Remarks by John F. Sherman III*

The following question was posed to me, how are corporate advisers to advise their clients when a human rights standard is ill-defined or contested by the states in which they operate? More generally, what are some of the issues and challenges that lawyers face in counseling companies to respect human rights in accordance with international standards?

This is a broad subject, so let me focus on the role of corporate counsel advising companies on mergers and acquisitions in developing economies—particularly in countries where the rule of law is weak, corruption is high, and there is a high risk of conflict between communities, business, and government.

In such cases, a key concern relates to disputes with community over land. An M&A lawyer for a mining company may seek assurance that the company will get proper legal title to the land that it needs for its project. But securing legal title might not be enough. The land itself may have been made available for private use as a result of a flawed government acquisition process, in which the local communities were not consulted adequately, and families were resettled without adequate compensation. Or there may be concerns about water pollution and displacement of arable land.

Let me start with an emblematic case. It involves indigenous Guatemalan villagers who were illegally forced off their land during the civil war. The land was sold to a nickel mining company, which was later acquired by a Canadian company called Hudbay. The villagers tried to retake their land, and during confrontations with security forces protecting the property, village women were allegedly raped and protesters were shot and killed. The villagers filed suit against the parent company in Canada, claiming that it allegedly violated a duty of care to protect them against security force violence. Hudbay moved to strike the complaint on the grounds that this was not an established duty under Canadian law and did not meet the test for recognition of a novel duty of care.

To establish such a duty, the court must find that the harm is foreseeable; that there is a proximate connection between the defendant and the harm; and that the duty is not contrary to public policy.

Hudbay filed a motion to strike the complaint. Amnesty Canada filed an amicus brief and argued that all three elements of the test were met. It cited, among other standards, Guiding Principle 23(c), which provides that companies should treat the potential risk of involvement in gross human rights abuses as a matter of legal compliance.

The court denied the motion to strike, concluding that under the very high standards for granting such a motion, such a claim was not beyond the pale. Here's what the court reasoned:

On foreseeability, the villagers alleged that the parent company knew or should have known of risks of violence due to:

- High community tensions; a conflict zone;
- Use of armed, poorly trained security forces handling evictions.

On proximity, the villagers allege that it is fair to impose direct liability on the parent company because the company:

- Was trying to deal with problems at the site;
- Was in charge of land and security at the site;

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- Had promised to live up to the Voluntary Principles on Security and Human Rights;
- Had assumed direct responsibility for security forces.

On public policy, the court concluded that there were competing considerations, but concluded that on balance, a duty of care would not violate public policy, because:

- Canada is trying to hold companies to high corporate social responsibility standards abroad;
- Canada has a goal of reducing excessive force by security forces protecting Canadian companies abroad;
- Tort law should evolve with globalization; victims of Canadian companies abroad should have avenues of redress.

Of course, this was a highly preliminary ruling by the trial court, and the plaintiffs are obliged to prove their claims with evidence in court. The Canadian higher courts will surely have the last word.

As cases like *Hudbay* demonstrate, assurance of legal title may not address the entire risk to the company. Legal liability aside, disputes with communities can lead to blockades that can stop a major project in its tracks, and can lead to incidents of violence during confrontations between protesting community members and security forces protecting the company's property. This can have grave consequences for the company as well as for the community.

Shift's research on costs of conflict in the extractive industry has found that:

- Less than 30% of cases involve a fatality/injuries, damage to property, and/or suspension or abandonment;
- Fifty percent of cases involve a physical blockade;
- Environmental/community health and safety issues are the most common proximate cause of conflict;
- The most common underlying issues are economic and social—distribution of benefits, communication, consultation processes—that affect the quality of the relationship.

On the company side of the ledger:

- The most frequent costs are from delay, e.g., a USD$3–5 billion capital expenditure mining project can lose $20 million per week in net present value terms due to delay and lost production;
- The most often overlooked costs are the costs of senior staff time spent managing conflict;
- The greatest costs are opportunity costs (e.g., new projects, expansion, or sale):
  - Esquel (2006) $379m asset write-down on $1.33b reserves (Meridien Gold in Argentina);
  - Tambogrande (2003) $59.3m asset write-down on $253b reserves (Manhattan Minerals in Peru);
  - Conga (2011) suspended during construction—majority owner (51.35%) spent $900m in past three years (Newmont in Peru).

As a result, company general counsel are instructing their external lawyers to go beyond black-letter law in transactions like these and advise on what is acceptable and workable from a human rights perspective. They are asking outside counsel to become partners in helping businesses to achieve the company's strategic goals by identifying human rights risks that relate to legal transactions.

This has been reflected in the actions of national and international law societies.

1. In 2011, the ABA endorsed the UN Guiding Principles and the OECD Guidelines on Multinational Enterprises. It concluded that under ABA Model Rule 2.1, a lawyer has a professional responsibility to provide independent and candid advice to a client, which goes beyond the letter of the law to include the relevance of international standards—such as the UN Guiding Principles. Just as a lawyer needs to understand the commercial context of a transaction in order to provide sound advice, it needs to understand the human rights context as well.
2. Similarly, the Business and Human Rights Advisory Group to the Law Society of England and Wales issued a report last month recommending that the Law Society adopt the position that lawyers have a professional responsibility to make the business case to companies to avoid or mitigate human rights risks through application of the Guiding Principles, where relevant to the particular transaction. And the International Bar Association has formed a working group consisting of representatives of the bar associations of five countries—which I chair—to provide guidance on the implications of the Guiding Principles for the legal profession.