

The License to Operate: Human Rights and the Ability to Operate Globally

John F. Sherman, III, General Counsel, Secretary, Senior Advisor to Shift Project

E. Christopher Johnson, Jr., CEO and Co-founder, Center for Justice, Rights & Dignity, and former VP General Counsel, GM North America

Linsi Crain, Senior Advisor, Corporate Responsibility and Public Policy, Chevron

Thomas Wilson, Partner, Vinson & Elkins (Moderator)



Why All the Concern with Business and Human Rights?

Shift

Putting Principles into Practice

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John F. Sherman, III,
General Counsel and Senior
Adviser, Shift

Right to education:
children
working all day
in fields

Right to health:
pipeline leaks;
tailings dam
breach

Right to life:
Security
guards using
excessive
force

Right to
water:
pollution of
water supply

Decent work
conditions: heat
exposure;
excessive hours;
chemical
exposure

Children's
rights: child
sex trafficking
in tourism;
child labour in
agriculture

Indigenous
rights: lack of
FPIC

Right to privacy:
sharing
employee/consum
er data

Freedom of
Association:
attacks on
union leaders

Right to adequate
standard of living:
forced evictions;
lost livelihoods

Non-
discrimination:
harassment of
women workers

Forced labor:
in pig iron
and fishing

Business impacts on human rights

- People around the world are affected by business activities every day, many very positively.
- Yet hundreds of millions of people are exposed to the harms when businesses do not respect human rights.

Global Supply Chains

- Production processes are fragmented
 - Iphone 6 has 785 suppliers in 31 countries
- 80% of global trade is linked to production networks of global companies (UNCTD)
- Global trade in intermediate goods greater than trade in all other non-oil traded goods (WTO)

Supply Chain Employment

- 1/7 jobs worldwide are related to global supply chains. Doesn't include
 - Casual and temporary work
 - Forced and bonded labor
 - Work at bottom of chain done by women & children in homes
- Many have families who depend on them
- Estimated 1 billion people involved in or affected by global supply chains.

Impacts on People (per ILO)

- 21 million people work in forms of forced labor and slavery.
- 168 million child workers, with 85 million in hazardous forms of work.
- More than 2.3 million people die every year from occupational accidents or work-related diseases, with 317 million on the job accidents.
- 170,000 annual worker related deaths in agricultural supply chains alone are reported to be 170,000
- Numbers grow when affected communities are added in

Impacts on Business

- Operational disruption and delay;
- Reputation
- Divestment or lost investment;
- Distraction of management
- Lost opportunities
- Recruitment and retention of employees
- Lawsuits

Costs of Human Rights Harm to business—examples

- Oil & Gas
 - \$6.5 billion value erosion in 2 years for one company due to delay from community protest
- Extractives
 - \$20 mm per week from delay and lost production on \$3-5 billion project
- Garment Industry
 - \$200 million from strikes over poverty wages in Cambodia

UN Guiding Principles on Business and Human Rights

- Unanimously endorsed by UN Human Rights Council in 2011
- Have become the authoritative global standard
- Increasingly reflected in national policy, law, practices of companies, etc.

The Three Pillars—Protect, Respect, and Remedy

HUMAN RIGHTS

PROTECT

STATE

duty to
protect

RESPECT

CORPORATE

responsibility
to respect

REMEDY

VICTIMS

access to
effective remedy

HUMAN RIGHTS DUE DILIGENCE



Business responsibility to address human rights harm

- Not legally binding,
 - but not in a law free zone, either.
- Legal compliance is a bedrock requirement,
 - but responsibility to respect goes over and above local law.
- Businesses not responsible to address everyone's human rights
- Responsibility extends beyond their direct operations
- Not a voluntary sign up standard
- Not philanthropy, charity, or pro bono

Response depends on mode of involvement

- Cause
 - e.g., employer discriminates against own employees
 - Cease and provide remedy
- Contribute with another
 - e.g., buyer incentivizes/facilitates/encourages supplier's unsafe work conditions
 - Cease and provide remedy
- Linkage only (no contribution)
 - Use or build leverage to influence other party to change behavior
 - Consider withdrawal as a last resort

Role of corporate lawyers

- Initially skeptical, then highly supportive
- General counsel and external law firms
- Bar Associations have endorsed Guiding Principles:
 - IBA
 - ABA
 - Others
- Acting as wise counselor on human rights is key.

Mergers & Acquisitions

- Identifying human rights risks helps increase chances of successful merger.
- Buyer inherits the responsibility to respect human rights affected by target
- Not enough merely to add human rights items to a due diligence checklist.
- Key goals: identify, prioritize, address

1. Risk Identification

- Poor quality of information is a challenge
 - Not enough time
 - Legal compliance not enough
 - Reliance on information from target not enough
 - Can't engage with affected stakeholders

Consider

- Training & empowering each member of M&A team to spot human rights issues in their areas of expertise
- Acknowledging unique role of lawyers in explaining gaps in domestic law.
- Consulting experts with knowledge of country, sector, etc., to serve as proxies for stakeholders
- Drawing on buyer's prior experience
- Looking at experience of others
- Candidly assessing buyer's capacity to manage risk of target business if in a new business, country.

2. Risk Prioritization—Severity of Harm to People

- Scale: Impact is grave
- Scope: Large number of people may be harmed
- Irremediable: Unable to make harmed people/communities whole

Risk Addressing

- Are there any human rights deal breakers?
- What can be done in negotiation of purchase agreement?
 - E.g., set aside for payment of past harm
- What can be done after merger is consummated?
 - E.g., engaging with affected stakeholders