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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"

EXECUTIVE SUMMARY

THE SUB-COMMISSION'S DRAFT NORMS, IF PUT INTO EFFECT, WILL UNDERMINE HUMAN RIGHTS, THE BUSINESS SECTOR OF SOCIETY, AND THE RIGHT TO DEVELOPMENT:

The Commission on Human Rights Needs to End the Confusions Caused by the Draft *Norms* by Setting the Record Straight

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.

We respect the Sub-Commission for its hard work and dedication in producing its draft "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises With Regard to Human Rights." But we also believe that its proposed *Norms*, if it were to be given effect, would undermine the progress being made to realize human rights. We are also concerned that the promotion, or "marketing," of the "Norms" that is now taking place will undermine the credibility of the human rights community, of which we are all a part.

For over 80 years, both the International Organisation of Employers, and the International Chamber of Commerce, have been working to promote the realization of human rights. While neither of us publicly calls itself a "human rights NGO," all of our work aims at increasing the enjoyment of human rights, in particular, economic and social rights. (Please see Appendixes A and B for more information about us.)

The Sub-Commission's proposed *Norms*, and the lack of transparency and accountability in the way that it produced its draft, have placed upon the Commission on Human Rights the responsibility to restore meaning and credibility to international human rights law.

This Executive Summary outlines our main concerns.

1. The Sub-Commission has misstated international human rights law

As the Executive Director of Human Rights Watch, has observed, "international [human rights] standards apply formally only to governments, not to corporations themselves."[1] This is correct: States are the duty-bearers of obligations under the international human rights law. Not private actors – including private businesses.

However, the Sub-Commission's draft *Norms* declares that private actors – specifically, private businesses -- have the legal duty to "secure the fulfilment of," "protect," etc. the rights that are recognized in the various United Nations human rights treaties. This is a serious misstatement of international law, and it is seriously confusing the public.

The proposition that international law imposes legal obligations on private actors is a "radically-new" idea, in the words of Sir Nigel Rodley.[2] The General Assembly rejected this revolutionary idea as recently as 1998 when it adopted the "Declaration on the Rights and Responsibilities of Individuals, Groups, and Organs of Society to Promote Universally Recognized Human Rights and Fundamental Freedoms."[3] Indeed, human rights NGOs were strongly against the imposition of duties on private actors, and the member states of the General Assembly agreed with them.

2. The Sub-Commission has misused its authority

The Sub-Commission has not presented its "Norms" as a *recommendation* that the United Nations should place human rights obligations on private business actors. Instead, its *Norms*, the annexed *Commentary*, and its adopting resolution, have been written in a manner that is giving people the false impression that the Sub-Commission has changed international law by its own authority.

Indeed, this is how private organizations that worked closely with members of the Sub-Commission are presenting the draft *Norms*. Publicity materials are blatantly calling it the "UN Norms," and saying that it is "authoritative," and that businesses are "oblige[d]" to comply with its provisions, for example.

The Sub-Commission has gone beyond the scope of its authority. As a body of twenty-six "independent experts," it has no right to try to enact "international legislation," and it cannot "wash its hands" of all of the misleading promotional activities.

3. The Sub-Commission has not respected the principles of transparency and accountability

The working-group that wrote the draft *Norms* said, in a "restricted" report, that:

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[1] "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.

[2] Nigel S. Rodley, "Can Armed Opposition Groups Violate Human Rights?," in Mahoney and Mahoney, *Human Rights in the Twenty-First Century* (Martinus Nijhoff, 1993), at 297, 306.

[3] General Assembly resolution 53/44 (1998).

> "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."[4]

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.[5]

Even more seriously, the Sub-Commission never addressed this "difficult issue." In fact, it appears to have gone out of its way to avoid facing the question.

4. The duties in the draft **Norms** *are extraordinarily vague, and, if put into effect, will lead to arbitrary enforcement actions, and the violation of human rights*

The duties in the draft *Norms* are extraordinarily vague. For instance, private business persons are said to have the duty to "secure the fulfilment" of "the right to development" (arts. 1 and 23). Moreover, this duty "shall" be enforced in national courts, and violators "shall" pay reparations to anyone affected (art. 18).

The Sub-Commission's draft *Norms* is filled with equally vague duties, all of which "shall" be enforced by the courts.

Legal and political actions to enforce these vague duties will result in widespread arbitrariness -- violating the interests and the rights of the businesses, their employees, managers, owners, customers, creditors, and others who are connected with the enterprises.

5. The Sub-Commission's draft **Norms** *will legitimise vilification campaigns targeted at private persons, and this will result in violations of human rights*

Charges of "Human rights violator!" carry a great deal of stigma in the eyes of the public. As the Executive Director of Human Rights Watch explains, "The human rights movement has to build and channel outrage."[6] The strategy is to "stigmatize and delegitimize" the targeted Government in order to change its behaviour, and to ensure punishment of the guilty state actors.[7]

The draft *Norms* shifts the targets from States to private persons. The extraordinary vagueness of its provisions, and the artificial stretching of the definition of "human rights" in Article 23, will empower political actors to engage in vilification campaigns based on their personal disagreements about business decisions.

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

[5] 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.

[6] "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.

[7] *Id.*, at 231.

Generating outrage based on one's personal and ideological opinions will cause human rights violations of the people who are targeted, and will adversely affect the legitimate operations of the businesses.

6. The draft Norms *is an extreme case of privatisation of human rights*

Ironically, the proposed *Norms*, if put into effect, would "privatise human rights." States are the duty-bearers of human rights obligations. But by trying to hold private persons accountable as "human rights violators," the Sub-Commission has left the real duty-bearer – the State – out of the picture.

For instance, the draft *Norms* makes "an adequate standard of living" exclusively dependant upon a person's pay-check (art. 8). This completely ignores the vital importance of public goods, and the State's duties under the International Convention on Economic, Social, and Cultural Rights with respect to public goods.

Moreover, it completely ignores the duty of the State to act as the social safety-net. And it ignores the State's duty to create the conditions that will allow people to realise their right to an adequate standard of living, and all other social and economic rights.

Realizing the right to an adequate standard of living of everyone in the world will take a less naïve approach to business than shown in the draft *Norms*. And it will require a more positive attitude to business.

7. The Sub-Commission has not taken a positive approach to the private business sector, and the realisation of human rights

The Sub-Commission has taken a negative approach to business, and to the promotion of human rights. The draft *Norms* is centred on imposing sanctions for violations of impossibly vague duties. And its privatization of human rights divorces the life of businesses from the duties of the State.

The realization of social and economic rights requires a more constructive strategy. The positive approach integrates negatively-oriented measures into broader initiatives that will help States to build their capacities to create the conditions in which all human rights can be enjoyed. The enjoyment of all economic and social rights is heavily dependant upon the realization of society's right to development, and this will require the promotion of business.

Conclusion

The Commission on Human Rights is urged to make a clear statement disapproving of the Sub-Commission's draft, and to set the record straight. In particular, the Commission should state, without any ambiguity: that the duty-bearers of human rights obligations are States, not private actors (including private business persons); that the draft Norms are neither "UN Norms" nor "authoritative"; and that the Sub-Commission's proposal is a draft with no legal significance without adoption by the law-making organs of the United Nations.