

SIPTU Submission: Working Outline of Ireland's National Plan on Business and Human Rights 2016-2019

Introduction

Last year SIPTU welcomed the opportunity for trade union organisations to put forward their perspective on the UN Guiding Principles at the DFAT NGO Forum on Business and Human Rights Forum 2015 and call for submissions on this topic. SIPTU now wishes to make a submission in respect of the Working Outline of Ireland's National Plan on Business and Human Rights 2016-2019.

Our previous submission (see appendix) outlined SIPTU's Policy priorities which the Irish government was encouraged to adopt in the development of a National Action Plan.

SIPTU firstly welcomes the proposal for the establishment of the 'Business and Human Rights Implementation Group', and encourages Ireland to ensure that this group includes adequate representation from social partners and civil society to monitor, evaluate and provide recommendations for improving implementation. Importantly, we would very much welcome trade union representation on the group. SIPTU suggests that the implementation group be coupled with an assessment framework that has measurable milestones and outcomes to reduce business-related human rights abuses.

We broadly welcome the following elements:

- The concentration on pillar one is quite correct given that this is a national action plan and should concentrate on the actions that the state can take to fulfil its duties to protect. The headings on page 9 however appear to imply that they come from the guidelines rather than a set of headings created here in Ireland? This should be made clearer. The list could also benefit from an additional point for "Work and the Human Rights of Workers" - something that is covered in some detail on later pages (13, 14, 15, 16) in the working outline.
- Baseline assessment of legislative and regulatory framework as it applies in Ireland is a significant commitment and something we recommended in our original submission. We believe that despite improvements there has been a failure to protect the rights to freedom of expression and right to form and join trade unions under article 11 of the ECHR, where there are outstanding issues in relation to the right of trade unions to represent their members as set out in the Wilson Judgement of the European Court of Human Rights.
- Commitments to providing practical support to Irish businesses, including through a toolkit for public and private enterprises and the reference to the Global Union Paper on the Guidelines and the human rights of workers to form or join trade unions and to bargain collectively;

SIPTU would like to take this opportunity to submit a number of recommendations to strengthen the current draft.

1. Public procurement: We very much welcome the inclusion of public procurement in the current draft however we believe the actions points stated are too weak to have any real impact for workers. Public Procurement is one of the main types of commercial transaction through which States are able to promote respect for human rights. We would kindly ask that the following suggestions be considered for inclusion:

- Developing guidance for procurers on practical steps they can take to address risks in procurement of both goods and services, as part of the transposition of the new EU Procurement Directives
 - Establishing online tools on risks per product and country of origin, as US, Dutch and Danish governments have done
 - Identifying collaborate approaches public authorities can use to pool resources and achieve economies of scale in the monitoring of compliance with contractual obligations to meet ILO Core Labour Standards
 - Capacity building activities for procurement personnel, in partnership with professional bodies and others.
2. Practically none of our own suggestions about Ireland’s NCP under the OECD Guidelines for Multinational Enterprises have been taken on. We hope that this section will be strengthened in the final text.
 3. We are concerned at the singling out of some industries in the supply chain section. Recent tragedies have exposed appalling violations of workers’ human rights in different global supply chains e.g. the garment industry in Bangladesh, the construction sector in Qatar. We firmly believe that the ratification and implementation of International Labour Standards, in particular of the ILO core conventions are key elements of any credible policy on Global Supply Chains. The effective implementation of these standards, via national law and legal systems, are a prerequisite for leveraging working conditions in Global Supply Chains. We would very much welcome references in the plan to the current work of the International Labour Organisation (ILO) in this regard.
 4. The section on, pages 28 and 29, fails to make clear that it is not reputational risk but the risk to the human rights of workers that the UNGPs address. We would urge greater clarity in the text to supply chain transparency and the fact that business should remediate adverse impacts they cause or contribute to, even when not required to so by law (e.g. reinstate wrongfully dismissed workers).
 5. The principles outlined on page 5 are welcome but the 6th one is a bit problematic for us in that many existing initiatives have not adapted to the implications of the UNGPs. CSR activities cannot substitute for the role of the state which has a distinct role. Responsibility is not a “voluntary concept” and respecting human rights is not “optional” even where it is not legally binding. In the CSR world, the focus is on the “positive contributions” that businesses unilaterally decide to make. In this new thinking, the focus is on the adverse impacts on others that business *must address*. There is no “picking and choosing” of what rights must be respected. Business must respect all internationally recognised human rights. Because the responsibility is over harm caused to others - it is not about the “sustainability” of the company – it is about those affected by the business including those that do not have any other relationship to the business or any interest in the business’s success or long-term prospects. They are rights holders whose rights are violated or threatened. There is no “shared responsibility” between business and government – there are distinct roles that are independent of each other. Philanthropy is beyond the scope of the business responsibility to respect human rights. There is no “carbon offset” for violating human rights.
 6. We believe that Action Point 38 can be strengthened. Under Section 4 Guiding Principle 7 deals with supporting business respect for human rights in conflict-affected areas. Irish business operates in a range of countries where conflict or dictatorship has led to terrible

abuses of workers' rights. Irish business stands a high risk of being directly associated with such human rights abuses, and in some cases causing or contributing to them. Thus we would urge that the text be bolstered by indicating Government together with the independent oversight body should conduct a regular mapping exercise to identify high risk areas e.g. Colombia, Palestine, Burma and Qatar. Government should issue country specific guidance to businesses investing in or sourcing from a high risk country, on steps to take to meet human and trade union rights standards. In addition the national action plan should include provision for the Irish government to conduct in-country briefings on human rights risks for Irish business and investors that involves local unions and other human rights defenders.

7. On page 40, final paragraph in which the draft text discusses the business case, it would be important from our perspective to add that the absence of such a case does not remove any of the responsibility of business for their impact on human rights. Failure to do so implies a get out for business on the grounds that to do so would be too onerous etc. The first paragraph on same page is also slightly misleading in that while the treaties do not impose obligations on business enterprises, they do impose a duty on states to protect people's human rights and any national action plan should state this.

Appendix:

SIPTU SUBMISSION on Ireland's proposed National Action Plan on UN Guiding Principles on Business and Human Rights

Introduction

Following on from the DFAT NGO Forum on Business and Human Rights which took place in November 2014, the Department of Foreign Affairs and Trade is undertaking a consultation process to develop a National Action Plan on Business and Human Rights. SIPTU welcomed at that time the opportunity for trade union organisations to put forward their perspective at the Forum and now wish to expand on this in our submission.

The UN Framework and the Guiding Principles constitute the most significant development in over 30 years with respect to international standards of behaviour for business. The UN Framework was formally welcomed by the UN Human Rights Council in 2008 giving it official status and marking the first occasion that the UN body mandated for human rights adopted substantive policy on Business and Human Rights.

Importantly the Guiding Principles clearly outline the roles of the state and of business as different and independent of each other. States cannot use the power of business as an excuse to not do their duty to protect human rights. Businesses cannot use the failure of the state to protect as an excuse to avoid their responsibility to respect human rights.

It is within this context that SIPTU wishes to outline its priorities for the Department in developing a National Action Plan and in ensuring its subsequent full implementation.

Background

The UN Guiding Principles on Business and Human Rights are important for trade unions in a number of respects.

Firstly, the Guiding Principles helpfully clarify the different roles and responsibilities of the state and business. It is the duty of states to enact and implement laws and policies to protect against human rights abuse. And businesses should not decide what their responsibilities to society are - as many Corporate Social Responsibility (CSR) policies do - but instead should meet their "responsibility to respect" the human rights of all people affected by their operations.

Secondly, the Guiding Principles call on businesses to prevent their negative human rights impacts wherever they occur, even beyond the direct employment relationship. This could include workers in jobs that business outsourcing has made insecure, low paid, and dangerous. For example, if an Irish supermarket's purchasing practices are denying an agricultural worker her legal wage or resulting in unsafe working conditions, then it needs to act to prevent that irrespective of whether or not she is directly employed by them.

Thirdly, the Guiding Principles are not legally binding, but can be a strong advocacy tool to improve existing rules and policies, given the strong backing for them from governments, employers, trade unions and other civil society organisations. For example, the Irish Congress of Trade Unions (ICTU) worked with the Trade Union Advisory Committee to the OECD (TUAC) to secure language from the Guiding Principles in the recently update of the OECD Guidelines for Multinational Enterprises. Unions have also begun including the Guiding Principles in collective bargaining and global framework agreement with multinational companies.

Finally, we believe that of utmost importance concerning human rights is the right of workers to form or join trade unions and to bargain collectively over the conditions under which they perform work. Because these human rights apply to persons that perform work, they are applicable to all economic activities and, hence to all business enterprises. We expect business enterprise to apply the Guiding Principles, putting in place policies and due diligence processes that facilitate the avoidance of any adverse human rights impacts which their decisions and activities may have on workers seeking to form or join trade union or to bargain collectively. We also expect that business enterprises remediate their adverse impacts on these human rights.

This submission outlines SIPTU’s policy priorities which the Irish government is encouraged to adopt in the development of the National Action Plan.

In light of the Department’s development of a National Action Plan, SIPTU firstly recommends the establishment of an independent oversight body with representation from social partners and civil society to monitor, evaluate and provide recommendations for improving implementation. This would be an integral part of the action plan in order to ensure its success. This should be coupled with an assessment framework that has measurable milestones and outcomes to reduce business-related human rights abuses.

Pillar 1: The state duty to protect

Guiding Principles (“GPs”) 1, 2 & 3 – States should meet their “duty to protect”

In relation to Pillar 1, SIPTU recommends that the Government of Ireland should conduct a “root and branch” review of legislation, and the implementation of such, to identify gaps in the Irish legal and policy framework to ensure that businesses operating in or from Ireland are respecting for human rights. This should include a special emphasis on the international treaties, and the jurisprudence of the International Labour Organisation (ILO) Committee of Experts, the European Social Rights Committee and the European Court of Human Rights, particularly as they relate to freedom of association and the right to collective bargaining and the right to strike.

Allied to such a review, the Irish Government should ensure that appropriate measures are in place to ensure the effective implementation of these obligations. This should include:

- The absence of a proper framework for **Collective Bargaining** since the infamous Supreme Court decision in *Ryanair* (2007) has been a major impediment to trade unions trying to advance the pay and conditions of workers. Collective Bargaining is an essential requirement of the workplace if growing inequality in society is to be arrested and a fundamental right of

all workers. Government must finally introduce the long awaited new regime of Collective Bargaining. Effective legal protections are essential but so are workplace policy and practice. Business cannot cherry pick between human rights deciding to respect and promote some while ignoring others. Respecting the human right of their workforce to freedom of association, the right to organise and collective bargaining is a key measure of how a business complies with human rights in practice. It is sometimes difficult to reconcile business claims of support for human rights with the ongoing attacks on the processes and structures promoting collective bargaining and just and fair wages and working conditions. For example, despite the enactment of legislation to restore the Joint Labour Committee (JLC) system Employers in a number of key sectors have boycotted the re-established JLCs and have thus totally frustrated the ability of the JLC to conclude an Employment Regulation Order (ERO) that will set out much needed basic pay and employment conditions. While other representative associations of employers have resorted to further legal challenges to halt the operation of the JLC on technicalities.

- Ensuring **access to justice** for workers:
 - At the level of the enterprise this means providing the worker with an entitlement to be represented by their union as part of a fair grievance and discipline process.
 - A key issue for workers is the delay in having cases involving complaints of breach of trade union, equality, employment, labour and human rights at work heard. Long delays, two years is not uncommon, undermine the right to effective and adequate remedies. It is hoped that the workplace relations bill, when enacted will reduce such delays.
 - However this is not enough, all too often the only remedy afforded is limited financial compensation. For workers who have lost their job this is not an adequate remedy. Legislation needs to prevent unfair dismissals from occurring. Workers faced with an unfair dismissal relating to a breach of human rights - such as freedom of association, the right to organise and collective bargaining - should be able to prevent the dismissal from going ahead until the case is finally determined. This much need protection has been introduced to protect whistle-blowers and SIPTU argues that it should be extended to protect workers against reprisals from employers when they exercise their human right to unionise.
 - No fees should be introduced for workers seeking to use the Workplace Relations Commission as will price many working people out of access to justice.

- Ensure measures to reduce the vulnerability of work, by ensuring statutory enforcement agencies, including the Health and Safety Authority and the Labour Inspectorate under the Workplace Relations Commission are properly resourced and have effective inspection and enforcement powers.
- Amend the Companies Act to ensure that the “responsibility to respect human rights” is included as a director’s duty, and where all such duties contribute towards the primary duty to promote the long-term success of the company.
- Require business to communicate on their human rights impacts and how they address them through strengthening requirements for narrative reporting on social and environmental due diligence and impacts at Irish and EU level.
- Strengthen the ability of institutions such as the Irish Human Rights and Equality Commission, the Oireachtas Joint Committee on Jobs and Enterprise, Joint Committee on Justice, Defence and Equality and Joint Committee on Foreign Affairs and Trade to periodically assess the adequacy of our laws and policies to meet its “duty to protect” against business-related human rights harm.

GPs 4, 5 &6 - The State-business nexus

These Guiding Principles call on the state to use its interactions with businesses to promote human rights due diligence. Yet the Irish government’s current approach is very fragmented.

To meet these Guiding Principles, the Irish government should:

- Introduce legislation to require that the “responsibility to respect human rights” is included as a director’s duty.
- Request the Irish Human Rights and Equality Commission (IHREC) assesses the adequacy of Irish laws and policies to meet the “duty to protect” against business-related human rights harm.
- Map out how it supports or interacts with business. This includes businesses that it owns or controls, including contracted-out services. It also includes the whole range of supports¹, financial and non-financial, available from Government Departments, Offices and Agencies to assist companies to grow, improve competitiveness, create employment and improve productivity. This includes support or services provided to business provided by Enterprise Ireland and IDA Ireland, the Micro Finance scheme, the Credit Guarantee Scheme, and the Credit Review Office, and through public-private partnerships, development assistance, finance, insurance or other forms of guarantee. It should especially include commercial transactions that

¹ DJEI listed supports: <http://www.djei.ie/enterprise/businesssupport.htm# Access to Credit>

it conducts with business, including its procurement activities.

- It should then develop clear guidance, in consultation with civil society and the UN Working Group on Business and Human Rights, on what it expects of companies when conducting human rights due diligence (see GPs 16 to 24 below). This could include reference to the Global Union paper² on the UN Guiding Principles on Business and Human Rights and the human rights of workers to form or join trade unions and to bargain collectively. This paper outlines how businesses should at the very least:
 - Implement due diligence for the right to form or join a trade union by identifying and preventing anti-union policies and practices as well as mitigating the adverse impacts on the exercise of this right by other business activities and decisions;
 - Implement Due diligence for the right to bargain collectively by recognising that business enterprises must be prepared to bargain under a wider range of structures in countries where the law and practice does not provide a well-defined framework for bargaining.
- The Irish Government should seek to introduce a harmonised “human rights due diligence” requirement into all of these interactions with business, such as through contracts, investment policies, procurement processes, legislation, or regulation. This would include advocating for the revision of the EU procurement directive to allow for member states to put in place human rights due diligence requirements in procurement policies. It should also establish appropriate screening or complaints mechanisms or procedures, such as using the Irish National Contact Point (NCP) for the OECD Guidelines.³
- The Irish government should require Irish state agencies/companies operating abroad (i.e. ESB International) to operate in accordance with the IFC Performance Standards and strongly encourage Irish businesses to do the same. These environmental and social standards have been implemented by IFC clients, clients of European government financing (i.e. UK, Germany, Netherlands) and clients of 80 large financial institutions (Bank of America, Citigroup, Barclays, Deutsch Bank, KBC etc - but no Irish bank).

Guiding Principle 7 deals with supporting business respect for human rights in conflict-affected areas. Irish business operates in a range of countries where conflict or dictatorship has led to terrible abuses of workers’ rights. Irish business stands a high risk of being directly associated with such human rights abuses, and in some cases causing or contributing to them. Government together with

² http://www.ictu.ie/download/pdf/joint_paper_on_due_diligence_and_foa.pdf

³ Each of the 43 signatory countries to the OECD Guidelines for Multinational Enterprises is obliged to set up a National Contact Point to hear complaints against companies operating in or from their territory for alleged breaches of the Guidelines.

the independent oversight body should conduct a regular mapping exercise to identify high risk areas e.g. Colombia, Palestine, Burma and Qatar. Government should issue country specific guidance to businesses investing in or sourcing from a high risk country, on steps to take to meet human and trade union rights standards. In addition the national action plan should include provision for the Irish government to conduct in-country briefings on human rights risks for Irish business and investors that involved local unions and other human rights defenders.

GP 9 – Maintaining domestic policy space under international treaties or contracts

States may enter into international trade and investment agreements or private contracts that constrain their ability to fully implement their international human rights obligations. For example, such agreements can have so-called “stabilisation clauses” which allow foreign investors to be exempt from any future government regulation, or states may lower human rights standards seeking to attract foreign investment, especially through Export Processing Zones. The Trans Atlantic Trade and Investment Partnership negotiations are a source of much concern to our membership and to trade unions across the EU and USA. Of particular concern is the way that TTIP creates a right for companies to launch a suit for financial compensation if a Government introduces a rule or regulation and that rule or regulation has a negative impact on the company’s profit, or expected profit.

In the context of Guiding Principle 9 –which concerns maintaining domestic policy space under international treaties or contracts-Ireland should ensure that any agreement or contract contains a guarantee that the states will not lower or “freeze” human rights standards especially through ‘stabilisation clauses’ and strong and broad exemptions for states to take action in the public interest, and especially to meet its human rights obligations.

The Irish government can use the multilateral institutions it engages with to promote the implementation of the Guiding Principles in the following ways:

- Support the inclusion of the implementation of the Guiding Principles as part of the UN Human Rights’ Council’s Universal Periodic Review
- Seek to include in EU trade agreements, commitments for the parties to require businesses operating in or from their territory to conduct human rights due diligence; and adhere to and implement the OECD Guidelines for Multinational Enterprises.
- Provide funding and support for the ILO to assist governments, especially in the developing world, to improve their “duty to protect”, with a particular focus on businesses operating in their territory.
- Support and fund an ILO action plan on implementing the ILO Declaration on Multinational Enterprises.
- Support the OECD to put in place a strong peer review mechanisms to improve the effectiveness of National Contact Points in implementing the OECD Guidelines for Multinational Enterprises.

Pillar 2: The business responsibility to respect

The concept of “due diligence” in the UN Framework and its Guiding Principles is considered to be an on-going process undertaken by a business enterprise to identify, prevent, mitigate and account for how it addresses actual and potential adverse human rights impacts.

It is widely understood that due diligence means that actions should be commensurate with the risk involved. Less appreciated is that the risk is not the risk to the reputation of the business enterprise but the risk to workers who wish to exercise their human rights.

In recent years there has been a burgeoning industry of enterprises selling “social auditing” of supply chain workplaces. This has become the standard Corporate Social Responsibility (CSR) practice in labour intensive industries. The social auditing approach is controversial for various reasons. Disappointing results with “check list” auditing has led to the promotion of new approaches based on involving workers directly in workplace investigations, changing the purchasing practices of sourcing business enterprises or in capacity building for suppliers and local organisations including trade unions. An integrated approach which includes the promotion of mature industrial relations is needed to replace the narrow social auditing model.

The best way to identify actual and potential adverse impacts on specific human rights is to first understand how adverse impacts are caused by business enterprises.

Transparency with respect to its business relationships can be critical to an enterprise seeking to practice due diligence. In industries characterized by complex and lengthy supply chains due diligence involves disclosure of the supply chain by the sourcing business enterprise. Due diligence also means avoiding these impacts and mitigating them where they are not avoided.

To increase the number of Irish-based businesses that are conducting human rights due diligence and to accordingly reduce business-related human rights abuses SIPTU recommends that the Irish government under GPs 11 to 24 (the steps for businesses to conduct human rights due diligence) should:

- Develop definitive guidance, in consultation with the independent oversight group and the UN Working Group on Business and Human Rights, for companies on how to carry out “human rights due diligence” as described in the Guiding Principles under this pillar, and require companies to implement such guidance.
- Specific guidance should be developed on what business should be doing to address difficult governance gaps such as the denial of freedom of association including in public procurement, supply chains and indeed outsourcing of public services.
- The independent oversight group should be in a position to provide guidance to businesses to improve their respect for human rights.

Pillar 2 states that business enterprises must have processes in place to enable remediation of the adverse impacts that they cause or contribute to. Remedy is also the subject of the third pillar of the UN Framework.

Business enterprises should remediate the adverse impacts that they caused or contributed to even where they are not required to do so under national laws. Business enterprises should rehire

workers who were dismissed unfairly, for example because of their trade union activities, and they should endeavour to undo any discrimination against trade union supporters that have taken place.

Industrial relations is, in itself, one of the most important non-state grievance mechanisms concerning business behaviour. Collective agreements often spell out procedures for dispute resolution that can provide remediation for rights violations.

Pillar 3: Access to remedy

GP 25 and 26 - Judicial mechanisms

As stated in GPs 1-3 above, the Irish government should ensure access to justice for workers by making the changes suggested above.

GP 27 – Non-judicial mechanisms

One of the useful contributions of a national action plan could be to shine a light on the revised OECD Guidelines on Multinational enterprises, which now incorporate this basket of rights to compliment the UN Guiding Principles. The OECD Guidelines for Multinational Enterprises comprise a set of recommendations from Governments to MNEs on responsible business conduct. They apply to MNEs with headquarters in countries that have signed the Guidelines, wherever those MNEs operate and their business relationships, subsidiaries as well as suppliers, investors and other business partners.

A unique feature of the guidelines is a Government-backed complaints mechanism where potentially big business can be held to account for its impacts on workers and the environment. Under the Guidelines, each signatory government is required to set up a National Contact Point (NCP) – a government body hearing complaints and generally promoting the Guidelines. Out of the 40 or so signatory governments, barely a handful have functioning NCPs (the UK NCP is generally regarded as one of the best). The Irish NCP is among the poorest performers, because of its lack of procedures, oversight body, and lack of track record in resolving disputes. It has received only 4 cases - hardly surprising given the lack of promotion and knowledge of the guidelines among Irish business and civil society. You can read more about trade union cases brought to other NCP's and an evaluation of NCP performance on the Trade Union Advisory Committee to the OECD (TUAC) website.

There is significant room for improvement. The Irish government should:

- Increase the resources of the Irish NCP especially to enable it to conduct in-country investigations and mediations; and
- Use the Irish NCP in carrying out any assessments of business adherence to the Guiding

Principles, particularly in determining state support or whether or not to establish a business relationship as per the recommendations in GPs 4, 5 & 6 above.

An example of the kind of initiative that could be led by the NCP is outlined in a [TUAC submission](#) to the 2014 Meeting of the National Contact Points and the Informal Ministerial Meeting on Responsible Business Conduct, urging governments to take action on the severe violations of migrant workers' human rights in Qatar. Trade unions are gravely concerned about the high level of work-place accidents in Qatar leading to injury and death of migrant workers and the widespread violations of workers' human rights. Qatar has the highest ratio of migrants to citizens in the world. The awarding of the FIFA 2022 World Cup to Qatar will likely further increase the demand for migrant labour. In [April 2014, the UN Special Rapporteur on human rights of migrants](#) published a report that identified a host of abuses that constitute severe violations of workers' human rights.

The TUAC submission called for government action by Ministers, National Contact Points (NCPs) and the OECD itself to address these violations of the OECD Guidelines in Qatar. Governments, in line with the State duty to protect against business-related human rights abuses, should recognise the central role of the National Contact Points in implementing the OECD Guidelines and invite NCPs to convene meetings involving MNEs operating in or with links to operations in Qatar, trade unions and investors with a view to addressing these human rights violations, including through human rights due diligence. The submission lists a number of Irish companies operating in Qatar.

GP 28 -31 – Non-state-based mechanisms

Operational-level or enterprise based grievance mechanisms can have a role to play as part of a mature system of industrial relations that has collective bargaining at its heart. However such mechanisms should not be used as a substitute for trade unions or genuine collective bargaining, which should be recognised as playing a vital role in providing routes for redress and vigilance against human rights abuses.

The Irish Government should encourage any multi-stakeholder initiative that it supports which has the aim of improving business respect for human rights to have effective grievance mechanism in line with Guiding Principles 30 and 31.