Joint Civil Society Statement on the draft Guiding Principles on Business and Human Rights

January 2011

In June 2011, the Special Representative of the UN Secretary-General on transnational corporations and other business enterprises (SRSG), Prof. John Ruggie, will present his final report to the UN Human Rights Council. This report will include Guiding Principles for the operationalization of the "Protect, Respect and Remedy" Framework as well as options for UN mechanisms on business and human rights to follow the SRSG.[i]

This civil society statement[ii] identifies critical areas in the current draft of the Guiding Principles released on 22 November 2010 that need revision or further elaboration. Unless addressed, these gaps will prevent the Guiding Principles from effectively advancing corporate responsibility and accountability for human rights and so may fail to gain widespread acceptance by civil society. The current draft of the Guiding Principles does not provide sufficient guidance to States and business to close the governance gaps identified by the SRSG as the root cause of the business and human rights predicament today. The draft Guiding Principles is not a statement of the law. In some areas the draft of the Guiding Principles takes a more regressive approach towards the human rights obligations of States and the responsibilities of non-state actors than authoritative interpretations of international human rights law and current practices. Some of the formulations in the current draft, as indicated below, also appear to be weaker than aspects of the Framework presented in the SRSG's prior reports. In their current form, the draft Guiding Principles therefore risk undermining efforts to strengthen corporate responsibility and accountability for human rights.

To provide clear guidance to States and business and to become a useful tool to prevent and redress business-related abuses of human rights, the draft Guiding Principles should, at a minimum:

1) **Provide clear recommendations to States consistent with internationally recognized human rights standards.**

The draft Guiding Principles on the State duty to protect lack specificity and at times depart from existing interpretations of international law provided by UN human rights treaty bodies. In Principles 1, 5, 6, 8, 10, 13, 14, 17, 23, 24, and 25, the draft refers to "appropriate steps," "appropriate actions," and steps that should be taken "where appropriate" when referring to State regulation of business activity. However, the draft Guiding Principles provide little guidance as to what is or is not appropriate and, in so doing, fail to provide concrete recommendations for enhanced protection of human rights against abuse involving business.

Principle 2 provides that States should "encourage" business enterprises to respect human rights throughout their global operations. This does not reflect increasing international recognition, including by UN treaty bodies, of the legal obligation for States to take action to prevent abuses by their companies overseas. Additionally the phrase "States should encourage business"

appears weaker than the reference, in the 2008 report of the SRSG, to increasing international recognition of the need for home States to take "regulatory action" to prevent abuse by their companies overseas.

The Guiding Principles should clearly state that:

- States should adopt and implement effective regulatory measures to prevent, put an end to and punish business abuses of human rights at home and in other countries, and to ensure the provision of effective remedies, including through engaging in international cooperation and assistance. Such guidance would be more consistent with the interpretation by UN treaty bodies of States' duties to prevent human rights abuses in other countries;
- in order to discharge the obligation to protect human rights against corporate abuse, the "appropriate steps" that States should take to prevent, investigate, punish and redress business-related human rights abuse must include mandatory corporate human rights due diligence for private and state-owned enterprises; and
- corporate human rights due diligence should be accompanied by independent monitoring systems to ensure the credibility of the process and the veracity of the outcome.

2) Specifically address the governance gaps created by globalization.

The Guiding Principles should make recommendations on how the conduct of transnational business operations that cause or contribute to human rights violations in other countries should be regulated and remediated. They should more specifically provide guidance for States to ensure that companies under their jurisdiction do not contribute to human rights abuses at home or abroad. In addition to urging that States maintain policy coherence domestically (Principle 4), the Guiding Principles should also articulate measures that States should undertake to ensure the primacy of international human rights law, particularly when engaging in international trade and investment agreement negotiations.

3) Be clearer on the human rights responsibilities of business enterprises.

Consistent with earlier reports by the SRSG to the Human Rights Council, the Guiding Principles should state that the corporate responsibility to respect human rights exists independently of States' human rights obligations under national or international law, and that all business enterprises have the same responsibilities to respect all human rights irrespective of the country, sector, or specific context in which they operate. Businesses should be given clear guidance on the need and modalities to avoid contributing to human rights abuses committed by other actors whether at home or abroad. Proper consultation and engagement with local communities should be given a central place in corporate human rights due diligence processes.

4) Provide more robust guidance on protecting and respecting the rights of women, children, Indigenous peoples, and human rights defenders.

Although the Human Rights Council directed the SRSG to integrate a gender perspective throughout his work and to give special attention to persons belonging to groups in vulnerable situation, in particular children, the draft Guiding Principles fail to provide clear guidance as to how States and business entities should address these issues. Clear guidance should be provided by drawing from recommendations made by other UN Special Procedures, UN human rights treaty bodies, the UN Permanent Forum on Indigenous Issues, and the International Labor Organization. Further, explicit reference to relevant treaties and declarations, should be included in the Guiding Principles when articulating the sources of internationally recognized human rights that companies must respect (Principle 12 a). These include core human rights treaties such as the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Elimination of Racial Discrimination and the Convention on the Rights of the Child, as well as the UN Declaration on the Rights of Indigenous Peoples, and internationally

recognized labour standards, such as ILO instruments such as the Indigenous and Tribal Peoples Convention 169, among others.

5) **Provide more explicit recognition and greater consideration of the human right to an effective remedy of individuals and communities who have suffered business-related human rights abuses.**

The draft Guiding Principles do not adequately reinforce the central importance and established guarantees under international law of the human right to an effective remedy, and in particular the right to reparation as a substantive dimension of the right to an effective remedy. Much of the focus of the guidance is on grievance mechanisms, with only a single principle (24) dealing with judicial mechanisms, which are necessarily at the core, albeit not the sole modality, of effective remedies under international law. Voluntary mechanisms, including operational level grievance mechanisms, do not provide an appropriate and adequate means of safeguarding human rights against business abuse. The Guiding Principles should take a comprehensive approach to remedies that include: effective legally-binding remedies consistent with international human rights law; voluntary mechanisms; and other measures that will ensure adequate remedies. Operational level mechanisms should report to public human rights authorities, such as national human rights institutions, about the grievances so that they may monitor and respond if issues raised involve the public interest. Additionally, the Guiding Principles should clearly refer to and address businesses' responsibility to respect the human right to an effective remedy.

Lastly, there is currently no guidance for States on measures to assist individuals and communities to overcome obstacles to justice, such as large imbalances in power, resources and information compared with business actors. States should adapt their legal and policy frameworks with a view to ensuring victims can exercise their right to an effective remedy, including by reducing or eliminating financial barriers to access public justice mechanisms, and by making the functioning and decisions of those mechanisms more effective.

The Need for Robust Follow-on Mechanisms at the UN

Looking ahead, the United Nations human rights system should continue to address the impact of business on human rights. One important step will be to review the Protect, Respect and Remedy Framework as it is applied in practice, with the aim of distilling valuable lessons that can benefit the protection of human rights. Follow-on institutional arrangements within the United Nations human rights system should be created to:

- Assess the implementation of the Framework and the Guiding Principles, by receiving information from a variety of sources, including rights-holders, and examining their implementation, including by undertaking site visits;
- Elaborate additional guidance as needed and in a manner that addresses the experiences and difficulties faced by victims of business-related human rights abuse;
- Examine and propose measures, mechanisms or institutional arrangements that may be necessary to effectively promote respect for human rights in the context of global business activity.

We urge the Human Rights Council to create one or more Special Procedures or mechanisms to fulfil these functions, so as to ensure further development of robust, clear and workable guidance for the protection of human rights against business-related abuse.

[i] The Protect, Respect and Remedy Framework was proposed by the SRSG in 2008 (UN Doc A/HRC/8/5) and rests on three principles: the state duty to protect against human rights abuses by third parties, including business; the business responsibility to respect human rights; and greater access by victims to effective remedy.

[ii] Additional civil society support for this statement will be forthcoming throughout the month of January.