Building corporate human rights responsibility: between confidence and justice
Possible NHRIs contributions to "the State duty to protect," the first pillar of corporate human rights responsibility

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Good morning ladies and gentlemen.

I would first like to thank the organisers for inviting me to speak before you today. I also want to salute the earlier speakers whose work is largely responsible for the fact that we are all here today to discuss corporate human rights responsibility.

Without Mary Robinson, the debate would have remained largely theoretical. Her precursory work with certain multinationals demonstrated that this is not a situation in which everything is black and white. It is not the evil corporations on one side versus the nice rest of the world on the other. The goal is not to combat businesses in general, but to ensure that those which abuse human rights answer for their actions. We are not trying to fight economic progress; rather, we want to ensure that it serves women and men, all free and equal in dignity and in rights.

For his part, John Ruggie stepped up the efforts to get this debate out of the mire in which it had been stuck since 2003. Today, thanks to him, the fact that companies have a specific responsibility in terms of human rights is almost never contested. The challenge now is to find out how this responsibility is implemented and especially what happens when it fails. Using the three pillars of the conceptual framework that he presented to the Human Rights Council in 2008, I will try to highlight the issues, principles and possible lines of action for national human rights institutions (NHRIs).

The State "duty to protect" against human rights abuses, the first pillar and main guarantee of public interest and sustainable development

John Ruggie defined the first pillar as the State duty to protect against human rights abuses by third parties. The exact term Ruggie used was "duty." In French this should be translated as "devoir" and not the awkward interpretation "obligation" that we find in the official United Nations text. This naturally implies a legal responsibility, but what about the question of political responsibility posed by this pillar?

Let us first examine the current economic context. Given today's globalisation, the playing field is the entire world. The main players are the multinationals, but there are also countless small, medium and large companies affiliated with – and often dependent upon – these corporations. Finally, in a free-trade economy, the predominant watchword is competition.

When this competition produces innovation and quality without harming the environment, and when it then allows for fair and responsible distribution of the wealth, it furthers progress in human rights. But on the other hand, when growth translates to price war, tax evasion, exploitation or pollution of the environment and unequal distribution of the wealth produced, it is human rights that suffer. For the never-ending quest for the lowest cost, whether for the purpose of lowering prices or increasing share value, leads to economic warfare. And this warfare consists of shifting the real cost of production onto the environment, the workers, or both. In this war, following Henri Dunant's example in the context of military war, we must gradually build the equivalent of the Geneva Conventions to protect human rights and the environment. It is this moral and political imperative that we will discuss over the next three days. And this protective mission falls to the State, hence the famous "duty to protect" restated by Ruggie.

The road still to be travelled is long. And mindsets are not yet ready for an international legal framework. But States have accepted the abandonment of sovereignty in terms of investment or international trade. This is the case in the WTO, for example. In this area, we have both incentive mechanisms and restrictive rules. Furthermore, when infringements of the principle of free trade are observed, the competent authorities impose sanctions, including ones with extraterritorial effect. But when it comes to human rights and the abuses perpetrated by economic players, protection mechanisms often turn out to be watchdogs whose bark is worse than their bite. This difference in treatment, which we call a double standard, embodies a principle of inequality rather than a principle of justice. Let us face the facts: today, human rights have less weight than financial and international trade rights.

But if the State has this "duty to protect," it is precisely because there are risks, and because the forces in action are not equal, that this imbalance can cause harm to the weak. Yet human rights belong to all of humanity; they are "the common ideal to be achieved by all people and all nations" as stated in the Universal Declaration: no one may be deprived of them in the name of any special interests, especially economic. It is therefore as a guarantor of public interest that the State has the duty to recognise and monitor corporate human rights responsibility. This responsibility extends to all internationally recognised rights, regardless of the country, sector or context in which the companies operate. And this "duty to protect" must remain free from any form of selectiveness or double standard. Political realism and pragmatism do not preclude audacity and a vision of the future that we are designing for our children – for the future generations which also have the right to development that we want to be sustainable.

To this end, the State can of course initiate and encourage voluntary undertakings. But if certain companies do not play the game, it is ultimately the State that has failed in its "duty to protect" as a result of having imprudently believed in the virtues of good will alone. A large number of companies have also understood to what extent absolute voluntarism has its limits when it penalises most harshly the efforts of the companies that respect human rights. And some of these companies are now demanding rules that will protect them legally and safeguard them from unfair and cynical competition.

The role of NHRIs in the continuation of the SRSG's dual mandate:[2] evaluation for evolution?

It is crucial that we continue the debate mobilised by John Ruggie. International recognition of his three pillars must not disappear. To this end, this 10th NHRIs conference could support the creation of an international scheme that would continue Ruggie's work. The role of such a scheme may be based upon two driving ideas: evaluation for evolution. For the progress of the past five years to live on, it is essential that we understand the obstacles and difficulties the different players will encounter in their operational implementation of these three pillars. Evaluation for evolution – this is a concept that companies understand very well since they already use it on a daily basis to enhance their products' performance on the market and the productivity of their employees.

In concrete terms, there are at least three missions that could justify the future international scheme.

1. **Encourage and help States to clarify companies' specific responsibility in terms of human rights**, whether direct or indirect: the goal would be to better identify and anticipate the issues involved and the risks surrounding corporate human rights violations by economic players. Indeed, for States to be able to honour their "duty to protect," must they not attentively scrutinise existing public policy and regulatory framework to identify any gaps? Nationally, the NHRIs have a crucial role to play in this clarification work by issuing improvement recommendations regarding legal and administrative matters. Furthermore, when contributing to the reports of the Universal Periodic Review (UPR) or those submitted to treaty bodies, NHRIs could ensure that corporate human rights responsibility is also taken into account.

[2] UN Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises.

2. **Work together toward the positive development of international standards on corporate human rights responsibility**, whether public or private, binding or voluntary. In this area too, NHRIs could further these efforts by cooperating internationally to reinforce the international community's duty to protect human rights: this could take the form of comparative law studies, case studies, proposals for improving existing regional or international schemes and so on. Efforts have been made by institutions such as the World Bank or the European Investment Bank: using these experiences as inspiration, NHRIs could for example propose risk and challenge assessment methods for human rights related to corporate operations.
3. **Document best practices and cases of deliberate or accidental human rights abuses by companies.** Looking at some while ignoring the others is neither fair nor useful. Humans naturally need examples to follow, but an example alone is not enough: we all know that we learn even more from our errors. Highlighting best practices is only worthwhile if, at the same time, we also dare to take a good look at bad ones. Moreover, this makes it possible to anchor action in the reality of the facts rather than remaining in the sphere of rhetoric. For none of us is fooled by institutional communications boasting of total perfection; rather, these generate distrust. By refusing to speak of the flaws of some, we disregard the praiseworthy efforts of all the others.

These are three possible missions, among others, for an international scheme which, we hope, could continue the mandate of the SRSG. This is a natural scope of action for NHRIs, as was demonstrated by the Francophone seminar on corporate social responsibility held in Rabat in 2008.

What NHRIs can do to implement the three pillars at national level: assist and ensure compliance

At national level, States enjoy access to a whole array of tools for purposes ranging from incentive to monitoring. NHRIs have full legitimacy for helping them increase the accountability of businesses in terms of human rights. Through their recommendations and their own initiatives, they can play a dual role: providing assistance and ensuring compliance.

In terms of assistance, here are two potential lines of action for NHRIs to explore:

- **Educating:** through their respective or collective work, NHRIs can increase familiarity with texts on corporate human rights responsibility, for example by facilitating comprehension and implementation. These promotion, education and research initiatives led by NHRIs are indispensable for supporting the State "duty to protect"; they also make it possible to provide guidance to companies and to help them integrate the various voluntary or binding standards into their day-to-day management. For this, it is necessary that NHRIs working alone or in networks obtain the skills and resources they will need to take on these new challenges.
- **Promoting dialogue and information:** discussion among stakeholders is not only a method but also part of the response to corporate human rights responsibility issues. NHRIs could build spaces for balanced dialogue to facilitate mutual understanding of what is at stake. This could take the form of institutional and professional networks, multi-stakeholders meetings (dedicated to specific topics or business sectors), multidisciplinary research, joint training bringing together representatives of different backgrounds and so on. NHRIs could also encourage the collective negotiation of acceptable compromises to benefit the many.

But encouragement is not enough, because there is no such thing as freedom without limits, rights without duties, or confidence without security. If the encouragements of a State go unheeded, if the trust it grants in good faith is in vain, its own responsibility and the respect for its authority will be compromised. Being respected means ensuring respect by:

- **Being exemplar:** certain States are not yet willing to legally require companies to respect human rights. Yet they cannot escape their own responsibility. Is it acceptable for public funds – taxpayers' money – to finance the operations of businesses that would abuse human rights? To fulfil their "duty to protect,"

States must first of all demonstrate exemplarity in the framework of their own relations with companies: State-owned companies, companies that tender for public procurement, companies that receive public funds (aid, financing coming from sovereign wealth funds or pension funds, export credits etc.), companies receiving credit associated with development or from international financial institutions and so on. All of these relations should depend on a prior assessment of the human rights responsibility of the concerned corporations, as Ruggie proposes. Here again, the NHRIs could help the State define the required obligations and the ways to evaluate compliance transparently, independently and with credibility.

- **Being firm:** on the recommendations of the NHRIs, the States should intervene when companies do not respect their obligations in the use of public funds; measures of the same order could also concern companies which, alone or in groups, might put pressure on representatives of public authorities to slow or impede the development of provisions promoting the respect of human rights, both in the regulatory process or in its implementation.
- **Supporting the actions of human rights defenders and protecting them** from systematic or occasional abuses committed by certain companies. As provided in their mandate, the NHRIs must maintain regular contacts with defenders and take action when necessary.

Why must we describe and supplement due diligence?

The second pillar defined by John Ruggie is the corporate responsibility to respect human rights. The Special Representative places this responsibility on due diligence. Due diligence is a risk-identification process used in particular in finance, in the framework of business acquisitions. Used in the context of human rights, it means identifying the risks to which a company might expose the rights of persons affected by its operations or management decisions. This concept is interesting, but this conference could draw attention to several questions that it raises and seek greater precision in the final report that Ruggie is to submit.

- First of all, if we adopt a risk-based approach, we must clearly specify from which point of view these possible risks are analysed. **Here it is not a question of the risks run by the company, but rather, as stated in ISO 26000, "the organisation must undertake to examine challenges and dilemmas from the point of view of the individuals and groups which could be harmed."** This detail is crucial. A company may in some cases run no legal, financial or image-related risk because national law is deficient or poorly applied, the cost of sanctions is low or media attention is focused elsewhere. The operations of this company may nonetheless violate the rights of persons who lack the means for defending themselves. These are the risks that are core to due diligence. Moreover, the necessary objectivity and impartiality pose the question of the evaluator's independence in the context of the risk of conflicts of interest.
- Next, what obligations does due diligence entail? Establishing a charter of principles promoting human rights at the level of the parent company cannot substitute for having a diligent policy for the entire group. **Beyond public commitments, due diligence includes risk analysis, the appropriate prevention or protection measures, means for their effective implementation, schemes for evaluating the results and the proof of necessary adjustments.** It is of capital importance to avoid any ambiguity and to restate these obligations as does ISO 26000. Let us also keep in mind that **due diligence means nothing unless it covers all the operations of all the entities of a company, and also, to avoid risks of negligence or collusion, the operations of the suppliers and subcontractors on which the company has a significant influence**. This is something that Ruggie had specified early on, at the time of his participation in the creation of the Global Compact.
- Finally, as a risk-based approach, due diligence is above all a defensive strategy. It does not make it possible to embrace the issues of certain human rights, in particular economic, social or cultural ones. For corporate human rights responsibility does not consist only of "avoiding infringing on the rights of others." This responsibility has a moral dimension and obligations of resources. **In fact, without taking**

over the role of the public authorities, companies can promote the development of human rights by using their influence on other players as well as in their own scope of action. They can undeniably contribute to the right to a standard of living that is sufficient for ensuring good health and well-being, the right to social protection, the right to trade union freedom and collective bargaining, the right to water and food, the right to housing, the right to scientific progress and so on. Not being risks to prevent but rather goals to work toward, they do not strictly speaking enter into the concept of due diligence. In its current form, this concept thus proves insufficient for characterising Ruggie's second pillar by itself.

In sum, due diligence must be described more rigorously by international organisations and States: it cannot depend only on the discretionary authority and good will of companies. A company's daily operations rest upon mandatory rules. These rules are scrupulously defined by the contracts the company signs with employees, suppliers and subcontractors, whom they monitor and sanction when these contracts are not respected. At the very least, it would be paradoxical if the same exactitude were not expected of companies when human rights are at stake.

To this exactitude in management we must add access to comprehensible information on company behaviour in terms of human rights. If dialogue with stakeholders is to be balanced and productive, if regulators are to be able to act in the name of public interest, and if victims are to have access to remedy, systematic confidentiality cannot be the rule. To ensure respect for all, due diligence must therefore be accompanied by mechanisms for appropriate information adhering to the principles of relevance, exhaustiveness, balance, comparability, accuracy, clarity and reliability defined for example by the Global Reporting Initiative.

On all of these points, this conference could launch a working group to guide international analysis via recommendations and provide each NHRI with pathways for regulations.

Why must we describe and increase access to remedy and reparation?

The third and final pillar defined by John Ruggie is access to effective remedy and reparation. This justiciability normally translates to judicial mechanisms, but there are also extrajudicial mechanisms and schemes aimed at appeals. The advantage of these is that they are available when access to justice is impossible, ineffective or illusory. However, as specified in ISO 26000: "private mechanisms must not impede the strengthening of State institutions, in particular judicial mechanisms, but rather should be able to offer additional opportunities for remedy and reparation."

To avoid certain deviations and improve the quality of existing non-judicial mechanisms, NHRIs could issue advice, ex officio or upon referral. This advice would serve to:

- Draw attention to voluntary standards which do not have mechanisms for remedy or reparation.
- Qualify the nature of these mechanisms according to whether they open the way to a simple claim, true remedy or possibilities for reparation.
- Evaluate the degree of credibility of these mechanisms with regard to their legitimacy, fairness, independence, the effectiveness of their decisions and their compatibility with international human rights law.
- Measure their degree of validity in terms of their visibility, accessibility, predictability, transparency, clarity, processing time, cost etc.

But regardless of the quality of these claim schemes and extrajudicial mechanisms, they perpetuate the inequality of access to rights and the fragility of certain individuals, communities and indigenous populations. Indeed, depending on the places and circumstances, we find either impunity for human rights abuses perpetrated in part or in whole by companies, or an absence of means for remedy. In brief, the current state of justiciability undermines respect for article 55 of the UN Charter, which advocates "universal and effective respect for human rights." This justiciability should translate to the universal guarantee of access to a judge, the independence of this judge and the effectiveness of remedy (existence of a procedure in which both parties are heard, judges with sufficient skills and power, a reasonable

timeframe for processing the complaints, compatibility between the formalism and cost of justice, effective execution of decisions, measures for reparation and restitution, rehabilitation, compensation, non-repetition guarantees, etc.).

With this in mind, this conference could therefore call for:

- Continuation of debate on the legal personality of multinational corporations, the responsibility between parent company and subsidiaries as well as the respective competences of the courts of host States (of the subsidiary or the supplier/subcontractor) and States of origin (of the parent company).
- Extension to all NHRIs of the competence that some of them already have to receive complaints from victims of abuse committed by companies. Failing this, ability of the NHRIs to, at a minimum, provide assistance to victims and ensure mediation aimed at conciliation and reparation.
- Ability of the NHRIs to fulfil an observatory role to note and document cases of abuse observed at national level, with a view to better understanding their State's failures in terms of "duty to protect."
- Set-up of periodic meetings among NHRIs as well as creation of other discussion, training and information tools to increase skills and harmonise practices.

In conclusion

As you see, much is at stake and the debate is far from finished. NHRIs can contribute their experience, analytical skills and legitimacy. For a guide, they will use the universal principles of international human rights law as well as a sense of justice for those whose rights have been abused.

Thank you for your attention.

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Annex: Summary of proposals

In its concluding statement, this 10th NHRI conference could

- **Support the creation of an international scheme that would continue the work achieved by John Ruggie**, with a view to working at least in three main areas:
  - **Encourage and help States to clarify the specific responsibility of companies in terms of human rights**, via an examination of public policy and existing normative framework for remedying any gaps.
  - **Work together toward a positive development of international standards on corporate human rights responsibility** (public or private standards, binding or voluntary), via comparative law studies, case studies, proposals for improvements to existing schemes (national, regional or international), in particular regarding methods for assessing risks and challenges in human rights linked to corporate operations.
  - **Document best practices as well as cases of deliberate or accidental violation of human rights by corporations**, in particular by creating observatories.
- **Contribute to the justiciability of corporate human rights responsibility by calling for:**
  - Extension to all NHRIs of the competence that some of them already have to receive complaints from victims of abuse committed by companies. While they lack quasi-judicial competence, NHRIs could assist victims and provide mediation.
  - NHRIs to fulfil the role of observatory, noting and documenting cases of abuse observed at nation level to better understand breaches of the "duty to protect."
  - Set-up of periodic meetings among NHRIs as well as creation of other discussion, training and information tools to increase skills and harmonise practices.

At international level, the CIC could launch a working group to guide international analysis via recommendations and provide each NHRI with pathways in terms of regulations, in order to:

- **Contribute to international analysis** in the framework of the scheme at the end of the SRSG's mandate
- **Describe the concept and operationality of due diligence** (defining the concept of risk, expectations and actions associated with the concept, degree of consideration for the analysis of challenges other than risks, definition of scope, access to information, procedural recommendations etc.).
- **Continue the debate on the legal personality of multinational corporations, the responsibility between parent company and subsidiary and the respective competences of the courts** of host States (of the subsidiary or the supplier/subcontractor) and States of origin (of the parent company).

At national level, the NHRIs could, through their recommendations and their own initiative:

- **Educate:** the NHRI could increase awareness of corporate human rights responsibility texts through promotion, training or research initiatives with a view to assisting States in their "duty to protect" and guiding companies in their day-to-day management. For this, NHRIs must obtain the skills and resources they will need to take on these new challenges.
- **Promote dialogue and information:** NHRIs could construct areas of balanced dialogue to facilitate mutual understanding of the issues, in the form of multi-stakeholders meetings (dedicated to certain topics or business sectors), multidisciplinary research, joint training or negotiations bringing together representatives of professional organisations, workers' organisations, civil society, NGOs, consumers and the scientific community etc.
- **Be exemplar:** NHRIs could help States define the obligations required by State-owned companies, companies that tender for public procurement, companies that receive public funds (aid, financing coming from sovereign funds or pension funds, export credits etc.), companies receiving credit associated with development or from international financial institutions and so on. They could define the required obligations and the ways to evaluate compliance transparently, independently and with credibility.
- **Demonstrate firmness:** the NHRIs could make recommendations aimed at intervening when companies do not respect their obligations in the use of public funds; measures of the same order could also concern companies which, alone or in groups, would put pressure on representatives of public authorities to slow or impede the development of provisions promoting the respect of human rights, both in the regulatory process and in its implementation.
- **Support the actions of human rights defenders and protect them:** NHRIs must maintain regular contacts with defenders and take action in the event of systematic or occasional abuses committed by certain companies.
- **Help improve the quality of existing non-judicial mechanisms:** NHRIs could draw attention to voluntary standards that have no mechanisms for remedy or reparation; they could also issue advice on the nature, credibility and validity of such mechanisms.