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Emerging Human Rights Issues

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Mr. Chairperson, Minister, President of the Law Society, ladies and gentlemen,

At the outset let me thank the Human Rights Commission and the Law Society for the kind invitation to address the conference. I am greatly honoured. I have to confess though that I am somewhat intimidated by the venue. This hall and I go back a long way. One of my more painful memories is of taking tax law exams here – and failing – badly. That was, also, however, an occasion to experience the great kindness and pastoral care of the then Law Society Director of Education, the recently deceased Professor Larry Sweeney. I take this opportunity to pay tribute to him and his contribution to the modernisation of professional legal education in Ireland.

Another much more recent memory is of being here for last year's conference and having the privilege of listening to the memorable addresses of the Chief Justice, the UN High Commissioner for Human Rights and Professor Binchey. I must admit though that I also recall thinking how cruel it was on them – and on us - to have to speak so early on a Saturday morning. Never did it occur to me that I would be in their shoes just a year later.

This conference is addressing "emerging issues". I understand that term as a synonym for "new vulnerabilities", "key contemporary human rights themes". On that basis my starting point today has got to be the human rights impact of the economic crisis. The affect is, as we all know, very grave indeed. We are all well aware of the impact for human lives of the downturn. We are no less alert to the human rights implications of the economic choices that are being made for us.

For all the relevance of human rights to the situation, it has been very difficult historically to get the economic and human rights sectors to engage with each other. They have existed often in a state of mutual incomprehension. Just to take the economists, they are often bemused by human rights talk

of very specific social goods. They glaze over when we try to explain why human rights impact indicators have so often to be somewhat impressionistic in nature.

Notwithstanding the difficulties there has been some engagement and dialogue. This is particularly the case in the context of the Global South – the developing world. Here a development approach called the “rights-based approach to development” has emerged and gained significant traction. It has a lot to say regarding the engagement of human rights and economics, even for a country such as Ireland. The other significant meeting point of recent years has been the high level discussion between global human rights leaders and such institutions as the IMF and the World Bank – a practice initiated by Mary Robinson when she was UN High Commissioner for Human Rights.

So, what have these experiences yielded that is of help to us? It seems to me that they have provided key insights regarding the necessary goal and vision for economic leadership as well as of specific tools and approaches to work towards the vision.

First, the vision. It is increasingly accepted that human rights can serve as a core part of the goal of economic governance. Specifically, a human rights approach points to the need for decision making to be in pursuit of a society built on principle of equality and non-discrimination, that insists on the consistent application of the rule of law and, most importantly, sees the most vulnerable in society as those most in need of protection.

Turning to the issue of tools and approaches let me just mention three. The first of these is that of normativity. In other words, economic action should be based on and in pursuit of the implementation of the country’s binding international human rights treaty obligations. Any policy built on law is all the stronger and the more justified for that. In this regard Ireland is a party to the European Social Charter and the International Covenant on Economic, Social and Cultural rights, to name but two treaties. Economic policy should aim towards the fullest possible implementation of these sets of binding obligations.

The second tool or approach is that of the insistence in all action on the putting in place and the use of sturdy frameworks of accountability. Institutions and individuals who make and implement the key decisions must be held accountable before the law and the people for their actions.

The third of the approaches suggested by the rights-based approach is that of ensuring the full and respectful participation of rights holders – of us – in the formulation and implementation of economic policy. In other words, economic action that is respectful of the State’s human rights commitments must serve to empower the citizen.

One last set of lessons from the past work on these issues is the extent of the international dimensions. This recalls the extent to which others, elsewhere, have been where we are and what they have much to teach us on how to engage with the international financial institutions, and, more generally, how to ensure that the human rights goal and approaches are integrated into public affairs. I suggest that the relevant Irish groups would do very well now to listen to and learn from those with the greatest experience – most of whom are in the Global South – the developing world. One of their lessons would concern my last point on this issue – that is that it is essential to acknowledge the extent to which the decision making does not take place in the national capital – but, instead, it is to a large extent located in Frankfurt, Brussels and Washington. In other words,

effective advocacy for a rights-based response to the current crisis requires as much a concentration of effort in these places as in Dublin.

Now, let me turn to what I was supposed to be focussing on today...

My starting point is a recollection of an exchange that I had with a representative of a powerful western State when the UN body on which I sit, the Human Rights Committee, was reviewing a periodic report submitted by that country on its record of implementing civil and political rights. At our meeting at UN human rights headquarters in Geneva I asked the government delegation to comment on reports that trans-gendered and cross dressing people were habitually being locked up by their police who then subjected them to sexual and other serious assaults, tantamount to torture. One of the representatives responded that he could not see the relevance of the issue for our discussions since the human rights treaties make no mention at all of transvestites. And that was it – the full extent of his answer to all of the concerns I raised. To be fair, it was swiftly repudiated by the head of his delegation who assured us that their government took such allegations very seriously, but I recall the incident today specifically to acknowledge three elements of the consideration of new or emerging human rights issues: in the first place there is usually a great deal of ignorance and confusion regarding the situation – either concerning the identity of those who face human rights risks or what those risks might be. The second element is that of uncertainty regarding the application of existing human rights law to address the problems. The third element, commonly present, is that of widespread prejudice and fixed views deriving from various ethical or moral positions. All three of these were in play for my government interlocutor. All three are relevant, to a greater or lesser extent, for the five themes for our discussion.

Take for example, gender identity. Here we are confronted by a very complex set of issues. In the first place there are what many find to be a bewildering range of life situations and their designations, including, transgender, transsexuals, intersex, cross dressers, as well as groups within many indigenous communities, such as *muxi*, *hijra* and *kothi*. In the various contexts there remains very little appreciation of the vulnerabilities and issues that people confront. In the first place, fundamental questions arise of human identity. How best can a society honour the choice of any person to live in a gender identity of their own choosing? There have, of course, been welcome developments regarding the right of persons to have identity documents altered following gender re-assignment medical and surgical procedures – especially in light of the *Linda Foy* case – and I very much look forward to Dr Foy's presentation this morning - as well as jurisprudence of the European Court of Human Rights. But what of situations where people chose to change gender identity but without undertaking any medical procedures? And what to do in the cases of children who are born intersex being subjected to genital surgery while still in infancy (apparently some 150 such children are born each year just in one country, Germany) – a practice which has been sharply criticised by some of those who were subjected to it. Still another severe problem is that of combating gender-identity-related prejudice and abuse. A recent Scottish survey reported that 50% of respondents would be unhappy about a relative forming a relationship with a transsexual person. In a question directed at transgender respondents, 48% reported abuse in domestic relationships. There have been a number of recent high-profile hate-motivated killings of transsexuals in Portugal and The Netherlands. Taking all of this into account it is hardly surprising that 30% of transgender respondents to a Europe-wide study in 2008 reported at least one suicide attempt as an adult.

Having attempted to map out the situations that people confront because of their gender identity there is then the challenge of relating these to the existing human rights legal standards. At least at the level of the international human rights treaties the challenge of a lack of explicit references – has to be overcome. Much good work has been done on this recently. As I already mentioned, the European Court of Human Rights has generated some helpful case-law. In addition, there has been a wide ranging exercise by lawyers and activists (in which I participated) to chart the application of international human rights law to the range of experiences of people of diverse sexual orientations and gender identities. The results are contained in what are known as the *Yogyakarta Principles*. The Principles have been endorsed by the Irish government in a foreign policy context and have been well received at law and policy levels internationally. I strongly recommend them to you as a resource for your discussions. I also suggest that account should be taken of them by the government's Gender Recognition Advisory Group.

Time does not allow me to speak much further on issues of sexual orientation and human rights. It would be odd though if I did not make mention of a key context for today's discussions – the Civil Partnership Act, 2010. This is obviously a very welcome development. However, in what it omits or precludes, it worries me. In particular, the preclusion of the possibility of same-sex couples adopting children – excluding them on the basis of their orientation without regard for their parenting capacities – is worrying. It also flies in the face of the right of the child to the benefit of a loving home.

Another of the issues for debate today is that of human rights and the environment. While not exactly an emerging issue it is certainly one of considerable legal uncertainty at the international level. The extent to which we can deduce substantive environmental protection rights within the existing treaties remains unclear. European jurisprudence has addressed only a small number of issues, not very consistently, and only one of the UN human rights treaty monitoring bodies, the Committee on Economic, Social and Cultural Rights, has delivered focussed guidance. What is of more interest is the extent to which we can identify environmental protection rights of a procedural nature. Three of these are addressed in the Aarhus Convention (1998): the rights to information, participation in environmental decision-making and access to justice. That treaty, which focuses on countries in the European region, has received wide acceptance by States, with 40 of its 45 signatories having ratified it. The miscreants in this regard are Iceland, Liechtenstein, Monaco, Switzerland and Ireland. It is important to challenge the government on this failure to ratify. Nevertheless, even without the benefit of the treaty, I would argue that we can enforce these three procedural rights also by means of the other existing treaties of general human rights application. This is illustrated by the conclusions reached by the Human Rights Committee in the case of *Poma v. Peru*. That case concerned the degradation of grazing land of indigenous llama breeders as a result of interference by the State with the water table. In finding a violation of article 27 of the International Covenant on Civil and Political Rights, we stipulated that the government's interventions with the water table must be undertaken in full consultation with the affected communities. Regarding another of the procedural rights, freedom of information, just this year the Committee adopted a draft general comment that identifies this right as an element of the right of freedom of expression (article 19 of the Covenant) – and the Committee describes it much more widely than the equivalent right identified by the European Court of Human Rights.

The environmental issue that most preoccupies me is that of climate change – arguably the most compelling of contemporary global challenges. For all the recent concerns about the operation of the International Panel on Climate Change there seems to be little doubt now that climate change is underway, is man-made and that if it is not checked within the next 40 years, the consequences will be catastrophic. The impact will be most felt for low-lying islands and coastal zones, arid regions, areas liable to floods, drought and desertification, and the Arctic. The human rights implications will be enormous, raising issues of the rights to, among others, food, water, shelter, property, health and life. Endemic patterns of discrimination and inequality seem inevitable. For these reasons it is high time that policy makers adopt rights-based approaches to all aspects of climate change. For example, climate change mitigation policies need to be human rights-proofed so that action to reduce carbon emissions does not themselves violate rights – it is not acceptable, for instance, that the diversion of crops from food to bio fuel production undermines food security. And climate change adaptation policies must be respectful of both the human rights of the individual and need for equitable global resource and burden sharing.

In terms of how best to ensure a human rights-based response to climate change there is an inconclusive debate about the adequacy of the current legal regime and the utility of adopting for a new treaty on the topic. This is something you may wish to consider. Another challenging point to reflect on is that of how best to respect the human rights of people not yet born – bearing in mind that it is our children, not us, who will bear the brunt of the climate change disaster. The current human rights regime is not well suited to such issues. There have been some fascinating initiatives to address this. For instance, Hungary has established the office of National Ombudsman for Future Generations – is this or some variant of it, of any use for Ireland?

I would like to turn briefly now to another of your themes – that of human rights and business. Here, for all the sustained attention that the issue receives internationally I have a sense that Irish practice has some way to catch up. In tackling the issue you might want to employ the framework proposed by the UN Special Representative on the topic, Professor John Ruggie. This has three elements: first, the State's duty in international law to protect citizens from the violation of human rights by (transnational) business; second, the corporate responsibility to respect human rights; and, third, the need for access to effective remedies including through appropriate judicial or non-judicial mechanisms.

Within this context I suggest that there are some specific Irish priority areas to consider, including: ensuring corporate respect for human rights in as exposed and multi-national dependent an economy as ours; putting in place adequate systems so that private bodies undertaking public functions are human rights compliant; and, challenging what is sometimes characterised as a climate of impunity for corporate actors who are complicit in human rights abuse.

As you address these areas you will come across concrete meeting points of human rights, business and the environment. Probably the most emblematic of these is the Corrib gas controversy. The facts of this long-running saga are well known and I will not recall them again. Instead let me point to just some of the human rights aspects. First, there is the evident riskiness of this gas pumping and refining project. Studies make clear that this is a danger-prone sector and it is reported that some of the Corrib facilities may have been located too close to human settlements. Moreover, the recent Gulf of Mexico spill reminds us of the particular dangers for people and their environment of off-

shore mining. Such circumstances as these raise issues of the rights to life, food and health and of the protection of the biosphere. The implicated authorities include government, the planning authorities and even *Coilte*. The apparent failure to ensure adequate, respectful and ongoing processes of consultation with all elements of the local community, as we have seen, also gives cause for concern in international law. What is more, the impact of any accident for the wellbeing and stability of the local *gaeltacht* community engages the law on the rights of minorities. Still another of the human rights issues is the manner in which some protestors apparently have been dealt with by private security guards and by the Gardai and how complaints of ill-treatment have been handled. In this regard, the NGO Frontline has produced a valuable report indicating the extent to which the policing of the dispute raises concerns under the UN Declaration on Human Rights Defenders. The Corrib gas controversy, in other words, is a laboratory in which the State's resolve to protect human rights in face of commercial considerations, of delegated authority and of threat to the environment is being put to the test.

As the final element of my comments this morning I would like to turn to some core considerations that you might keep in mind regardless of which of the issues you will be looking at. I have four in mind.

In the first place I believe it to be very important that you take as your starting point the articulation of human rights to be found in international law, particularly in the core human rights treaties. Basing your discussion on these commonly agreed standards provides you with a sure foundation safe from any suggestion that you are invoking or imposing any ideological or sectoral points of view. You will find that the international standards go surprisingly far in addressing the main problems – as witnessed by the breadth of protection that underlies the Yogyakarta Principles. Of course the human rights protections only apply for countries that have ratified the treaties. In this context I hope you will draw attention to Irish gaps. In addition to the environmental convention I already mentioned Ireland has yet to ratify such important treaties as the Convention on the Rights of Persons with Disabilities, the Optional Protocol to the Convention against Torture and, of particular relevance for today's discussions, the Migrant Workers Convention.

Second, it is very important to keep in mind the intersectionality of human rights vulnerability. In other words, people who are already disadvantaged by one form of vulnerability will experience other forms much more than might the general population. In terms of today's issues it would be good to keep in mind such challenges as the intersectionality of refugee or migrant status with poverty, of the particular challenges faced by the refugee who belongs to a sexual minority, of the acute vulnerability of the trafficked child. And across all of the issues we can identify concerns regarding the gathering, retention and use of personal data.

Third, I encourage you to pay close attention to the state of health of what I might term Ireland's national human rights infrastructure – the institutional framework that underpins its commitment to human rights. Today I have in mind just two of the core pillars of that infrastructure: human rights education and the existence of a strong national human rights institution.

Human rights education is required at many levels – in the schools, universities, in non-institutional adult education and in training for professionals and public officials. Recent attention to some of these areas is encouraging – for instance, we should acknowledge the Human Rights Commission's publication of a training programme for civil servants. Professional human rights training for lawyers

is an area of particular importance. While much has been achieved in this regard over recent years, I suggest there is room for considerable improvement. Lawyers should, for instance, receive a much deeper grounding in economic, social and cultural rights and, more generally, in the application of the UN treaties. One sometimes hears as an objection to such a proposal that this would be a waste of time for reasons of the non-justiciability of some rights and the fact that the treaties have no more than persuasive force in Irish courts. I am not convinced – experience in the higher courts of many other dualist countries, in particular in India, have demonstrated the extent to which the UN treaties can be drawn on to forge important human rights jurisprudence.

And, then, the national institution – in Ireland’s case, the Human Rights Commission. We are extremely fortunate on our commission – it has an excellent mandate and carries out its functions with distinction. It has, however, had to operate despite extraordinary financial odds. It is difficult to convey to you the extent to which, by international standards, the Commission is without resources. Other commissions in similarly sized European States operate with budgets that are significantly greater – and those budgets are often considered to be inadequate. I have worked in war torn countries, some of them among the world’s poorest, many of them no larger than Ireland, where the national human rights commission had a bigger budget than has ours. This situation cannot be allowed to continue – and the desperate state of the economy must not be invoked to the contrary. As the Commission has made clear, much more effectively than can I, the greater the economic problems the more we need a strong national human rights institution.

My fourth and final suggestion has to do with an important upcoming opportunity. Next year, Ireland’s human rights record will be reviewed by the United Nations Human Rights Council in what is called the universal periodic review procedure (UPR). This is a unique process where States examine each other’s human rights record and put recommendations regarding what they think are the greatest causes for concern. All the member states of the UN are subject to the procedure. The UPR has been in place for the last two years and is generally considered to be an important forum to bring attention to problems and generate political will for change. There are many points at which concerned Irish organisations can become involved in the Irish review. In the first instance, in accordance with the UN’s recommended procedure, the Irish government will undertake consultations over the coming weeks across the country with a view to helping it draft its own UPR report. In parallel, NGOs and the Human Rights Commission are undertaking their own consultative processes. Cumulatively it is intended that these discussions will raise awareness of the procedure, bring to light the key issues and provide data that will be put before the other UN member states.

Let me come to a conclusion here by briefly returning to my opening point.

It would be impossible for you to have today’s discussions without taking account of the economic crisis and its impact for human wellbeing, including in the context of the five thematic areas. This context for our conference is not however a problem or a distraction. It is an important opportunity. This meeting is one event that allows us the chance to draw attention to the relevance of human rights to help guide the decision makers. And ultimately what are human rights all about – distilled in just a few words they are about recognising, honouring and upholding the human dignity of every last man, woman and child in this country. If through today’s event we can contribute even to the

slightest opening of a door to placing that considerations at the heart of the current national debate then we will have accomplished something very important indeed.

Thank you.