd.org/factsheet-working-together-national-human-rights-institutions-and-OECD-guidelines-for-MNEs.pdf>.

<sup>261</sup> For comparison, the UK NCP steering committee including external members from stakeholder groups such as business, trade unions and NGOs, representatives from relevant government departments. It has a dedicated budget and ‘a small team of permanent civil servants who work exclusively on the priorities of the UK NCP’ See <https://www.gov.uk/government/organisations/uk-national-contact-point/about/our-governance#steering-board>.

<sup>262</sup> OECD Meeting at Ministerial Level ‘Progress Report on National Contact Points for Responsible Business Conduct..’ (May 2019) 7 listing Ireland as one of eight NCPs ‘based in one single ministry that do not involve other ministries in the work of the NCP and also do not involve stakeholders in their structure’ available at [https://www.oecd.org/mcm/documents/NCPs%20-%20CMIN\(2019\)7%20-%20EN.pdf](https://www.oecd.org/mcm/documents/NCPs%20-%20CMIN(2019)7%20-%20EN.pdf).

<sup>263</sup> *ibid* re structure and impact on activity 8 paras 20-22. See also Hackett et al (n 221) 9.

<sup>264</sup> Hackett et al (n 221) 8 stating ‘Unfortunately, the Irish Government, and the Irish NCP have not been active in developing the business and human rights infrastructure domestically. Despite the publication of the NAP, for example, the failure to implement this to date emphasises the apparent and ongoing unwillingness to engage beyond the bare minimum on such issues that cut across the corporate/state landscape.’

<sup>265</sup> See 2019 ‘Progress Report’ (n 262) 12, Ireland is listed as one of five NCPs which carried out no promotional activities in either 2018 or 2017 (Egypt, Estonia, Iceland, Ireland and Jordan) available at [https://www.oecd.org/mcm/documents/NCPs%20-%20CMIN\(2019\)7%20-%20EN.pdf](https://www.oecd.org/mcm/documents/NCPs%20-%20CMIN(2019)7%20-%20EN.pdf). See also See ‘Annual Report on the OECD Guidelines for Multinational Enterprises 2018’ 27 and Ireland page 3 available at <https://mneguidelines.oecd.org/2018-Annual-Report-MNE-Guidelines-EN.pdf>.

<sup>266</sup> See Annex 1 [https://www.oecd.org/mcm/documents/NCPs%20-%20CMIN\(2019\)7%20-%20EN.pdf](https://www.oecd.org/mcm/documents/NCPs%20-%20CMIN(2019)7%20-%20EN.pdf).

staff involved but stem from the challenges faced in obtaining political commitment and financial support.<sup>267</sup>

It is to be hoped that the 2021 Peer Review will yield improvements for the Irish NCP. Pending the outcome of the Peer Review, recommendations for consideration are included in Section F.

### **C.3. Ireland – State-Based Judicial Remedies**

State based judicial remedies can be anticipated to be the dominant mechanism of remedy.<sup>268</sup> The threads of criminal and civil law, and future regulation of human rights due diligence, interact with the potential impact of the Irish Constitution. As outlined, litigation against multinational corporations in their home states continues to grow. Recalling that underlying on-going cases in the UK, Netherlands and Canada, are allegations including rape, torture, killing, slave labour, and environmental pollution causing damage to livelihoods and health.<sup>269</sup> As the UN High Commissioner for Human Rights notes:

Although causing or contributing to severe human rights abuses would amount to a crime in many jurisdictions, business enterprises are seldom the subject of law enforcement and criminal sanctions. Private claims often fail to proceed to judgment and, where a legal remedy is obtained, it frequently does not meet the international standard of “adequate, effective and prompt reparation for harm suffered”<sup>270</sup>

#### **C.3.1. Corporate Criminal Liability**

The issues with corporate accountability in criminal law outlined in section B.4.1 resonate in Ireland. Within criminal law, well documented problems with the identification method of attribution of liability negatively impact enforcement.<sup>271</sup> This is particularly so within larger more complex commercial organisations, which are those which have been typically involved in litigation for business-related adverse impacts. To overcome such issues and target behavioural change, extension of the existing models of ‘failure to prevent’ offences may offer benefits. This model is recognised as a shift in approach to corporate liability,<sup>272</sup> but is cogently argued to be more effective than ‘orthodox’ criminal prosecution.<sup>273</sup> In driving business to ensure that ‘offences are not committed in its name or on its

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<sup>267</sup> See Progress Report (n 262) paras 47-49.

<sup>268</sup> (n 135).

<sup>269</sup> Respectively (n 161); (n 162); (n 146); (n 158); (n 159).

<sup>270</sup> Human Rights Council (10 May 2016) “Improving accountability and access to remedy for victims of business-related human rights abuse - Report of the United Nations High Commissioner for Human Rights” A/HRC/32/19

<sup>271</sup> Law Reform Commission ‘Report on Regulatory Powers and Corporate Offences’ Volume 2 (2018) LRC 119-2018 570 (ILRC Corporate Offences) 570. See also Campbell (n 134 ) 57.

<sup>272</sup> ILRC (Corporate Offences) (n 271) 399 on how corporate bodies are treated in criminal law and rendering the corporate body criminally liable for failure to observe a duty of care in the UK Corporate Manslaughter and Corporate Homicide Act 2007.

<sup>273</sup> Campbell (n 134) 57 arguing as more straightforward than both identification and gross negligence approach.

behalf,<sup>274</sup> it arguably syncs with developments regarding parent company duty of care within civil litigation and the concept of human rights due diligence.

### **C.3.1.1. Failure to Prevent for Human Rights Abuses**

In the UK and in Ireland, established offences of bribery/corruption provide failure to prevent models, which could be extended to impact upon remedy in business and human rights. Under the UK Bribery Act 2010, a corporate entity may be liable for its failure to prevent an officer, employee, agent or subsidiary committing the offence.<sup>275</sup> It is a strict liability offence. The onus is on the entity to prove that it had ‘adequate procedures’ to prevent the conduct,<sup>276</sup> assessed against principles which are appropriately ‘flexible and outcome focused’.<sup>277</sup> The model has been extended to offences of failure to prevent tax evasion in the UK Criminal Finances Act 2017,<sup>278</sup> and is also employed in other jurisdictions.<sup>279</sup> While limits preclude further elaboration, criticisms regarding failure to prevent offences in the UK are acknowledged, and arguably can be addressed.<sup>280</sup> Notably, post legislative scrutiny of the UK Bribery Act in 2019 termed it ‘much praised’.<sup>281</sup>

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<sup>274</sup> ILRC Corporate Offences (n 271). From a similar perspective concerning economic crime, see also UK Ministry of Justice, ‘Corporate Liability for Economic Crime: Call for Evidence’ (2017) 17 available at [www.gov.uk/government/consultations/corporate-liability-for-economic-crime-call-for-evidence](http://www.gov.uk/government/consultations/corporate-liability-for-economic-crime-call-for-evidence).

<sup>275</sup> Section 7. See ILRC Corporate Offences (n 271) 387 noting s.7 formula potentially results in the conviction of directors or senior officers who would otherwise have avoided liability due to an inability to prove intention or knowledge.

<sup>276</sup> Article 7(2). The Guidance on the Act outlines 16 factors to be considered including the level of control over the activities of the associated person and the degree of risk that required mitigation. At 20-28, it includes six principles concerning procedures to prevent: proportionate procedures, top level commitment, risk assessment, due diligence, communication, training, monitoring and review. Available at [www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf](http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf).

<sup>277</sup> ILRC Corporate Offences (n 271) 573.

<sup>278</sup> The guidance document, ‘Tackling tax evasion: legislation and guidance for a corporate offence of failure to prevent the criminal facilitation of tax evasion’ (2016), para 1.3. explains that the policy objective of extending the use of the ‘failure to prevent model’ was to ‘overcome the difficulties in attributing criminal liability to corporations for the criminal acts of those who act on their behalf’. Available at [www.tax.org.uk/system/files\\_force/file\\_uploads/160715%20Corporate%20offence%20of%20failure%20to%20prevent%20the%20criminal%20facilitation%20of%20tax%20evasion%20-%20CIOT%20comments.pdf?download=1](http://www.tax.org.uk/system/files_force/file_uploads/160715%20Corporate%20offence%20of%20failure%20to%20prevent%20the%20criminal%20facilitation%20of%20tax%20evasion%20-%20CIOT%20comments.pdf?download=1). See Campbell (n 134) 61 identifying that the arguably less onerous standard of ‘reasonable procedures’ in the 2017 Act is a result of lobbying. While the person must be providing services for or on behalf of the corporate entity, unlike s.7 of the 2010 Act, it is not a requirement that the offence be for the benefit of the it.

<sup>279</sup> Penal Code of Finland, chapter 7 section 2; Swiss Penal Code Article 102.1 and 102.2; Canadian Criminal Code (n 318) section 22.2(c).

<sup>280</sup> ILRC Corporate Offences (n 271). Concerns over the effectiveness of the model expressed by Campbell (n 134) 63-66. For details of increased activity and corporations charged with Section 7 failure to prevent offences, see [www.sfo.gov.uk](http://www.sfo.gov.uk). See also Widdis (n 6) chapter 2. Additional critiques of such offences in the UK include possible concerns with due process rights for corporations and use of a reverse burden defence of adequate procedures to prevent Campbell (n 134) 61-63. See also Wells (n 134) 6. Further, ILRC Corporate Offences (n 271) 579. It appears that neither are considered to be barriers by the ILRC, which concludes that the reverse onus does not compromise obligations under Article 6 ECHR, see ILRC Corporate Offences 580.

<sup>281</sup> ‘The Bribery Act 2010: Post Legislative Scrutiny’ available at [www.parliament.uk/business/committees/committees-a-z/lords-select/bribery-act-2010/news-parliament-2017/bribery-act-2010-report-publication/](http://www.parliament.uk/business/committees/committees-a-z/lords-select/bribery-act-2010/news-parliament-2017/bribery-act-2010-report-publication/).



As the Baseline Assessment notes, ‘action on law reform proposals in relation to corporate criminal responsibility is long awaited.’<sup>282</sup> The Irish Law Reform Commission (ILRC) has recognised that existing mechanisms of attribution of liability are not well adapted for complex organisations, and may incentivise management to ‘turn a blind eye’.<sup>283</sup> In its 2018 ‘Report on Regulatory Powers and Corporate Offences’, it recommended fundamental changes.<sup>284</sup> The scheme which it proposed validly focuses on persons with control over policy, rather than those executing policy,<sup>285</sup> and includes provision for complicity for failure to prevent an offence.<sup>286</sup> Further, it recommended that conduct by omission be attributed to the corporate body in the same way as it is to a natural person.<sup>287</sup> In Ireland, ‘failure to prevent’ offences are already provided in the Criminal Justice (Offences Relating to Information Systems) Act 2017, and the Criminal Justice (Corruption Offences) Act 2018,<sup>288</sup> including a due diligence style defence.<sup>289</sup> Noted also is the potential relevance of the Protected Disclosures Act 2014,<sup>290</sup> applying where an offence has been, is being, or is likely to be committed under which a worker can make a disclosure to the worker’s employer, or to a ‘prescribed body’,<sup>291</sup> as previously raised in the Baseline Assessment.<sup>292</sup>

While limits preclude fuller elaboration, consideration may be given to extending the failure to prevent model in Ireland beyond economic crimes,<sup>293</sup> to failure to prevent human rights abuses. A corporate offence of failure to prevent human rights abuses in Ireland is suggested for consideration by Widdis,<sup>294</sup> extending from the model in the Criminal Justice (Corruption Offences) Act 2018.<sup>295</sup> Arguably, it is

<sup>282</sup> Baseline Assessment (n 2) 25; see Law Reform Commission, Report on Corporate Killing LRC 77-2005 (October 2005).

<sup>283</sup> See ILRC Corporate Offences (n 271) 433. At 391, the main approaches for attribution are identified as: strict identification; rules of attribution; expanded identification; vicarious/strict liability; and failure to prevent. See also 366; Campbell (n 134) 57.

<sup>284</sup> *ibid* 364-378. See also Campbell (n 134) 57.

<sup>285</sup> ILRC Corporate Offences (n 271) R 9.02.

<sup>286</sup> *ibid* R 9.12. See also Law Reform Commission, *Report on Corporate Killing* (n 282).

<sup>287</sup> ILRC Corporate Offences (n 271) R 8.23 and R 8.16. Noting the ILRC ‘Consultation Paper on Corporate Killing’ (LRC CP 26-2003) para 2.09 recommended introduction of a statutory offence of corporate manslaughter.

<sup>288</sup> Available at [www.irishstatutebook.ie/eli/2018/act/9/section/18/enacted/en/html](http://www.irishstatutebook.ie/eli/2018/act/9/section/18/enacted/en/html). See ILRC Corporate Offences (n 271) 570.

<sup>289</sup> ILRC Corporate Offences (n 271) 392 confirming a due diligence defence is in use in Ireland in relation to statutory strict liability offences, citing *Shannon Regional Fisheries Board v Cavan County Council* [1996] 3 IR 267 (Keane J) quoted with approval by the Supreme Court in *Waxy O’Connors Ltd v Riordan* [2016] IESC 30. See also 570; 566-567. At 426-427, the scheme proposed by the ILRC includes a rebuttable presumption that the conduct element of the offence has been satisfied, placing the onus on the corporate defendant to demonstrate it took ‘all reasonable steps to prevent’ it.

<sup>290</sup> See Baseline Assessment (n 2) 23.

<sup>291</sup> As defined by SI 339/2014 as amended by SI 448/2015.

<sup>292</sup> See Baseline Assessment (n 2) 24 stating that this legislation ‘closely reflects international best practice recommendations on whistle-blower protection made by the OECD, the UN and the Council of Europe and draws on recent developments in legislative models adopted or being put in place in other jurisdictions.’

<sup>293</sup> See generally Campbell (n 134). See also Wells (n 134) 6 arguing that the failure to prevent model could ‘pave the way for the wholesale adoption of failure to prevent as a model for corporate liability’.

<sup>294</sup> Widdis (n 6) chapter 2.

<sup>295</sup> ILRC (n 271) 592 considering this model may be more effective in incentivising good governance, and avoids identification doctrine issues with The Criminal Justice (Offences Relating to Information Systems) Act 2017.



appropriate to hold corporations to the higher standard of ‘all reasonable steps and exercised all due diligence to avoid the commission of the offence’ as provided in s.18 of the Act,<sup>296</sup> and not to require the offence to be for the benefit of the corporate body.<sup>297</sup> The ILRC considered that to apply failure to prevent generally would be onerous on corporate bodies.<sup>298</sup> On the other hand, it acknowledges that it enables issues with the identification doctrine to be avoided, and may ease the burden on the prosecution. The ILRC comments that it is ‘... substantially easier to prosecute a corporation for failing to prevent criminal activity than prosecuting for carrying out the substantive criminal act itself’.<sup>299</sup>

Both the Criminal Justice (Corruption Offences) Act 2018 and the Protected Disclosures Act 2014 have extraterritorial reach,<sup>300</sup> and are arguably successful models of home state regulation with extraterritorial effect,<sup>301</sup> outlined as effective means for States to advance access to remedy. The UK Bribery Act and Irish 2018 Act are acknowledged by the ILRC to have benefits in deterrence and compliance.<sup>302</sup> Existing gaps in accountability are supportive of public prosecution where deemed feasible,<sup>303</sup> and arguably prosecuting corporations will deter abuses and improve corporate culture and behaviour, similarly to the ‘indirect regulatory effects’ of foreign direct liability litigation in civil law.<sup>304</sup>

In light of the status of human rights and existing accountability gap, it is arguably proportionate and appropriate to consider an offence of failure to prevent model to human rights abuses.<sup>305</sup> The introduction of legislation imposing a duty on all companies to prevent human rights abuses has been recommended by the UK Joint Committee on Human Rights.<sup>306</sup> Independently, the British Institute of

<sup>296</sup> *ibid* 597. Standard considered as higher and arguably more appropriate than the standard in the Bribery Act.

<sup>297</sup> Widdis (n 6) chapter 2. As in the Criminal Finances Act 2017 (UK), rather than the approach in s.7 of the Bribery Act 2010. Although this construction was adopted in the UK, the ILRC Corporate Offences (n 271) at 593 considers that such a formulation, which does not require the offence to be for the benefit of the corporation, may lead to unfairness.

<sup>298</sup> ILRC Corporate Offences (n 271) 600, concludes that to apply this model generally would place ‘an extremely onerous, strict liability general duty on the corporate body to prevent all offending’.

<sup>299</sup> *ibid* 594.

<sup>300</sup> S. 11 and 12 of the 2018 Act apply to offences which take place both inside or in part outside Ireland; Section 5(4) 2014 Act.

<sup>301</sup> Noting s.6 of the Criminal Law (Human Trafficking) Act 2008 which provides for criminal liability where a trafficking offence is committed by a corporate body and the Criminal Law (Human Trafficking) Amendment Act 2013, giving effect to Directive 2011/36/EU on Preventing and Combating Trafficking in Human Beings and Protecting its Victims; the Geneva Conventions Act 1962; Criminal Justice (United Nations Convention Against Torture) Act 2000, International Criminal Court Act 2006. See also Baseline Assessment (n 2) 49.

<sup>302</sup> ILRC Corporate Offences (n 271) 592 noting that similar to section 7, liability under section 18 of the 2018 Act is based on organisational faults in a corporate body’s systems or policies and ‘may therefore be more effective in ensuring compliance and incentivising good governance’.

<sup>303</sup> Noting the use of deferred prosecution agreements under the UK Bribery Act. See Campbell (n 134) 63-66.

<sup>304</sup> See Schrempf-Stirling and Wettstein (n 28) on indirect regulatory benefits, indicating increased impetus in publishing human rights policy statements, human rights audits, training for employees, and engagement with NGO’s is apparent once legal proceedings have issued, with norming effects positively influencing the behaviour of both defendant and non-defendant companies. See also McCorquodale et al (n 14) 207.

<sup>305</sup> See proposal by Widdis (n 6) chapter 2. See also section A.1. Evidently, successful implementation requires adequate resources for enforcement to be effective, see Baseline Assessment (n 2) 33.

<sup>306</sup> UK House of Lords House of Commons Joint Committee on Human Rights Human Rights and Business (2017), ‘Promoting responsibility and ensuring accountability’ para 193 available at <https://publications.parliament.uk/pa/jt201617/jtselect/jtrights/443/443.pdf>. See also Herbert Smith Freehills,

International and Comparative Law has also proposed a failure to prevent mechanism for corporate human rights harms in the UK.<sup>307</sup> In discussions on the EU sustainable corporate governance initiative, it has been recommended that ‘... the [EU] legislation include criminal liability provisions for companies and directors and management that are held responsible in the event of severe violations of human rights.’<sup>308</sup> Arguably, extending the successful failure to prevent model to human rights abuses responds to the need for effective mechanisms of remedy, and supports States’ existing obligations to prevent abuses by private actors. In this light, it would work with the thrust of widely accepted international standards such as the UNGPs, developments in HRDD, and litigation in private law.<sup>309</sup> The alternative is to default to remedy for business-related abuses relying exclusively upon voluntary implementation, and claimants bearing the burden of taking challenging litigation within civil law.

### **C.3.2. Approaches to Corporate Civil Liability**

Foreign direct liability litigation (FDL) seeks judicial remedy in the home states of multinational corporations. The cause of action is within the tort of negligence, underlying which are business-related adverse impacts on human rights, often at a severe level.<sup>310</sup> These cases are based upon the principle that a parent company may owe a duty of care to those impacted. To the authors knowledge, litigation of the style discussed in this review has not been commenced in Ireland, although business operating in Ireland are being discussed in connection with abuses overseas.<sup>311</sup> For present purposes, it is most instructive to look to the development of FDL litigation in the English courts.<sup>312</sup> It offers settled jurisprudence in relevant aspects.<sup>313</sup> Further, courts in the EU are generally applying the law of the forum where the harm occurred,<sup>314</sup> which in several cases is influenced by English common law.<sup>315</sup> In 2019, the UK Supreme Court handed down its judgment in *Vedanta*.<sup>316</sup> It can be expected to provide

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‘UK Government pushed to impose a duty to prevent corporate human rights abuse’ (6 April 2017) available at [www.herbertsmithfreehills.com/latest-thinking/uk-government-pushed-to-impose-a-corporate-duty-to-prevent-human-rights-abuse](http://www.herbertsmithfreehills.com/latest-thinking/uk-government-pushed-to-impose-a-corporate-duty-to-prevent-human-rights-abuse).

<sup>307</sup> British Institute of International and Comparative Law (BIICL), Peter Hood, Julianne Hughes-Jennett, Dr Irene Pietropaoli, Lise Smit ‘A UK Failure to Prevent Mechanism for Corporate Human Rights Harms’ (February 2020) available at <https://www.biicl.org/publications/a-uk-failure-to-prevent-mechanism-for-corporate-human-rights-harms>.

<sup>308</sup> UN CESCR General Comment No. 24 (n 70) para 15; Draft Opinion of the Committee of Foreign Affairs for the Committee of Legal Affairs (n 170) paras 49-51.

<sup>309</sup> Including subsidiaries in the ambit would impact positively on the challenges to accountability of the company law doctrines of separate legal personality discussed in section B.3.

<sup>310</sup> See section B.4.1. Given limitations and lack of judgments on the merits, damages are not considered.

<sup>311</sup> (n 1).

<sup>312</sup> The United Kingdom (UK) is the nearest common law jurisdiction and has commonalities with Ireland of concepts in private law; ‘legal family’; language; socio-economic background in Western Europe; and historical context. The rulings of the Canadian courts in *Hudbay*, *Garcia* weigh in precedential value, and *Araya* is relevant concerning violations by a corporation of fundamental human rights enshrined in customary international law, such as the prohibition against slavery, forced labour, and torture (B.4.2.).

<sup>313</sup> *Chandler* (n 156) (Arden LJ) [69]. The English courts have established that direct parent company liability is distinct from veil-piercing. Vicarious liability has not been oft pleaded in English jurisprudence.

<sup>314</sup> Section B.4.2. and B.4.3.

<sup>315</sup> *Vedanta* (SC) (n 158) (Briggs LJ) [44].

<sup>316</sup> (n 158).

persuasive authority, and exert influence on the future direction of case law in this field.<sup>317</sup> It is established that parent company duty of care extends beyond those with whom the parent has a direct (employer/employee) relationship, to the wider community negatively affected by the operations of subsidiaries. The English courts have shown pragmatism, recognising that there are a range of models of management in multinational corporations which may ground the necessary level of control or intervention by the parent company in the operations of its subsidiaries.<sup>318</sup> Further, it was made clear that a corporation which fails to ‘walk its talk’ may be courting legal risks.<sup>319</sup>

The hurdle of establishing jurisdiction, and joining foreign co-defendants, would face claimants taking an FDL style case in the Irish courts.<sup>320</sup> The anchor defendant must be domiciled in Ireland<sup>321</sup> to connect a foreign defendant to proceedings in Ireland under Article 8 Brussels I.<sup>322</sup> A national court will determine whether to hear the cases against the two parties together,<sup>323</sup> with leave to serve the party outside the jurisdiction to be determined under domestic civil procedure rules.<sup>324</sup> The inclusion of the anchor defendant ‘must not be a mere device’ aimed at anchoring proceedings before the Irish courts.<sup>325</sup>

<sup>317</sup> The clarification by the UK Supreme Court that parent company duty of care is not a ‘novel’ extension can be expected to render actions based on parent company duty of care more accessible in courts which conceivably may have exhibited reticence to moving beyond established categories in negligence. The ICJ and Core submission into the UK Supreme Court in *Okpabi and others v Royal Dutch Shell plc and Shell Petroleum Development Company Limited* UK SC 2018/0068 argues that the Court of Appeal erred in its analysis, available at [https://corporate-responsibility.org/wp-content/uploads/2020/06/Okpabi-ICJ-and-CORE-submissions-29-05-2020-for-filing-at-UKSC\\_23322670\\_1.pdf](https://corporate-responsibility.org/wp-content/uploads/2020/06/Okpabi-ICJ-and-CORE-submissions-29-05-2020-for-filing-at-UKSC_23322670_1.pdf).

<sup>318</sup> *Vedanta* (SC) (n 158) (Briggs LJ) [51].

<sup>319</sup> *Vedanta* (SC) (n 158) (Briggs LJ) [53] stating ‘Even where group-wide policies do not of themselves give rise to such a duty of care to third parties, they may do so if the parent does not merely proclaim them, but takes active steps, by training, supervision and enforcement, to see that they are implemented by relevant subsidiaries (...)’ With this statement, it is arguable that corporate policies in areas such as supply chain due diligence and environmental sustainability will be subject to granular examination by the courts.

<sup>320</sup> To the author’s knowledge to date there are no cases in Ireland concerning a duty of care on a parent company of the FDL style. See B.4.3. Article 4(1) of the Brussels I (recast) (n 152) was incorporated into domestic law in Ireland via The European Union (Civil and Commercial Judgements) Regulation 2015 SI No. 9, 1-117. Jurisdiction over EU domiciled defendants is mandatory in Ireland *Abama v Gama Construction Ireland Ltd* [2011] IEHC 308 (Dunne J) [32], [2015] IECA 179 (Peart J) [40]. See also Hilary Biehler, Declan McGrath and Emily Egan McGrath, *Delany, and McGrath on Civil Procedure* (4th edn, Thomson Reuters Ireland 2018), 1-91 and 1-94.

<sup>321</sup> Under the RSC Order 11A, Rule 10 is to be determined in accordance with the provisions of Articles 62 and 63 of Brussels I (recast) or the Lugano Convention.

<sup>322</sup> Brussels I (recast) (n 152) Art 8(1).

<sup>323</sup> See Case C-98/06 *Freeport* [2007] ECR I-08319; C-616/10 *Eva Maria Painier v Standard VerlagsGmbH* (2011) STJUE; Case C-352/13 *Cartel Damages Claims Hydrogen Peroxide* [2015] EU: C:2015:335. See also Delany and McGrath (n 320) 1-269; 1-272 to 1-276. On the risk of irreconcilable judgments, see *Vedanta* (SC) (n 158) [79].

<sup>324</sup> Rules of the Superior Courts (RSC) (Jurisdiction, Recognition and Enforcement of Judgments) 2016 SI No. 9. In a typical FDL case taken in Ireland, the provisions of RSC Order 11 would apply. available at [www.irishstatutebook.ie/eli/2016/si/9/made/en/print](http://www.irishstatutebook.ie/eli/2016/si/9/made/en/print). On the operation of Order 11 Rule 1 see *Vodafone GmbH v- IV International Licensing and Intellectual Ventures II LLC* [2016] IEHC 321 deriving a set of common principles from *Grehan v Medical Incorporated (Grehan)* [1986] IR 528, 541, *Analog Devices BV v Zurich Insurance Co.* [2002] IR 272, 281, and *O’Flynn v Carbon Finance Ltd.* [2015] IECA 93. See also Delany and McGrath (n 320) 1-25; 1-136.

<sup>325</sup> Delany and McGrath (n 320) 1-69. *Vedanta* (SC) (n 158) (Briggs LJ) [23] considering that only if the ‘sole purpose’ of proceedings against the anchor defendant was to attract jurisdiction against the foreign defendant, would it constitute an abuse of EU law

In FDL style litigation in Ireland, the issue of jurisdiction would be assessed by the courts, *inter alia*, based on whether the claimants establish an arguable case that a parent company owed a duty of care.<sup>326</sup> In assessing such a claim, Irish courts may consider the approach taken by the English courts. In *Vedanta*, the UK Supreme Court clarified that parent company duty of care is not a ‘novel’ extension, and that the general principles of tort law apply.<sup>327</sup> On balance, this may render actions based on parent company duty of care more accessible to courts which may have hesitated on extension to new categories within negligence.

The question of whether access to justice is available in the alternative forum, typically the place where the subsidiary is located, has weighed in FDL litigation. In cases in other jurisdictions, the approach of the judiciary has proven to be influential regarding the risk of denial of access to justice for claimants. Arguably, the approach of considering access to justice as ‘separate and distinct’ from the connecting factors to the alternative jurisdiction is ascendant.<sup>328</sup> Even on the basis that FDL style litigation may be substantively feasible in Ireland, procedural and practical circumstances remain significant barriers.<sup>329</sup> Another factor which may be considered, is the potential influence of the Irish Constitution.<sup>330</sup>

#### **C.4. The Irish Constitution**

The Irish Constitution may positively impact upon remedy for business-related abuses. Potentially, this could relate to the influence of the Constitution upon shaping tort law, via an action for infringement of a constitutional right, or in supporting the right of access to the courts.<sup>331</sup> On the basis that ‘central to our understanding of the aims of [Irish] tort law is the Constitution’,<sup>332</sup> it is arguable the Constitution may bear influence on the scope of duty of care in eventual FDL cases.<sup>333</sup> The Constitution is based on

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<sup>326</sup> *Ward v McMaster* [1985] I.R. 29; John Tully, *Tort Law in Ireland* (Clarus Press 2014), 10. The elements of negligence are the existence of a duty of care, and breach causing harm. The test of duty of care as formulated by Keane CJ in *Glencar Exploration plc v Mayo County Council* [2002] 1 I.R. 84 [139]; *Ennis v Health Service Executive* [2014] IEHC 440 [64] (Hogan J) [85] referring back to according to the principles in *Dorset Yacht Co. Ltd. v. Home Office* [1964] A.C. 1004.

<sup>327</sup> *Vedanta* (SC) (n 158) [54].

<sup>328</sup> *Vedanta* (SC) (n 158) [88]; (Briggs LJ) [11] emphasised, the risk substantial justice is not available in an alternative jurisdiction is the exception, and as such a finding may affect international comity it merits attentive scrutiny and requires cogent evidence; *Garcia* (n 162) [30], [128]-[129]. On art. 6(1) ECHR see *Nait-Liman* (n 166). See also Augenstein, ‘Torture as Tort?’ (n 125) 610 stating ‘where the victim faces a flagrant denial of justice or where instituting civil proceedings in another state does not constitute a reasonable alternative, a domestic court’s decision to decline jurisdiction can amount to a violation of Article 6 of the ECHR (*forum necessitatis* jurisdiction).’ Widdis (n 6) chapter 6 forwards that it may be considered that the rights violations which underpin FDL cases merit such judicial discretion in the light of natural or constitutional justice.

<sup>329</sup> As presented by Widdis (n 6).

<sup>330</sup> Donal O’Donnell, ‘International Aspects of the Constitution: Skibbereen Eagle or a shaft of dawn for the despairing wretched everywhere’ (2018) 59 *Irish Jurist* 5, 9.

<sup>331</sup> Widdis (n 6) chapter 6.

<sup>332</sup> William Binchy, ‘Tort Law in Ireland: A Half Century Review’ (2016) 56 *Irish Jurist* 199.

<sup>333</sup> *Carr v Olas* [2012] IEHC 59 Hogan J [36]. See also Alistair Richardson ‘Lateral Thinking: Justifying the Horizontal Application of Constitutional Rights’ (2018) 21 *Trinity College Law Review* 159, 162. In South Africa, the constitutional court has clarified the process of grafting constitutional normative values onto the customary process of incremental development of the common law, including when new development of the common law is at issue 2003 (6) SA 505 (CC); 2003 (10) BCLR 1100 (CC) [17].

natural law philosophy<sup>334</sup> whereby rights inhere in people by virtue of their humanity.<sup>335</sup> The Irish courts have identified unenumerated (i.e. unwritten) rights under Article 40.3.1° of the Constitution,<sup>336</sup> including typical ‘human rights’ such as the right to bodily integrity,<sup>337</sup> and freedom from torture and inhuman and degrading treatment.<sup>338</sup> It may be considered that there is symmetry between such implied personal rights, and the rights impacted in FDL cases, *inter alia*, to be free from inhuman or degrading treatment, to bodily integrity, property, and livelihoods.<sup>339</sup> Within the larger context of normative arguments, and evolving international standards supporting remedy and accountability, the Irish courts may embrace the opportunity within FDL litigation to re-consider the role of tort law.<sup>340</sup> The Irish courts have held that the fundamental rights and principles recognised by the Irish Constitution are capable of being applied directly to private individuals,<sup>341</sup> and to legal entities such as corporations.<sup>342</sup> However, scholars highlight that the Constitution does not specify or prescribe a procedure for remedying their breach.<sup>343</sup> In principle, violations by non-state actors can engender constitutional torts.<sup>344</sup> However the parameters remain uncertain,<sup>345</sup> notwithstanding notable contra-voices in support.<sup>346</sup> While who may invoke the Constitution is not explicit, the broad line of case law is interpreted by scholars as ‘non-

<sup>334</sup> For example, *McGee v Attorney General* [1974] IR 284 (Walsh J), 310; 317–318; See Oran Doyle, *Constitutional Law: Text Cases and Materials* (Clarus Press 2008) Chapter 4. II; Hogan et al (n 208) chapter 7.

<sup>335</sup> See Bryan MacMahon and William Binchy, *The Law of Torts* (4th ed Bloomsbury Professional 2013) 1.114 stating: ‘They are not the gifts of a positive legal system that are conferred from above by the State on its subjects. These rights, on this approach, predated the promulgation of the Constitution, which recognised rather than created them’. See also Hogan et al (n 208) chapter 7 for discussion of future directions.

<sup>336</sup> Article 40.3.1° states: ‘[t]he State guarantees in its laws to respect, and, as far as practicable by its laws to defend and vindicate the personal rights of the citizen’. Article 40.3.2° provides that the State shall, ‘in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen’.

<sup>337</sup> *Ryan v Attorney General (Ryan)* [1965] IR 294.

<sup>338</sup> *State (C) v Frawley* [1976] IR 365.

<sup>339</sup> Widdis (n 6) chapter 6.

<sup>340</sup> Hogan et al (n 208) 7.126. In *Merriman v Fingal County Council* [2017] IEHC 695 [21] Barrett J, *obiter*, forwarded comments on the existence of a ‘right to an environment that is consistent with the human dignity and well-being of citizens at large’ and ‘is an essential condition for the fulfilment of all human rights’ protected under Article 40.3.1° of the Constitution. See also Eadbhard Pernot, ‘The Right to an Environment and Its Effects for Climate Change Litigation in Ireland’ (2019) 22 Trinity College Law Review 151, 156.

<sup>341</sup> *Educational Company of Ireland v Fitzpatrick (No.1)* [1961] IR 323; *YY -v- Minister for Justice and Equality No.1* [2017] IEHC 176 (Humphreys J) [64].

<sup>342</sup> Colm O’Cinnéide, ‘Irish Constitutional Law and Direct Horizontal Effect – A Successful Experiment?’ in *Human Rights in the Private Sphere: A Comparative Study* (Vol 1) Oliver and Fedtke (eds) (Routledge Cavendish, 2007) 213, 214.

<sup>343</sup> Hogan et al (n 208) 7.1.132 stating ‘Neither the Constitution itself nor any other law prescribes any particular procedure as appropriate for remedying a breach of constitutional rights (...)’.

<sup>344</sup> *Glover v BLN Ltd* [1973] IR 388. See also O’Cinnéide (n 342); Sibó Banda ‘Taking Indirect Horizontality Seriously in Ireland’ (2009) 16 DULJ 263; William Binchy, ‘*Meskeil*, The Constitution and Tort Law’ (2011) 18 DULJ 339; Binchy (n 332); James Kane, ‘Civil Liability for Exploiting Trafficking Victims? A Speculative Application of *Meskeil v CIE?*’ (2015) 54 Irish Jurist 57; Richardson (n 200).

<sup>345</sup> *Hanrahan v Merck Sharp and Dohme* [1998] IRLRM 629 (SC). *W v Ireland (No 2)* [1997] 2 IR 141 (Costello J) [164] (HC); *McDonnell v Ireland* [1998] 1 IR 134. *Louis Bleheine v The Minister for Health and Children, Ireland and the Attorney General* [2018] IESC 40 (Charlton J) [15]. Hogan et al (n 208) 7.3.76-81. See also Aoife Nolan ‘Holding non-state actors to account for constitutional economic and social rights violations: Experiences and lessons from South Africa and Ireland’ (2014) 74 <https://academic.oup.com/icon/article-abstract/12/1/61/628585>.

<sup>346</sup> Hogan J *Sullivan v Boylan (No 2)* [2013] IEHC 104 [24]; *Olas* (n 333). MacMahon and Binchy (n 335) 1.124.



citizens possess constitutional rights but they are not co-extensive with those of citizens'.<sup>347</sup> In the factual context of the rights impacted in FDL cases, it may be considered that Irish courts might look to the Constitution to enhance access to remedy for potential victims overseas.<sup>348</sup>

## C.5. Procedural and Practical Barriers

It is only practicable to engage litigation to access remedy if the procedural and practical circumstances of the forum are sufficient to enable it. Barriers include high costs of bringing claims, combined with a lack options to reduce costs via legal aid, or market based mechanisms. Further barriers, include inadequate options for class actions and other collective action procedures.<sup>349</sup>

### C.5.1. Mechanisms of Collective Redress

States are considered to have the tools to cooperate regarding cross-border cases<sup>350</sup> relating to business and human rights.<sup>351</sup> As it stands, Ireland does not have a fit for purpose structured collective redress mechanism, or relevant structure for cross border cases.<sup>352</sup> While the Rules of the Superior Courts allow for representative actions<sup>353</sup> and test cases,<sup>354</sup> neither mechanism is appropriate. Further, there is a bar on representative actions in tort.<sup>355</sup> This situation persists despite recommendations from the Law Reform Commission for multi-party actions (MPAs) in 2005,<sup>356</sup> and a private members Bill reflecting these recommendations in 2017.<sup>357</sup> The Government opposed the Bill, and referred the question of an MPA procedure for consideration within the Review of the Administration of Civil Justice, which is

<sup>347</sup> Hogan et al (n 208) 7.133 fn 96

<sup>348</sup> In *Re Article 26 of the Constitution and ss.5 and 10 of the Illegal Immigrants (Trafficking) Bill 1999*[2002] IR 360, 410 (Keane CJ); *NHV v Minister for Justice* [2017] IESC 35 (O'Donnell J); The Constitutional Review Group 1996 pn 2632 265 available at [www.constitution.ie/reports/crg.pdf](http://www.constitution.ie/reports/crg.pdf); Hogan, Whyte, Kenny and Walsh (n 208) 7.127, 7.1.36. See also *Kiobel v Shell* 2019 ECLI:NL:RBDHA:2019:4233 available at <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2019:6670>.

<sup>349</sup> Section B.5. See IHREC (n 218) 16-17; Joanne Blennerhassett, 'Mass Harm Litigation in Ireland, Multi-Party Actions and Routes to Collective Redress' *Contemporary Readings in Law and Social Justice* (2018) 10(1) 35. For discussion, see Widdis (n 6) chapter 6.

<sup>350</sup> A/HRC/32/19/Add.1 (n 79) box 3. 'a "cross-border" case is one where the relevant facts have taken place in, the relevant actors are located in or the evidence needed to prove a case is located in more than one State.'

<sup>351</sup> A/HRC/35/33 UNWG 'Best practices and how to improve on the effectiveness of cross-border cooperation between States with respect to law enforcement on the issue of business and human rights' (April 2017) available at <https://undocs.org/A/HRC/35/33>.

<sup>352</sup> BIICL, 'State of Collective Redress in the EU in the context of the Commission Recommendation' 680 clearly considers that existing mechanisms are not a replacement to a structured collective redress mechanism, available at [www.biicl.org/documents/1881\\_StudyontheStateofCollectiveRedress.pdf](http://www.biicl.org/documents/1881_StudyontheStateofCollectiveRedress.pdf).

<sup>353</sup> Order 15 rule 9 of the Rules of Superior Courts available at [www.courts.ie/rules.nsf](http://www.courts.ie/rules.nsf).

<sup>354</sup> Joinder and consolidation of cases are also available. See BIICL Collective Redress (n 352) 683-684; Blennerhassett (n 349) 40 stating: 'These cases are unduly costly and result in procedural inefficiencies as well as unnecessary duplication'.

<sup>355</sup> Order 5 rule 10 Circuit Court Rules 2001 available at [www.irishstatutebook.ie/eli/2001/si/510/made/en/print#11-8](http://www.irishstatutebook.ie/eli/2001/si/510/made/en/print#11-8).

<sup>356</sup> Law Reform Commission 'Multi-Party Litigation' (LRC 76-2005). The 2005 report followed the 'Multi-Party Litigation (Class Actions) Consultation Paper' (LRC CP 25-2003).

<sup>357</sup> Private members Bill sponsored by Deputies Donnchadh Ó Laoghaire and Pearse Doherty available at [www.oireachtas.ie/en/bills/bill/2017/130/](http://www.oireachtas.ie/en/bills/bill/2017/130/); Deputy Donnchadh Ó Laoghaire Dáil Debates on the Multi-Party Actions Bill available at [www.oireachtas.ie/en/debates/debate/dail/2017-11-14/35/](http://www.oireachtas.ie/en/debates/debate/dail/2017-11-14/35/); Dáil Deb 21 February 2018 available at [www.oireachtas.ie/en/debates/debate/joint\\_committee\\_on\\_justice\\_and\\_equality/2018-02-21/3/?highlight%5B0%5D=multi&highlight%5B1%5D=party&highlight%5B2%5D=actions](http://www.oireachtas.ie/en/debates/debate/joint_committee_on_justice_and_equality/2018-02-21/3/?highlight%5B0%5D=multi&highlight%5B1%5D=party&highlight%5B2%5D=actions).

due in 2020.<sup>358</sup> This Review is being undertaken by an expert group, chaired by the former President of the High Court, Mr. Justice Peter Kelly, and is tasked with making recommendations for changes with a view to improving access to civil justice in the State, promoting early resolution of disputes, reducing the cost of litigation, creating a more responsive and proportionate system, and ensuring better outcomes for court users.<sup>359</sup>

As it stands, Ireland remains outside the 2013 EU Recommendations on collective redress.<sup>360</sup> To ensure the right to remedy, a fit for purpose mechanism for collective actions is required. This may encompass a set of approaches which balance the need for access to justice and efficiency, whilst deterring abusive litigation.<sup>361</sup> Notably, there is a marked disparity between provision in the UK and in Ireland. Collective redress is well established in the UK and the mechanisms available there are broadly consistent with the EU Recommendation.<sup>362</sup> For present purposes, the significance is the positive impact of collective redress mechanism upon access to justice in the UK, including for litigation with a cross border element.<sup>363</sup>

### C.5.2. Financial Barriers

The constitutional right to access to a court to vindicate a legal right is one of the personal rights under Article 40.3<sup>o</sup> of the Irish Constitution.<sup>364</sup> However, it is arguably not ‘effective in practice’ unless there are means of funding litigation. Even with a fit for purpose mechanism of collective redress, victims

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<sup>358</sup> Minister of State at the Department of Health Deputy Catherine Byrne Dáil Deb 14 November 2014 available at [www.oireachtas.ie/en/debates/debate/dail/2017-11-14/35/](http://www.oireachtas.ie/en/debates/debate/dail/2017-11-14/35/).

<sup>359</sup> See <https://www.oireachtas.ie/en/debates/question/2019-11-26/250/>; <http://www.civiljusticereview.ie/>; <http://www.justice.ie/en/JELR/Pages/PR17000097>.

<sup>360</sup> Commission Recommendation 2013/396/EU of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law [2013] OJ L201/60 available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013H0396&from=EN>; Communication to the European Parliament and Council, ‘Towards a European Horizontal Framework for Collective Redress’ COM (2013) 401/2; ‘Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the implementation of the Commission Recommendation of 11 June 2013 (2013/396/EU) COM/2018/040 final 1 available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2018:0040:FIN>; BIICL (n 352) 195. See also CM/Rec(2016)3 (n 46); EU FRA (n 50) Opinion (n 1).

<sup>361</sup> Blennerhassett (n 349) 36 and 51, arguing that MPAs are a ‘remedy of last resort’, and are not the most efficient route to justice, and that alternative mechanisms of achieving redress, *inter alia*, regulatory redress and consumer Ombudsmen should be examined as part of the development of a suite of mechanisms. See Widdis (n 6).

<sup>362</sup> UK Civil Procedure Rules 19.11 Parties and Group Litigation (1). Practice Direction 19B provides the procedure for applying for a GLO available at [www.justice.gov.uk/courts/procedure-rules/civil/rules/part19#19.11](http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part19#19.11); See also BIICL (n 352) 971. The UK offers an opt-in collective redress mechanism for victims of mass harm, including non-residents, to claim injunctive relief and compensatory damages. Sector specific regimes are also available in UK Competition and Consumer law. See also Blennerhassett (n 349) 45-46.

<sup>363</sup> The BIICL (n 352) 267 study highlights the weight of cross border claimants in proceedings in the UK. EU FRA (n 18) 3 findings indicate prospect of a favourable outcome appears to be lower in such cases, particularly where cross-borders reaching outside the EU. EU FRA (n 50) stating: ‘Procedural rules need to allow for collective redress, as well as representative action in business and human rights-related cases’.

<sup>364</sup> *Macauley v Minister for Posts and Telegraphs* [1966] IR 345, 358

will remain unable to access remedy unless it is possible to access funding.<sup>365</sup> This Review concerns potential victims overseas, and it is not assumed that claimants are domiciled in an EU Member State.<sup>366</sup>

The general principle concerning litigation taken in Ireland is that ‘costs follow the event’, risking a double financial burden on the unsuccessful party.<sup>367</sup> Civil legal aid is specifically excluded within the existing mechanisms of test cases and representative actions.<sup>368</sup> Further, the wording of the Civil Legal Aid Act 1995 is interpreted to prohibit the provision of legal aid in Multi-Party litigation.<sup>369</sup> The right to legal aid is enshrined in art 6(3)(c) ECHR and art 47 CFREU.<sup>370</sup> In alternatives, as Bacik and Rogan advocate, Protective Costs Orders which are utilised in Ireland concerning environmental cases, would at least provide certainty at the outset of litigation.<sup>371</sup> A recent decision of the High Court in *Friends of the Irish Environment CLG v Ireland and the Attorney General* (FIE) ruled that civil legal aid can only be granted to ‘natural persons’, excluding ‘legal persons’, such as NGOs.<sup>372</sup> The court concluded that the case was not made that a lack of civil legal aid made it impossible for the applicant to exercise its right of access to the court or that it was denied an effective remedy.<sup>373</sup> Conditional Fee Arrangements are permitted for the deferral of legal fees, but contingency fees relating to a proportion or percentage of awards are not legal.<sup>374</sup> After the Event insurance appears to be a legitimate means of third-party

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<sup>365</sup> BIICL (n 352) 685 ‘the lack of possibility to fund it would usually prevent initiation of such proceedings.’

<sup>366</sup> See Council Directive 2003/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02003L0008-20030131>. See also European Commission advice on legal aid in Cross border disputes available at [https://e-justice.europa.eu/content\\_legal\\_aid-37129-en.do](https://e-justice.europa.eu/content_legal_aid-37129-en.do). See also FLAC stating ‘A person living abroad who has a case in Ireland for which he/she is seeking legal aid and advice must meet the financial means test of the Irish Legal Aid Board or of his/her own country. The appropriate body will then identify if he/she meets the Irish merits test and if so, will allocate representation. Information and forms on cross-border legal aid are available at <http://bit.ly/crossborderlegalaid>’ available at [https://www.flac.ie/assets/files/pdf/civil\\_legal\\_aid\\_guide\\_final.pdf](https://www.flac.ie/assets/files/pdf/civil_legal_aid_guide_final.pdf).

<sup>367</sup> Under the general rules set out in Court Order 99 of the RSC 1986 [www.courts.ie/rules.nsf/8652fb610b0b37a980256db700399507/a55af2a6669ec72180256d2b0046b408](http://www.courts.ie/rules.nsf/8652fb610b0b37a980256db700399507/a55af2a6669ec72180256d2b0046b408).

<sup>368</sup> Section 28(9)(a)(ix) of the Civil Legal Aid Act 1995. See Bacik and Rogan (n 369).

<sup>369</sup> FLAC ‘Submission on the Multi Party Actions Bill to the Select Committee on Justice and Equality, (February 2018) available at [www.pila.ie/download/pdf/submission\\_to\\_joc\\_mpa\\_bill\\_2017.pdf](http://www.pila.ie/download/pdf/submission_to_joc_mpa_bill_2017.pdf). The LRC Multi-Party Litigation (n 356) para. 3.49 recommended that the Civil Legal Aid Act 1995 be amended to make provision for the funding of an otherwise eligible group member for his or her proportion of any eventual costs order.

<sup>370</sup> See European Commission advice on legal aid in Cross border disputes available at [https://e-justice.europa.eu/content\\_legal\\_aid-37129-en.do](https://e-justice.europa.eu/content_legal_aid-37129-en.do) stating ‘The right to legal aid is enshrined by: the [European Convention on Human Rights \(ECHR\)](#) - Article 6 (3)(c) of the ECHR guarantees the right to legal assistance where the defendant has insufficient means to pay for legal assistance, and to get free legal aid when the interest of justice so requires; the [Charter of Fundamental Rights of the European Union](#) - Article 47 of the Charter stipulates that legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.’

<sup>371</sup> Ivana Bacik and Mary Rogan (eds) *Legal Cases that Changed Ireland* (Clarus Press 2016) 124 re Aarhus Convention. See also Blennerhassett (n 349) 43.

<sup>372</sup> [https://www.courts.ie/acc/alfresco/fe3f46ca-1aab-4a57-9c49-0aeeb6ad6d3c/2020\\_IEHC\\_454.pdf/pdf#view=fitH](https://www.courts.ie/acc/alfresco/fe3f46ca-1aab-4a57-9c49-0aeeb6ad6d3c/2020_IEHC_454.pdf/pdf#view=fitH).

<sup>373</sup> FIE argued that Article 47 of the CFREU on the right to an effective remedy and Article 9(4) of the Aarhus Convention imposed an obligation to interpret the 1995 Act so as to include legal persons See <https://www.pila.ie/resources/bulletin/2020/09/30/irish-high-court-rules-civil-legal-aid-can-only-be-granted-to-natural-persons-not-ngos/>.

<sup>374</sup> Blennerhassett (n 349) 43.

funding litigation in Ireland.<sup>375</sup> For present purposes, it is anticipated that claimants who are not domiciled or habitually resident in Ireland will face funding barriers in cross border litigation. By comparison, claimants in the English courts in FDL type litigation have been able to leverage innovative solutions to fund litigation in order to sustain access to justice.<sup>376</sup> Unlike in Ireland, funding of litigation by third parties is possible.<sup>377</sup> To fund large cases litigators can access investors who are willing to fund litigation. Notably, the BIICL study found that the general view of third party funding in the UK was favourable, and no practical problems with the functioning of the system are apparent.<sup>378</sup>

In Ireland, procedural and practical barriers recall the words of Walsh J, thirty years on, that ‘One of the fundamental political rights of the citizen under the Constitution, indeed one of the most valued of his rights, is that of access to the courts (...)’<sup>379</sup> The ban of third party funding of litigation was upheld by the Irish Supreme Court in *Persona Digital Telephony Limited Sigma Wireless Networks Limited v The Minister for Public Enterprise Ireland and The Attorney General and Denis O’Brien and Michael Lowry*.<sup>380</sup> Notwithstanding, the judgments infer developments facilitating access to remedy may potentially be anticipated.<sup>381</sup> As Clarke J stated in this case:

The constitutional right of access to the court may include an entitlement that that right be effective, not just as a matter of law and form, but also in practice<sup>382</sup>

The Court noted that the fundamental importance of access to justice would merit consideration of legislation to enable third party funding of litigation by parties with a legitimate interest in the proceedings.<sup>383</sup> Should the failure to advance legislative provision persist, the possibility that the courts

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<sup>375</sup> *Greenclean Waste Management Ltd v Leahy* [2015] IECA 97. In *Greenclean Waste Management Limited v Maurice Leahy* (2014) IEHC 31, Hogan J expressed the view that the ATE policy was not champertous. Further at [27], that ATE insurance is a legitimate service, which facilitates ‘access to justice for persons and entities who might otherwise be denied this’, and [23] access to justice is ‘a constitutional fundamental’.

<sup>376</sup> Access to civil legal aid in early cases in the English courts was no longer available by 2000. Under the Access to Justice Act 1999, ATE insurance and CFAs were introduced, enabling funding FDL litigation via cost recovery from the defendant. Subsequently, the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO) negatively impacted access to justice, particularly in claims relating to environmental damage, a situation exacerbated by the operation of Rome II. See BIICL (n 352) 363; LRC Multi-Party Litigation (n 356) section 3.59; Meeran (n 157) 381.

<sup>377</sup> Criminal Law Act 1967 abolished the crimes and torts of maintenance and champerty in England and Wales.

<sup>378</sup> ‘Minor concerns’ were raised regarding regulation and control. See BIICL (n 352) 19, 195, 269.

<sup>379</sup> *Society for the Protection of Unborn Children v Coogan* [1989] IR 734,744.

<sup>380</sup> [2017] IESC 27 *Persona* (SC). The Court upheld the crimes and torts of maintenance and champerty. Denham CJ defined Maintenance as ‘the giving of assistance, by a third party, who has no interest in the litigation, to a party in litigation; Champerty is where the third party, who is giving assistance, will receive a share of the litigation succeeds’. Both were abolished in the UK in 1967.

<sup>381</sup> See Hilary Biehler, ‘Case Comment Maintenance and champerty and access to justice - the saga continues’ (2018) 59 Irish Jurist 130, 138; Widdis (n 6) chapter 6.

<sup>382</sup> *Persona* (SC) (n 380) (Clarke J) [2.6], [2.8]-[2.9]. At [36] in agreement, McKechnie; Also, McKechnie J [48].

<sup>383</sup> Via constitutional challenge, or legislative reform. Denham CJ [18], [52], [54 (v)-(vi)]. See ILRC Contempt of Court and Other Offences and Torts Involving the Administration of Justice (LRC IP 10-2016) para 6.33.

may intercede has been reiterated by Chief Justice Clarke.<sup>384</sup> As outlined, access to justice is a ‘constitutional fundamental’,<sup>385</sup> reinforced by the provisions of art 6 ECHR and art 47 CFREU.<sup>386</sup>

Both the EU Commission and BIICL highlight that availability of funding as a key factor in victims partaking in claims,<sup>387</sup> and particularly in cross-border cases.<sup>388</sup> It is apparent from litigation in the English courts, that in the absence of legal aid, third party funding with appropriate checks and balances enables access to justice. Comparative data indicates concerns over abuse of process may be unfounded,<sup>389</sup> or as has been suggested, can be managed via court procedures,<sup>390</sup> rendering retaining a bar on this basis questionable. Ensuring access to justice for victims of business-related abuses of human rights is widely advocated.<sup>391</sup> The position of cross border claimants who are not domiciled either in Ireland or an EU Member State should be considered in legislative analysis of third-party funding of litigation, and similar mechanisms. Addressing additional funding barriers faced by women and vulnerable or marginalised groups is specifically recommended.<sup>392</sup>

## **C.6. Human Rights and Environmental Due Diligence**

The justifications behind regulation of human rights due diligence (HRDD) outlined in section A apply to Ireland. Support for mandatory HRDD is evident from civil society,<sup>393</sup> investors<sup>394</sup>, business,<sup>395</sup> representative organisations and consumers is evident.<sup>396</sup> For this purpose, ‘human rights abuse’

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<sup>384</sup> *SPV OSUS Limited v. HSBC Institutional Trust Services (Ireland) Limited* [2018] IESC 44 with which O’Donnell J., McKechnie J., Dunne J., and Finlay Geoghegan J agreed. Clarke CJ [2.1] acknowledging the ‘significant and, arguably, increasing problem with access to justice’, at [6] that the courts may have no other option but to intervene ‘if no real effort was being made on the part of the legislature’ to address this issue.

<sup>385</sup> *Greenclean (HC)* (n 375) Hogan J [23].

<sup>386</sup> Section C.2; C.4.2.

<sup>387</sup> BIICL (n 352) 272.

<sup>388</sup> *ibid* BIICL 195; EU Commission Report (n 360) 10.

<sup>389</sup> BIICL (n 352) concluded although there is no overarching system of regulation of third-party funding in the UK, there is reason to have confidence in the pragmatism of the courts. See EU FRA (n 15) 2.11 on oversight and representative actions within the EU legal framework on data protection, and in environmental cases.

<sup>390</sup> Hilary Biehler, ‘Case Comment Maintenance and champerty and access to justice - the saga continues’ (2018) 59 *Irish Jurist* 130, 138.

<sup>391</sup> A 72/162 (n 40) para 65 confirming that the responsibility under UNGPs 11 and 12 to respect all ‘internationally recognised human rights’ includes the right to remedy under the UDHR art. 8 and ICCPR art. 2(3); EU FRA 2017 (n 50) and 2019 (n 15); EU FRA 2017 (n 50) and 2019 (n 15); Council of Europe Recommendation cm/Rec(2016)3 (n 46); A/HRC/32/19 (n 79) 15.3. stating: ‘Rules of civil procedure [should] provide for the possibility of collective redress mechanisms in cases arising from business-related human rights abuses’; Accountability and Remedy Project (n 45).

<sup>392</sup> Section B.2.1; CEDAW (n 97); A/HRC/41/43 (n 8) para 51-61, para 52 (e) para 82.

<sup>393</sup> For a summary see ECCJ (n 64); ECCJ ‘Over 100 civil society organisations demand human rights and environmental due diligence legislation’ (2 December 2019) available at <https://corporatejustice.org/news/16800-over-100-civil-society-organisations-demand-human-rights-and-environmental-due-diligence-legislation>.

<sup>394</sup> See ‘The Investor Case for Mandatory Human Rights Due Diligence’ available at <https://investorsforhumanrights.org/sites/default/files/attachments/2019-12/The%20Investor%20Case%20for%20mHRDD%20-%20FINAL%20for%2011.25%20launch.pdf>

<sup>395</sup> The BHRCC portal maintains a list of large businesses (>1 bn € turnover), associations & investors with public statements & endorsements in support of mandatory due diligence regulation <https://www.business-humanrights.org/en/latest-news/list-of-large-businesses-associations-investors-with-public-statements-endorsements-in-support-of-mandatory-due-diligence-regulation/>.

<sup>396</sup> ECCJ (n 199).



includes environmental rights.<sup>397</sup> As civil society and legislative proposals in European States progress, the EU is moving forward. The EU Commission public consultation on Sustainable Corporate Governance legislation has been launched.<sup>398</sup> The European Parliament opinions are also progressing.<sup>399</sup> In December 2020, the EU Council of Member States in its ‘Conclusions on Human Rights and Decent Work in Global Supply Chains’ calls on the Commission to ‘TABLE a proposal for an EU legal framework on sustainable corporate governance, including cross-sector corporate due diligence obligations along global supply chains’.<sup>400</sup> The process of developing regulation will engender debate,<sup>401</sup> and engagement with stakeholders should commence also in Ireland.<sup>402</sup>

To give context, the EU study ‘Human Rights Due Diligence Legislation – Options for the EU’ (2020) recommends a substantive due diligence model, requiring companies to engage actively in analysing, mitigating and remedying any adverse impacts on human rights based on their own activities and connected to them in their business relations including the value chain. It recommends the legislation should cover all companies independently of their size and take a non-sector specific approach.<sup>403</sup> This approach is consistent with the position of the UNGPs, OECD Guidelines, and UN recommendations.<sup>404</sup> Cogent concerns are expressed on the burden and resource implications of application to SMEs<sup>405</sup> and to micro-enterprises.<sup>406</sup>

<sup>397</sup> Second Revised Draft UN Binding Treaty, ‘Human rights abuse’ is defined as including environmental rights, Article 1.2, available at [https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG\\_Chair-Rapporteur\\_second\\_revised\\_draft\\_LBI\\_on\\_TNCs\\_and\\_OBEs\\_with\\_respect\\_to\\_Human\\_Rights.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf)

<sup>398</sup>

<sup>399</sup> See opinions (n 169); [https://www.europarl.europa.eu/doceo/document/DEVE-AD-657424\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/DEVE-AD-657424_EN.pdf); [https://www.europarl.europa.eu/doceo/document/INTA-AD-655776\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/INTA-AD-655776_EN.pdf); [https://www.europarl.europa.eu/doceo/document/AFET-AD-655782\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/AFET-AD-655782_EN.pdf).

<sup>400</sup> See <https://www.consilium.europa.eu/media/46999/st13512-en20.pdf>.

<sup>401</sup> Landau (n 186) 245, ‘... the unfamiliarity of the concept to many companies and the heterogeneous nature of the companies and sectors in which it must be implemented, a regulator must be prepared to engage in dialogue with regulated firms and other stakeholders so as to develop shared understandings of what conduct is required.’

<sup>402</sup> The Irish Coalition for Business and Human Rights commissioned Rachel Widdis to develop the first legislative proposal for human rights and environmental due diligence in an Irish context: Outline Legislative Proposal, Explanatory Memorandum and Summary Report (forthcoming).

<sup>403</sup> Policy Department for External Relations Directorate General for External Policies of the Union PE 603.495 - June 2020 1) 6 available at [https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/603495/EXPO\\_BRI\(2020\)603495\\_EN.pdf#:~:text=This%20briefing%20aims%20to%20provide%20a%20concise%20and,diligence%20legislation%20at%20the%20European%20Union%20%28EU%29%20level.](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/603495/EXPO_BRI(2020)603495_EN.pdf#:~:text=This%20briefing%20aims%20to%20provide%20a%20concise%20and,diligence%20legislation%20at%20the%20European%20Union%20%28EU%29%20level.)

<sup>404</sup> *Inter alia*, UN CESCR General Comment No. 24, para 33; Second Revised Draft Treaty Article 5(3)-5(6). UN Global Compact; UNGP 14; OECD Guidelines Chapter I, Concepts and Principles, para. 1 & 4; ILO Tripartite Declaration Aim and Scope, para. 6 and General Policies, para. 10.b; EU Council Conclusions on Business and Human Rights 2016.

<sup>405</sup> See Chambers Ireland and (ISME) submissions to the Irish NAP. In A/HRC/41/43 para 10 the UNWG advises development of specific guidance for difference types of businesses (informal businesses, SMEs, multinational corporations) and sectors.

<sup>406</sup> Committee of Legal Affairs (n 170).

Committee of International Trade for the Committee of Legal Affairs to the recommendations to the [EU] Commission on corporate due diligence and corporate accountability para 6(2020/2129(INL)) available at [https://www.europarl.europa.eu/doceo/document/INTA-PA-655776\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/INTA-PA-655776_EN.pdf) .

Noting that although some Irish companies have moved to adopt Modern Slavery style statements, well-founded criticism levelled at the operation of the Act<sup>407</sup> infers that the adoption of similar legislation in Ireland would not be a route to pursue.<sup>408</sup> As the Baseline Assessment states:

‘For the [Irish] State to continue to develop its strong reputation in the protection of human rights it is suggested that consideration ought to be given to the adoption of mandatory human rights due diligence.’<sup>409</sup>

It identifies the 2017 French Duty of Vigilance Law as an example of legislation that could be followed in Ireland.<sup>410</sup> This Review recognises the French Law to be apt in requiring the elaboration and disclosure of a Plan, which must be effectively implemented.<sup>411</sup> A similar ‘Strategy’ and ‘Report’ structure is adopted by the Committee of Legal Affairs in its advice to the European Parliament.<sup>412</sup> To progress, it is recommended that the onus be on the organisation to prove that it has complied with provisions.<sup>413</sup> The French Law is home state regulation with extraterritorial effect.<sup>414</sup> The duties under the Law apply to French companies in respect of their own activities, those of companies they control, and of suppliers and contractors with whom they have an ‘established commercial relationship.’<sup>415</sup> Companies coming under the French law which fail to fulfil their obligations risk penalties and civil suit,<sup>416</sup> with widely conceived standing.<sup>417</sup> Similarly, regulation should specify a legal duty of care and

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<sup>407</sup> See, ‘Promoting responsibility and ensuring accountability’ (n 306).

<sup>408</sup> See LeBaron and Rühmkorf (n 188); Modern Slavery Reporting: Is there Evidence of Progress?” Ergon Associates, October, 2018, 21 available at [https://ergonassociates.net/wp-content/uploads/2018/10/Ergon\\_Modern\\_Slavery\\_Progress\\_2018\\_resource.pdf?x74739](https://ergonassociates.net/wp-content/uploads/2018/10/Ergon_Modern_Slavery_Progress_2018_resource.pdf?x74739); NYU Stern Center for Business and Human Rights, ‘Research Brief: Assessing Legislation on Human Rights in Supply Chains: Varied Designs but Limited Compliance’ (June 2019), available at: <https://bhr.stern.nyu.edu/blogs/2019/6/19/research-brief-assessing-legislation-on-human-rights-in-supply-chains>.

<sup>409</sup> Baseline Assessment (n 2) 20, 52.

<sup>410</sup> *ibid* Summary of Recommendations, 52. See also Sherpa Vigilance Plan Reference Guide 37-38 available at <https://www.asso-sherpa.org/vigilance-plans-reference-guidance-legal-analysis-on-the-duty-of-vigilance-pioneering-law>.

<sup>411</sup> (n 65) art.1, para 3. Paras 4-9 indicate five types of measures that the Plans shall contain, interpreted as an indicative rather than exhaustive checklist. The duty is two-fold a) legal duty and b) compliance duty, arts 7 and 9. See Tiphane Beau de Loménie et al, ‘The French Law on Duty of Vigilance’ in Angelica Bonifanti (ed), *Business and Human Rights in Europe: International Law Challenges* (Glawcal 2019). See Stéphane Brabant and Elsa Savourey, ‘France’s Corporate Duty of Vigilance: What Penalties are Businesses Likely to Face’ available at [www.herbertsmithfreehills.com/latest-thinking/frances-corporate-duty-of-vigilance-law-what-penalties-are-businesses-likely-to-face](http://www.herbertsmithfreehills.com/latest-thinking/frances-corporate-duty-of-vigilance-law-what-penalties-are-businesses-likely-to-face).

<sup>412</sup> (n 170).

<sup>413</sup> Sherpa (n 410) the burden of proof in the French law is an issue. Companies are only liable if they fail to show that they have implemented the ‘reasonably assessed’ measures to a) prevent adverse human rights impacts and b) provided avenues for remedy. Landau (n 186) 221-247.

<sup>414</sup> See section B.3.1; See ECCJ legal brief available at <https://corporate-responsibility.org/wp-content/uploads/2019/10/2020-Legal-Brief.pdf>. See also Baseline Assessment (n 2) 24, ‘Under the Companies Acts, or other Acts of the Oireachtas, Ireland has not imposed specific human rights obligations on companies with regard to their subsidiaries outside the jurisdiction.’

<sup>415</sup> Sherpa Vigilance Plan Reference Guide (n 410).

<sup>416</sup> Duty of Vigilance law (n 65) art. 2.

<sup>417</sup> Any person whose human rights are allegedly affected as a result of a lack of vigilance has standing to bring a civil claim against it before French courts, including victims, NGOs, trade unions and competitors.

provide for sanctions linked to civil remedy, with standing widely conceived. Appropriate provision in criminal law is advised for consideration.

The French Law, which is based upon large numbers of employees, is expected to apply to only c.100/150 of France's largest companies.<sup>418</sup> Recalling that HRDD processes are expected to be proportionate and flex relative to size, but address the scale, nature and irremediable character of risk. Alternatives may include initiating regulation for SMEs in risk sectors, as provided in the legislative proposal in Germany<sup>419</sup> and Switzerland;<sup>420</sup> including companies above a certain combined threshold as in the German proposal;<sup>421</sup> or at a deferred time-defined date. Specific provision could be made for incentives to companies as in the French law, combined with provisions for exclusion from government contracts, trade and investment supports.<sup>422</sup> While limits preclude elaboration, assessment of additional potential costs<sup>423</sup> and studies regarding benefits to business of mandatory HRDD are noted.<sup>424</sup> To be effective, (Board level) committee oversight of implementation,<sup>425</sup> an engaged regulator, and enforcement of provisions is required. Consideration of the interaction with Company Law and Directors Duties is recommended. To counteract the risk of a 'process' approach and to assist compliance, a high standard of accountability in conjunction with a formal transparency requirement is advised.<sup>426</sup> Consultation with stakeholders is identified as a key part of the process and is recommended.<sup>427</sup>

In particular, provision should be made for open and on-going consultation with those who may be disproportionately affected or face additional barriers.<sup>428</sup> A key recommendation of the UNWG is the

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<sup>418</sup> The law only covers companies that have their registered office in France and employ at least 5,000 employees within their company and subsidiaries in France, or at least 10,000 employees within their company and subsidiaries in France and abroad. See Sandra Cossart, Sherpa, 'What lessons does France's Duty of Vigilance law have for other national initiatives?' (27 June 2019) available at <<https://www.business-humanrights.org/en/what-lessons-does-frances-duty-of-vigilance-law-have-for-other-national-initiatives>.

<sup>419</sup> See 'Legislative Proposal: Corporate responsibly and Human Rights: Legal Text and Questions and Answers on the Human Rights Due Diligence Act proposed by German NGOs' available at [https://corporatejustice.org/news/mhrdd\\_lawproposal\\_and\\_faq.pdf](https://corporatejustice.org/news/mhrdd_lawproposal_and_faq.pdf).

<sup>420</sup> Swiss Coalition for Corporate Justice 'The Initiative Text with Explanations', available at: [https://corporatejustice.ch/wp-content/uploads/2018/06/KVI\\_Factsheet\\_5\\_E.pdf](https://corporatejustice.ch/wp-content/uploads/2018/06/KVI_Factsheet_5_E.pdf).

<sup>421</sup> For example, based on employees, turnover and balance sheet.

<sup>422</sup> UN CESCR General Comment No 24 (n 70) advised States to 'consider measures including; revoke business licences and subsidies, from offenders; and revise relevant tax codes, public procurement contracts, export credits and other forms of State support, privileges and advantages in case of human rights violations.'

<sup>423</sup> EU (2020) 'Study on due diligence requirements through the supply chain' (n 36), 428-430.

<sup>424</sup> *Inter alia*, E & Y [https://www.ey.com/Publication/vwLUAssets/EY-building-responsible-and-resilient-supply-chains/\\$FILE/EY-building-responsible-and-resilient-supply-chains.pdf](https://www.ey.com/Publication/vwLUAssets/EY-building-responsible-and-resilient-supply-chains/$FILE/EY-building-responsible-and-resilient-supply-chains.pdf).

<sup>425</sup> Committee of Legal Affairs (n 170) Article 1; Article 12.

<sup>426</sup> Landau (n 186) '234; McCorquodale et al (n 14); ECCJ (n 64).

<sup>427</sup> UNGP 18 (b); OECD Guidelines; ILO Tripartite Declaration; A/HRC/38/20/Add.2 (1 June 2018) para 8; Committee of Legal Affairs (n 170) Article 5.

<sup>428</sup> Committee on CRC, General Comment No 16 (n 98). EU FRA (n 50) Opinion 5; A/72/162 (n 40) para 25. Responsible Business Conduct Working Group, 'Shadow EU Action Plan on the Implementation of the UN Guiding Principles on Business and Human Rights within the EU', 6 (March 2019) available at <https://responsiblebusinessconduct.eu/wp/wp-content/uploads/2019/03/SHADOW-EU-Action-Plan-on-Business-and-Human-Rights.pdf>. See also Committee of Legal Affairs (n 170) para 39 and 40.

integration of a gender perspective in due diligence regulation.<sup>429</sup> It should, throughout, include consultation with *inter alia*, representatives of women workers, gender experts, and representative organisations, and be gender responsive in design and related provisions.<sup>430</sup>

## **D. CONSULTATION**

### **D.1. Feedback**

Welcome and valuable written feedback on the Draft Review was received from 4 State Departments, 2 State agencies, IHREC, the National Contact Point, and 1 civil society organisation. It is hoped that the feedback is considered in the body of this Review and reflected as appropriate.

### **D.2. Consultation**

A sample of 83 relevant stakeholders were invited to participate and to share their views; including 21 publicly listed trading companies domiciled or headquartered in Ireland; 4 large trading privately held companies domiciled or headquartered in Ireland; 4 state owned companies; 22 NGO, civil society and representative organisations; 4 associations representing business, including small businesses; 2 trade unions; 7 corporate law firms; 2 firms of solicitors; 3 State departments and 14 other stakeholder or public service entities. Consistent with its terms, the commercial entities are mainly large operating enterprises with supply chains overseas. Contact with the 83 relevant stakeholders was initiated by the Department of Foreign Affairs and Trade. The consultation document was sent by the independent consultant, and on average followed up twice by the consultant. Additional follow up requests to participate were made by the Department of Foreign Affairs and Trade. It is plausible that the relatively new nature of remedy related to operations overseas, and the timing during the global COVID-19 pandemic with associated impacts, may have restrained the level of participation. The responses received were of great value in insights for this Review, and appreciated.

The consultation was in confidence. In light of the small size of the sample, it was indicated prior that insights from responses would be reflected generally. All questions were optional, and not all respondents answered all questions. Several respondents added reflections and further information which offered insights into the mechanisms, policies and provisions currently in place in Ireland. The following reflections are observations on the responses, with the caveat that the number of responses is 19, and it is not purported that specific or definitive conclusions are drawn. Of the 19 respondents,<sup>431</sup>

<sup>429</sup> A/HRC/41/43 (n 8). See also Kelly Groen and Lis Cunha of Action Aid, 'Due diligence laws must not leave women behind' BHRCC (25 June 2019) available at <https://www.business-humanrights.org/en/due-diligence-laws-must-not-leave-women-behind>.

<sup>430</sup> See Joanna Bourke Martignoni and Elizabeth Umlas, 'Gender-Responsive Due Diligence for Business Actors: Human Rights-Based Approaches' Geneva Academy, Academic Briefing No 12 (December 2018), 26 available at <https://www.geneva-academy.ch/joomlatools-files/docman-files/Academy%20Briefing%2012-interactive-V3.pdf>. See generally <https://www.ohchr.org/EN/Issues/Business/Pages/GenderLens.aspx>;

<sup>431</sup> Dr Widdis was available to explain further, and telephone/zoom calls were arranged on request.

10 are large trading companies, including state owned commercial entities. The other 9 responses received include from State institutions/services (2), civil society organisations (5), representative organisations (1), and professional firms (1). The respondents work in a wide range of areas within entities, including policy, legal, compliance, sustainability, equality, ESG, executive leadership, advocacy, and corporate social responsibility.

### **Policies and Provisions**

Respondents have made a public policy commitment to respect human rights (9), have publicly available policies concerning corporate social responsibility (10), and/or publicly available statement on modern slavery (9).<sup>432</sup> In developing their policies relating to human rights, responses indicate reference is most frequently made to international initiatives, and mainly to the UN Guiding Principles on Business and Human Rights (UNGPs); ILO Conventions or Declarations; and the UN Sustainable Development Goals. National initiatives, including the National Action Plan on Business and Human Rights, and Plan on Corporate Social Responsibility, were identified by 2/3 respondents. In further detail, concerning the gender dimensions of human rights, entities indicated they sought guidance most in the UNGPs and OECD Guidelines. Overall, there appears to be less policy provision and engagement with initiatives concerning the gender dimensions of human rights abuses and human rights defenders, than vulnerable groups or communities generally. Respondents indicated they have a process to proactively identify human rights risks and impacts that it may cause or contribute to (12), and impacts through business relationships including supply chain (10), such as via a risk management assessment process or framework. A number of respondents identified that they do not operate in, or knowingly source from, zones of conflict.

### **Barriers to Remedy**

Respondents (14) indicated that they agreed that barriers to remedy exist for potential victims of human rights abuses by companies domiciled in Ireland, and, that access to remedy for potential victims overseas is a concern (8). Respondents indicated wide recognition that certain groups may face additional barriers to remedy, including women (15), vulnerable communities (15), children (14), migrant workers (16), people with disabilities (15), indigenous peoples (14), and victims overseas (14). Concerning ensuring access to remedy for potential victims overseas: 11 respondents consider it is the concern of both the State and each business organisation; 5 other respondents consider it the concern of each business organisation wherever they operate; and 2 other respondents that it is the concern of the State. While potentially less accessible queries for Respondents, the barriers for potential victims overseas most identified were: access to information (10); appropriate provision for class actions (5); availability of third party funding for litigation (5); and difficulties with cross-border litigation (5). As

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<sup>432</sup> There is no equivalent in Ireland to the much critiqued UK Modern Slavery Act 2015. Statements are adopted entirely voluntarily, and in content and commitments decided by an entity.



to how any potential liability to victims overseas would be addressed, most responses given indicate via company grievance mechanisms (7). Response levels to questions on public commitments to remediation, and taking a role in remediation were lower, but indicate that several commercial entities have relevant policies and systems in place. A number of the respondents indicate a high level of engagement with the issues covered, and volunteered additional information on their work to engage their suppliers with international initiatives, supplier risk assessment processes, training relating to operating in higher risk environments including regarding forced labour, and proactive and sustained measures to engage and provide a forum for exchange with local communities.

### **Regulation of Human Rights Due Diligence**

A majority of Respondents are aware of the anticipated EU legislative initiative concerning human rights due diligence (10). The reasons most cited to undertake, or to advocate others to undertake, HRDD were the organisation's responsibility to respect human rights (16), assessment that voluntary measures are insufficient to prevent abuses (10), and legal (10), financial (12) and reputational (12) risks for the organisation. More consider that regulation of HRDD is not anticipated by business in Ireland, than think it is anticipated. The responses indicate, primarily, that regulation of HRDD 'is considered as required to identify, prevent, mitigate and account for business-related human rights abuses related to companies domiciled in Ireland' (14). Secondly, most identified was that it 'is consistent with the expectations of consumers, shareholders and investors' (12). Responses indicated support for HRDD as a condition for receiving state investment and supports (11). Respondents (14) considered that mandatory human rights due diligence across supply chains 'is appropriate for all commercial entities including: State owned or State funded entities; large commercial entities; and SMEs'. 7 Respondents indicated that a defence such as 'took all reasonable steps and exercised all due diligence...' should be provided for in Ireland.

### **Additional Reflections**

Recalling, the small size of the sample, all questions were optional, and not all respondents answered all questions. These are general observations upon the responses, with the caveat that the number of responses is 19. It is not purported to draw either broad or specific conclusions. Valuable additional comments regarding positive practices were offered, such as: use of Supplier Codes of Conduct which refer to international initiatives; risk assessment frameworks; community liaison; publicised and accessible means for communities to express their views; and training for doing business in higher risk environments. Within the responses received, there is a notable level of awareness of relevant issues, as well as areas which may benefit from awareness raising, such as concerning the gender dimensions of human rights. Respondents were invited to identify areas where they seek guidance. Those identified were: on incorporating risks to vulnerable groups or communities (6) and to human rights defenders in policies and processes (6); integrating a gender responsive approach in policies and processes (2).

## **E. CONCLUSIONS**

The adverse impact of business on human rights and the environment is a global societal issue. Gaps in governance, regulation, and access to remedy across national and international levels propagate a context in which adverse impacts occur and will recur. This is a fast-evolving environment posing challenges to stakeholders, policy makers, regulators, and actors in business and law. To address it, the challenges include recognising barriers to remedy for rights holders, building capacity, developing effective mechanisms of accountability, and changing behaviour. The approach taken to date has been primarily voluntary implementation of initiatives, such as the UN Guiding Principles on Business and Human Rights (UNGPs). Globally, businesses are just beginning to implement these initiatives, if at all. Implementation is assessed as low and slow. Other reporting and ‘single issue’ regulatory initiatives have recognised shortcomings, for example, the UK Modern Slavery Act. There is realisation that voluntary modes and means, alone, are no answer to the magnitude of continuing harms to rights holders. The UNGPs have considerable and undoubted value, and continuing implementation remains crucial. However, they were conceived as part of a ‘smart mix’ of voluntary and instrumental measures.

Significant additional and intersecting barriers to accessing appropriate and effective remedies are faced by women and groups which have been marginalised. There is a clear need to focus on transformative remedy. The experience of rights holders should inform the design of remedy. The participation of women in the development of gender transformative remedies, including gender responsive human rights and environmental due diligence should be ensured. This human context, the status of human rights, and existing barriers to remedy support facilitating civil remedy in domestic legal systems, including consideration of specific provision regarding jurisdiction and applicable law for business-related impacts. Judicial remedies are most frequently sought. Underlying on-going cases in the UK, Netherlands and Canada are allegations including rape, torture, killing, slave labour, and environmental pollution causing damage to livelihoods and health. Litigation against multinational corporations in their home states continues to grow. Jurisprudence in the English courts spanning thirty years may be considered to offer persuasive precedent for other jurisdictions, including potentially in Ireland.

Seeking judicial remedy for business-related harms is arduous and costly, particularly so in light of the barriers to access to information, funding, and expertise, as well as barriers of circumstances, geography, and language of the claimants typically involved in litigation. In other jurisdictions, there are frequently thousands of claimants in a single case. In Ireland, there are procedural barriers to eventual cases, including lack of a fit for purpose mechanism for collective redress. Practical barriers to remedy include substantial legal costs and lack of mechanisms to reduce costs. Judicial remedy for victims overseas may be substantively feasible, yet impossible in practice on the basis of procedural and practical barriers. Proactive measures are recommended to reduce barriers, and make available

remedies to rights holders to the international standard of: Accessible; Affordable; Adequate; and Timely.

### Summary Comparison

UK		IRELAND	
▶ <b>Collective Actions</b>	Yes (GLOs)	▶ <b>Collective Actions</b>	No
▶ <b>Third party funding</b>	Yes (1967)	▶ <b>Third party funding</b>	No
▶ <b>Modern Slavery*</b>	Yes 2015	▶ <b>Modern Slavery</b>	No
▶ <b>Failure to Prevent</b>	Yes (2010)	▶ <b>Failure to Prevent</b>	Yes (2018)
▶ <b>FDL style litigation</b>	Yes (1998)	▶ <b>FDL style litigation</b>	No
▶ <b>FDL litigation feasible</b>	Yes	▶ <b>FDL litigation feasible*</b>	No
▶ <b>Judicial support</b>	Yes	▶ <b>Judicial Support</b>	?
▶ <b>EU Recommendations</b>	Yes	▶ <b>EU Recommendations</b>	No
▶ <b>Constitution</b>	No	▶ <b>Constitution</b>	Yes

\* Extensively critiqued

\* Procedural and practical barriers

The risk of denial of justice has weighed in litigation in other jurisdictions. Any state is able to enact regulations which oblige corporations linked to it to respect human rights wherever they operate, and can equally provide practical supports for litigation, access to information, and support non-judicial remedies. The expert Review of the Administration of Civil Justice, commissioned by the Irish Minister for Justice, is pending.

Appropriate criminal offences should work in tandem with civil causes of action in ensuring remedy. The systemic barriers to accountability in criminal law are prompting new approaches. Well-constructed failure to prevent offences are proving effective. It may be considered to introduce an offence based on primary liability of the corporate entity for failure to prevent human rights abuses, including an appropriately designed defence of due diligence. State based non-judicial mechanisms have an important role to play in remedy, and which could be enhanced in the Irish context. Given the costs associated with formal judicial mechanisms, means and resources to engage in voluntary resolution and mediation would be valuable. The Peer Review of the Irish NCP is positive, and it is hoped that its impact will be enhanced. Investment in access to information, visibility, and transparency is advocated. There is momentum for mandatory human rights and environmental due diligence. A substantive model is advocated. The structure of the French Law of 2017 is considered an appropriate starting point, to be adapted in aspects. Scope, in particular the position of SMEs, is recognised to require attention and balanced consideration. A full regulatory assessment, including consideration of incentives, links to State supports, and provision of appropriate supports for SMEs should precede. Full and open consultation with stakeholders is recommended. The process can be expected to be engender debate and to take time, rendering it logical to commence. Proposals are under development in a number of European countries. In Ireland, the Irish Coalition for Business and Human Rights is developing an outline legislative proposal.

The proposed EU legislative initiative concerning Sustainable Corporate Governance including human rights due diligence is in progress. The open public consultation on the proposal for a Directive states:

This initiative aims to improve the EU regulatory framework on company law and corporate governance. It would enable companies to focus on long-term sustainable value creation rather than short-term benefits. It aims to better align the interests of companies, their shareholders, managers, stakeholders and society. It would help companies to better manage sustainability-related matters in their own operations and value chains as regards social and human rights, climate change, environment, etc.<sup>433</sup>

## **F. SUMMARY OF RECOMMENDATIONS**

### **General**

- Recommendations are subject to appropriate evaluation and assessment of regulatory impact
- Recommendations are pending the Review of the Administration of Civil Justice
- Principles of proportionality, and full and prior consultation with stakeholders.
- To progress, it is crucial that all stakeholders are fully consulted, engaged, and dialogue is enhanced.
- The experience of rights holders should inform how remedies are provided
- In all steps, gender dimensions should be considered
- To include the recommendations within this Review within the National Plan on Business and Human Rights, including identifying actor(s) responsible and timeframes for their achievement

### **1. Reduce Barriers to Remedy: Legal, Procedural and Practical**

- Address barriers to remedy for victims overseas for adverse impacts caused by or contributed to by corporations domiciled in Ireland, including by rendering judicial remedy more accessible, ensuring sanction in criminal law, and enhancing the impact of State based non-judicial mechanisms

### **2. Jurisdiction and Applicable Law**

- Consider recommendations on appropriate and proportionate approaches within European regulation relating to jurisdiction for business-related harms, which operate in combination with national rules on jurisdiction, and the exercise of judicial discretion.

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<sup>433</sup> <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance>.

- Consider recommendations on appropriate and proportionate approaches within European regulation relating to applicable law for business-related harms

### **3. Collective / Multi-Party Actions**

- Introduce a mechanism for collective actions as recommended by the Law Reform Commission, and consistent with the 2013 EU Recommendations on Collective Redress
- Include a suite of alternative mechanisms to ensure accessibility and proportionality

### **4. Funding Barriers**

- Review civil legal aid provisions for class actions concerning business-related harms
- Claimants who are not domiciled or habitually resident in Ireland are anticipated to face barriers funding cross border litigation
  - Consider in legislative analysis of third-party funding of litigation, and similar mechanisms
- Consider additional funding barriers faced by women and groups who are marginalised

### **5. Practical Barriers**

- Provision of accessible, up to date, free of charge information on access to judicial and non-judicial remedy for rights holders, including related to funding and procedural cross-border elements

### **6. Additional Barriers**

- Ensure the rights holder is central in all consideration and provisions
- Provision to be made for those who are disproportionately affected or face additional barriers, including women, children, human rights defenders, and indigenous peoples
- Adopt and apply a gender lens in implementing the UNGPs
- Awareness raising concerning the gender dimensions of business and human rights, barriers to remedy experienced by women, and promote adoption of international standards in this respect
- The effectiveness criteria of remedies should be informed by the impact upon women, the intersectional nature of discrimination faced by women, and the experience of women regarding barriers to accessing and enforcing remedies
- Regard to the UNWG three-step framework: gender-responsive assessment; gender-transformative measures; and gender-transformative remedies
- Provision for consultation with representatives of women workers and representative organisations



## **7. Criminal Law**

- Engage legislative assessment of an offence of failure to prevent human rights abuses, providing for corporate entity primary (plus derivative) liability, including assessment of an appropriate due diligence defence

## **8. Enhance Non-Judicial Remedies**

- Focus on mechanisms, means and resources for rights holders and parties to engage in voluntary resolution and mediation
- Pending the outcome of the Peer Review of the Irish NCP, the following aspects are recommended for consideration: Funding and resourcing the NCP consistent with its role, including minimum one dedicated full time member of staff; Facilitating structured engagement with other Ministries, relevant actors from business, law and civil society; Enhancing information and transparency on complaints procedures
- Request feedback from entities who have submitted instances to the NCP on improving the process
- The NHRI may consider engaging with the European Network of National Human Rights Institutions Working Group on Business and Human Rights, and in other actions relating to business and human rights, within its remit and subject to its discretion

## **9. Human Rights and Environmental Due Diligence**

- Commence consideration of regulation of human rights and environmental due diligence in Ireland, cognisant also of developments in the legislative initiative at EU level
- Commence full and open consultation with stakeholders
- The French Duty of Vigilance Law is an appropriate model, to be adapted on the basis of learning on its operation since its introduction, and advances in proposals in other EU jurisdictions.
- Include balanced assessment of the potential impact upon SMEs, within a substantive model
- Regulation should include provisions for remedies (civil, criminal), incentives, and enforcement.
- Regulation of human rights due diligence should be gender responsive
- Engage consideration of interaction with Company Law and Directors Duties

## **10. UN Binding Treaty**

- Encourage relevant actors and stakeholders to engage in discussions, which include remedy

## **11. Capacity and Resources: Move the Dial**

- Dedicated resource in one State agency to establish and maintain:
- A Central Digital BHR Information Hub providing up to date and expert information on: evolving standards and State supports; links to sectoral and country specific studies; ‘how to’; best practice; FAQ; blog. Focus on rights holders: gender dimensions; indigenous peoples; human rights defenders. Remedy: Judicial; State based non-judicial; Mediation; Remediation. Understanding Human Rights and Environmental Due Diligence and the EU legislative Sustainable Corporate Governance initiative
- A Central Training Hub providing capacity building and knowledge transfer adapted to assist actors in practice
- Establish a dedicated SME portal to provide: a forum for dialogue and knowledge transfer: hear and consider the specific challenges of small and medium sized businesses relating to developments this field; and inform the supports which may be required

## **12. National Plan on Business and Human Rights 2021-2024: Step Change**

- Content grounded in rights and obligations underpinning business and human rights.
- A directional and unifying force containing firm messaging and concrete time defined actions
- A clear programme of work to move each objective forward, attributing achievement of each action point to an identifiable and accountable actor
- Incentivise implementation of content, links to public procurement, and State supports.
- Include the recommendations within this Review in the next Irish National Plan on Business and Human Rights, including actor(s) to advance, and timeframes for their achievement

## **For Further Analysis**

- Financial Institutions. Specific consideration of business and human rights via investments.
- Consider a study of the interaction of these recommendations, and the field of business and human rights with Company Law and Directors Duties, including in relation to human rights and environmental due diligence.
- Consideration of the role of a regulator or enforcement body (BHR/HRDD)
- Consideration of the Business and Human Rights Implementation Group, perhaps having regard to a programme of time defined outputs, enhancing its visibility and impact
- Consideration of a package of incentives for business to respect for human rights, and rendering state supports subject to respect for human rights

## Appendix I:

### Feedback – with thanks to

Department of Enterprise, Trade and Employment	Department of Finance
Department of Justice	Department of Employment Affairs and Social Protection
Enterprise Ireland	Industrial Development Authority (IDA)
Irish Business and Employers Confederation	National Contact Point
Trócaire	

### Respondents – with thanks to

#### The respondents which gave their consent to be listed are:

Action Aid	Total Produce plc
Central Bank	TerraJusta
EIRGRID	William Fry
Electricity Supply Board	
Front Line Defenders	
Irish Centre for Human Rights	
Irish Congress of Trade Unions	
Irish Human Rights and Equality Commission	
Institute of Public Administration	
NTMA as manager of the Irish Strategic Investment Fund	
Kenmare Resources plc	
Kerry Group plc	
NTR Asset Management DAC	
Oxfam	
Primark Limited	
Shift	