

Law Society of Ireland
Certificate in Corporate Social Responsibility Practice
BUSINESS AND HUMAN RIGHTS

HARD AND SOFT LAW

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INTRODUCTION

Human rights are the concern of governments. But not just governments. Individuals and corporations can contribute—positively and negatively—to the realisation of human rights.

‘[I]n response to the view that corporations cannot be subjected to human rights responsibilities because they are incapable of observing human rights designed to direct state action, it may be said that to the contrary, corporations can affect the economic welfare of the communities in which they operate and, given the indivisibility of human rights, this means that they have a direct impact on the extent that economic and social rights, especially labour rights in the workplace, can be enjoyed.’¹

Some recent examples—

In May 2020 Siemens, Booking.com, G4S, and Airbnb were identified among other businesses working in occupied territories (Crimea, Western Sahara, Occupied Palestinian Territory) with risks of complicity in human rights violations.²

In May 2020 an Amazon vice president resigned because, he said, the company had fired workers for protesting against unsafe workplaces during the Covid-19 pandemic.³

In February 2020 Christian Aid reported that ESB was contributing to the forced displacement of people in La Guajuram, Colombia, and to severe pollution, by importing coal from the Cerrejón mine. It was reported that an Irish company, CMC Marketing, managed the mine’s sales.⁴

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¹ Peter Muchlinski, *Corporate social responsibility and international law: The case of human rights and multinational enterprises* in THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW (Doreen McBarnett, Aurora Voiculescu and Tom Campbell eds, 2007). See also Opinion 7 [B&HR] Improving access to remedy in the area of business and human rights at the EU level 4 (EU FRA, 2017); NADIA BERNAZ, BUSINESS AND HUMAN RIGHTS: HISTORY, LAW AND POLICY – BRIDGING THE ACCOUNTABILITY GAP (2017); SIMON BAUGHEN, HUMAN RIGHTS AND CORPORATE WRONGS: CLOSING THE GOVERNANCE GAP (2015); SURYA DEVA & DAVID BILCHITZ, HUMAN RIGHTS OBLIGATIONS OF BUSINESS: BEYOND THE CORPORATE RESPONSIBILITY TO RESPECT? (2013); JENNIFER ZERK, MULTINATIONALS AND CORPORATE SOCIAL RESPONSIBILITY (2006); ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS (2006) ch 6; David Weissbrodt & Maria Kruger, *Human rights responsibilities of business as non-state actors* in, NON-STATE ACTORS AND HUMAN RIGHTS (Philip Alston ed, 2005)

² Marya Farah, *Business and human rights in occupied territory: Guidance for upholding human rights*

³ Mihir Zaveri, *An Amazon vice president quit over firings of employees who protested*, NY Times, 4 May 2020

⁴ Peter Hamilton, *ESB called out for ‘contributing to human rights violations’*, Irish Times, 20 February 2020; Luke Holland, *Undermining human rights: Ireland, the ESB and Cerregón coal* (February 2020) . In December 2019 the United Nations Committee on the Elimination of Racial Discrimination expressed concern about this and recommended that Ireland consider stop buying this coal and guarantee that victims have access to effective

In 2019 the Wall Street Journal reported that Adidas, Coca Cola, Gap, H&M, Kraft Heinz and other well-known brands were selling apparel and food with supply chains stretching to camps in which more than a million Uyghurs are detained and forced to work.⁵

On 24 April 2013 the Rana Plaza complex in Dhaka, Bangladesh collapsed, killing 1,134 people, including at least 38 children, and injuring more than 2,500. The complex housed several garment factories where workers made clothes for global brands, some of whose labels were found in the rubble. Two factories in the building had been the subjects of ‘social audits’ of working conditions, neither of which covered building safety.⁶

In 2012, 258 workers died in a fire at a textile factory in Karachi, Pakistan owned by Ali Enterprises. Windows were barred and emergency exits were locked. Three weeks before the fire, RINA Services SpA, an Italian inspection and certification agency, certified Ali’s compliance with the SA 8000 social accountability standard.⁷ Criminal proceedings in Italy have been filed against RINA.⁸ The factory’s main customer was Kik, a German discount retailer. Civil and criminal proceedings were filed in Germany against Kik, who have paid \$1 million in emergency aid to survivors and agreed in a dialogue moderated by the International Labour Organization to pay \$5.15 million damages to those impacted by the fire.⁹

In 2018 the High Court was told that migrant fishermen were working on Irish trawlers in conditions akin to modern slavery.¹⁰ The Department of Justice and Equality reported discovering 19 trafficking victims in the Irish fishing industry in 2017.¹¹

In 2018 the High Court awarded damages to 27 Portuguese construction workers working for a consortium of 3 Portuguese construction companies for providing deplorable work camp style accommodation. The 3 companies were subcontracted for work on the N7 Nenagh to Limerick motorway project. The compound was

remedies and compensation in Ireland, among other things. Committee on the Elimination of Racial Discrimination, *Concluding observations on the combined fifth to ninth reports on Ireland* UN Doc CERD/C/IRL/CO/5-9 (12 Dec 2019) ¶¶49-50

⁵ Eva Dou & Chao Deng, *Western companies get tangled in China’s Muslim clampdown*, Wall St Journal 16 May 2019

⁶ ILO, *The Rana Plaza accident and its aftermath* available at https://www.ilo.org/global/topics/geip/WCMS_614394/lang-en/index.htm; Sarah Young, *Fashion Revolution week: What was the Rana Plaza disaster and why did it happen?*, The Independent, 23 April 2020; European Center for Constitutional and Human Rights, *Case Report: OECD complaint against TÜV Rheinland* (2018) Fatima Syed, *A court will decide: what does Loblaw owe the workers who died making its clothes in Bangladesh?* Toronto Star, 4 May 2018; Dana Thomas, *Why won’t we learn from the survivors of the Rana Plaza disaster*, NY Times, 24 April 2018

⁷ Declan Walsh & Stephen Greenhouse, *Inspectors certified Pakistani factory as safe before disaster*, NY Times, 19 Sept 2012; RINA, *On September 11, 2012, a fire occurred in a garment factory located in Baldia Town, Karachi, Pakistan* (4 December 2018)

⁸ European Center for Constitutional and Human Rights, *Case Report: RINA certifies safety before fire in Pakistan* (2018)

⁹ European Center for Constitutional and Human Rights, *Case Report: Pakistan - cheap clothes, perilous conditions* (2019). The Dortmund regional court dismissed criminal proceedings in January 2019 on the basis that the limitation period has expired.

¹⁰ Aoghan O’Faolain, *Migrant fishermen claim their working conditions are akin to ‘modern slavery’*, Irish Times, 22 November 2018; *International Transport Workers Federation v Minister for Justice and Equality* [2018] IEHC 695

¹¹ Department of Justice and Equality, *Trafficking in Human Beings in Ireland: Annual report 2017*

described in evidence as a fire hazard. Due to the plumbing arrangements ‘human beings were expected to shower in cold, dirty water that had been mixed with diesel and their own sewerage [*sic*].’ This resulted in shedding skin and other illnesses. And the employers took ‘what can only be described as extortionate deductions from the workers’ wages. This money supposedly went towards food that was often insufficient to properly feed the workers and accommodation that was unfit for purpose.’¹²

In 2017 Ferrovial, a Spanish infrastructure and construction group with operations in Ireland, acquired a subsidiary running Australian refugee detention centres on Nauru and Manus Island, and found itself unable to get out of the contracts.¹³

In 2017 Allied Irish Banks was named among the buyers of stone from a quarry in Chimakurthi, Andhra Pradesh where debt bondage was prevalent and there were incidences of child labour and other concerns with working conditions.¹⁴

This paper looks at how hard and soft law human rights law affects business enterprises in cases like these.

THE LAW: LIABILITY FOR INFRINGING CONSTITUTIONAL RIGHTS

Infringements of individuals’ human rights are often punishable by the criminal law and the subject of civil remedies. For instance, the *de Silva* case mentioned above¹⁵ involved breaches of contract and employment law.

In Article 40.3.1^o of the Constitution, the 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^o requires the State to ‘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.

Ó Dálaigh CJ famously said in *The State (Quinn) v Ryan*:

‘It was not the intention of the Constitution in guaranteeing the fundamental rights of the citizen that these rights should be set at naught or circumvented. The intention was that rights of substance were being assured to the individual and that the courts were the custodians of these rights. As a necessary corollary it follows that no one can with impunity set these rights at naught or circumvent them, and that the courts’ powers in this regard are as ample as the defence of the Constitution requires.’¹⁶

Thus, the State is not just obliged to refrain from infringing citizens’ personal rights. It must, *by its laws*, defend and vindicate these rights, protect them from unjust attack, and vindicate them when injustice is done. One important way the State meets this obligation is by providing civil

¹² *da Silva v Rosas Construtores* [2018] IEHC 832 ¶¶9 & 10 (Stewart J), appeal dismissed [2019] IEHC 237

¹³ Jenny Wiggins, *Ferrovial forced to run Nauru, Manus detention centres until late 2017*, Australian Financial Rev, 7 Aug 2016; Ben Doherty, *Detention centre operator's contract extended despite new owner's objection*, The Guardian, 8 Aug 2016; Amnesty International, *Spanish corporate giant Ferrovial makes millions from Australia's torture of refugees on Nauru 2017*; *Ferrovial position on the Amnesty International report on the Nauru RPC* (2017)

¹⁴ Glocal Research, India Committee of the Netherlands & Stop Child Labour, *The Dark Sites of Granite: Modern slavery, child labour and unsafe work in Indian granite quarries - What should companies do?* (2017)

¹⁵ Note 12

¹⁶ [1965] IR 70 (SC)

redress for violation of person, property, good name, privacy, and other fundamental interests.¹⁷ If the ordinary civil law fails to provide an effective remedy,¹⁸ a person whose constitutional rights are infringed can sue the infringer—whether the infringer is the State or a private actor.¹⁹

Examples involving business enterprises—

When CIÉ refused to re-employ a worker unless he joined a trade union, it infringed his constitutional right of dissociation. In the Supreme Court, Walsh J said ‘if a person has suffered damages by virtue of a breach of a constitutional right, that person is entitled to seek redress against the person or persons who have infringed that right.’²⁰

A private company was liable for infringing the constitutional right to fair procedures in how it decided to terminate a fixed term employment contract.²¹

But an insurer does not have to conduct ‘a kind of trial or hearing’ before reupdating liability. The courts are reluctant to impose constitutional rights in the context of commercial contracts.²²

A farmer, members of her family, and her cattle suffered bad health caused, they claimed, by pollution from a pharmaceutical plant. The trial held that they had not proved that the emissions caused the harm. They argued that, by requiring them to prove this, which was difficult, the law was not effectively guaranteeing their personal and property rights. They asked to have the onus of proof reversed: it should be for the factory owner to prove that its emissions did not cause the harm.²³ The Supreme Court disagreed. It held that when the law provides a remedy, plaintiffs are normally confined to the limitations of that remedy. They can only sue for breach of a constitutional right if the available remedy is wholly ineffective.²⁴

¹⁷ *Grant v Roche Products* [2008] IESC 345; *Hanrahan v Merck, Sharpe & Dohme* [1988] IESC 1, [1998] ILRM 629 ¶¶22-25 (Henchy J); *W v Ireland (No. 2)* [1997] IEHC 212, [1997] 2 IR 141

¹⁸ And only if. *Hanrahan v Merck, Sharpe & Dohme* (n 17) ¶24

¹⁹ See generally BRYAN MCMAHON & WILLIAM BINCHY, *LAW OF TORTS* (4th edn, 2013) 860-70; Colm O’Cinneide, *Irish constitutional law and direct horizontal effect - A successful experiment?* in *HUMAN RIGHTS AND THE PRIVATE SPHERE* (Dawn Oliver & Jörg Fendtko eds, 2007)

²⁰ *Meskill v CIÉ* [1973] IR 121, 133 (SC). The Supreme Court considered dissociation an implied correlative to the art 40.6.1° constitutional right to form associations and unions. It had already reached this conclusion in *Educational Co of Ireland v Fitzpatrick (No 2)* [1961] IR 345, holding that the protection afforded under the Trade Disputes Act 1906 did not apply to industrial action with the purpose of enforcing a closed shop. See also *O’Connell v Building & Allied Trade Union* [2016] IECA 338.

²¹ *Glover v BLN* [1973] IR 388 (SC)

²² *Fagan v General Accident Fire and Life Ins Corp* [1998] IESC 27 ¶32 (Lynch J); *Carna Foods v Eagle Star Ins Co* [1977] 2 ILRM 499 (HC)

²³ Causation is laden with policy and moral considerations, which can lead to relaxation of a plaintiff’s need to prove ‘but for’ causation. *Kuwait Airways Corp v Iraq Airways Co* [2002] UKHL 19, [2002] AC 833 ¶¶69-74 (Lord Nicholls), 128 (Lord Hoffman); see also *Hayes v Minister for Finance* [2007] IESC 8, [2007] 3 IR 190 (overturned finding that gardai in a car chase caused an accident, partly on the ground that they must have discretion); *Bonnington Castings Ltd v Wardlaw* [1956] AC 613; *McGhee v National Coal Board* [1973] 1 WLR 1; *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22, [2003] 1 AC 32; *Heneghan v Manchester Dry Docks Ltd* [2016] EWCA Civ 86, [2016] 1 WLR 2036 ¶¶23 & 50 (Lord Dyson MR); *Best v Wellcome Foundation Ltd* [1993] IR 421, 488-89; *contra Quinn v Mid Western Health Board* [2005] 4 IR 1, 19; TADGH DORGAN AND PETER MCKENNA, *DAMAGES* 104-05 (2015)

²⁴ *Hanrahan v Merck, Sharpe & Dohme* (n 17)

A newspaper published details of the plaintiff's private telephone conversations and her relationship with a priest. The conversations were apparently intercepted by a private investigator retained by the plaintiff's husband. The newspaper publisher was held liable for infringing the plaintiff's constitutional right of privacy. Compensatory and exemplary damages were awarded.²⁵

A debt collector working for a building contractor harassed the plaintiff with threatening emails, parked a van marked 'licensed debt collector' outside her home, and threatened to ring her neighbours' doorbells. This was a breach of the plaintiff's constitutional rights to protection of her person and inviolability of her dwelling. Although the harassment appeared to be a criminal offence,²⁶ existing tort law seemed not to provide a remedy. Because the common law rules were not effective to vindicate the plaintiff's constitutional rights to person and dwelling, the debt collector was liable for compensatory and exemplary damages for violation of those rights.²⁷

As with harassment, the State has chosen to make human trafficking a crime without providing in the legislation for civil remedies.²⁸ But those who engage in human trafficking, and exploitation of people who have been trafficked, could be liable for infringement of constitutional rights.²⁹

Ireland is unusually³⁰ relaxed about enforcing the Constitution against private actors directly. In many constitutional systems, such the United States, these are matters for private law only, not the constitution.³¹ Constitutional rights there are said to operate 'vertically', between the citizen and the state; not horizontally, between citizen and citizen.

Other systems give fundamental rights 'indirect' horizontal effect, in different ways. Some, notably Germany, give constitutional rights indirect horizontal or third party effect (*mittelbare Drittwirkung*) by requiring that private law be construed as far as possible to give effect to constitutional values.³² Others make the *state* liable for failing to protect against infringement by private actors. That is the approach of European Court of Human Rights.³³

Oxana Rantseva, a 21-year-old Russian national worked at a cabaret in Cyprus on an 'artiste' visa arranged by the owner. She left the job and

²⁵ *Herrity v Associated Newspapers* [2008] IEHC 249

²⁶ Under §§10 & 11, Non-Fatal Offences against the Person Act 1997

²⁷ *Sullivan v Boylan (No 2)* [2013] IEHC 104

²⁸ Criminal Law (Human Trafficking) Act 2008 (as amended).

²⁹ *Janes Kane*, Civil liability for exploiting trafficking victims: A speculative application of *Meskeil v CIE?* 54 IR JUR (NS) 57 (2015).

³⁰ But not unique. See eg Aoife Nolan, Holding non-state actors to account for constitutional economic and social rights violations: Experiences and lessons from South Africa and Ireland 12 INTL J CONSTITUTIONAL L 61 (2014).

³¹ *Civil Rights Cases* (1883) 109 US 3; Erwin Chemerinsky, *Rethinking state action* (1986) NW U L REV 503

³² See Jörg Fedtke, *Drittwirkung in Germany* in HUMAN RIGHTS AND THE PRIVATE SPHERE (n 19). In *Carr v O'Las* [2012] IEHC 59 ¶36 Hogan J suggested this indirect horizontal approach, saying 'While the law of torts may be regarded as the primary mechanism whereby the State's constitutional duty to vindicate the life and person is achieved ... the common law must, where necessary, be remoulded and re-fashioned in order to reflect and to accommodate itself to these basic constitutional values' citing *Hanrahan v Merck, Sharpe & Dohme* (n 17), *Grant v Roche Products* (n 17) and William Binchy, *Meskeil, the Constitution and the law of torts* (2011) DULJ 339. See also Sibō Bando, *Taking indirect horizontality seriously, a time to magnify the nuance* (2009) DULJ 263.

³³ See Andrew Clapham, Revisiting human rights in the private sphere: using the European Convention on Human Rights to protect the right of access to the civil courts in TORTURE AS A TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION (Craig Scott ed, 2011),

the accommodation that went with it. The cabaret manager found her and took her to the police, saying she was illegal. When the police discovered that she had a visa they told the manager to come back and get her, as her employer was responsible for her. She was found dead the next morning, fallen from the sixth-floor window of an apartment building. Her father brought proceedings against Russia and Cyprus. The European Court of Human Rights found that the Cypriot authorities were aware that many foreign women were being trafficked to Cyprus on artiste visas to be sexually exploited by cabaret owners and managers. It held that Cyprus breached its article 4 obligation to protect Ms Rantseva against slavery, servitude or compulsory labour, in (a) how the artiste visa scheme operated, and (b) handing her back to her employer when there were credible reasons to suspect that she was being trafficked and exploited. Russia breached article 4 by failing to investigate the trafficking allegations.³⁴

Two British companies decided to de-recognise unions and offer personal contracts to their employees. The employees who refused to sign the contracts continued to receive pay increases, but less than those who did sign. Some of them sued in the English courts, but the House of Lords held that the differential pay was legal. In proceedings against the UK, the Strasbourg court held that by allowing employers use higher pay to induce their employees to surrender important union rights, the UK had failed in its positive obligation to secure the employees' enjoyment of their article 11 right to join unions for their interests.³⁵

A privately-owned fertiliser plant caused severe pollution with adverse effects on people living a kilometre away in Manfredonia. The court held Italy liable, not for interfering with their article 18 right to respect for private and family life and home, but for failing to take the necessary steps to secure the effective protection of that right.³⁶

In addition to the human rights convention, the Council of Europe acquis also includes the revised European Social Charter,³⁷ which includes rights relevant to business, in particular rights of workers.³⁸

Rights under EU law, in particular the Charter of Fundamental Rights (Charter),³⁹ are also relevant to business. As Advocate General Bot observed in *Bauer*: 'Labour law is undoubtedly one of the main fields in which EU rules may be relied on in disputes between private individuals.'⁴⁰ Some Charter rights are enforceable with direct horizontal effect,

³⁴ *Rantsev v Cyprus* [2010] ECHR 22.

³⁵ *Wilson v UK* [2011] ECHR 1645

³⁶ *Guerra v Italy* [1988] ECHR 7

³⁷ (Adopted 3 May 1996, entered into force 1 July 1996) CETS 163, [2007] ITS 23

³⁸ Social partners and some international NGOs can make collective complaints against states. Additional protocol to the European Social Charter for a system of collective complaints (adopted 9 November 1995, entered into force 1 July 1998) CETS 158, [2007] ITS 24

³⁹ [2012] OJ C 326/02

⁴⁰ Joined Cases C-569/16 and C-570/16 *Stadt Wuppertal v Bauer* EU:C:2018:337 ¶13

including the article 21(1) prohibition of religious⁴¹ and age⁴² discrimination and workers' article 31(2) right to paid annual leave.⁴³ Some are not, such as workers' right to information.⁴⁴

In a claim by embassy domestic workers under EU law for discrimination, harassment and breach of the Working Time Regulations, the UK Supreme Court held that provisions of the UK Sovereign Immunity Act were inconsistent with the ECHR article 6 right to a fair trial and the Charter article 47 right to an effective remedy for violation of EU law rights. It held that the later had direct horizontal effect, requiring that the relevant provisions of the Sovereign Immunity Act be disapplied.⁴⁵

The claimants alleged that Google put unauthorised cookies on their browsers and collected private information about their internet usage for advertisers. They sued Google for the distress they claimed this caused. The UK Data Protection Act did not allow compensation for distress (without damage) in their case. The English Court of Appeal held the claims invoked the Charter article 7 right to respect for private and family life, home and communication, and article 8 right to protection of personal data. These rights in turn engaged the article 47 right to an effective remedy for their breach, which has direct horizontal effect, requiring the court to disapply the Data Protection Act's limitation of recoverable damages to pecuniary loss.⁴⁶

EU procurement law as transposed in Ireland⁴⁷ requires contractors and suppliers to the public and utility sectors to comply with environmental, social and labour law obligations established by EU law, national law, collective agreements or by certain international, environmental and labour treaties. The listed treaties include the International Labour Organization (ILO) 'core' conventions concerning freedom of association and collective bargaining,⁴⁸ forced labour,⁴⁹ child

⁴¹ Cases C-193/17 Cresco Investigation v Achatzi EU:C:2019:43 ¶¶76-77; C-414/16 Egenberger v Evangelisches Werk für Diakonie und Entwicklung EU:C:2014:2 ¶¶69-70

⁴² Case C-555/07 Küçükdeveci v Swedex [2010] IRLR 346 ¶¶50-51 (following case C-144/04 Mangold v Helm [2005] ECR I-9981, holding that the general principle against age discrimination has horizontal direct effect, pre-dating the Charter and applying Dir 2000/78).

⁴³ Stadt Wuppertal v Bauer (n 40) ¶¶84-86

⁴⁴ Case C-176/12 Association de médiation sociale v Union locale des syndicats ¶¶45-49 CGT EU:C:2014:2

⁴⁵ Benkharbouche v Embassy of Sudan [2017] UKSC 62, [2019] AC 777

⁴⁶ Google v Vidal-Hall [2015] EWCA Civ 311 ¶¶95-105

⁴⁷ European Union (Award of Public Authority Contracts) Regulations, SI 284/2016, reg 18(4)(a); European Union (Award of Contracts by Utility Undertakings) Regulations 2016, SI 2016/286, reg 35(4)(a); European Union (Award of Concession Contracts) Regulations 2017, SI 2017/203, reg 29(4).

⁴⁸ Convention concerning Freedom of Association and Protection of the Right to Organise, C087 (adopted 9 July 1948, entered into force 4 July 1950); Convention concerning the Application of the Principles of the Right to Organise and Collective Bargaining, C098 (adopted 1 July 1949, entered into force 18 July 1951).

⁴⁹ Convention concerning Forced or Compulsory Labour, C029 (adopted 28 June 1930, entered into force 1 May 1932); Convention concerning Abolition of Forced Labour, C105 (adopted 25 June 1957, entered into force 17 January 1959).

labour⁵⁰ and workplace discrimination.⁵¹ This provision might give victims of labour abuse in public supply chains a civil remedy.⁵²

INTERNATIONAL STANDARDS AND THE GUIDING PRINCIPLES

Recent years have seen the emergence of international standards on respect for human rights by business.

The Organisation for Economic Cooperation and Development (OECD) adopted ‘Guidelines for Multinational Enterprises’ in 1976. A human rights chapter was added in 2011, in the current edition.⁵³ These guidelines also deal with employment and industrial relations, environment, bribery, consumer interests, science and technology, competition, and tax.

In 1977 the ILO adopted a ‘Tripartite Declaration concerning Multinational Enterprises and Social Policy’. It is now in its 5th edition, adopted in 2017.⁵⁴ In addition to human rights, it addresses the responsibilities of governments and multi-national enterprises concerning employment.

In a speech at Davos in 1999, then-Secretary-General Kofi Anan announced the United Nations Global Compact, a statement of 10 principles for business in the areas of human rights, labour, environment, and corruption. More than 9,500 companies and 3,000 other organisations have signed the UN Global Compact.⁵⁵

None of these is legally binding, but there are some ‘nudge’ remedies. Notably, the OECD guidelines provide for each state adhering to them to have a ‘national contact point’ (NCP) for dealing with issues raised by interested parties. The results of this process are to be made public and notified to the OECD investment committee.

The Irish NCP, at the Department of Business, Enterprise and Innovation’s Trade Policy Unit,⁵⁶ has investigated a number of complaints.

In October 2018 Global Legal Action Network asked the Irish NCP to investigate San Leon Energy’s oil exploration in Western Sahara, said to be in violation of the rights of the Sahrawi people. This seems to be ongoing.⁵⁷

In 2011 it investigated a complaint from the Irish Palestine Solidarity Campaign that a CRH subsidiary had supplied cement for building the Israeli government’s separation wall and settlements in the West Bank. CRH raised procedural objections. The case was still ongoing in

⁵⁰ Convention concerning Minimum Age for Admission to Employment, C138 (adopted 26 June 1973, entered into force 19 June 1976); Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, C182 (adopted 17 June 1999, entered into force 19 November 2000).

⁵¹ Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, C100 (adopted 29 June 1951, entered into force 23 May 1953); Convention concerning Discrimination in Employment and Occupation, C111 (adopted 25 June 1958, entered into force 15 June 1960).

⁵² Éamonn Conlon, *Civil liability for abuses of ILO core labour rights in European Union government supply chains: Ireland as a case study* in PUBLIC PROCUREMENT AND HUMAN RIGHTS: OPPORTUNITIES, RISKS AND DILEMMAS FOR THE STATE AS BUYER (Olga Martin-Ortega & Claire Methven O’Brien eds, 2019)

⁵³ OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2011)

⁵⁴ International Labour Organization, *TRIPARTITE DECLARATION OF PRINCIPLES CONCERNING MULTINATIONAL ENTERPRISES AND SOCIAL POLICY* (5th edn, 2017)

⁵⁵ United Nations Global Compact, *The ten principles of the UN Global Compact*, available at <https://www.unglobalcompact.org/>

⁵⁶ See Dept of Business, Enterprise and Innovation, *National contact point for Ireland – Procedures for dealing with complaints brought under the OECD Guidelines for Multinational Enterprises* (2018)

⁵⁷ Dominic Dudley, *Irish oil exploration firm targeted in complaint over Western Sahara drilling*, Forbes, 24 Oct 2018; Graham Clifford, *NGO slams Irish oil co's Africa plans*, Irish Independent, 12 July 2015

December 2015 when CRH disposed of its interest in the subsidiary. The case was closed in February 2016.⁵⁸

In 2008 the Irish and Dutch NCPs investigated a complaint from Pobal Chill Chomáin against the developers of the Corrib gas project. They concluded that there had not been sufficient consultation with stakeholders in the early stages of the project, in accordance with the spirit of the OECD guidelines, but that consultation had improved in later stages.⁵⁹

The ILO constitution has procedures for representations and complaints against member states, and these have been used to complain indirectly about businesses.⁶⁰

In 2010 the Irish Congress of Trade Unions made a complaint against Ireland based on allegations of anti-union discrimination by Ryanair. The government responded that it intended to reform the law on workers' rights to engage in collective bargaining in line with recent European Court of Human Rights decisions. The ILO committee invited the government to review the existing framework and consider measures to ensure respect for the freedom of association and collective bargaining principles.⁶¹

In the early 2000s, work was progressing at the United Nations on international 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights'.⁶² The norms were approved in 2003 by the UN Sub-Commission on the Promotion and Protection of Human Rights for adoption by its parent, the (then) Commission on Human Rights.⁶³ But the commission disavowed the document, saying it had never asked for it, and it was not to be used for monitoring. Instead, it asked the UN High Commissioner for Human Rights for a report.⁶⁴ The report led to the commission asking the Secretary-General to appoint a special representative to identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights.⁶⁵

In 2005 Annan appointed John Ruggie of Harvard's Kennedy School of Government. They had worked together on the Global Compact. Ruggie describes how he found himself at the centre of a storm, with human rights organisations wanting the 'norms' and a treaty to make them binding, business against any new international framework, and governments telling him to just avoid a train wreck.⁶⁶

In 2008 Ruggie presented 'Protect, Respect and Remedy: A Framework for Business and Human Rights'.⁶⁷ This framework identified three core principles or pillars:

⁵⁸ OECD Watch, *Ireland-Palestine Solidarity Campaign vs CRH* available at https://complaints.oecdwatch.org/cases/Case_215

⁵⁹ OECD Watch, *Pobal Chill Chomáin et al vs Marathon Oil* available at https://complaints.oecdwatch.org/cases/Case_151

⁶⁰ Constitution of the ILO, Treaty of Peace between the Allied and Associated Powers and Germany (signed 28 June 1919, entered into force 10 January 1920) [1919] UKTS 4 (Cmd 153) pt XIII, arts 24-34.

⁶¹ ILO, report no 363, case no 2880 (Ireland) (2012)

⁶² UN Doc E/CN4/Sub2/2003/12/Rev2 (2003)

⁶³ Resolution 2003/16 UN Doc E/CN4/Sub2/2003/L11 52 (2003)

⁶⁴ Decision 2004/116 of the UN Commission on Human Rights UN Doc E/CN4/2004/L11/Add7 (2004)

⁶⁵ Resolution 2005/69 UN Doc E/CN4/RES/2005/6 (2005)

⁶⁶ JOHN GERARD RUGGIE, *JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS* (2013) xix-xxiii; see also Susan Ariel Aaronson and Ian Higham, *'Re-righting business': John Ruggie and the struggle to develop international human rights standards for transnational firms* (2013) 35 HUM RTS Q 333, 337

⁶⁷ UN Doc HRC/8/5 (2008) (Framework)

- the state *duty to protect* against human rights abuses by third parties, including business
- the corporate *responsibility to respect* human rights
- the need for *effective remedies*.

The UN Human Rights Council approved Ruggie’s Framework and extended his mandate to ‘operationalize’ and promote it.⁶⁸ In 2011 Ruggie presented Guiding Principles on Business and Human Rights: Implementing the ‘United Nations “Protect, Respect and Remedy” Framework’ (Guiding Principles),⁶⁹ which the Human Rights Council unanimously endorsed on 16 June 2011.⁷⁰

The Guiding Principles have been widely taken-up in a short time, by governments and the EU who have formulated action plans,⁷¹ the Council of Europe,⁷² the African Union, the Organisation of American States, the Association of South-East Asian Nations, the International Finance Corporation, the International Organisation for Standardisation, the Equator Principles banks, many corporations, workers’ organisations, and bodies representing the legal profession.⁷³ The OECD Guidelines for Multinational Enterprises,⁷⁴ ILO Tripartite Declaration⁷⁵ and UN Global Compact⁷⁶ discussed above all point to the Guiding Principles.

PILLAR 1: THE STATE DUTY TO PROTECT

As already noted, the first pillar of Ruggie’s Framework is that states have a *duty to protect* against business-related human rights abuses in their territory and jurisdiction.⁷⁷ We have seen this duty in Constitution of Ireland, the European Convention on Human Rights, and the EU Charter. It is also a duty under international law. While a state is not liable for every human rights abuse in its territory, the state’s duty ‘requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.’⁷⁸

⁶⁸ UN Doc A/HRC/RES/8/7 (2008)

⁶⁹ UN Doc HR/PUB/11/04 (2011)

⁷⁰ UN Doc A/HRC/RES/17/4 (2011)

⁷¹ For example, Government of Ireland, *National Plan on Business and Human Rights 2017-2020*; Council of the European Union, *EU Action Plan on Human Rights and Democracy* (2015); see also Beata Faracik, *Implementation of the UN Guiding Principles on Business and Human Rights* (2017, study requested by the European Parliament Subcommittee on Human Rights)

⁷² Committee of Ministers recommendation CM/Rec(2016)4, *Human rights and business* (2016). See also Claire Methven O’Brien, *Business and Human Rights: A handbook for legal practitioners* (2018), a Council of Europe publication which places the Guiding Principles against their international law background.

⁷³ John Gerard Ruggie, *Regulating Multinationals: The UN Guiding Principles, Civil Society, and International Legalization in BUSINESS AND HUMAN RIGHTS: BEYOND THE END OF THE BEGINNING (GLOBALIZATION AND HUMAN RIGHTS)* (Cesar Rodriguez-Garavito ed, 2017).

⁷⁴ Note 53, chapter 4

⁷⁵ Note 54 ¶10

⁷⁶ Note 55

⁷⁷ Guiding Principles (n 69), Principle 1. References to a numbered ‘Guiding Principle’ are to the principles within the Guiding Principles, each of which is followed by commentary.

⁷⁸ Guiding Principle 1 and commentary; UN Human Rights Council: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises: Addendum: State responsibility to regulate and adjudicate corporate activities under the United Nations core human rights treaties: an overview of treaty body commentaries UN Doc A/HRC/4/35/Add.1

According to the Guiding Principles, each state should ‘clearly express the expectation’ that its domiciliary companies respect human rights throughout their operations.⁷⁹ States have particular responsibility to regulate businesses with a state nexus, that is—

- those owned or controlled by the state⁸⁰
- those receiving substantial state support such as export credit or investment insurance or guarantees⁸¹
- those with export licences⁸²
- those that, under state contracts or legislation, provide services that may impact on human rights⁸³ and
- those doing business with the state, including through public procurement contracts.⁸⁴

PILLAR 2: THE CORPORATE RESPONSIBILITY TO RESPECT

Guiding Principle 11 crisply states the baseline responsibility of businesses:

Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.

Addressing adverse human rights impacts means taking adequate measures to prevent them, to mitigate them and, when appropriate, to remedy them. This is not a law, but a ‘global standard of expected conduct for all business enterprises wherever they operate.’⁸⁵ The

⁷⁹ Guiding Principle 2. According to the commentary, international law permits but does not currently require a company’s home state to regulate its activities abroad. For two episodes in the scholarly debate about this, see Markus Krajewski, *The state duty to protect against human rights violations through transnational business activities* (2018) 23 DEAKIN LR 13 and Claire Methven-O’Brien, *The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Rebuttal* (2018) 3 BUS & HUM RTS J 47.

⁸⁰ Guiding Principle 4. The state may be accountable for infringements by a state company, or a company performing public functions or exercising state authority. International Law Commission articles on State responsibility for internationally wrongful acts, adopted 9 August 2001 (UN Doc A/56/10), taken note of by the UN General Assembly on 12 December 2001 (UN Doc A/Res/56/83); JAMES CRAWFORD, *STATE RESPONSIBILITY: THE GENERAL PART* (2013) chs 4-6. European Court of Human Rights jurisprudence can attribute acts of state-controlled enterprises to the state. *Eg* Liseyitseva v Russia [2014] ECHR 1307 ¶¶ 184-219.

⁸¹ Guiding Principle 4

⁸² Committee of Ministers recommendation CM/Rec(2016)4 (n 72) ¶22

⁸³ Guiding Principle 5. Again, international law may attribute the actions of such enterprises to the state. See n 80

⁸⁴ Guiding Principle 6. On procurement, see PUBLIC PROCUREMENT AND HUMAN RIGHTS (n 8).

⁸⁵ Guiding Principle 11, commentary. While corporations have enforceable rights under investment treaties, whether they have international law duties is contested. The classic position that (with a few highly esoteric exceptions) only states are subjects of international law was all-but dispatched mid-20th century both in scholarship (George Manner, *The object theory of the individual in international law* 46 AJIL 428 (1952); Phillip Jessup, *The subjects of a modern law of nations* 45 MICH LR 383 (1947)) and in the emergence of an international criminal jurisdiction over individuals (Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and Charter of the International Military Tribunal (signed and entered into force 8 August 1945) 82 UNTS 280, art 6; Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 278, [1978] ITS 1, art 4 (state obligation to punish those committing genocide, whether rulers, public officials and private officials); Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, [2002] ITS 3, art 25(1) (jurisdiction over natural persons); *contra* Tel-Oren v Libya 726 F2d 774, 805-808 (DC Cir 1984) (Bork J concurring); *cf* William A Schabas, *State policy as an element of international crimes* 98 J CRIM L & CRIMINOLOGY 953 (2008) (state policy is a necessary element of international law crimes). On corporations, see Andrés Felipe López Latorre, *In defence of direct obligations for business under international human rights law* 5 BUS & HUM RTS J 56 (2020); Erika George, *The enterprise of empire: evolving understandings of corporate identity and responsibility* in THE BUSINESS AND HUMAN RIGHTS LANDSCAPE: MOVING FORWARD LOOKING

responsibility of business enterprises to respect human rights is distinct from issues of legal liability and enforcement, which remain defined largely by domestic law.⁸⁶

What rights should business enterprises respect? Guiding Principle 12 answers: internationally protected human rights. It says that this includes, at a minimum:

- the rights expressed in the International Bill of Human Rights, comprising the Universal Declaration of Human Rights and the two instruments that codified it: the the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights⁸⁷
- the core labour standards set out in the ILO Declaration on Fundamental Principles and Rights at Work,⁸⁸ that is: (a) freedom of association and the right to collective bargaining, and elimination of (b) forced labour, (c) child labour and (d) workplace discrimination.

In particular circumstances, business enterprises may need to take account of additional standards concerning the human rights of particular groups or populations on whom the businesses activities may have adverse impacts, such as indigenous peoples;⁸⁹ women;⁹⁰ national, ethnic, linguistic or religious minorities; children;⁹¹ people with disabilities;⁹² or migrant workers and their families.⁹³

Involvement, linkage and leverage

Businesses can be implicated in infringing human rights infringements in a number of ways.

- They can *cause* an infringement through their own activities.
- They can *contribute to* an infringement, again through their activities.
- An infringement could be *linked* to their operations, products or services by their business relationships (even if the business didn't cause or contribute to the infringement).

Guiding Principle 13 states that businesses should avoid causing or contributing to human rights infringements; and they should seek to prevent or mitigate infringements that are linked to their operations, products or services by their business relationships. And they must address any infringement they cause or contribute to, as discussed below.

A business can be linked with human rights infringements through its supply chain, upstream or downstream. Some hypothetical examples:

BACK (Jena Martin & Karen Bravo eds, 2016); S; José Alvarez, *Are corporations subjects of international law?*⁹ SANTA CLARA J INTL LAW 1 (2011); ANDREW CLAPHAM (n 1) ch 2; Philip Alston, *The 'not-a-cat' syndrome: can the international human rights regime accommodate non-state actors?*⁹ in NON-STATE ACTORS AND HUMAN RIGHTS (n 1).

⁸⁶ Commentary to Guiding Principle 12.

⁸⁷ Compilation of these instruments available at <https://www.ohchr.org/Documents/Publications/Compilation1.1.en.pdf>

⁸⁸ Available at <https://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm>

⁸⁹ UN Declaration on the Rights of Indigeneous Peoples (adopted 13 September 2007) UN Doc A/RES/61/127

⁹⁰ Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) [1249] UNTS 1, [1986] ITS 9

⁹¹ Convention on the Rights of the Child (adopted 30 November 1989, entered into force 30 September 1990) [1577] UNTS 3, [1994] ITS 3

⁹² Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 30 March 2007) [2015] UNTS 3, [2018] ITS 5

⁹³ Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 92

A builder subcontracts work to a subcontractor who has hired workers through an agency exploiting trafficked workers.⁹⁴

A business buys electronic products that include parts containing minerals that were mined using forced labour.

A bank provides finance for a power project to be built on land from which the indigenous inhabitants were violently ejected.⁹⁵

A law firm advises that bank on that transition.⁹⁶

The Guiding Principles hold that these businesses have a responsibility to prevent or mitigate the harm linked to their product, services or operations. The actions called for by that responsibility will depend on the circumstances. According to the commentary to Guiding Principle 19, among the factors are—

- the business’s leverage over the entity causing the infringement
- how crucial the relationship is to the business
- the severity of the abuse
- whether terminating the relationship would itself have adverse human rights consequences.

If the business has leverage, it should use it to try to prevent or mitigate the human rights harm. For example—

Stockholm County Council contracted with Dell to supply computers in 2010, and again with Atea, a Dell reseller, in 2014. The value of the second contract was 156 million SEK (€17 million). In 2013 a Danish civil society organisation reported harsh working conditions in Chinese factories supplying Dell and other electronics brands. These included working hours of up to 74 hours per week, forced overtime, wages below the legal minimum, and inadequate safety and health provision. A network of Swedish county councils engaged with Dell over an extended period to get Dell to implement a programme which resulted in improved conditions in supplier factories.⁹⁷

Following pressure from civil society and investors, several pharmaceutical manufacturers took steps to stop their products being used for execution by lethal injection.⁹⁸

If the business lacks the leverage to prevent or mitigate the harm, it may have to consider ending the relationship, taking into account whether that would cause more harm. If the relationship continues and the harm is allowed to continue, the business should be able to demonstrate its own ongoing efforts to mitigate the harm and be prepared to accept the consequences—reputational, financial, legal—of the continuing connection.⁹⁹

⁹⁴ See Unchosen and Sally Arthur, *Your Construction Project* (video, 2015).

⁹⁵ See David Kovick, *Rethinking remedy and responsibility in the the financial sector: How using an ecosystem approach can push the remedy conversation out of deadlock and into meaningful action* (2019) available at <https://www.shiftproject.org/resources/viewpoints/rethinking-remedy-responsibility-financial-sector-ecosystem-human-rights/>

⁹⁶ See INTERNATIONAL BAR ASSN, *IBA PRACTICAL GUIDE ON BUSINESS AND HUMAN RIGHTS FOR LAWYERS* (2016)

⁹⁷ Electronics Watch, *Public procurement and human rights due diligence: A case study of the Swedish county councils and the Dell Computer Corporation* (2016)

⁹⁸ Methven O’Brien (n 72) 79-80; Lise Smith and others *Study on due diligence requirements through the supply chain* (2020) 67-68; Erik Eckholm, *Pfizer blocks the use of drugs in executions* NY Times, 13 May 2016

⁹⁹ Commentary to Guiding Principle 19.

High-level policy commitment

The Guiding Principles say that businesses should make a policy commitment to meet their responsibility to respect human rights. This commitment should—

- be approved at the highest level in the organisation
- be informed by relevant expertise (internal, external or both)
- state the business’s human rights expectations of personnel, business partners, and other directly linked to its operations, products, or services
- be publicly available and communicated widely internally and externally, from the top through all functions
- be reflected in operational policies and procedures such as performance incentives, procurement practices, and lobbying activities.¹⁰⁰

Hundreds of companies have published formal policy statements on human rights.¹⁰¹ But benchmarking assessments have shown that the majority of companies assessed are not aligned to the Guiding Principles.¹⁰²

Human rights due diligence

Due diligence is at the heart of the corporate responsibility to respect.¹⁰³ Businesses need to ‘know and show’ how they address their impact on human rights. A human rights due diligence process has multiple components:

- *Assess the business’s actual and potential impacts on enjoyment of human rights.* This requires both expertise and meaningful consultation with potentially affected groups and other stakeholders. It is an ongoing process.
- *Integrate and act on the findings.* If the assessment unearths actual or potential human rights, it needs to be addressed. *Potential* harm should be prevented or mitigated. Responsibility needs to be assigned, concrete steps need to be decided, budgets need to be allocated, oversight needs to be set up. If *actual* harm has already occurred, it needs to cease and (as discussed below) remedied. If the actual or potential harm is from linkage, leverage needs to be considered (as discussed above).
- *Track the effectiveness of the responses.* Businesses need to know whether and how the steps they are taking are addressing any identified harm. This tracking can be integrated into existing reporting processes. It should draw on feedback from internal and external sources including affected groups.
- *Communicate how harm is being addressed.* This can take the form of in-person meetings, online dialogues, consultation with affected stakeholders, and formal public reports. Formal reporting is expected when there is a risk of severe human rights harm.

Some 80 companies have adopted the UN Guiding Principles Reporting Framework¹⁰⁴ as guidance on reporting how they respect human rights. A key concept of its approach to

¹⁰⁰ Guiding Principles 15(a) and 16, commentary

¹⁰¹ Business and Human Rights Resource Centre, Company policy statements on human rights, available at <https://www.business-humanrights.org/en/company-policy-statements-on-human-rights>. But many of the links on this page are broken.

¹⁰² Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises (2018) UN Doc A/73/167 ¶25; *see also* Lise Smith and others (n 98) 48-50

¹⁰³ Guiding Principles 17-21. *See also* the OECD’s *Due Diligence Guidance for Responsible Business Conduct* (2018), which applies a similar framework to the wider responsible business conduct arena.

¹⁰⁴ Resources available at <https://www.ungpreporting.org/>

impact assessment is *salience*—a focus on the most severe and widespread harm with the potential to occur in the future. The emphasis is on harm to the enjoyment of human rights, not on harm to the business. This reflects the Guiding Principle 24, which says that when priorities have to be established, businesses should first seek to prevent and mitigate the most severe harm, or any which delay would make irremediable.

PILLAR 3: REMEDY

We have already seen that the Irish Constitution, the Convention, and EU law all require the state to provide effective remedies for non-state infringement of the rights they guarantee, as part of its duty to protect against infringement of those rights. So does international law.¹⁰⁵

The Guiding Principles recognise this state duty.

As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.¹⁰⁶

Effective judicial mechanisms are at the core of ensuring access to remedy, and states need to consider ways to reduce legal, practical and other barriers.¹⁰⁷ Legal barriers include:

- facilitating the avoidance of appropriate accountability through how legal responsibility is attributed among members of a corporate group¹⁰⁸
- denying access to courts in a corporation's home state when justice is denied in the host state¹⁰⁹
- excluding certain groups such as indigenous people and migrants from the same level of protection afforded to the wider population.¹¹⁰

Practical and procedural barriers include cost, difficulty in obtaining legal representation,¹¹¹ inadequate opportunities to aggregate claims or bring representative proceedings such as class actions, and prosecutors' lack of resources. Imbalance of resources (financial, information, expertise) can cause or compound these barriers. People at heightened risk of vulnerability or marginalisation often face additional barriers.¹¹²

¹⁰⁵ *Eg* Universal Declaration on Human Rights, art 8; International Covenant on Civil and Political Rights, art 2(3).

¹⁰⁶ Guiding Principle 25.

¹⁰⁷ Michael Stürmer, *Zivilprozessuale Voraussetzungen für Klagen gegen transnationale Unternehmen wegen Menschenrechtsverletzungen* in *ZIVIL- UND STRAFRECHTLICHE UNTERNEHMENSVERANTWORTUNG FÜR MENSCHENRECHTSVERLETZUNGEN* (Markus Krajewski, Franziska Oehm & Miriam Saage-Maaß eds, 2018); JUAN JOSÉ ÁLVAREZ RUBIO & KATERINA YIANNIS, *HUMAN RIGHTS IN BUSINESS: REMOVAL OF BARRIERS TO ACCESS TO JUSTICE IN THE EUROPEAN UNION* (2017)

¹⁰⁸ *See eg* *Vedanta Resources v Lungowe* [2019] UKSC 20, [2019] WLR(D) 241; *Doh v Royal Dutch Shell NL:GHDHA:2015:3586* (2015 Hague Court of Appeal) ¶3.2.

¹⁰⁹ *See eg* *Vedanta & Doh* (n 108) ¶3.9; *Daimler AG v Bauman* 571 US 20 (2014); *Kiobel v Royal Dutch Petroleum Co* 569 US 21 (2013); *see also* n 79

¹¹⁰ On whether the rights of 'citizens' in the Irish Constitution have wider application, *see* Elaine Dewhurst, *Exclusionary or Inclusionary Constitutional Protection: Protecting the rights of citizens, non-citizens and irregular immigrants under Articles 40-44 of the Irish Constitution* 49 IRJUR (NS) 98 (2013)

¹¹¹ In 2019 the UN Committee on the Elimination of Racial Discrimination expressed concern about the lack of legal aid for social welfare appeals, housing and eviction matters, and racial discrimination claims before the Workplace Relations Commission. Committee on the Elimination of Racial Discrimination (n 4) ¶¶43-44; *see also* Committee of Ministers recommendation CM/Rec(2016)4 (n 72) ¶41 (recommending that legal aid schemes cover human rights claims against business).

¹¹² Guiding Principle 26 and commentary

The Guiding Principles also identify a need to supplement judicial mechanisms with state based non-judicial mechanisms¹¹³ and non-state based grievance mechanisms¹¹⁴. Important as judicial remedies are, a broader approach is required.

Remedy may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition.¹¹⁵

There is also a broad concept of grievance and grievance mechanism.

For the purpose of these Guiding Principles, a grievance is understood to be a perceived injustice evoking an individual's or a group's sense of entitlement, which may be based on law, contract, explicit or implicit promises, customary practice, or general notions of fairness of aggrieved communities. The term grievance mechanism is used to indicate any routinized, State-based or non-State-based, judicial or non-judicial process through which grievances concerning business-related human rights abuse can be raised and remedy can be sought.¹¹⁶

Remedy is also a responsibility of business enterprises. When businesses identify (through due diligence or otherwise) that they have caused or contributed to human rights harm, they should provide for or cooperate in remedying the harm through legitimate processes. This may require cooperation with judicial mechanism.¹¹⁷ In addition, businesses should establish or participate in operational-level grievance mechanisms (which can support due diligence as well as providing a way to remedy harm).¹¹⁸

Guiding Principle 31 identifies 'effectiveness' criteria non-judicial grievance mechanisms.

In order to ensure their effectiveness, non-judicial grievance mechanisms, both State-based and non-State-based, should be:

- (a) Legitimate: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;
- (b) Accessible: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;
- (c) Predictable: providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;
- (d) Equitable: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;

¹¹³ Guiding Principle 27

¹¹⁴ Guiding Principle 28

¹¹⁵ Guiding Principle 25; Framework (n 67) 22

¹¹⁶ Ibid

¹¹⁷ Guiding Principle 22 and commentary

¹¹⁸ Guiding Principle 29 and commentary

- (e) Transparent: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake
- (f) Rights-compatible: ensuring that outcomes and remedies accord with internationally recognized human rights;
- (g) A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms;

Operational-level [that is, non-state] mechanisms should also be:

- (h) Based on engagement and dialogue: consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances

CONCLUSION

Because of their impact, business enterprises have responsibility to respect human rights. This is at least a social expectation, tending towards a legal duty. To give effect to this responsibility they should, in summary—

- avoid causing or contributing to human rights harm
- use leverage to prevent or mitigate human rights harm directly linked to their operations, products or services through business relationships
- embed respect for human rights through a high level well-communicated policy commitment
- do human rights due diligence to identify, prevent, mitigate and account for how they address their impacts on human rights
- set up or co-operate in effective processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.

As we have seen, the discourse on business and human rights is not new. But it is still developing. We can conclude by identifying three potential areas of development: mandatory human rights due diligence, multi-stakeholder operational level grievance mechanisms, and the human rights as a factor in investor-state disputes.

The law again: mandatory due diligence

There have been several initiatives for laws requiring (or encouraging) due diligence in human rights and related areas.¹¹⁹

The EU non-financial reporting directive as transposed (eventually) in Ireland requires a limited class of large companies to include in their annual reports 'certain information to the extent necessary for an understanding of the development, performance, position and impact of its activity [if any] relating to, at least, the following matters: (i)

¹¹⁹ See Shane Darcy, *Embedding business & human rights in Ireland: Legislating for human rights due diligence* (18 December 2019) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3506384; see also Doug Cassel, *Outlining the Case for a Common Law Duty to Exercise Human Rights Due Diligence* (2016) 2 BUS & HUM RTS J 179

environmental matters; (ii) social and employee matters, (iii) respect for human rights, and (iv) bribery and corruption.’¹²⁰

The EU conflict minerals regulation, which takes effect on 1 January 2021, requires importers of tin, tungsten, tantalum and gold to comply with supply chain due diligence and risk management obligations.¹²¹

France’s 2017 duty of vigilance law requires large companies to develop, disclose and effectively implement a ‘vigilance plan’ to include ‘reasonable vigilance measures to adequately identify risks and prevent serious violations of human rights and fundamental freedoms, risks and serious harms to health and safety and the environment.’ Failure to comply with the vigilance plan, or an inadequate plan, can result in civil liability to those who suffer harm as a result.¹²²

The Dutch 2019 child labour diligence law requires companies selling in the Netherlands to determine whether there is a reasonable suspicion that their products involve child labour, and if so to develop and implement an action plan. Companies must make due diligence statements, which are published centrally by a regulator.¹²³

Supply chain transparency legislation in the UK,¹²⁴ Australia,¹²⁵ and California,¹²⁶ require public statements of the steps (if any) taken to counter slavery in a company’s business and supply chain.

The Irish Criminal Justice (Corrupt Offences) Act 2018 makes companies liable for bribery offences committed by their employees, agents and subsidiaries but permits a defence of showing that the company took all reasonable steps and exercised all due diligence to avoid the offence.¹²⁷

In 2014 the United Nations Human Rights Council set up an open-ended intergovernmental group mandated ‘to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other

¹²⁰ Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2014] OJ L 330/1; European Union (Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups) Regulations 2017, SI 2017/360, as amended by European Union (Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups) (Amendment) Regulations 2018, SI 2018/410

¹²¹ Regulation (EU) of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas [2017] OJ L 130/1

¹²² Commercial Code, Art. 225-102-4, added by Law No. 2017-399 of 27 March 2017 relating to the duty of vigilance of parent companies and sponsoring undertakings; Sandra Cossart, Jérôme Chaplier & Tiphaine Beau de Lomenie, *The French law on duty of care: A historic step towards making globalisation work for all* (2017) 2 BUS & HUM RTS J 317. Vigilance plans are compiled by on the *Duty of vigilance radar* available at <https://vigilance-plan.org/search/>

¹²³ Anneloes Hoff, Dutch child labour due diligence law: a step towards mandatory human rights due diligence (10 June 2019) available at <http://ohrh.law.ox.ac.uk/dutch-child-labour-due-diligence-law-a-step-towards-mandatory-human-rights-due-diligence/#>

¹²⁴ Modern Slavery Act 2015 §54

¹²⁵ Modern Slavery Act 2018

¹²⁶ Civil Code §1714.43

¹²⁷ Section 18.

business enterprises.¹²⁸ The July 2019 draft¹²⁹ of this treaty requires state parties to ensure that their domestic legislation requires businesses to respect human rights, including the due diligence measures specified in the Guiding Principles.

The European Commission has recently signalled that it will propose legislation for mandatory corporate human rights due diligence in 2021. On 19 May 2020 EU trade commissioner Phil Hogan told an OECD forum that his colleague, justice commissioner Didier Reynders, is leading the work on examining options for regulating due diligence, both in companies' own operations and through their supply chains.¹³⁰ According to Hogan, Reynders' preference is for a 'mandatory, horizontal due diligence legislation' and, subject to consultations, the Commission would table legislative proposals in 2021.¹³¹

Voluntary multi-stakeholder operational level grievance mechanisms

Rana Plaza¹³² collapsed only 5 months after a fire in the Tazreen Fashions factory on the outskirts of Dhaka had killed 112 people and injured more than 200.¹³³ Both tragedies drew attention to the unsafe working conditions in which cheap clothes sold in European and North American high streets and shopping malls were made, and other grim realities for the (mostly female) workforce: extremely low pay, long hours, lack of collective rights.¹³⁴ More than 200 global fashion brands joined the Accord on Fire and Building Safety in Bangladesh, a legally binding agreement with two global union federations and Bangladeshi trade unions, and a number of civil society organisations as witness signatories. The Accord's main function is to carry out independent inspections of factories, with the reports made public. An important feature is that the Accord is enforceable by binding arbitration, which has been invoked twice.¹³⁵

In December 2019, the Hague Rules on Business and Human Rights Arbitration were launched, for use either as a grievance mechanism in accordance with the Guiding Principles.¹³⁶

¹²⁸ UN Doc A/HRC/26/L22/Rev1. See SURYA DEVA AND DAVID BILCHITZ, *BUILDING A TREATY ON BUSINESS AND HUMAN RIGHTS: CONTEXT AND CONTOURS* (2017); Douglass Cassell & Anita Ramasastry *White paper: Options for a treaty on business and human rights* 6 NOTRE DAME J INTL & COMP L 1 (2016); Olivier de Schutter *Towards a new business and human rights treaty* 1 BUS & HUM RTS J 42 (2015)

¹²⁹ Permanent Mission of Ecuador to UN, *Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises* (2019)

¹³⁰ Reynders also said this at a webinar on 30 April 2020. European Parliament Working Group on Responsible Business Conduct, *European Commission Promises Mandatory Due Diligence Legislation in 2021* (2020)

¹³¹ OECD, *Introductory Remarks by Commissioner Phil Hogan at OECD Global Forum on Responsible Business Conduct* (19 May 2020)

¹³² See page 2 above.

¹³³ *Tazreen tragedy victims being remembered*, Dhaka Tribune, 24 November 2019

¹³⁴ See note 135

¹³⁵ Richard Croucher and others, *Legal sanction, international organisations and the Bangladesh accord* 48 INDL LJ 549 (2019); Smith (n 13) 87-89. For an overview of these initiatives, see Paul van der Heijden & Rubin Zandvliet, *Enforcement of fundamental labor rights: The network Approach: Closing the governance gaps in low-wage manufacturing industries* (2014). For critical assessments of the Accord and a rival 'Alliance' set up by 26 North American brands see Fahreen Alamgir & Subhabrata Bobby Banerjee, *Contested Compliance Regimes in Global Production Networks: Insights from the Bangladesh Garment Industry* 68 HUM RELATIONS 1131 (2018); Jimmy Donaghey & Juliane Reinecke, *When industrial democracy meets corporate responsibility—A comparison of the Bangladesh Accord and Alliance as responses to the Rana Plaza disaster* 56 BRJ IND REL 14 (2018); Beryl ter Haar & Martin Keune, *One step forward or more window dressing? A legal analysis of recent CSR initiatives in the garment industry in Bangladesh* 30 INTL J COMP LAB LAW & IND RELS 5 (2014).

¹³⁶ Available at https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf.

Human rights in investor-state disputes

Recent investment treaties and tribunal awards have taken account of investors' observance of human rights obligations.¹³⁷ For example the Dutch Model Bilateral Investment Treaty includes state party commitments to the international framework on business and human rights, including the UN Guiding Principles and the OECD guidelines. Perhaps more importantly, it expects arbitral tribunals to take an investor's non-compliance with 'its commitments under' these instruments into account when they assess compensation.¹³⁸

So there are signs that, from public procurement to trade and investment to stand-alone diligence requirements to voluntary multi-stakeholder remedies, the soft-law corporate responsibility to respect human rights is gaining traction. Hardening, perhaps.

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¹³⁷ *Eg* Bear Creek Mining v Peru (ICSID Case No ARB/14/21), Award ¶¶256-266, 599-600 and dissenting opinion of Prof Philippe Sands QC (2017); *see generally* Mihaela-Maria Barnes, *The 'Social licence to operate': an emerging concept in the practice of international investment tribunals* 10 J INTL DISPUTE SETTLEMENT 328 (2019); Silvia Steininger, *What's human rights got to do with it: An empirical analysis of human rights references in international arbitration* 31 LEIDEN J INTL L 33 (2018); José E Alvarez, *Reviewing the use of 'soft law' in investment arbitration* 7:2 EUR INTL ARB R 149 (2018)

¹³⁸ Netherlands Model Investment Agreement, arts 6(6), 7(2) & 23 (2019). Available at <https://www.rijksoverheid.nl/ministeries/ministerie-van-buitenlandse-zaken/documenten/publicaties/2019/03/22/nieuwe-modeltekst-investeringsakkoorden>