



**International Chamber of Commerce**

*The world business organization*

38, Cours Albert 1er, 75008 – Paris, France

Telephone +33 1 49 53 28 28 Fax +33 1 49 53 28 59

Web site [www.iccwbo.org](http://www.iccwbo.org) E-mail [icc@iccwbo.org](mailto:icc@iccwbo.org)



**ORGANISATION INTERNATIONALE DES EMPLOYEURS  
ORGANIZACIÓN INTERNACIONAL DE EMPLEADORES  
INTERNATIONAL ORGANISATION OF EMPLOYERS**

Chemin de Joinville, 26

CH - 1216 Cointrin/Geneva

Telephone +41 22 929 00 00

Web site: [www.ioe-emp.org](http://www.ioe-emp.org)

Fax +41 22 929 00 01

E-mail: [ioe@ioe-emp.org](mailto:ioe@ioe-emp.org)

*Joint views of the IOE and ICC on the draft  
“Norms on the responsibilities of transnational corporations and other  
business enterprises with regard to human rights”*

## **THE SUB-COMMISSION’S DRAFT NORMS**

*(If put into effect, it will undermine  
human rights, the business sector of society,  
and the right to development)*

*The Commission on Human Rights needs to end the confusion  
that the Draft Norms is causing by setting the record straight*

*March 2004*

# *Table of contents*

## **INTRODUCTION**

### **I. THE ROLE OF THE STATE IN THE REALIZATION OF HUMAN RIGHTS**

1. The State is the duty-bearer of human rights obligations, not private persons
2. The concept of “horizontal effects” is essential to a State’s fulfilment of its duties
3. Most human rights require balancing decisions
4. “Norms” and “standards” are jargon that hide the need for balancing
5. The marginalization of economic and social rights
6. Positive and negative approaches to promoting human rights
7. The rhetoric of “human rights” can be very confusing

### **II. THE PROBLEMS WITH THE SUB-COMMISSION'S DRAFT *NORMS***

#### **1. The Sub-Commission has misused its authority**

- A. The Sub-Commission has misrepresented human rights law
- B. The Sub-Commission has created the appearance that it has changed international law
- C. The Sub-Commission has violated the principles of transparency and accountability

#### **2. The draft *Norms*, if given effect, will create serious legal problems**

- A. The Norms is an extreme case of vagueness, and this will produce arbitrariness
- B. The Norms' vagueness will result in violations of the rights of private business persons
- C. By privatizing human rights, the Norms would result in the violations of the rights of others
- D. The basic obligations in Article 1 are indeterminate
- E. Conclusions

#### **3. The draft Norms will legitimize the vilification of private persons**

- A. The role of vilification as a political tool
- B. Shifting the vilification to private persons

#### **4. The draft Norms privatizes human rights by divorcing the activities of private businesses from the duties of the State**

#### **5. The Sub-Commission's draft reflects a negative attitude towards business**

### **III. WHILE THE SUB-COMMISSION HAS TAKEN A NEGATIVE APPROACH, THE UN NEEDS TO DO MORE TO SUPPORT BUSINESS**

1. Realization of the right to development depends upon the promotion of business
2. There are many links between business, development, and the enjoyment of human rights
3. The false dichotomy between “businesses” and “human rights organizations”
4. Conclusion

### **CONCLUSION**

**The Commission Needs to End the Present Confusion by Setting the Record Straight**

## INTRODUCTION

The International Organisation of Employers, and the International Chamber of Commerce, strongly support greater efforts to secure the enjoyment of human rights, especially in the often neglected field of social and economic rights.

The Sub-Commission is to be respected for its hard work and dedication in producing the draft “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises With Regard to Human Rights.”<sup>1</sup> But while we respect the Sub-Commission’s efforts, we believe that its proposed *Norms*, if given effect, will undermine the progress being made to promote human rights.

First, however, we would like to introduce ourselves. The International Organisation of Employers (IOE) is the largest representative of employers worldwide, with more than 135 members. The IOE has been promoting economic and social rights for 84 years. Our primary work is with the ILO, where we serve as the Secretariat for the one its Tripartite partners, the Employer’s Group. Among our many other activities, we sit on the UN Global Compact Advisory Council, and we work closely with several UN agencies. (Please see Appendix A for further information about us.)

The International Chamber of Commerce (ICC) is composed of thousands of member companies and associations from over 130 countries. We are dedicated to responsible, long-term entrepreneurship as the driving force for sustainable development, and for providing the managerial, technical, and financial resources to meet social and environmental challenges. ICC’s founders, in 1919, called themselves “the merchants of peace” in recognition of the vital role that trade plays in peace and prosperity. Today, ICC takes a leading role in addressing business ethics, environmental issues, and other vital aspects of business’s contribution to society. ICC national committees work with their members to address the concerns of businesses in their countries, and to convey ICC policy positions to their governments. (Appendix B gives more information about ICC.)

While neither the IOE nor ICC publicly calls itself a “human rights NGO,” all of our work aims at increasing the enjoyment of human rights, particularly economic and social rights.

The Sub-Commission is to be appreciated for opening up discussions about the relationships between business and human rights. But we believe that the proposed *Norms* is a step in the wrong direction. The practical effect of the draft, if it were to be given effect, would be to undermine human rights. The proposed *Norms* will also undermine the rights and legitimate interests of private businesses, and, as a consequence, will impede the realization of every society’s right to development, a right which is the foundation for the increased enjoyment of the economic and social rights of all individuals.

---

<sup>1</sup> Sub-Commission resolution 1998/8, adopting, “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises With Regard to Human Rights,” UN Doc. E/CN.4/Sub.2/2003/16 (13 Aug. 2003), and accompanying “Commentary,” UN Doc. E/CN.4/Sub.2/2003/38/Rev.2.

The Sub-Commission's draft *Norms* is an extreme case of the "privatization of human rights." Among other things, it shifts human rights duties from States to civil society actors. Its artificial definition of "human rights," together with its extraordinarily vague provisions, turn human rights into highly subjective, politicized claims – and this will undermine the credibility of international human rights law that so many people have worked so hard to achieve.

The United Nations can, and must, do more to promote business as a means for increasing the realisation of human rights. But the Sub-Commission's draft *Norms* reflects a naïve understanding of the links between promoting business and the realization of human rights, and, ultimately it seems, a negative attitude towards privately owned and operated businesses.

In short, the Sub-Commission has "created a solution" without first "defining the problem." As a result, the "solution" will not make a positive contribution.

The International Organisation of Employers and International Chamber of Commerce recommend that the Commission on Human Rights reject the proposed *Norms*. The Commission should also register its disapproval of the "false advertising" that is being used to "sell" the Sub-Commission's proposal to the public as binding, *authoritative, UN Norms*.

As the parent body of the Sub-Commission, the Commission on Human Rights needs to end the confusions that the *Norms* has given rise to. In particular, the Commission should set the record straight by stating, in unambiguous terms: that the duty-bearers of human rights obligations are States, not private actors (including private business persons); that the proposed *Norms* are neither "UN Norms" nor "authoritative"; and that the *Norms* is a draft with no legal significance without adoption by the law-making organs of the United Nations.

In Part I, we begin by placing the draft *Norms* in the context of the responsibilities of States as the duty-bearers of human rights obligations. Part II then discusses the main problems with the proposed *Norms*. Readers can go directly to Part II, of course, but since there is so much confusion surrounding the meaning and practice of international human rights law, it is important to evaluate the *Norms* within the broader context. Part III then discusses the importance of promoting business as a means for increasing the realization of human rights. While the draft *Norms* has taken an essentially "negative approach" to the promotion of human rights, we stress the need to integrate negatively-oriented measures within a broader, positive strategy.

# Part I

## THE ROLE OF THE STATE IN THE REALISATION OF HUMAN RIGHTS

### 1. The State is the Duty-Bearer of Human Rights Obligations, Not Private Persons

The State is the duty-bearer of human rights obligations under international human rights law. Only States have legal obligations, so only States can fulfil human rights. And, conversely, only a State can violate human rights. Private persons are not the duty-bearers of the rights in the UN human rights treaties, and related agreements: consequently, private actors cannot violate human rights. A private actor *can* violate a *national law* that a State has enacted to implement its international obligations: but a private person is not a “human rights violator,” properly speaking.<sup>2</sup>

This fundamental point is reflected throughout the legal literature. As *Human Rights Training: A Manual on Human Rights Training Methodology* explains, human rights “obligate States and State actors.”<sup>3</sup> The *Manual* then elaborates on this basic legal principle:

Human rights are universal legal guarantees protecting individuals and groups against actions which interfere with fundamental freedoms and human dignity. Human rights law obligates Governments to do some things and prevents them from doing others. Some of the most important characteristics of human rights are the following: . . . They obligate States and State actors.<sup>4</sup>

The *Manual* continues its explanation of “human rights”:

When something [] is defined as a right, it means that someone holds a *claim*, or legal entitlement, and someone else holds a corresponding *duty* or legal obligation. This means that Governments, and their agents, are *accountable* to people for fulfilling such obligations. The duties held (by individual States vis-à-vis their own people, and collectively by the international community of States) are in some cases *positive duties* (to do or provide something) and, in others, *negative duties* (to refrain from doing something).<sup>5</sup>

That is correct: the State, and only the State, is the duty-bearer. There is no serious disagreement on this. For instance, the executive director of Human Rights Watch, has recently observed: “International [human rights] standards apply formally only to governments, not to the corporations themselves.”<sup>6</sup>

---

<sup>2</sup> By “agreements,” we mean resolutions of the General Assembly, and other similarly authoritative, formal statements about human rights. The Universal Declaration of Human Rights is the best known example of an authoritative statement in an agreement that is not technically a treaty.

<sup>3</sup> UN Doc. HR/P/PT6, Sales No. ISSN 1020-16888 .

<sup>4</sup> *Id.*, para. 49, p. 10.

<sup>5</sup> *Id.*, para. 55, at p. 11.

<sup>6</sup> “Human Rights Organizations: A New Force for Social Change,” in Samantha Power and Graham Allison, *Realizing Human Rights: Moving From Inspiration to Impact* (St. Martin’s Press, 2000), at 225, 235

The Sub-Commission's draft *Norms* has done a great disservice by confusing people on this fundamental point. The preamble incorrectly says that private business persons (natural and legal) have "human rights obligations," and this legal error is expanded throughout the operative provisions. For instance, Article 1 says that private business persons "have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights," and other articles go on to say that these duties *shall* be enforced by courts (art. 18), that so-called violators *shall* pay reparations (art. 18), and that they shall be subjected to other political enforcement actions (arts. 15 to 18).

The draft *Norms* not only misrepresents the fundamental legal point, it has ignored the *nature* of the UN human rights treaties, and the *practical steps* that need to be taken to ensure realisation of human rights. The essential problem with the draft Norms is that it privatises human rights by making private persons (natural and legal) the duty-bearers. Privatisation leaves the real-duty bearer – the State – out of the picture. This will have profoundly negative consequences, legal and practical (as discussed in Parts II and III).

## **2. The concept of "horizontal effects" is essential to a State's fulfilment of its obligations as the duty-bearer**

While States are the entities that have human rights obligations, there are important connections between the Government's international duties and private persons (natural and legal). One of the most important of these connections is best explained by the concept of "horizontal effects."

The UN training manual quoted above makes a vital point when it says that human rights law places *positive duties* on States: the State must "do or provide" various things in order to ensure that people will actually enjoy their human rights.

In particular, a State fulfils its international obligations by making laws, and by creating institutional structures that will ensure that the Government's laws and policies can be carried out. Many of these laws will regulate the conduct of private persons, either vis-à-vis each other, or between the person and the State. *Horizontal effects* captures the idea that the State is discharging, or fulfilling, its international obligations when it enacts various types of laws that regulate the conduct of private persons. Or to put it another way, implementing the UN human rights treaties will require the State to enact numerous laws regulating the conduct of civil society actors – that is the idea behind "horizontal effects."

To illustrate the notion of horizontal effects, let us begin with an example under the International Covenant on Civil and Political Rights. The ICCPR requires the State to protect the reputation and honour of people (art. 17). Libel and slander laws are one way that the State protects these aspects of human dignity; defamation laws regulate interpersonal behaviour, and are therefore illustrations of the horizontal effects of the ICCPR. When a person engages in slander, the private actor violates national law, not human rights law.

The notion of horizontal effects is probably even more important when it comes to the International Covenant on Economic, Social and Cultural Rights. For instance, the ICESCR recognizes a right to work, a right to an adequate standard of living, and a right to the highest attainable standard of health. But while these rights are held against the State, they do not require the State to *provide* all of these social goods – the jobs, education, health care, and so forth. Instead, the rights require the State to *create the conditions* that will allow people to enjoy these “social goods.” This is the reason that the rights in the ICESCR (and their counterparts in the Convention on the Rights of the Child) are often called “obligations of results.”

Moreover, economic and social rights are *progressive* in nature, so that the State does not necessarily have to *ensure* that every person in its jurisdiction actually has the social goods in question. While the obligations of results are framed in terms of ideals or end-goals, the duties are qualified by the availability of resources: international human rights law imposes the duty on the State to *do the best* that it can to achieve the results—to take all reasonable steps towards each goal. And what is “reasonable” is judged by the realities of the situation, including the State’s resource capacities.

For instance, the right to work does not require the State to ensure that everybody actually has a job, or is actually paid a “living wage.” Instead, the duty is to take all reasonable measures to create the conditions in which people will be able to have employment, and to receive a good salary.

In short, to realize these rights, a State will have to have an extensive body of laws and regulations pertaining to civil society actors, including private business persons. These legal rules will cover many areas: labour relations, pensions and other social security measures; consumer protection; environmental protection; banking; investing; and numerous other fields. All of these laws would be examples of the “horizontal effects” of the State’s international law duties.

Tax laws are another example: a State cannot carry out its human rights obligations under any human rights treaty without money, and Governments typically obtain these revenues by requiring civil society actors to pay taxes. Taxation also redistributes wealth, and this affects the relations between people, again, through the intermediary of the State.

Under *horizontal effects*, a national law will make a private person (natural or legal) a duty-bearer, and the corresponding right-holder will be either another private person, or else the Government itself. An improper failure to fulfil the obligation will mean that the private duty-bearer has violated the law. But the private person’s breaking of a national law is not a “human rights violation”: it is a state law violation.

On the other hand, if the State has not taken reasonable steps to create the necessary conditions – for instance, if it has not enacted appropriate national laws --, then the State will probably be in violation of its international human rights obligations. Or, if the State has good laws but does not properly enforce them, then this could be a human rights violation.



We can summarize the discussion as follows:

- The State – and only the State – is the duty-bearer of human rights obligations.
- The notion of “horizontal effects” says that fulfilment of these duties will require the State to enact many laws to regulate the conduct of private persons.
- A private person who fails to carry out the state-law duties will violate nation law: but the person will not be a “human rights violator,” properly speaking.<sup>7</sup>

### 3. Most human rights require balancing decisions

The rhetoric of human rights – the way people talk about human rights -- is often confusing. For instance, speaking in terms of “human rights standards,” or “norms,” often paints a picture that is over-simplified. “Human rights norms” can give the impression that the international community has determined the specific things that a State must do, and not do, and now the only question is to carry out, or implement, those decisions.

This is often a false impression because it ignores the need for balancing decisions. Most of the rights in the human rights agreements require policy judgments about trade-offs between competing interests. “Human rights”-talk routinely ignores the need to make balancing decisions before the duties in the treaties can be translated into concrete entitlements. And when the need for trade-offs is ignored, one cannot take the practical steps that are necessary to realize human rights.

The starting point is to appreciate the need for balancing decisions.

Most economic and social rights are “obligations of future results,” or idealized statements about end-goals, rather than “obligations of conduct.” The right to work, the right to “just and favourable conditions” of employment, and the right to an “adequate standard of living,” for instance, are end-objectives. The task is to translate these abstract statements into real-life entitlements. That is to say, into concrete do’s and don’ts, or obligations of conduct, for each State.

---

<sup>7</sup> While no qualifications to these statements need to be made in the context of this paper, several nuances should be mentioned. (1) *The right-holders*. While the State Parties to treaties are both right-holders and duty-bearers to each other, there is disagreement about whether the treaties make individuals right-holders under a third-party beneficiary theory. See, Louis Henkin, “Introduction,” in Louis Henkin (ed.), *The International Bill of Rights* (Columbia Univ. Press, 1981), at 1, 14-5. This paper accepts without question that individuals are right-holders. (2) *Moral v. Legal Duties*. Since the topic is international law, this paper refers to legal duties. The Universal Declaration recognizes that individuals have ethical obligations (“[E]very individual . . . shall strive by teaching and education to promote respect for these rights,” proclamatory paragraph; see also art. 29). Promotional materials for the draft *Norms* often fail to make the distinction between legal and moral duties. (3) *Special types of duties*. Members of treaty bodies take an oath, UN staffers to the these bodies have contractual duties, and a chief purpose of the UN is to promote human rights (e.g., Charter, art. 1(3).) While these duties are *related to* human rights, only States are the duty-bearers of rights in the UN human rights treaties. (4) *Complicity*. Under national criminal law jurisprudence, one person can be guilty of “aiding and abetting” another person’s crime. While human rights treaties do not contain complicity provisions, the notion of “horizontal effects” would require a State to have appropriate criminal laws to punish private persons who are complicit in a State’s violation of human rights. The Global Compact embraces the notion of complicity in Principle 2 (“Ensure that they [businesses] are not complicit in human rights abuses.”). None of these nuances, however, change the discussion in the main text.

As Professor Philip Alston has said, “One of the most striking features of the [ICESCR] is the vagueness of the normative implications of the various rights that it recognizes.”<sup>8</sup> He has referred to the vagueness, or indeterminacy, of ICESCR rights as “the abyss.” He has argued that it is necessary for the ICESCR Committee to define the “minimum core content” of each right -- the absolute minimum entitlement of each right, the universal standards below which no State can ever fall, regardless of the circumstances. But he has also said that this task is “infinitely” difficult.

Our concern here is not about the problem of defining the absolute minimum entitlements, but about the need for balancing, which is actually the heart of the “abyss” problem.

### *Different types of balancing*

Translating the obligations of future results -- moving towards realization of the end-goals -- requires several types of balancing.

There must be trade-offs between different *categories of right-holders*. State spending on university education cuts into the budget for primary education; the judiciary’s funding needs competes with those of the ministry of labour – a pay raise for judges might mean the sacking of safety inspectors, for instance.

There must also be balancing between different *categories of rights* for each right-holder. What the State spends on cleaning up air pollution will not be available to pay for food subsidies for the poor, although everyone needs both proper food and clear air, to give one example. And there’s balancing within different applications of the *same right*: in fulfilling the right to “fair and just conditions” of employment, spending more to ensure greater work-place safety could mean a postponement of pay raises.

And then there is *balancing over time*, both for the same right-holders (e.g., as between one’s current pay-check and what is set aside for one’s future pension), and between generations (how pensions are financed, and many environmental issues, for instance).

Moreover, while the human rights treaties define the State’s duties to all person’s within its jurisdiction, there are *moral obligations* to help promote the realizations of the rights of everyone world-wide. In particular, wealthier States must assist the less-well-to-do ones. These moral obligations will affect the fulfilment of the State’s legal duties to the right-holders within its jurisdiction. This adds one more factor to the balancing equations.

And finally, the balancing will always take place in the *context of some particular real-life situation*. For instance, the meaning of “highest attainable standard of health,” and “fair and just conditions” of employment, will be context-specific: what one particular State must do with respect to a given health or employment issue will not necessarily be the same as what another State will have to do.

---

<sup>8</sup> Philip Alston, “Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights,” 9 Human Rights Quarterly 332, 351-2 (1987).

### *The progressive nature of economic and social rights*

The substantive, or sectoral, rights in the ICESCR (and their counterparts in the Convention on the Rights of the Child) are progressive in nature.<sup>9</sup> The notion of progressivity means that the level of fulfilment -- that is to say, the concrete obligations of conduct or results in the here-and-now -- depend upon the society's economic capabilities.

The duties are also progressive in the sense that what any particular person is entitled to is dependant upon the pre-existence of many things that have been built up over the years, even over generations.

For instance, while every child has the progressive right to an education, a State does not create an entire educational system for an individual right-holder. When Kim turns six and must begin school, the State already has a complex educational system that has been built up of over a long period of time: The school house, the training of teachers, the development of text books, the whole administrative structure, and on and on. The State does not create these things just for Kim: it has built them up over many years.

The same is true for the right to "just and favourable conditions" of employment. Pension plans, unemployment protection, and accident compensation programs require the existence of complex economic and administrative structures. These must be in place before Kim reaches the age of entering the workforce in order for Kim to enjoy the right to work.

While it is the State's duty to fulfil these rights, realization depends upon the State's cooperating over long time periods with civil society, intergovernmental, and other actors. Within the ILO framework, for instance, Governments, employers, workers' organizations and the ILO itself have played critical roles in creating the present day conditions under which States fulfil their duties to realize the right to "just and favourable" conditions of employment.

### *"Balancing" is a metaphor*

Most of the policy decisions that States must make on these rights are not really "balancing" decisions at all. Balancing is a metaphor. It's a figure of speech that calls to mind a balance scale -- like what a butcher uses -- an objective method of decision-making, a method that depends upon agreed standards of evaluation.

Fulfilment of social and economic rights requires people to make judgment calls in a world of imperfect knowledge, not "balancing" in the literal sense. Often, there will be disputes about the "facts" of the existing situation; and disputes about the causes of the present situation; and disputes about the future consequences of current actions; and disputes about the biggest nightmare of policy-makers -- unplanned consequences. Those unintended, often unanticipated, *bad* effects of well-meant plans that have gone wrong.

---

<sup>9</sup> Part III of the ICESCR contains the "sectoral rights," starting with the right to work (art. 6), while Part II contains the "umbrella provisions," like the right of non-discrimination (art. 2).

And moreover, the disputes will not only be about “*facts*” – past, present, or future – but about *values*. And also about *ideologies*. A person who is ideologically opposed to private ownership of businesses, for instance, will have different judgments about the rightness of how a State goes about fulfilling its obligations in case after case.

To summarize, the *obligation of future results* – as a goal or an idealized statement – is universal, or the same for all States. But the *actual results* that must be achieved in the here-and-now, and the concrete *obligations of conduct* to produce these immediate results, will vary from State to State. They will also vary over time within any given State. So these rights are both *universal* – the same abstract statement of the obligations of future results, or idealized end-objectives, apply to all State Parties --, while, at the same time, the rights are *context-specific* – that is to say, the concrete application or interpretation of the right can be different from State to State.

### ***Civil and political rights***

And the same can be said for most of the rights in the International Covenant on Civil and Political Rights (and the corresponding provisions in the Convention on the Rights of the Child).

A case in point is freedom of speech, one of best known of all human rights. The right of expression is defined in ICCPR article 19. What is often over-looked is the fact that it is made up of two opposing principles. Paragraph (2) says that “Everyone shall have the right to freedom of expression,” and paragraph (3) says that the enjoyment of this right must be balanced against such considerations as “respect of the rights or reputations of others,” and “protection of . . . public order [], or of public health or morals.” The principles in paragraphs (2) and (3) must be balanced against each other in every real-life case in order to determine a person’s actual entitlement.<sup>10</sup>

Let us take a simple case: What is the international standard with respect to burning a national flag? Do “international human rights norms” permit States to outlaw flag burning, or do they grant immunity (so to speak) to flag-burners?

The answer is: It depends! It depends on the balancing of paragraphs (2) and (3) in the particular situation at hand. What constitutes “public order,” “public morals,” and “the rights of others” may differ in one country from another, so there is no one-size-fits-all solution for all free speech cases. Moreover, the “balancing” must be done by human beings, not on a butcher’s scale, and human beings have a notorious ability to disagree with each other.

Not surprisingly, the supreme court of one country will give the green light to flag burning, while an equally ranked court in another country will give the green light to parliament’s judgment to outlaw it. Different societies, different judges, different legal answers.<sup>11</sup>

---

<sup>10</sup> It is customary to speak of paragraph (3) as a “limitation clause” to paragraph (2). Of course, paragraph (2) likewise is a type of “limitation” clause on (3). Regardless of the terminology, the fact remains that any actual enjoyment of article 19 requires a balancing of the two paragraphs.

<sup>11</sup> See, e.g., Peter Quint, “The Comparative Law of Flag Desecration: The United States and the Federal Republic of Germany,” 15 *Hastings Int’l. & Comp. L.Rev.* 613 (1992) (flag burning is a fundamental right in the U.S., while it is a crime in Germany, according to the highest judges in those two countries).

## *Summary*

All categories of rights require decisions about the appropriate trade-offs between competing interests.

To be sure, there are some rights that are standards in the true sense of the word. The prohibition of torture, and the right of a minor never to face the death penalty, do not require the balancing judgments that are necessary with the context-dependant rights. One does not make a trade-off between a particular person's interests in not being tortured, on the one hand, and public morals or the need for social order in the case at hand, on the other. Freedom from torture is applied directly to the real-life situation without the need for an intermediary balancing decision.

Moreover, it should be noted that the scope or range of balancing can vary greatly between the various human rights that requires trade-offs. In addition, a considerable amount of the work of UN organs is directed at narrowing the scope of the balancing in defined situations -- or "standard setting," as it is often called.

But the basic point remains: For most human rights, a State must make context-specific judgment calls about trade-offs. And this is especially true for the "horizontal effects": all the labour laws, family laws, environmental laws, criminal laws – *all* the laws that regulate the conduct of private persons – require judgments about the appropriate trade-offs between competing interests.

As will be discussed below, the draft *Norms* will "privatize" human rights: it will place private business persons in the position of having to make the balancing decisions that are only appropriate for the State to make. (This is discussed in Part II.2.C.)

## **4. "Norms" and "Standards" are Jargon That Hide the Need for Balancing**

The rhetoric of human rights can often be confusing. For instance, it has become the custom to speak of "human rights *norms*" and "*standards*." These words are not being used in their ordinary senses, however: they are jargon. And, unfortunately, the jargon hides the need for balancing decisions.

When one tells the butcher, "Give me a kilo of shrimp," *kilo* is a "standard." By contrast, the "progressive" right to an "adequate standard of living" is not a "standard." In their ordinary meanings, *norms* and *standards* imply an agreed basis for passing judgment on the appropriateness of the conduct in question. *Kilo* has a concrete, agreed-upon meaning by which one can judge the appropriateness of the butcher's conduct: it is a standard by which one evaluates the amount of shrimp that the butcher gives the customer, and the price that the butcher charges. But "an adequate standard of living" is a vague abstraction that contains no criteria for making objective evaluations.

In the field of human rights, *norm* and *standard* have taken on a specialized meaning. The more that balancing is required to translate the State's human rights duties into entitlements, the more "human rights standards" and "norms" becomes specialized rhetoric, or jargon.

Every professional field has its own vocabulary, and we are in no way objecting to the specialized word usage per se. We are only pointing out the fact that this rhetoric obscures the need for a State to make difficult decisions about trade-offs between competing interests.

## 5. The Marginalization of Economic and Social Rights

During her tenure as the High Commissioner for Human Rights, Mary Robinson advocated vigorously for greater attention to social and economic rights. Her efforts have made a valuable contribution because human rights advocates have traditionally focused on civil and political rights, and, within this category, on only some of those rights.<sup>12</sup>

Why it is that high profile human rights organizations have been marginalizing social and economic rights is an interesting question for specialists to explore.

But what can be said is that these human rights organizations have mainly focused on the rights that do not permit any balancing at all, like the prohibitions of torture, extra-judicial executions, and genocide, or that do not require complicated balancing judgments. Targeting abuses of these rights can portray matters in simplistic terms of “Good versus Evil.”

But, as we have just seen, social and economic rights are end-goals that require complex balancing decisions spanning long periods of institution building. These rights do not lend themselves to simple good-versus-evil campaigning. And the rhetoric of “human rights norms” can obscure the political campaigners' subjective opinions about the balancing decisions.

We understand the former High Commissioner's constructive criticisms to have been about civil society actors identifying themselves as “human rights organizations.” This is because many others have not been neglecting economic and social rights. Other civil society actors, intergovernmental organizations, and States in general, have been working to realize this category of rights for a long time.

As a result of these efforts, tremendous progress has been made worldwide in rising standards of living, increased life expectancy, and literacy and education, to name just some of the indicators of progress. The ILO, WHO, and UNICEF are only a few of the intergovernmental bodies that have been working with States to help bring about this progress.

---

<sup>12</sup> More recently, the former Higher Commissioner has referred to “the common misconception among the public and many politicians, especially in the West, that human rights is just about civil and political rights – areas in which high-profile groups such as Amnesty International and Human Rights Watch have traditionally focused.” Mary Robinson, Foreword to, Rory Sullivan, *Business and Human Rights* (Greenleaf, 2003), at 9, 10. For an earlier criticism, see Philip Alston, “The Fortieth Anniversary of the Universal Declaration of Human Rights: A Time More for Reflection than for Celebration,” in Jan Berting, et al., *Human Rights In A Pluralistic World* (Meckler, 1990), at 1, 8-11 (criticizing Amnesty International for undermining ICESCR rights).

The same can be said for civil society actors. For instance, the International Organization of Employers and the International Chamber Commerce have each been working for over 80 years at all levels of society to promote the realization of social and economic rights.

## **6. Positive and Negative Approaches to the Promotion of Human Rights**

Mary Robinson's constructive criticisms have been about the high-profile human rights organizations that concentrate on a limited range of civil and political rights. These organizations also tend to specialize in what may be called "the negative approach."

The negative approach focuses on "violations" and "abuses" of human rights, and it advocates for punishment of the "guilty" state officials, and other sanctions against these persons or the State, like reparations to the victims. The types of abuses that these organizations have traditionally targeted lend themselves to this approach.

But negative advocacy does not work very well for economic and social rights. As we have seen, ICESCR rights (and their counterparts in the CRC) require complicated balancing decisions. And they depend upon the building up of systems and institutions over long periods of time. And their fulfilment depends upon society as a whole. Creating the conditions in which every person can actually enjoy "an adequate standard of living," or "just and favourable" work conditions, needs more than State actors: it needs the combined efforts of many civil society actors, and intergovernmental organizations, and other States, all working together.

"Children's rights" and "women's rights" organizations have often provided excellent examples of the positive approach. The ILO and other intergovernmental organizations also follow this model. By integrating negative-orientated measures within a broader strategy of capacity building, problems are addressed holistically. In the campaign against child labour, for instance, programs to remove youngsters from the targeted occupations are linked to programs that will get them into school, and to family support interventions. The strategy does not concentrate only on punishing the guilty parties. It aims, among other things, to provide children and their families with real alternatives, and on changing attitudes and values so that everyone will make the best choices. The positive approach helps the State to create the conditions in which human rights can be realized.

The Sub-Commission's draft *Norms* is based on the negative approach, as will be discussed more fully in Part II. The draft is framed in terms of rules that "shall" be obeyed, and rules that call for sanctions and other enforcement actions against violators (e.g., art. 18). The draft *Norms* is just the opposite of the positive approach because it does nothing to help Governments build their capacities to realize their duties more fully. Or to help build the capacities of private business persons to comply with national laws. Or to otherwise contribute to the social conditions that underlie the progressive realization of human rights.

## 7. The Rhetoric of Human Rights Can Be Very Confusing

The present-day rhetoric of “human rights” is often very confusing, even to legal specialists. As Professor Louis Henkin has written, “‘Human rights’ is common parlance, but not all agree on its meaning and significance.”<sup>13</sup> *Akehurst’s Modern Introduction to International Law* adds another important point. “The concept of human (or fundamental) rights is certainly a dynamic one and has been subject to change and expansion,” but still, “it is important to retain the essence of the concept.”<sup>14</sup>

### *“Human rights” has multiple meanings*

This paper has been speaking of human rights in the sense used in the UN Charter, and in the subsequent UN-created agreements, like the Universal Declaration, the two Covenants, and the Convention on the Rights of the Child. The human rights treaties create legal obligations -- that is to say, specific duty-bearer/ right-holder relations --, and the aim is to ensure respect for the human dignity of each and every person. Since the Sub-Commission is a body within the UN system, it is appropriate to use the term *human rights* in accordance with its established usage when evaluating its draft *Norms*.

At the same time, however, it is important to be aware of the fact that people use *human rights* in a number of other ways. The Sub-Commission has declared that private business persons “have . . . human rights obligations,” so one must consider the possible ways that people might understand, and use, these statements in the proposed *Norms*. One must be aware of the multiple meanings of *human rights*.

There are three other usages that must be distinguished from the mainstream UN meaning.

### *Natural law*

Sometimes people use *human rights* to refer to what may best be called natural rights. In this sense, “human rights” are metaphysical claims. Metaphysical beliefs are personal matters; they are essentially transcendent, or spiritual, beliefs.<sup>15</sup>

Using “human rights” in this sense leads to a great deal of confusion. In this usage, people will say that the rights in the UN treaties are not the true rights; they are only the guarantees or promises that States have made to enforce “human rights” -- meaning, the metaphysical rights.

When such people say, “I am taking action to enforce international human rights law,” they may mean that they are using the rhetoric of “international human rights law” to ensure that other people comply with their transcendent, or metaphysical, beliefs about what constitutes “right” conduct in particular situations. The rhetoric of “internationally

---

<sup>13</sup> Louis Henkin, “Human Rights: Ideology and Aspiration, Reality and Prospect,” in Samantha Power and Graham Allison (eds.), *Realizing Human Rights: Moving From Aspiration to Impact* (St. Martin’s Press, New York 2000), at 5.

<sup>14</sup> Peter Malanczuk, *Akehurst’s Modern Introduction to International Law*, 7th Rev. Ed. (Routledge, London 2001), at 209.

<sup>15</sup> See, e.g., Karen Armstrong, *A History of God* (Ballantine Books, 1993) (“Humanism is itself a religion without God – not all religions, of course, are theistic.”), at xix.



agreed human rights” simply hides their personal beliefs on these matters. It is sometimes said that human rights is a “secular religion,” and what this expression is probably referring to is the hidden, metaphysical meaning that some people give to *human rights*.<sup>16</sup>

The “human rights” that this paper has been talking about in the above sections are based in the international legal agreements: they are not metaphysical claims. When we are speaking, let us say, of the “right to education,” we *know* that such a right exists -- without resorting to metaphysics -- because we can point to it in the relevant provision in a UN treaty. As international legal obligations, the meaning or scope of these rights are determined, first and foremost, according to the standard rules of legal interpretation, in particular, the rules agreed upon in the Vienna Convention on the Law of Treaties.

But when *human rights* are metaphysical claims, the meaning of the right, and even its “existence,” is a personal matter.

### ***Constitutional and other national laws***

Another source of confusion is the practice of referring to constitutional rights and rights in national legislation as “human rights.” A state constitution might recognize freedom of expression, and someone might call the constitutional guarantee a “human right.” Or if the state’s labour code requires employers to pay 30-days severance pay, then this might be called a “human right,” or a “human rights standard.”

While this is how some people use *human rights*, it is difficult to find a commentator in the legal literature who has given a justification for this way of speaking. One may, however, speculate on the underlying chain of reasoning. Since the ICESCR requires the State Party to respect the right to work, including the right to just and favourable conditions of work, then any state law that serves to realize this right becomes a “human right.” So the 30-day severance pay rule is a “human rights standard.”

This is one way to interpret the Sub-Commission's draft *Norms*: any State law that helps implement a human right -- anything that translates the State’s international law obligations into national law or policy -- is a “human right,” or a “human rights standard.”

There is an obvious problem with this reasoning: virtually any state law that imposes a duty becomes a “human right,” or a “human rights standard,” since nowadays international human rights law covers nearly every aspect of human well-being.

Take, for example, laws that regulate the driving of automobiles. Motor vehicle laws help implement freedom of movement, and, because they seek to prevent accidents, they also help implement the right to life and the right to the highest attainable standard of health. The horizontal effects of these three human rights will require numerous traffic laws. Thus, violating a speed limit or running a stop light becomes a “human rights violation,” at least when another person’s life, health, or freedom of movement are jeopardized.

---

<sup>16</sup> See, e.g., Elie Wiesel, “A Tribute to Human Rights,” in Yael Danieli, et al (eds.), *The Universal Declaration of Human Rights: Fifty Years and Beyond* (Baywood Publ., 1999), (“The defence of human rights has, in the last fifty years, become a kind of worldwide secular religion.”), at 3; Shelly Wright, *International Rights, Decolonisation and Globalisation* (Routledge) (“Human rights have become a kind of civil religion to many . . .”), at 12.

Of course, when “human rights” means everything, it means nothing. The further the term is stretched, the thinner it becomes; the once powerful idea of “human rights” is reduced to triviality.

### ***Rhetorical flourishes***

People also use rights-rhetoric as a way to add emotional emphasis to their claims. Saying, “I have a right to [fill in the blank]!,” can mean simply, “I feel very, very strongly about what I am saying! If you do (or don’t do) such-and-such, I will be extremely angry with you!” In this usage, *human rights* is a rhetorical device to express feeling and to gain attention.

### ***The confusions of “human rights” rhetoric***

A final observation needs to be made about the rhetoric of “human rights.” Since “human rights” has such positive connotations, there is a tendency for some people to use the term as much as possible. Thus, one sees expressions like “human rights issues,” “human rights concerns,” “human rights challenges,” and “impact on human rights.” It is often difficult to know what exactly the speakers have in mind.

What does “human rights values” mean? Since human rights aim to protect and promote human dignity, and since virtually all significant areas of life are connected in some way to the rights recognized in the various treaties and declarations of the United Nations system, what value is not a “human rights value”? What challenge worthy of attention by the community of States is not in some way a “human rights challenge”?

### ***Conclusion***

In short, when someone asks, “Can private persons violate human rights?,” one may first need to demand a clarification: “Tell me what you mean by *human rights*.” In examining the literature on “business and human rights,” it is surprising to see how often commentators do not make their meanings clear. Commentators frequently have natural rights, or transcendent beliefs, in mind; occasionally this is made explicit, but more often than not one must deduce the metaphysical, or spiritual, meaning from a close reading of the text.

As will be discussed in the next Part, the Sub-Commission has greatly added to the confusion by its unusual definition of “human rights,” and by its incorrect assertions about international law.



## Part II

### THE PROBLEMS WITH THE SUB-COMMISSION'S DRAFT NORMS

#### 1. The Sub-Commission Has Misused Its Authority

##### A. The Sub-Commission has misrepresented human rights law

States, and only, States, are the duty-bearers of human rights obligations, as was discussed in Part I. The Sub-Commission's draft *Norms* conflicts with international law because it declares that private persons are the duty-bearers.

In the *Norms'* preamble, the Sub-Commission proclaims:

[para. 14] *Reaffirming* that transnational corporations and other business enterprises, their officers – including managers, members of corporate boards or directors and other executives – and persons working for them have, *inter alia*, human rights obligations and responsibilities and that these human rights norms will contribute to the making and development of international law as to those responsibilities and obligations.

[para. 15] *Solemnly proclaims* these Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights and urges that every effort be made so that they become generally known and respected.

This is improper: the members of the Sub-Commission cannot affirm something that is not true: only States are the duty-bearers of human rights obligations under international law.

The Sub-Commission expands this misstatement throughout the operative paragraphs of its proposed *Norms*. For instance, article 1 reads, in part:

[T]ransnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law . . . .

When the *Norms* is read as a whole, the Sub-Commission is clearly saying that private persons are duty-bearers under the international law on human rights, particularly when the preamble is read in light of the operative provisions, such as Article 1 quoted above, and the provisions that require courts to enforce the draft *Norms* (art. 18).<sup>17</sup>

The Sub-Commission's draft is not in conformity with international law.

---

<sup>17</sup> Preambular paragraph 14 speaks of "human rights obligations." When read in isolation, some people might think that it is referring to ethical obligations, in which case the statement would be correct. However, the expression must be read in its most natural sense, and read in conjunction with the entire text, including Article 1 and the enforcement provisions. Under the most natural understanding of the expression, "human rights obligations" refers to the obligations imposed by the rights in international human rights law, and since only States are the duty-bearers, only States have human rights obligations. So paragraph 14 is making an incorrect assertion. If one wishes to speak about the responsibilities of private persons, "ethical obligations," rather than "human rights obligations," would be the correct term.

## **B. The Sub-Commission has created the appearance that it has changed International law**

The Sub-Commission has given the impression that, by its own authority, it has changed international law by making private persons the duty-bearers of human rights obligations.

First, the Sub-Commission has not presented its draft as a *recommendation* that the Commission take steps towards the imposition of duties on private business persons. Neither the text of the draft *Norms*, nor the annexed Commentary, nor the adopting resolution, are framed in terms of a suggestion or recommendation.

It should be recalled that in 1998 the General Assembly decided that it is not appropriate for international law to impose legal duties on private actors in regard to human rights. The “Declaration on the Rights and Responsibilities of Individuals, Groups and Organs of Society to Promote Universally Recognized Human Rights and Fundamental Freedoms” is a re-affirmation of the duties of States.<sup>18</sup> But the Sub-Commission has not presented its work as a recommendation to change this decision.

To the contrary: the Sub-Commission's presentation of its draft *Norms* gives the impression that private persons right now have human rights duties, that they can violate human rights.

In other words, prior to 13 August 2003, when the Sub-Commission passed its adopting resolution, only States were the duty-bearers of the obligations imposed by the ICCPR, ICESCR, the Convention on the Rights of the Child, and the other UN human rights agreements. But upon that date, international law went through a fundamental change. The members of the Sub-Commission, by their own authority, have imposed legal obligations upon perhaps a billion or so private persons (natural as well as legal). That is the appearance that the Sub-Commission has created by not clearly framing its work in terms of a recommendation to the law-making organs of the UN.

Third, this same impression is being given in the publicity materials for the draft *Norms*.

Publicity campaigns are now calling the Sub-Commission's document “the UN Norms.” (The words “United Nations” or “UN” do not appear in the title of the Sub-Commission's *Norms*.) The public is being told that the so-called “UN Norms” is “authoritative”; that “the UN Human Rights Norms for Business oblige [sic] businesses” to comply with its provisions; that it is an “authoritative and comprehensive set of global business standards bearing the UN imprimatur – a powerful symbol of legitimacy and universality”; and that there is no need for the Commission on Human Rights, or any other UN organ, to take additional action to make them legally effective, but only that the Commission “should support the UN Norms” by a “resolution welcoming [the Sub-

---

<sup>18</sup> G.A. resolution 53/144 (1998). The one mention of private actor duties (art. 18) is only a re-statement of the general *ethical* principle contained in the Universal Declaration. See footnote 7, above. Human rights ngos were strongly against any step beyond the Universal Declaration's general statement, and the community of States agreed with them.

Commission's] adoption," -- that the Commission's "support" or "action . . . is not [] a prerequisite for the legitimacy of the UN Norms."<sup>19</sup>

Fourth, the Sub-Commission cannot "wash its hands" of all of the false and misleading "marketing" of the draft *Norms*. Private organizations conducting publicity campaigns have had close connections with the members of the Sub-Commission in the preparation and promotion of the draft *Norms*. Under such concepts as the precautionary principle and complicity (with are contained in the draft *Norms*), and other legal concepts like "piercing the corporate veil," members of the Sub-Commission, and the Sub-Commission as a whole, can bear responsibility for other organizations' false and misleading representations about the proposed *Norms*.

Moreover, we have not seen any of the members of the Sub-Commission make public statements saying that this publicity is erroneous.

The Sub-Commission has no authority to create international law; in particular, it has no right to impose duties on private persons. Its resolutions, studies, and other work might be used by competent authorities, in conjunction with other materials, in determining whether some particular practice has achieved the status of customary international law, but it has no legal capacity to make law.

There are a number of ways in which the draft *Norms* can be said to privatise human rights. When "twenty-six independent experts" purport to impose duties on other people, or give the appearance of having imposed duties, the action is "privatisation" because private persons are performing the functions of States.

In short, appearances suggest that the Sub-Commission may have been trying to use its *Norms* to impose duties on private persons, in which case it has acted *ultra vires*.<sup>20</sup>

### **C. The Sub-Commission has violated the principles of transparency and accountability**

The Sub-Commission has not lived up to the principles of transparency and accountability. The working-group that wrote the "Norms" said, in a "restricted" report, that:

Any draft guidelines for companies raises difficult issues as to the human rights obligations of non-state actors – a subject that requires further study by the Sub-Commission.<sup>21</sup>

---

<sup>19</sup> There are other erroneous claims being made in the publicity campaigns as well. For instance, some advocates try to convince the reader that there is nothing novel about international law making private actors the duty-bearers. Readers are incorrectly told that, "ILO Conventions . . . place substantive duties . . . directly on companies," for example. Citations for this quotation and the ones in the main text are not provided in this paper because the intention is to make a general point, rather than to call attention to any particular organization. The originals are on file with us, however, and can be viewed by interested States or others with a need to know.

<sup>20</sup> *Black's Law Dictionary, 7<sup>th</sup> Ed.* (West Group, 1999) (defining *ultra vires* as, "Unauthorized: beyond the scope of power allowed or granted by a corporate charter or by law"), at 1525.

<sup>21</sup> Draft Universal Human Rights Guidelines for Companies, UN Doc. E/CN.4/Sub.2/2001/WG.2/WP.1, RESTRICTED, at para. 14.

This is a candid admission: the “human rights obligations” of private persons is indeed a difficult issue since it is States that are the duty-bearers of the obligations, not private actors. But this blunt acknowledgement *was removed* from subsequent versions of the report.<sup>22</sup>

Even more seriously, the Sub-Commission never the addressed the “difficult issue.” Neither in the working group’s reports, nor in any other reports of the Sub-Commission, has the fundamental issue been addressed. States have the obligations to comply with international human rights law, not private persons: What, therefore, is the legal basis for the statements in the draft *Norms* which say that private persons have these obligation? The Sub-Commission appears to have gone out of its way to avoid addressing this question.

### ***Conclusion***

The Commission on Human Rights is not only the parent body of the Sub-Commission, it is also a principal organ in the UN system of law-making. The Commission has the authority, and the duty, to correct the Sub-Commission’s misuse of authority. The Commission must set the record straight on, first, the fact that only States are the duty-bearers under human rights law, and, second, the legal status of the Sub-Commission’s draft *Norms*.

## **2. The Draft *Norms*, If Given Effect, Will Create Serious Legal Problems**

Articles 1 to 14 of the draft *Norms* could have been reduced to one simple sentence: “Businesses must obey all the laws applicable to them.” If the Submission’s intention was to help ensure that businesses obey existing laws, then this would have been sufficient.

But the Sub-Commission’s intention appears to have been very different. The draft *Norms*, if it were to be given effect, would impose a vast array of new duties on private business persons; in particular, it would make private persons the duty-bearers of international human rights. And the duties in the draft are vague in the extreme, which would result in arbitrariness, and the violations of rights.

Moreover, the Sub-Commission never explained why it wanted to impose such duties on private persons: the principles of transparency and accountability have not been respected.

### **A. The Draft Is An Extreme Case of Vagueness, And This Will Produce Arbitrariness**

The Sub-Commission has written legal provisions that are the epitome of vagueness. If its draft is given effect, this extreme indeterminacy will result in arbitrariness, and arbitrariness will mean widespread violations of human rights of those persons against whom the *Norms* would be applied.

---

<sup>22</sup> E.g., Human Rights Principles and Responsibilities for Transnational Corporations and Other Business Enterprises, UN Doc. E/CN.4/Sub.2/2002/WG.2/WP.1/Add.1.

Here are a few examples of extreme vagueness:

Private business persons have the obligation to “secure the fulfilment” of the “right to development” (arts. 1 and 23).

These private business persons “shall carry out their activities in accordance with . . . human rights . . . and the precautionary principle, and shall generally conduct their activities in a manner contributing to the wider goal of sustainable development” (art. 14).

They “shall . . . respect . . . administrative practices, . . . the public interest, developmental objectives, social, economic and cultural policies including transparency, accountability . . . and the authority of the countries in which the enterprises operate” (art. 10).

They “shall . . . contribute to the[] realization of [all of the rights in the ICESCR, ICCPR, and the CRC, etc.]” and “shall refrain from actions which obstruct or impede the realization of those rights” (art. 12).

They shall “secure the fulfilment of . . . [the] interests of indigenous peoples” (art. 1).

Moreover, these indeterminate duties are to be enforced in the following ways:

Private business persons “shall provide . . . reparations to [everyone and every entity] that ha[s] been adversely affected by failures to comply” (art. 18).

They “shall apply and incorporate these Norms in their contracts . . . or other dealings . . . in order to ensure respect for and implementation of the Norms” (art. 15).

And finally, all of these provisions “shall be applied by national courts” (art. 18).

The Sub-Commission has written legal rules that are unparalleled in their vagueness. What does “the right to development” mean? What exactly are a State’s legal duties, if in fact it has legal duties, under the right to development? But our concern is with placing legal duties on *private persons*: What exactly is the substantive content of the “right to development” -- with respect to the duties of private business people?

Professor Philip Alston has referred to the extremely indeterminate rights in the International Covenant on Economic, Social and Cultural Rights as the problem of the “abyss.”<sup>23</sup> But despite the abyss faced by States, the Sub-Commission’s draft *Norms*, if given effect, would impose on private business persons the obligation to “secure the fulfilment” of the extremely indeterminate rights -- the end-goals -- in the ICESCR.

---

<sup>23</sup> Philip Alston, “Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights,” 9 *Human Rights Quarterly* 332, 351-2 (1987).



The Sub-Commission has not recognized the need for clarity and determinacy in legal rules that are to be applied against civil society actors. And it has compounded the problem of indeterminacy by making its provisions enforceable through judicial and political means.

### **B. The Draft's Vagueness Will Result in Human Rights Abuses Against Private Business Persons**

The draft *Norms*' extremely vague provisions will result in arbitrary enforcement action, by the State as well as by civil society actors, against the addressees (i.e., the persons covered by the *Norms*). And arbitrary enforcement will have innumerable adverse impacts on the enjoyment of the human rights of the business people affected.

Law-related enforcement actions include lawsuits, and threats to sue, by the State and by other businesses (art. 18). Enforcement includes refusals to comply with contracts (art. 15): The Purchaser accuses The Supplier of violating human rights, and then enforces the *Norms* by refusing to pay. Or The Company refuses to honour an agreement with The Union, using the same argument (art. 9). Or The Manufacturer boycotts The Sub-Contractor for failure to live up to the *Norms*, until the later goes bankrupt (art. 15).

A large percentage of the world's businesses are not corporations. The draft *Norms* applies to business enterprises that consist of a single person, a family, or a partnership, in which cases the addressees are natural persons. The right to protection of one's honour and reputation, the rights to an adequate standard of living, to work, to earn living, to own property, to make contracts and otherwise form associations with others, and so forth, can all be impaired by arbitrary actions undertaken pursuant to the *Norms*.

While legal persons are not right-holders under the UN human rights treaties, arbitrary enforcement against a corporation can impair the well-being and the human rights of its officers, employees, owners, customers, creditors, and so forth. Moreover, the draft *Norms* applies to businesses that are owned or operated by the State, so Governments are also opened up to arbitrary enforcement actions.

The draft *Norms* states that courts *shall* apply its vague provisions (art. 18). It should be recalled that no UN human rights treaty requires States to authorize judicial enforcement of all of its provisions, or makes all of the provisions self-executing. States have understood that there are limits to justiciability, or law-making by the judiciary. It is not only a matter of which branch of government is best suited to make certain types of balancing decisions, the problem of vagueness will result in arbitrariness in the application of the law.

The UN itself has recognized this problem. UN agencies do not permit their employees or contractees to use the rights in the Universal Declaration, or the human rights treaties, as a source of law in labour conflicts. Not even the Office of the High Commission for Human Rights permits this. The lack of precision makes it inappropriate for the UN human rights agreements to be a direct source of law in its employment and contract disputes.

International human rights law is fundamentally about preventing abuses of governmental power. Human rights laws sets out the things that States can do, and are forbidden to do, with the ultimate objective being respect for the human dignity of each and every person. Whether the duties are framed in the positive or negative, or framed in terms of conduct, results, or idealized end-goals, and irrespective of the right's abstractness or concreteness, each right seeks to avoid abuse of power by placing limits on the State's discretion to act.

The draft *Norms* is a lengthy and complex document, especially so since it incorporates by reference the Commentary, which can be used to add to, or “elaborat[e]” upon, its duties (ninth preambular paragraph). But as a legal text that is to be directly enforced, it is an astonishingly vague document. It is difficult to understand why the Sub-Commission wanted to expose so many persons (natural and legal) -- and one class of persons in particular: business people -- to such arbitrariness.

### **C. By privatizing human rights, the proposed *Norms* would result in the violations of the rights of others**

When the law imposes duties, it creates a two-edged sword. Imposing a duty grants a corresponding amount of authority to carry out the obligations. And when the duties are as vague as those contained in the draft *Norms*, the private duty-bearer is given extraordinary power to determine the obligations of conduct. This is “privatization” because it is the function of Government to define the do's and don'ts by enacting civil and criminal laws: it is not the prerogative of private actors.

A couple of hypothetical cases will illustrate the point.

The CRC recognizes the right to the highest attainable standard of health (art. 24), and this right includes, among other things, prenatal care for babies (art. 24(2)(d)). Round Tire Company now imposes a number of conditions on employment: people who work for it must not smoke at home if children live there, and pregnant women cannot do anything that will jeopardize the health or life of the baby, unless absolutely required to save the life of the mother.

Round Tire Company is criticized for its policies. It responds by saying that it is securing the fulfilment of human rights under the CRC. Not only has the draft *Norms* authorized Round Tire to impose these conditions, it must impose them (art. 1): international law, which is higher than state law, requires it to “secure the fulfilment of” the Convention on the Rights of the Child. If it does not take this action, it can face serious consequences for its failures.

Big Mountain Mining Company is suffering from attacks by armed groups. It sets up a security force, and, in the ensuing confrontations, numerous lives are lost. Big Mountain justifies its actions on the basis of the *Norms*: international law imposes on it the duty to secure the right of life of all of its employees: that duty gives it the right to take all the necessary measures to protect its workers' enjoyment of this right.

And Sweet Soda Factory fulfils the “right to water” of all the inhabitants of the town in which it operates. Sweet Soda is then criticized because its pumping operations are depleting the water table to such an extent that later generations could be harmed. But

it does not stop. In order to avoid violating its duties to all of the right-holders in the town, it must continue its pumping operations, according to the lawyers for Sweet Soda.

All of these hypothetical illustrations are cases of “privatization of human rights” because private actors have replaced the State as the entity that must make the balancing decisions. If the draft *Norms* were given effect as international law, private business actors would be forced to make the tough decisions about trade-offs. In doing this, they would have to act from the perspective of protecting themselves from sanctions for failure to act; and, given the extreme vagueness of the duties, and given the need to protect themselves, the private actors will have to have wide discretion, or a large margin of appreciation.

The Sub-Commission has made a fundamental mistake: it is wrong to privatize human rights. Only States are the duty-bearers of human rights obligations: it is their responsibility to make the determinations about trade-offs between competing interests, and to do so from an all-encompassing perspective, and to do so by enacting clearly defined laws. If taken seriously, the draft *Norms* would change all this by privatizing the balancing decisions.

#### **D. The basic obligations in Article 1 are indeterminate**

Article 1 of the draft *Norms* sets down the basic obligations, which are then elaborated upon in articles 2 through 14. Article 1 reads:

Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to

- [1] promote,
- [2] secure the fulfilment of,
- [3] respect,
- [4] ensure respect of [,] and
- [5] protect

human rights recognized in international as well as national law . . . .  
[Brackets and indentation added.]

Article 1 fails to state clearly what private businesses must do and must not do. Every phrase creates a mystery. To give some examples:

#### ***Secure the fulfilment of human rights***

The legal obligation to “secure the fulfilment of” human rights is an extraordinary, and ultimately, impossible burden. Even States do not have the duty to *secure fulfilment*, or ensure actual enjoyment, of all human rights. As we have seen, economic and social rights are progressive in nature, and almost all rights require trade-offs between right-holders, and between the rights themselves. With a few exceptions, the rights in this category are statements of end-objectives, or obligations of future results, so the State is only required to *make reasonable steps* towards their fulfilment.

It is extremely difficult to conceptualize what it would mean for a *private person* to have the duty to *secure the State’s fulfilment* of any type of right, not just social and economic rights. Human rights are the duties of States. A State has obligations to all of the

individuals in society to do, and not to do, various things – each right defines a relationship between the State and each of these individuals.

But “secure the fulfilment of” does not make sense when speaking of the duties of a private person in connection to this relation. A (the State) has a particular duty to B (an individual right-holder): to place a duty on C (a private person) to secure the fulfilment of A’s duties to B is an extraordinary innovation. It is difficult to image what C’s duties would actually entail in real-life situations.

### Respect human rights

What *exactly* does “respect human rights” mean in Article 1?

Almost all words have multiple meanings, and *respect* has at least three. It can mean *to feel or show deferential regard for: esteem* (e.g., “You must respect Secretary General Kofi Annan”). It can mean *to avoid interference with* (e.g., “Respect your colleague’s work-space!”). And it can mean *to avoid violation of* (e.g., “Respect the speed limit.”)<sup>24</sup>

But what does *respect* mean in Article 1, and in every other instance in the draft *Norms*?<sup>25</sup>

The other commands in Article 1 are likewise mysterious: *protect human rights*; *ensure respect for human rights*; and *promote human rights*. While these are common rhetorical expressions, the draft *Norms* is not supposed to be an exercise in oratory: it is intended to eventually have effect as a legal document. So what is the legal meaning of each of these phrases?<sup>26</sup>

### ***The draft Norms’ definition of human rights is a legal fiction***

The draft turns *human rights* into a legal fiction. The last sentence of the last article defines the term:

---

<sup>24</sup> The definitions are from *Webster’s II: New Riverside Dictionary* (Berkley Books 1984), at 595.

<sup>25</sup> In the literature on economic and social rights, one often sees “respect” used in a simplistic conceptual framework involving three terms: respect, fulfil, protect. These words are not found in the definition of the rights in the ICESCR, however, so the conceptual framework is not trying to fix the legal meaning of a legal term. Moreover, the definitions that commentators give are confusing: e.g., “The obligation to *respect* requires States to refrain from interfering with the enjoyment of” ICESCR rights. E/C.12/2000/13, at p. 17, [appendix] para. 6. But commonsense suggests that if a State is not doing enough to realise ICESCR art. 6, then it has interfered with the right-holder’s enjoyment of the right to work, that is to say, it has not respect the right to work. In other words, “fulfil” is a sub-set of “respect.” See, e.g., *Right to Adequate Food As A Human Right*, Sales No. E.89.XIV.2 (1989) (saying that “respect” and “fulfil” are “levels of obligation of the State,” but without explaining how the levels relate to each other), at paras. 60(a) and 66. Moreover, the treaty-bodies have not clarified matters; e.g., “The obligation to *respect* existing access to adequate food” is speaking of respecting access to food supplies, not “respecting the right to food.” CESCR Gen. Com. No. 12, at para. 15. Moreover, the Committee is speaking about the duties of States. Finally, in Article 10 of the draft *Norms*, “respect . . . national law” clearly means “to not violate.” But while private persons can violate national laws, they cannot violate human rights. So what *exactly* does “respect” in Article 1 mean?

<sup>26</sup> For instance, what is difference between “protect human rights” and “protect the enjoyment of human rights”?

The phrases “human rights” and “international human rights” include civil, cultural, economic, political and social rights, as set forth in the International Bill of Human Rights and other human rights treaties, as well as the *right to development* and rights recognized by *international humanitarian law*, *international refugee law*, *international labour law*, and *other relevant instruments* adopted within the United Nations system. [article 23, last sentence] [Emphasis added.]

The italicized words are not “human rights,” as that word is normally understood.

For one thing, the “right to development” is usually understood as a collective, or people’s, right, while “human rights” are normally understood to mean rights held by the individual, the realization of which is fundamental for the person’s human dignity.<sup>27</sup> *International humanitarian law*, *international refugee law*, and *international labour law* are distinct bodies of law, as is international human rights law: that’s why each has its own name.

### ***The definition is circular***

The phrase *other relevant instruments* is another mystery. The draft *Norms* says that “human rights” includes those rights recognized in “relevant instruments” (art. 23) But one cannot know what is “relevant” without knowing what a “human right” is. And since the Sub-Commission has created a legal fiction, the ordinary usage of the term is no longer a guide to meaning. This part of the definition is circular, which means that the basic obligations in Article 1 are even more indeterminate than first imagined.

Finally, the draft is not internally consistent. While the definition in Article 23 speaks of “human rights” in terms of “international instruments adopted within the United Nations system,” Article 1 speaks of *human rights recognized in ... national law*. [Emphasis added.] What exactly does that mean?

### **“within their respective spheres of activity and influence” is an empty phrase**

Article 1 contains another strange phrase:

*Within their respective spheres of activity and influence*, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law . . . . [Emphasis added.]

Promotional materials for the draft place great significance on the phrase *within their respective spheres of activity and influence*. One is given the impression that this clause protects private business persons from undue burdens, that it is some sort of a safeguard. In reality, it is an empty phrase.

No one can act outside of one’s sphere of activity; no one can produce any result beyond one’s sphere of influence. Every action, and every effect of one’s actions, are within the “sphere of activity and influence” of the actor – by definition.

---

<sup>27</sup> Centre for Human Rights, *Right to Adequate Food as a Human Right* (1989), Sales No. E89.XIV.2, at para. 60(a) (“Human rights express relations between the individual and the State.”).

The earlier hypothetical case of Round Tire Company illustrates the point.

When Round Tire's child-protection policies are criticized, it replies by saying that it is “securing the fulfilment of human rights” under the CRC. It has the *capacity* to impose these conditions, and it has *made the policy decision* to impose them: it is acting within the sphere of its activities and influence.

What everyone needs to know is: What would be the *duties* of the private business persons to act (or refrain from acting) if the Sub-Commission's draft were to become part of international law? These are not factual questions about a private person's capacity to act, or the course of action actually undertaken. These are legal questions about the meanings of the provisions in the draft *Norms*.

The Sub-Commission produced lengthy reports on the proposed *Norms*, and the promotional materials for them are running into the many hundreds of pages. But the meanings of the critical terms are ignored.

### ***Conclusions***

The Sub-Commission's draft *Norms* does not meet the most basic requirement of the rule of law: “fair notice” requires that a person not be exposed to indeterminate liability. It is hard to understand why the members of the Sub-Commission were so eager to try to impose duties on private business persons, but so unconcerned about defining what the duties really mean.

### **3. The Draft *Norms* Will Legitimize the Vilification of Private Persons**

The draft *Norms* not only will result in serious legal problems, it will also lead to abuses by civil society actors.

Law does not operate only in the formal realm of courts and administrative tribunals. The socio-political dimension of the law is equally important. Law is very much concerned with legitimacy. The law reflects, supports, and even creates society's perception of legitimacy. This is true with respect to the State itself and the exercise of power by State officials, and it holds for the conduct of civil society actors as well.

“Human rights” are especially concerned with legitimacy. It is probably fair to say that most of the work of human rights activists is directed at de-legitimizing particular behaviours of States, and legitimizing some particular behaviour to replace the status quo. The emphasis is overwhelmingly on change. Although the rights in the various UN treaties can be used to protect aspects of the status quo, the very notion of progressive rights entails change, and almost all human rights activism is directed at altering the status quo. But regardless of the particular issue, the battle is over legitimacy: “human rights” is very much a socio-political struggle for the “hearts and mind” of society with respect to what are the appropriate uses of power and authority.<sup>28</sup>

---

<sup>28</sup> See, e.g., Paul Gordon Lauren, *The Evolution of International Human Rights: Visions Seen* (Univ. of Pennsylvania Pres, 1998).

In evaluating the Sub-Commission's proposed *Norms*, equal attention must be given to its impact within the socio-political dimension of life.

### **A. The Role of Vilification as a Political Tool**

The executive director of Human Rights Watch, is a good guide to how political organizations use "human rights" in all its many senses. "The human rights movement has to build and channel outrage," he explains.<sup>29</sup>

It is a sign of the strength of the human rights movement that, today, no government wants to be known as a human rights violator. That is hardly to say that no government violates human rights, but every government does try to hide its abuses. Being seen to respect human rights has become an important part of a government's legitimacy before its own people and the international community. Press coverage of abuses can stigmatize and delegitimize a government before its public and peers. Governments will go to great lengths to avoid that fate.<sup>30</sup>

To gain leverage, the "generating [of] outrage"<sup>31</sup> is extended to Governments that are not the violators, but which might be in a position to influence the guilty State:

International human rights organizations therefore devote much time and energy to exerting pressure on these influential governments [e.g., the European Union] to live up to their declared policies and to use their diplomatic and economic clout on behalf of human rights. If these governments refuse, they can be subjected to the same stigmatization efforts as are used against abusive governments.<sup>32</sup>

The executive director of Human Rights Watch then gets to the heart of the matter -- legitimacy:

Why, one might ask, should an abusive government listen to the demands of an international human rights organization that may be located a continent or an ocean away? What legitimacy does an international human rights organization have to address distant human rights concerns? The answer lies in the movement's application of internationally recognized *human rights standards*.<sup>33</sup> [Emphasis added.]

The international agreements like the two Covenants create a "legal framework" that legitimates political action:

---

<sup>29</sup> "Human Rights Organizations: A New Force for Social Change," in Samantha Power and Graham Allison, *Realizing Human Rights: Moving From Inspiration to Impact* (St. Martin's Press, 2000), at 225, 235.

<sup>30</sup> *Id.*, at 231.

<sup>31</sup> *Id.*, at 235.

<sup>32</sup> *Id.*, at 233.

<sup>33</sup> *Id.*

This legal framework enables international human rights organizations to point *not* just to their *own values* but to *standards* that have broad international endorsement.<sup>34</sup> [Emphasis added.]

We have returned to our “old friend” *human rights standards* -- the jargon that hides the political actors' values and other subjective opinions.

### **B. Shifting the Vilification to Private Persons**

Under the precautionary principle (which the draft *Norms* embraces in art. 14 and elsewhere), one must anticipate all the potential impacts -- the good and the bad, and the unintended as well as planned impacts -- before taking action. The executive director of Human Rights Watch has made some important points that are directly applicable to an evaluation of the potential effects of the draft.

First is the importance of “generating outrage” as a political strategy. The cry of “Human rights violator!” carries a great deal of sting; labelling a government a “human rights abuser” has political power because of the strongly negative associations that the public has with this term.

If the draft *Norms* were to be accepted, the main effect in the socio-political arena will be to legitimate the vilification of private actors as “Human rights violators!” If the public believes that private persons are duty-bearers of human rights, then it follows that they can be “human rights violators.” The Sub-Commission's draft *Norms* will serve as the justification to use this rhetoric against private persons.

But the individuals who work for, or own, or manage private businesses have the same rights of reputation, privacy, and so forth, as any other human being, and the State must protect these interests from uncalled for, or excessive, exposure to hate- and anger-generating speech.

Businesses, and business people, already have to obey all of the laws that pertain to them. Political actors already are free to campaign on the basis of (alleged) violations of those laws. The “value-added” factor of the draft *Norms* is that it would allow activists to capitalize on the stigmatizing power of “Human rights violator!” The proposed *Norms*, if accepted, will legitimize a particularly harsh kind of name calling against private persons.

Second, as the executive director of Human Rights Watch says, what gives legitimacy to the campaigns of vilification is the fact that the activists are not acting on the basis of their personal, subjective judgments. International law has already made the decisions about what is right and wrong conduct, so their campaigns of stigmatization are only enforcing universal *standards*.

When it comes to vilification campaigns directed at governments that engage in extra-judicial executions, torture, and other clear-cut abuses, there is no problem of subjective value judgments. The facts may sometimes be in dispute, but the human rights

---

<sup>34</sup> *Id.*, at 234.



at stake are standards in the ordinary sense of the term. These situations lend themselves to campaigns based on “Good versus Evil.”

As the executive director of Human Rights Watch says, “Being *seen* to respect human rights has become an important part of a government’s legitimacy . . . (emphasis added).” It is not the reality of violating human rights, but the public’s *perception* that counts. And yet the international community has not made the innumerable policy decisions about the trade-offs that are involved in the regulation of businesses. The language of the draft *Norms* gives an illusion of universal standards, and this will give false legitimacy to vilification campaigns aimed against ordinary people. Accepting the Sub-Commission’s *Norms* will lead to abuses when political actors use its provisions to hide their personal opinions about business and governmental decisions that they do not agree with.

In short, the public’s perception of legitimacy must finally depend upon the ability of political actors to use the rhetoric of *standards* to obscure the absence of standards -- the lack of universal agreements on the innumerable balancing judgments that underlie the fulfilment of most human rights.

Third is the problem of “shake-down,” “mobbing,” or “smear campaigns.” As the executive director of Human Rights Watch explains:

Being seen to respect human rights has become an important part of a government’s legitimacy before its own people and the international community. Press coverage of abuses can stigmatize and delegitimize a government before its public and peers. *Governments will go to great lengths to avoid that fate.* [Emphasis added.]

As long as “Human rights violator!” has the power to generate outrage, private businesses will go to great lengths to avoid the fate of being targeted. There are several important implications to this truism.

For one, targeting is not an objective matter: because of the hidden value judgments underlying the decisions about human rights in general, and about the draft *Norms* in particular, targeting will be a political action.

And for another, the decision to capitulate to the demands of a vilification campaign will not typically be made on the grounds of the legal correctness of the criticisms. A business has to worry about its public image, and about the “bottom line.” Hundreds of thousands of businesses go bankrupt every year, while many others are forced into lay-offs and downsizing as a result of intensive market competition. In such a competitive environment, the costs of fighting unfair and malicious attacks in the court of public opinion -- the on-going loss of business that a vilification campaign will cause --, or the cost of legal actions against unlawful attacks, will often be foolhardy from the point of view of the viability of the business.

In short, shifting the targets of vilification from the State to private persons (natural and legal) raises profound policy, moral, and legal issues. But the Sub-Commission appears not to have considered these problems. Or if it did consider them, it did not do so in a transparent and accountable manner.

## ***Conclusion***

The Sub-Commission has made *human rights* into a legal fiction that is extraordinarily broad, and, because it is ultimately circular, indeterminate in meaning. We also saw that the basic duties in Article 1 are mysteries, and that the duties in the other articles are extremely vague. The executive director of Human Rights Watch's description of the socio-political function of "human rights"-talk helps us understand the function of the artificial definition and the extreme indeterminacy. The Sub-Commission has written its *Norms* in a way that legitimates the maximum amount of political targeting of private business persons. It gives unprecedented social sanction to the vilification of other people.

### **4. The Draft *Norms* Privatizes Human Rights By Divorcing the Activities of Private Businesses From the Duties of the State**

We have already seen several ways that the Sub-Commission has "privatised" human rights. Twenty-six "independent experts" trying to make a fundamental change in international human rights law, and legitimating the use of personal opinions about "correct" business decisions as the basis for vilifying private persons, are two types of privatization that have already been mentioned.

In this section, "privatization" refers to the divorcing of the activities and duties of private business persons from the real duty-holder, the State. This is an ironic side-effect of the Sub-Commission's negative approach to business. By fixating on violations of (impossibly vague) duties by private business persons, the Sub-Commission neglected the critical role of the State in creating the conditions in which economic and social rights are realized.

For instance, ICESCR article 7 says, in part, that the State Party

Recognizes the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular . . . [a] decent living for themselves and their families in accordance with the provisions of the present Covenant.

This is an idealized end-goal, or obligation of future results. The State does not have to provide the workers' wages: it only has to do its best to *create conditions* in which all workers in the society can be paid a decent salary.

The proposed *Norms* transposes the State's progressive duties to private business persons, and it alters the duty. In Article 8, private business actors

shall provide workers with remuneration that ensures an adequate standard of living for them and their families.<sup>35</sup>

---

<sup>35</sup> The second sentence of Article 8 is not framed as a qualification to this obligation, but a forward-looking duty to try to up-grade the remuneration over time.

Unlike the State's duty in ICESCR article 7, the obligation in the draft *Norms* is directly on the employer, and it is not progressive. Moreover, unlike the human rights obligation of the State, the duty on private business persons is enforceable in the courts (art. 18).

### ***Vagueness***

The problem of vagueness is immediately apparent: the critical terms “adequate standard of living” and “family” are not defined. It is difficult to imagine any of the private organizations that are now promoting the draft *Norms* actually inserting this obligation into their own employment contracts. It would be irresponsible for them to do so. And for the same reasons, it was reckless of the Sub-Commission to have drafted this provision as it did. As a sentiment, as a moral statement about how the world should be, Article 8 of the draft is unobjectionable. But the Sub-Commission intended its draft *Norms* to someday become law, and the duty is both unqualified and indeterminate.

But our concern at this point is with the privatization problem.

### ***Privatization***

First of all, the overwhelming reason that same businesses (and Governments) do not pay a living wage is the economy. Whether the employer is a private person or the State, the salary is determined, above all, by the overall situation of the economy. As a consequence of society's economic conditions, many employees may have to work two jobs, or both spouses might have to work, or people may need to make all sorts of unsatisfactory living arrangements just to get by. This is true in rich countries as well as in low incomes ones.

The draft *Norms* privatizes human rights because the duty to ensure an adequate standard of living is borne entirely by the private employer. There is nothing in the draft that integrates the private actor's (unqualified) duty with the duties of the State to promote the conditions under which people can progressively improve their standards of living.

Second, the Sub-Commission has privatized ICESCR article 7 because it makes “an adequate standard of living” solely a function of what a person can purchase. This ignores the importance of public goods – like clean water, public transportation, parks and playgrounds, health clinics, police, and so on. The standards of living of all but the super-rich depend upon public goods. This is especially true for those living at the lower ends of the economic scale. And, ironically, a large percentage of the world's businesses are individual or family enterprises, many of which do not earn enough for a decent standard of living.

Third, the economy is the main reason why businesses (and Governments) do not pay salaries that are sufficient for people to meet their aspirations, and the economy, like life itself, is a dynamic situation where problems are constantly arising. Bankruptcies and slowdowns hit the businesses, while lay-offs, catastrophic illnesses, accidents, and family

troubles plague the workers: all of these problems can cause a fall in the worker's standard of living.

The volatility of the economy, and of life itself, is therefore another reason why the State's fulfilment of its ICESCR duties is fundamental to enjoyment of an adequate standard of living. The State runs, or facilitates, various support services and safety-nets in order to help people cope with these problems. But the Sub-Commission privatizes human rights by placing the entire burden on private business persons. It has made no attempt to link the realities of the workers' and the employers' lives to the realities faced by States, and to the States' human rights obligations.

In short, the realization of an adequate standard of living depends upon many factors, not on just the wages that the employer pays. What an individual business can do for its employees is dependant upon the state of the economy, and upon the entire complex of things that the State is doing in all of its laws and policies in order to create the best possible conditions.

Taken as a whole, the duties that the Sub-Commission wants to impose on private business persons constitute an extreme step towards the privatization of human rights: its draft *Norms* has left the State out of the picture, even though the State is the duty-bearer.

## **5. The Sub-Commission's Draft Reflects a Negative Attitude Towards Business**

The Sub-Commission's negative attitude towards private business is reflected throughout the proposed *Norms*.

First, the only positive thing that the draft has to say about business is a passing reference in the preamble:

*Noting* that transnational corporations and other business enterprises have the capacity to foster economic well-being, development, technological improvement and wealth as well as the capacity to cause harmful impacts on the human lives of individuals through their core business practices and operations, including employment practices, environmental policies, relations with suppliers and consumers, interactions with Governments and other activities, . . . .<sup>36</sup>

That paragraph utterly fails to do justice to the contributions of businesses to the well-being of the society, and to all of humanity. And it has been carefully written so as to undermine the limited contributions that it does acknowledge. Everything good is summed up in a mere eight words, with thirty-eight words devoted to the vague "harmful impacts." The impression is that a glass 95% or so full is almost empty, and that, without the help of the *Norms*, the glass will become even emptier.

---

<sup>36</sup> Draft *Norms*, eleventh preambular paragraph.

Secondly, the operative provisions continue in the same vein. For instance, saying that “Transnational corporations . . . shall not engage in . . . crimes against humanity [and] genocide” (art. 3), is an innuendo, an implied accusation. It is not the traditional UN practice to single out social groups in connection with genocide, or other evils that are not confined to any particular segment of humanity. The Sub-Commission has been “selective.”<sup>37</sup>

Third, the Sub-Commission has made another dramatic departure from the traditional UN practice of declaring rights. In its eagerness to impose liabilities on corporations, the Sub-Commission has ignored the rights of businesses.

UN human rights treaties are framed in terms of the rights of human beings. Corporations are “legal persons,” so they are not right-holders under these treaties. Legal persons are right-holders under the European Convention on Human Rights, but not under the UN treaties.

Many of the rights in the UN agreements could easily be extended to corporations, however. The right to just and favourable conditions of employment can be extended to a corporation’s right to just and favourable conditions of doing business; a worker’s right to decent remuneration can be extended to a corporation’s right to a decent return on investment; and the right to protection of reputation can easily be extended from a natural person to a legal person. In addition, international corporations are often treated differently from national businesses or private individuals, raising issues of “discrimination,” “equality,” and “equity.”

Business leaders have not been calling for the extension of human rights to corporations. The UN “human rights regime” is not the appropriate forum for solving complex issues like trade, labour relations, and the environment. But if the UN is going to subject corporations to charges of being “human rights violators,” charges that will require some entity to balance competing interests, then the *rights* of corporations will have to be part of the equation. When the State legitimates the vilification of private persons as “human rights abuser!,” it must give them additional legal safeguards to protect them from abuses.

Fourthly, in assessing the Sub-Commission’s attitude towards business, it is relevant to take into account the other problems that have been discussed. In particular, the decision to subject private business persons to extremely vague duties, and to make these duties legally enforceable (recalling that States are not treated in the same way), and to expose private business persons to campaigns of outrage over these indeterminate duties, all need to be considered.

---

<sup>37</sup> To randomly pick some illustrations, consider the Declaration on the Elimination of All Forms of Discrimination Based on Religion or Belief (1981), the Convention on the Rights of the Child (1989), and the Guidelines on the Role of Prosecutors (1990). These UN human rights agreements don’t contain any statement saying that religious groups, or young people, or prosecutors should not commit crimes against humanity.

## Part III

### **WHILE THE SUB-COMMISSION HAS TAKEN A NEGATIVE APPROACH, THE UN NEEDS TO DO MORE TO SUPPORT BUSINESS**

#### **1. Realization of the Right to Development Depends Upon the Promotion of Business**

The General Assembly adopted the “Declaration on the Right to Development” in 1986.<sup>38</sup> Realization of the right to development is heavily depended upon the vitality of the private business sector. In order for States to fulfil society’s right to development, they must do much more to foster the growth, expansion, and productivity of businesses.

The promotion of business requires States to initiate multiple strategies.

#### ***Promotion of business requires regulation***

The promotion of business *inherently* requires regulation. This includes macro-regulation, like banking laws, enforcement of anti-corruption laws, environmental protection, the rule of law, international trade rules, and management of international debt problems, to give just a few examples. It also requires basic laws and administrating agencies to cover, among other things, labour relations, worker safety, and pensions. And it needs sector-specific laws for particular issues of product safety, the environment, and so forth.

Promotion and regulation are not antagonist activities; they always go together, like a steering wheel and a motor must be worked together when driving a car. With respect to any particular regulatory issue, there can be here-and-now conflicts between growth and regulation, and striking the appropriate balance will require decisions about trade-offs. But these specific balancing questions arise because of the fundament fact of life: regulation is essential to the promotion of business.

#### ***Promotion of business requires improvements in all areas of societal well-being***

The promotion of business needs more than the management or regulatory types of measures just mentioned. For one thing, businesses need a whole range of macro interventions that are not business-specific but which promote the well-being of society as a whole. Ensuring that the public has the highest attainable standards of health and of education are crucial for businesses, as well as for the individual holders of human rights. Likewise with the need for physical infrastructure, like roads and telecommunications. It’s like one coin with two sides. For instance, employees and employers both need an affordable and efficient public transportation system: without one, nobody shows up for work. For another, businesses need reductions in crime levels, and the prevention or resolution of violent conflicts. Moreover, the eradication of poverty, and the reduction of the glaring disparities between people within countries, and between countries, are also critical to the promotion of business.

---

<sup>38</sup> Declaration on the Right to Development, G.A. resolution 41/128 (1986).

These aspects of business promotion are addressed in the United Nations Millennium Declaration.<sup>39</sup> It's a truism that what is good for society is good for business, and because the right to development depends so much on the promotion of business, what in general is good for business is in general good for society.

***Promotion of business requires support for increased growth, expansion, and productivity***

But the factors just discussed are not governmental measures that are specifically designed to promote the growth, expansion, and productivity of businesses. In the dynamic sense of “promote,” the State must facilitate the ability of the private business sector to create new products, upgrade their infrastructure, expand the size of existing activities, and move into new ventures or new geographical locations. And most importantly, the State must facilitate the ability of people to start new businesses. This is especially true for people living in poverty, or otherwise disadvantaged or marginalized. States have sets of tools to facilitate these activities. The tools might pertain to financial incentives and credit opportunities, or to protecting intellectual and physical property, for instance, but the aim is the same: the State facilitates business through specifically designed laws and policies.

Realization of the right to development requires States to make better use of the tools available to them to promote the growth, expansion, and productivity of privately-owned businesses. Any measure to promote business will require a Government to make decisions about trade-offs between a variety of interests, and judgment calls about the risks of various costs and benefits. Much more needs to be done to improve the quality and the over-all fairness of the decision-making processes, and of the substantive judgments. And everyone has a role to play in ensuring good governance in these matters.<sup>40</sup>

The Sub-Commission's proposed *Norms* has to be evaluated within the broader context of the need for States to promote private business as an essential means for realizing the right to development.

**2. There are many links between business, the right to development, and the enjoyment of human rights**

The General Assembly has stressed the important connection between economic development and social justice. In 1969, the General Assembly declared that:

The rapid expansion of national income and wealth and their equitable distribution among all members of society are fundamental to all social progress, and they should therefore be in the forefront of the pre-occupations of every State and Government.<sup>41</sup>

---

<sup>39</sup> G.A. resolution 55/2 (2000).

<sup>40</sup> See, e.g., Hans-Otto Sano & Gudmundur Alfredsson, *Human Rights and Good Governance* (Martinus Nijhoff, 2002).

<sup>41</sup> Article 7, Declaration on Social Progress and Development, G.A. resolution 2542 (XXIV) (1969).

There are a number of ways that the promotion of business is essential to the realization of human rights.

### ***The promotion of business is essential to a State's ability to finance itself***

Most States depend heavily upon tax revenues to finance themselves. The wealth of a society is created by its business activities, and the State depends upon the economic surpluses generated by these activities to raise its revenues. Without the surpluses, there is nothing to tax.

A corporation, for example, cannot pay its taxes unless there is a surplus of its income over its expenditures – in other words, a “profit.” The same is true for the ability of individuals to pay their taxes. Although one does not use the word “profit” in this context, an individual tax-payer must still have a surplus of income over personal expenditures in order to be able to pay taxes.

States must have workable policies and laws to promote business activity if they are to expand the national income upon which they base their taxation.

In addition, many States also use their ownership of natural resources to help finance themselves. The utilization of these resources is itself business activity.

### ***The promotion of business is essential to economic growth***

When business expands, more employees can be hired. And the resulting increase in the active labour force increases the sources of tax revenues. In addition, the expansion of the workforce increases the number of people who are able to purchase goods and services, which in turn stimulates growth.

This same stimulus effect applies throughout an industry. An increase in the construction of new buildings will generate demands for new equipment and materials, for instance, and this will have its own multiplier effects: it will increase employment in these other businesses, thereby producing a greater tax base, and empowering more workers to purchase services and goods.

### ***The promotion of business raises the standard of living***

International human rights law recognizes the right to an adequate standard of living (ICESCR art. 11, CRC art. 27, and UDHR art. 25). “Standard of living” is a composite notion that includes food, shelter, clothing, health care, and numerous other goods and services. An “adequate standard of living” is the sum-total of all of the goods and services that are possessed by an individual, or by the society as a whole, when speaking in the aggregate.

The creation and delivery of these goods and services are the very essence of business. People cannot possess goods or services unless businesses have produced them, and unless the cost is low enough to make them affordable, and unless the person has the means to purchase them, or someone else (including the State) has the means to acquire them for the person.



The existence and affordability of the goods and services will depend upon a business having enough surpluses to invest in research and development. And upon its ability to attract financing through loans or by selling stock to shareholders. And this financing, in turn, will depend upon the investor's confidence in the business's ability to make the investment pay off – that is to say, that the business will have a surplus in the future.

A State promotes business by adopting policies and laws that will foster the creative, risk-taking activities that will invent and produce these goods and services. But if a State does not take such measures, goods and services will either not exist, or the prices will be unaffordable, or people will not have the means to acquire them.

Business is also essential to the ability of the State to carry out its own operations, and to practice good governance. For instance:

***Business is essential to a State's operations***

A State will depend upon businesses for the conduct of its operations in a similar way that citizens do for their everyday affairs. For example, the telecommunications that the State uses will have been invented, manufactured, and delivered by businesses; the portable refrigerators that public health officials use to transport vaccines are designed and produced by businesses; the computer program that the Ministry of Labour uses to forecast demographic changes may have been written by a consultant; and on and on.

The existence of these products and services, and their quality and their affordability, depend upon the vitality of the business sector.

***Businesses increase human resources***

The State also draws upon the business sector for its human resources. Businesses train people in technical and managerial skills, and a State will use this labour pool to help fill its public service. In addition, political leaders have often developed their leadership skills, and obtained their expertise on policy questions, from working in the business sector.

***Business creates and diffuses ideas that are important to good governance***

The highly competitive nature of business requires the development of planning and managerial tools, and States subsequently adapt these tools in order to achieve good governance. Accounting methods, data collection and forecasting, cost-benefit analysis, and impact-assessments are just some of the techniques that businesses have helped pioneer, and which are essential for Governments to adopt in order to improve their own performances.

Business people are also key disseminators of these ideas, throughout their societies and internationally.

### **3. The false dichotomy between “businesses” and “human rights organizations”**

The legal literature, as well as the promotional materials for the draft *Norms*, present “businesses” and “human rights organizations” as two distinct things, as in such expressions as, “Human rights organizations have been demanding that businesses . . . .” This is a false dichotomy, as are all dichotomies.

Dichotomies usually serve valid functions, so, even though they are false, they can be worthwhile to maintain. But from time to time, it is useful to acknowledge the various ways in which they paint a misleading picture.

The United Nations High Commission for Refugees has described itself an “operational human rights” agency. The services and goods that it provides to refugees, or that it facilitates through partnership arrangements, are vital to the preservation of human dignity. Since UNHCR is not a State, it does not “fulfil” human rights, but it does meet many of the needs that human rights law is concerned with.

The same can be said about businesses. A housepainter hires a new assistant; a restaurant gives the cook the weekly pay-check; a pharmacy sells a package of aspirin; and a newsstand sells a magazine. These businesses have provided people with social goods -- a job, income, medication, and information -- that are important to human dignity. As with UNHCR, these business enterprises do not “fulfil” human rights -- because only the State can fulfil (or not fulfil) rights under international human rights law. But just as with UNHCR, these businesses are helping people to meet the needs that are the subject of human rights law. Indeed, realizing the right to an adequate standard of living depends upon countless numbers of such transactions each and every day.

Routinely calling businesses "operational human rights" organizations would only add confusion to an already confusing field. But UNHCR has offered a useful insight. Civil society actors who advocate for, let us say, giving people better anti-malarial medications, and the actors who create, produce and deliver the better medicines, are both serving the cause of human rights. The advocates -- the political campaigners -- , and the "operational" people -- the inventors, manufacturers, and distributors of medications, or any other social goods, for that matter --, are both necessary for the realization human rights.

In other words, although only States are the duty-bearers of human rights obligations, many other actors are part of the picture. Human rights advocates, UN agencies, and private businesses each make their own contributions to the promotion of human rights. "Human right organisation" and "activist" are not terms that have to be reserved for only those actors that engage in political advocacy.

Moreover, business people play many important roles in society. They are often in the forefront of efforts to improve their local communities, in nation-wide campaigns for social and political reform, and in the promotion of relations internationally, between peoples and governments, to give just a few examples. Business leaders have not usually referred to themselves as “human rights activists,” but their efforts are still directed to the same objective: ensuring respect for the human dignity of everyone in society.

On the other hand, a “human rights organization” is a type of business. Non-governmental organizations come under the provisions of the draft *Norms* since “legal form” and “nature of the ownership” are irrelevant (art. 21). These organizations hire employees, buy and sell goods and services, conduct advertising, own property, and attract financing, for instance. And the largest international human rights organizations have budgets, staffs, bank accounts, and access to credit that far exceed those of a large percentage of the “businesses” in the world.

There are also interconnections between “businesses” and “human rights organizations.” For one, the funding for human rights organizations comes directly or indirectly from the surpluses generated by business. For another, human rights organisations engage in political activity that can benefit businesses and the people who work for them, as, for instance, when they press for fair trials and other civil and political rights. And they bring social justice issues to the public fore, helping to create attitudes that will shape consumer demands that businesses will respond to. In a similar manner, environmental organizations have played an important role in educating consumers to make environment-friendly, sustainable choices, for instance.

While all dichotomies are false, they still can be useful. In most contexts, it is appropriate to speak of “businesses” and “human rights organizations” as two different things. But in the context of promoting human rights, and especially with respect to evaluating the draft *Norms*, the points of similarity and the interconnections must be acknowledged: painting a picture of Us-versus-Them, or Good Guys-against-Bad Guys, is not appropriate.

#### **4. Conclusion**

This brief summary has outlined only some of the ways that business relates to the realization of human rights, and the right to development. When one surveys the literature on “business and human rights,” and the promotional materials for the Sub-Commission’s draft *Norms*, in particular, what is interesting to note is the absence of recognition of these connections.

States, however, are much more aware of the connections between the promotion of business and the realization of human rights, and the right to development, upon which the enjoyment of human rights so often depends.

Where States are not doing enough to promote business, it is usually because of an insufficient capacity to do so. Under a positive approach to human rights promotion, a key task is to help a State to build its capacity to promote business, which, as discussed earlier, inherently entails the regulation of business activity. On the other hand, States with high levels of economic development are already engaged in the promotion of business; indeed, that is in significant part why they have well-developed economies. In these situations, the key issues are often technical or strategic. But many of the issues are about achieving fairness between different segments of the population, inter-generation fairness, and fairness between well-to-do and less-well-to-do countries, to name some of the points of debate.

The Millennium Declaration is the UN's most comprehensive statement about the goals that States must individually and collectively work towards. Current assessments of progress towards some of the most critical benchmarks indicate that not enough is being done.

Because the Sub-Commission has taken a negative approach to the realization of human rights – trying to privatize human rights, and thus divorcing business activity from the role and responsibilities of the state --, it has not made a constructive contribution to the goals of the Millennium Declaration.

United Nations efforts to help reach the goals will need to include greater support for the business sector of society. The promotion of business activity is a primary means for realizing the right to development, and the specific human rights that depend for their fulfilment upon a country's level of development. While various intergovernmental organizations are already addressing business issues, UN human rights forums, like the Commission on Human Rights, should also contribute to the promotion of business. This includes, but is not limited to, protecting the rights of business enterprises, and protecting the human rights of the people who manage, work for, and own the businesses.

## CONCLUSION

**The Commission needs to end the present confusion by setting the record straight**

*The Sub-Commission is to be given credit for raising the broad question of the roles that private business plays in the realization of human rights. Many aspects of its work over the past four years have been useful in bringing important issues to the public fore. Its draft Norms, however, has ended up being “a solution looking for a problem.” And, unfortunately, its “solution” is already causing a great deal of confusion in light of the way that it is being “marketed.”*

*Moreover, at a time when the importance of good governance is being stressed, the Sub-Commission's lack of transparency and accountability has set an unfortunate precedent.*

*As the parent body of the Sub-Commission, the first task is for the Commission on Human Rights to restore credibility -- to set the record straight.*

*The Commission is urged to make a clear statement disapproving of the Sub-Commission's draft, and to clear up the confusions. In particular, the Commission should set the record straight by stating, in unambiguous terms, that the duty-bearers of human rights obligations are States, not private persons (including private business persons); that the draft Norms are neither “UN Norms” nor “authoritative”; and that the Norms is a draft with no legal significance without adoption by the law-making organs of the United Nations.*