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INTRODUCTION

Millions of lives have been lost and thousands of women have been raped in the Democratic Republic of the Congo, many reportedly were victims of violence fueled in part by the trade in conflict minerals. In India, thousands of farmers reportedly have committed suicide due to unfair conditions of competition while families in several developing nations around the world have been displaced by large-scale commercial land acquisitions. In China and Saudi Arabia hundreds of dissents and bloggers reportedly have been jailed or punished for expressing opinions and organizing protests using social media. In developing nations around the world, millions of people have suffered preventable illness and premature death because they were unable to access essential medicines. Millions of people are reportedly being trafficked into slavery and are believed to be toiling in abusive conditions connected to a global supply chain manufacturing system that lacks transparency.

In recent years rights activists have attributed abuses and adverse impacts such as these to a global governance gap that fails to regulate the human rights responsibilities of transnational corporate actors operating extraterritorially. Nations that “host” transnational corporations may be unable or unwilling to regulate to attract investment. Nations that are “home” to transnational corporations may be reluctant to regulate the conduct of business abroad. The resulting regulatory gap puts human rights at risk.

1 Professor of Law, University of Utah S.J. Quinney College of Law. https://faculty.utah.edu/u0412260-ERIKA GEORGE/biography/index.html.
International human rights law is understood to regulate the conduct of nations, yet the conduct of transnational corporate actors can also contribute to adverse human rights impacts. While human rights advocacy generally places primary emphasis on the state responsibility to protect rights, concerns over the role of non-state actors in aiding and abetting rights abuses have become increasingly prominent.

Prior efforts to close this governance gap with a binding international treaty to regulate the conduct of transnational corporate actors have not been successful. Present efforts to resurrect interest in imposing binding obligations on business enterprises through a treaty instrument at the global level will continue to meet significant opposition. Several transnational corporations have promulgated voluntary codes of conduct to regulate their social and environmental practices in efforts to bridge the gap. However, some rights activists view corporate self-regulation and social responsibility initiatives with skepticism. They continue to campaign for the implementation of strong legally binding international instruments to ensure that rights are protected.

New non-binding international standards that outline the obligations of businesses with respect human rights could hold promise to bridge the governance gap, provided strategies for enforcing adherence to the principle that business enterprises have an obligation to respect rights can gain strength. Indicators have the potential to play an important role solidifying emerging soft law standards and strengthening corporate self-regulation.

The United Nations Framework and Guiding Principles on Business and Human Rights unanimously endorsed by the U.N. Human Rights Council in 2011 is a new international standard that sets forth the roles and responsibilities of country governments and commercial enterprises with respect to human rights. The strategic use of indicators to enforce corporate adherence to the principle that business enterprises have a responsibility to respect human rights is a relatively recent phenomenon.

Just as indicators are being used to compare and rank the performance of nation states for different purposes, reporting frameworks and ranking formats are being developed to measure the human rights impacts of different influential industry sectors. For instance, the Enough Project has produced a ranking of electronics companies measuring progress on the eradication of conflict minerals from supply chains. Oxfam is
publishing a “scorecard” of the social and environmental policies of food and beverage companies that impact the enjoyment of human rights. A collective of non-governmental organizations, Know the Chain, is monitoring corporate reporting on trafficking and slavery in supply chains. The Ranking Digital Rights Project will rank companies in the Internet and telecommunications sector on respect for freedom of expression and privacy. The Access to Medicines Index rates the activities of research-based pharmaceutical companies in developing countries based on World Bank indices that measure country economic and human development. A coalition of investors and activists has formed the Corporate Human Rights Benchmark Initiative (CHRB) to rank the human rights policies and performance of influential transnational corporations. Shift, a management consultancy firm formed by experts central to the creation of the United Nations Guiding Principles on Business and Human Rights, have piloted the Human Rights Reporting and Assurance Framework Initiative (RAFI).

This Chapter examines the emergence and evolution of selected ranking and reporting frameworks in the expanding realm of business and human rights advocacy. Specifically, it examines how indicators in the form of rankings and reports evaluating the conduct of transnational corporate actors can serve as regulatory tools with potential to bridge a global governance gap that has places human rights at risk. It explains the conditions that have led to coordination and collaboration among those entities engaged in creating reporting frameworks and rankings while nevertheless relying upon the competitive impulses of the business enterprises being ranked to assert influence. It also identifies why the businesses being ranked have been slow to deploy effective counter-strategies despite efforts to contest emerging reporting requirements. It considers the interaction of selected business and human rights indicators with recent laws regulating supply chain transparency in the United States and with recent global policy initiatives calling for business enterprises to conduct human rights impact assessments. It reviews some of the methodological and moral risks raised with respect in ranking rights. In conclusion, it is argued that in the ecology of global governance these new business and human rights indicators will provide rights advocates with greater power and have the potential to play an important role in solidifying emerging soft law standards and strengthening corporate self-regulation. The strategic use of indicators in the business and
human rights realm could ultimately prove to make the commitments contained in voluntary codes of conduct to respect human rights obligatory.

The observations contained in this Chapter are based on analysis of selected indicators and the author’s interviews with individuals representing the organizations creating human rights rankings as well as individuals employed in some of the business enterprises being ranked between June 2012 and May 2015. In addition, the author attended the 2014 launch of the CHRB at the UN Forum on Business and Human Rights in Geneva. The Chapter proceeds as follows. Part I considers the defining features of indicators and the dynamics of indicator development. Part II presents features of recent global policy initiatives on business and human rights relevant to the dynamics of indicator development to evaluate the human rights risks presented by particular business practices. Part III provides an overview of recent reporting initiatives and rankings comparing and contrasting their distinctive features and the dynamics of their development. Finally, Part IV comments on the potential of emerging business and human rights indicators to influence standard setting and give substantive content to local laws and global policy initiatives aimed at addressing the adverse impacts of business on human rights and considers the risks of quantifying human rights. It also explores the institutional interaction between the producers of corporate responsibility indices as well as the impact of these interactions on the international human rights regime.
I. THE PRIMARY ELEMENTS OF INDICATORS

In their investigation of the significance of indicators in socio-legal processes, Kevin E. Davis, Benedict Kingsbury, and Sally Engle Merry observe that there is no consensus on the meaning of the term indicator but offer the following functional definition:

An indicator is a named collection of rank-ordered data that purports to represent the past or the projected performance of different units. The data are generated through a process that simplifies raw data about a complex social phenomenon.2

While social realities may be captured in a myriad of ways, Davis and colleagues contrast indicators as distinctive for serving to compile data in a manner that allows for comparisons to be made among particular units of analysis. For instance, an indicator could allow for comparative evaluations to be made of different countries, as does the World Justice Project’s Rule of Law Index; or for different companies, as does Oxfam’s “Behind the Brands Scorecard. Put simply, “indicators cater to the demand for (and receptivity to) numerical, rank-ordered and comparable data.”3 Complicating matters, indicators are far from simple and may not necessarily satisfy the demand for information. Significantly for the human rights advocate concerned about the conduct of powerful business enterprises, “the indicator represents an assertion of power to produce knowledge and to define or shape the way the world is understood.”4

Davis and his colleagues have set forth some salient characteristics of indicators. An effective indicator will have a name establishing authority to make measurements. An effective indicator will frequently take the form of a rank ordering that envisions “improvement” and allows for movement in the measurement. An effective indicator has the capacity to take complex information about social phenomena and simplify it to

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2 Kevin E. Davis, Benedict Kingsbury & Sally Engle Merry, Indicators as a Technology of Global Governance, 46 Law & Society Rev. 71, 73 (2012)
3 Id.
4 Id.
enable ease of comparison across difference. Finally, an effective indicator can be used to inform decisions and make evaluations.\(^5\)

Especially important for the success of indicators to address business and human rights issues is the potential for the index to be presented as authoritative and useful in evaluating the comparative performance of business enterprises in addressing adverse human rights impacts. Indicators can be created to measure progress towards realizing the corporate responsibility to respect human rights. To the extent that an indicator becomes the measure against which conduct is evaluated, it in effect sets a standard for conduct.

Davis and his colleagues identify some specific elements of indicators that make indicators easily accessible for use in decision-making regarding resource allocation or conduct. Consistency, transparency, authority, and impartiality are important elements. A consumer might decide how to allocate his or her disposable income on products and services rated by Good/Guide as the World Bank uses indicators to inform decisions on how to allocate aid. Indicators are attractive for their apparent “objectivity” and the added efficiency of reducing administrative costs of processing disparate information.

The apparent advantages of indicators notwithstanding, indicators do present problems and disadvantages. In some instances the creation of indicators can be costly. Multiple conflicting indicators can cause confusion. Missing or incomplete data could compromise the validity of rankings. As Wendy Nelson Espel and Michael Sauder have observed: “collecting the data that comprises indicators is often more difficult and messy than appears from the outside.”\(^6\) Most significantly for efforts to craft indicators to assess human rights is the concern that indicators simply oversimplify complex issues.

Davis and his colleagues posit that the growing demand for and reliance on indicators in global governance is related to the scale and intensity of social and economic interactions amenable to governance.\(^7\) Debates over the social responsibility of transnational business enterprises similarly have gained ground as the span and scale of

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\(^5\) Id.

\(^6\) Wendy Nelson Espel and Michael Sauder, The Dynamism of Indicators in GOVERNANCE BY INDICATORS: GLOBAL POWER THROUGH QUANTIFICATION AND RANKINGS 87 (Kevin E. Davis, Angelina Fisher, Benedict Kingsbury and Sally Engle Merry, eds.)

\(^7\) Davis, et. al at 87.
their influence is perceived by many to grow out of proportion to the ability of any one state to regulate commerce.

II.

THE U.N. GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS

In 2005, at the request of the Human Rights Commission the then UN Secretary-General and Nobel Laureate Kofi Annan appointed Harvard Professor John Ruggie as the “Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises” (SRSG) and tasked him with clarifying the “roles and responsibilities of states, companies, and other social actors in the business and human rights sphere.”

The SRSG’s review of reported instances of human rights violations involving corporations revealed that abuses primarily occurred in low to middle income countries either in or emerging from conflict with “weak governance” and below average scores on the World Bank “rule of law” index. The SRSG’s review also found that the extractive sector dominated reported instances of abuse followed by the food and beverages industry sector. The apparel industry and the information and communications technology sectors also featured prominently in reported rights abuses instances.

Despite the prevalence of credible allegations of human rights abuses involving business enterprises, a significant number of the Fortune Global 500 firms responding to the SRSG’s survey of the world’s largest corporations reported having “an explicit set of principles or management practices regarding the human rights dimensions of their operations.” In most instances human rights were incorporated into a more general corporate code of conduct. The SRSG concluded that “quite apart from bad judgments or acts of malfeasance by corporate officials” it was instead the “distinctive institutional

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8 JOHN GERARD RUGGIE, JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS xviii (2013).
11 Id at Para. 33.
features of transnational corporations” that most placed corporations at risk for committing or becoming complicit in the commission of alleged rights abuses.12

After consultation with a broad range of stakeholders, the SRSG developed the “Protect, Respect and Remedy Framework” and based it on three central pillars: (1) the duty of states to protect against human rights abuses by third parties, including business enterprises; (2) the duty of corporations to respect human rights by avoiding infringing on others’ rights and to redressing adverse impacts; and (3) access to judicial and non-judicial remedies for victims of rights violations. At the request of the Council, the SRSG next developed a set of “Guiding Principles on Business and Human Rights” to “provide concrete and practical recommendations” for working within the Framework.13

The U.N. Guiding Principles on Business and Human Rights (UNGPs) provide that to respect human rights business enterprises: “should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.”14 Among other things, the corporate obligation to respect human rights mandates that a business enterprise put in place “a human rights due-diligence process to identify, prevent, mitigate and account for how they address their human rights impacts.”15

The human rights due diligence process corporations should put into practice as envisioned in the UNGPs must recognize that human rights risks will evolve as the operations or operating context of a business enterprise change. Accordingly, “to gauge human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships.”16 Further, the UNGPs provide that business enterprises should track whether their human rights impacts are being

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12 Id. at Para. 23
14 UNGP 11.
15 UNGP 13.
16 UNGP 18.
addressed and suggest that tracking should “be based on appropriate qualitative and quantitative indicators.”

The UN Framework and Guiding Principles have gained an impressive following to date. In addition to being incorporated into the latest revisions to the OECD Guidelines for Multinational Enterprises, the Guiding Principles have been incorporated into the guidance materials of the International Finance Corporation’s (IFC) Performance Standards. The IFC Standards inform the institution’s lending determinations. Some states that are home to TNCs are developing national action plans to put the principles into practice. The United States recently announced plans to prepare a national action plan on the UNGPs. The American Bar Association has endorsed the UNGPs and the International Bar Association will consider endorsement at its annual meeting in October 2015.

The SRSG has explained that the UNGPs were designed to deal with the challenge of “polycentric governance” and rest on his observation that the conduct of transnational corporations is influenced by three distinct governance systems: 1) public law and governance at the domestic and international levels; 2) private governance through social pressure; and 3) private law and corporate governance. The UNGPs were intended to provide an authoritative basis for aligning these three governance systems. According to the SRSG, he intended to reject “the voluntary/mandatory dichotomy that had paralyzed creative thinking and policymaking for too long” in favor of a “smart mix of measures” to mediate and mutually reinforce these different systems of governance.

Some business stakeholders have enthusiastically welcomed the U.N. Framework and Guiding Principles and are working to understand how to it will impact them. For instance, the Principles have been embraced by the IPIECA and the ICMM, the major trade associations representing the extractive sector. However, some human rights campaign groups have expressed disappointment that the Framework and Guiding Principles did not go further in creating binding obligations for corporations. These

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17 UNGP 20.
19 Id.
stakeholders regret that the international community has failed to date to produce a legally binding framework for ensuring accountability. Proponents of the process that generated the Framework and Guiding Principles point out that industry’s involvement indicates that it could provide a pragmatic way of avoiding and addressing the problems that concern campaigners.

A global online survey of 853 of high-level corporate executives conducted by the Economist Intelligence Unit in November and December 2014 found that respondents identified “public benchmarking on human rights performances (e.g. an index of companies)” as most likely to “enable companies to better fulfill their corporate responsibility to respect human rights.” A public index of companies was viewed by respondents as more likely to lead to fulfilling human rights responsibilities than making human rights due diligence a legal requirement for business or strengthening legislative frameworks to ensure level market playing fields at the national level. These expressions would appear to confirm the observations by Ronen Shamir and Dana Weiss that engagement by business enterprises with human rights issues is increasingly linked to an enterprise risk management approach to strategy.

Indicators could provide the regulatory instrument needed to ensure that business enterprises incorporate rights by capitalizing on the creation of reputational risks and rewards. As expectations on businesses continue to escalate and demands that businesses meet the obligation to respect human rights are becoming more clearly articulated, calls for some means for measuring progress have increased in certain industry sectors.

III.

BUSINESS AND HUMAN RIGHTS INDICATORS

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21 The Economist Intelligence Unit, THE ROAD FROM PRINCIPLES TO PRACTICE: TODAY’S CHALLENGES FOR BUSINESS IN RESPECTING HUMAN RIGHTS (2015)
22 Id.
23 Ronen Shamir and Dana Weiss, Semiotics of Indicators: The Case of Corporate Human Rights Responsibility 111 in GOVERNANCE BY INDICATORS: GLOBAL POWER THROUGH QUANTIFICATION AND RANKINGS (Kevin E. Davis, Angelina Fisher, Benedict Kingsbury and Sally Engle Merry, eds.)
There are now reporting frameworks and rankings being developed to evaluate business enterprises based on their practices in general and pertaining to particular human rights issues. A summary of selected indicators under development is provided below. First instruments that are being designed to assess implementation of the U.N. Framework are outlined followed by instruments designed to assess compliance with laws mandating greater transparency or to address an urgent human rights issue.

**The Corporate Human Rights Benchmark Initiative (CHRB Initiative)**

Launched at the annual UN Forum on Business and Human Rights in December 2014, the Corporate Human Rights Benchmark (CHRB) will create a “free and public benchmarking of the human rights policy and performance” of business enterprises. The initiative is a collaboration of investors and activists including Aviva Investors, the Institute for Human Rights and Business, Calvert Investments, the Business and Human Rights Resource Centre, VBDO, and EIRIS.

The Initiative is in its infancy. By 2017 it aims to produce a free and public ranking of 500 major companies from around the world. It is not clear whether this will mirror the Dow Jones Industrial Index/Fortune 500 companies or some others. By 2016 the Initiative plans to launch a ranking of 300 companies online based on a transparent public methodology. Presently, the Initiative is in its first phase, conducting worldwide consultations to inform the creation of a transparent methodology for measurement. This phase will complete with a web-based portal and pilot ranking of 250 companies. The Initiative plans to test the pilot ranking across a diverse range of stakeholders before proceeding to the production of a ranking.

Though the Initiative is a collaboration it embraces competition in that the proposed benchmark it is working to create: “will build on a competitive approach to drive better human rights performance by companies through developing a transparent, publicly available and credible ranking of corporate human rights policy and performance.”

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24 Initiative Information Sheet on file with Author.
The Benchmark is to be an “open source” ranking available to the public. It aims to meet the demand for more information. It envisions benefits for a range of users including the business enterprises evaluated. Investors “will be better equipped with information to direct investments to companies actually performing against human rights standards and away from those who are not.”\textsuperscript{25} Members of civil society “will be empowered to make well-informed choices about specific companies and products through greater transparency and better data on performance, and will have better information to encourage and pressure for advances by companies.”\textsuperscript{26} According to the Initiative, policy makers will benefit by having “an objective means by which to focus on those companies and business sectors that have the greatest human rights impacts and in particular those which are underperforming against significant human rights risks, highlighting where regulation and incentives might be necessary.”\textsuperscript{27}

According to the Initiative:

There is already considerable evidence that public transparency combined with public rankings of companies’ performance is a powerful tool in driving a ‘race to the top.’ The initiative can make an important contribution to creating greater corporate accountability, incentivizing business behavior and creating greater leverage for policy-makers, investors, communities and consumers.”\textsuperscript{28}

\textit{Human Rights Reporting and Assurance Frameworks Initiative (RAFI)}

Responding to calls by investors and other stakeholders for greater transparency from companies on implementing the U.N. Guiding Principles, the RAFI process aims to create the first comprehensive guidance for companies on human rights reporting. A collaboration between private consulting firms and non-profit academic research centers including Shift, Mazars and the Human Rights Resource Centre; the RAFI implementation guidance contains provisions for tracking business performance. RAFI enjoys the formal support of investors representing 3.91 trillion in assets under

\textsuperscript{25} Id.
\textsuperscript{26} Id
\textsuperscript{27} Id.
\textsuperscript{28} Initiative Information Sheet on file with Author.
management worldwide. While the Initiative does not purport to rank businesses that use the guidance to inform reporting it is possible that the reports businesses issue could become the basis for enterprising human rights activists that appreciate the potential of rankings to alter power asymmetries.

Access to Medicines Index

The Access to Medicines Index (AMI) was founded by a Dutch entrepreneur Wim Leerveld and first published in 2008. It is a tool to incentivize action on the part of the pharmaceuticals industry. Intended to “simulate positive change by publicly encouraging pharmaceutical companies to step up their efforts to improve access to medicine worldwide” the Index measures seven performance categories and uses a weighted analytical framework to consistently capture and compare company data. Companies are evaluated in each category for commitment, transparency, performance and innovation.

The index is based on the idea that “problems can be successfully solved by bringing people together to create effective, lasting and transparent solutions.” By integrating input from stakeholders from different sectors—public, private, and non-profit—the organization has been able to create a robust, balanced Access to Medicine Index. The Access to Medicine Index examines the top 20 research-based pharmaceutical companies, based on the relevance of their product portfolios and market capitalization for their activities in developing countries, based on World Bank and UN classifications measuring economic advancement and human development.

The Index has been well received by the industry. At least two of the companies contained have featured their AMI ranking on their websites. One, GlaxoSmithKline topped the rankings. GSK has established a Developing Countries and Market Access unit as a department supported by a “lower price/higher volume” business model with employee bonuses structured to reward volume growth rather than profit growth.

Leerveld explains the success of the Index as follows:

*I knew the industry very well and I knew that if you compare these big companies with each other on important matters, I was convinced something would happen. If you make a list...it is a ranking really, but index has a bit more flavor... if you*
compare these companies that day in day out compete with each other that are thinking constantly of how to beat their competitor. If suddenly a list appears in the Financial Times on an issue where they can compare themselves with their peers...they care because their peers care. The World Health Organization cares. When we measure something that is very important it is a bull’s eye because the world has for a long time been trying to convince to these companies to do more--we help them. They had no direction what to and suddenly an index tells them how their competitor is doing. Prior to the index they all thought they were doing the best, but after the index comes out they find they are far from leading. They come away with the fact that they are not really leaders...Companies are now going to NGOs wanting to be higher on the index asking “help me” “help me” how.29

The success of the index turns on capitalizing on the competitive impulse within the industry sector coupled with the long time horizon of investment returns that counsels a cautious approach among competitors in the sector. As Leerveld explains: “Companies that do things that try to find a product that will be profitable in 12-15 years anticipate relevance in the future sooner than you think. They make it relevant themselves. They anticipate that the list is growing in importance and that is why they make it important.” 30

Investors are especially interested in the Index: “There are [investment firms] that say if you invest in the companies high on the index you get higher returns. How do they behave towards these markets, what are the implications for future markets how far thinking are they? It’s a business risk. Investors care because social issues are more and more on the agenda.”31

The Access to Medicines Index is an example of an indicator setting standards. The designers devised the standard by which to measure the conduct of pharmaceutical companies on the issue of access.

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29 Author interview with Wim Leerveld, Access to Medicines Index, January 8, 2015.
30 Id
31 Id.
The Ranking Digital Rights (RDR) Projects brings together a group of international researchers and advocates to create a ranking system that evaluates the world’s major information and communications technology companies on policies and practices related to free expression and privacy with reference to international human rights law. The Ranking aims to:

- Encourage companies to develop, deliver and manage products and services in a manner consistent with international human rights norms;
- Identify what specific legal and political factors prevent or hinder companies from respecting users’ and customers’ human rights;
- Inform companies, individual users, civil society, academics, investors, governments, and the public about the relationship between the ICT sector and human rights.

The development of the ranking is proceeding in phases. Pilot indicators were tested in 2014. Data for the indicator is derived from company responses to survey questions. Company responses to survey questions are assessed and weighted. For instance, a question concerning access to information asks whether a company removes, filters or restricts access to content and assigns a weighted value to assessing the quality of a company’s answer. A “strong” company would provide a detailed explanation to users while a “fair” company would provide a general explanation where a “weak” company might mention that content was restricted without providing a reason. Variable weights are given to different responses.

Based on the information gathered on a range of questions pertaining to rights and remedies for rights violations, the RDR Project aims to start ranking 50 companies in 2015 and will later add device software and equipment companies in 2016.

**Behind the Brands Scorecard**

Oxfam’s Behind the Brands Scorecard targets the world’s most prosperous and powerful food and beverage companies, including: Associated British Foods (ABF), Coca-Cola, Danone, General Mills, Kellogg, Mars, Mondelez International (previously
Kraft), Nestlé, PepsiCo and Unilever. Among other things, the Scorecard aims to increase transparency and accountability of the Big 10 throughout the supply chain. Oxfam evaluates how peer companies compare on policies and ranks companies to create an incentive for a "race to the top" to improve the social and environmental performance of the target companies.32

The scorecard examines company policies in seven areas Oxfam identifies as critical to sustainable agricultural production that had previously been neglected by the industry. The structure of the scorecard weights each of the seven areas equally. Each indicator is also weighted equally within each indicator category as is each sub-indicator. Oxfam announces updates to the rankings remarking on improvements that ranked companies have made to their policies over time. Still, no company performed better than “fair” in 2013.

The scorecard has attracted the attention of industry. For example, Nestlé issued a public letter responding to the ranking and committing to explore ways to approve their approach to women in their supply chain. Oxfam in turn issued a statement welcoming the company’s stated intention to make improvements and commended it for being the first of the three big chocolate companies to do make a public commitment. In the same statement Oxfam announced plans to hold public actions at the headquarters of Mars, Mondelez and Nestlé to mark International Women’s Day and to make a statement about the company performance with respect to gender equality.

The Oxfam ranking is an example of an indicator that is setting standards. It selected and set the seven standards against which to measure the industry sector. The Indicator is also used as a tool for engaging industry actors.

**Electronics Companies Ranked by Progress on Conflict Minerals**

The Enough Project, an initiative of the Center for American Progress to end genocide and crimes against humanity, was founded in 2007. Since 2010, it has ranked companies on progress made on conflict minerals originating in the Democratic Republic of Congo. The Ranking measures the performance of 21 leading electronics companies.

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32 Oxfam, Behind the Brands: Food Justice and the ‘Big 10’ Food and Beverage Companies.
in terms of profit and market share identified for their ability to “set the tone and direction of wider industry efforts.”

The project ranks electronics companies on conduct in five categories selected for impact on the conflict minerals trade: 1) tracing; 2) auditing; 3) certification; 4) legislative support; and, 5) stakeholder engagement. The project collects survey data from the business enterprises it ranks. The project also makes reference to but does not incorporate into calculations other rankings including the Greenpeace Guide to Green Electronics and Newsweek’s Green Rankings. The rankings are released along with a lengthy narrative discussion providing an overview of industry wide progress, or lack thereof. It also offers recommendations for individual company action. Leading companies are given credit while the laggards are condemned. A review of 2010 rankings compared to 2012 rankings reveals that some progress on the part of companies that fell in the middle was made enabling movement in the rankings for improvement.

The Enough Project ranking predated the enactment of regulations requiring companies to make conflict minerals reports to the Securities and Exchange Commission (SEC). The ranking incorporated support for the legislation requiring reporting as an indicator awarding “four points” for a company that separate from its industry association, met with members of Congress to lobby in favor of the legislation over ten times. This aspect of the indicator provides an interesting example of how an indicator can interact with the evolution of law and policy.

Sasha Lezhnev of the Enough Project explained that the “rank ‘em and spank ‘em” approach can be effective but that the rankings only came after attempts to pursue an education approach did not yield desired results. Nevertheless, he concedes that at least early on “corporations did not know where problems were, they probably suspected problems but could look the other way or not look at them.”

An indicator alone would not have been enough according to Lezhnev. To advance the aim of the conflict minerals indicator of Enough Project law was essential.

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33 Enough Project, Getting to Conflict-Free: Assessing Corporate Action on Conflict Minerals 2 (December 2010)
34 Interview with Sasha Lezhnev, Enough Project, June 22, 2012 Washington DC.
35 Id.
Lezhnev would attribute approximately 75% of successes seen to date to the conflict minerals legislation. While he made inroads using the education approach in some companies he expressed anxiety: “what if all the good guys retire?” To him having a law matters because things change. Employees committed to issues leave or interest fades. Initially Lezhnev had little faith in the binding regulatory requirements but came to see the impact:

I used to think it was all just on paper but now it is becoming valuable. Because of the law, the International Conference for the Great Lakes Region how has a process for chain of custody [of minerals] that is much improved. Before the law the meetings of the Conference were do-nothings. Now something is being done. The tenor of these meetings has changed. Before these guys were passing time now they actually must provide evidence for buyers –a better chain of custody system has come about not that the threat of a de facto embargo got the attention of people on the ground.36

Companies submitted their first reports to the SEC in 2014. In 2015, international human rights organizations Amnesty International and Global Witness teamed up to review the reports submitted and concluded that 79% of the reports failed to meet minimum requirements of the legislation. 37

Know the Chain: Company Statements Under the California Transparency Supply Chains Act

Know the Chain (KTC) is a resource to raise awareness of slavery in supply chains and to promote greater disclosure and transparency in compliance with a California law that requires companies to post disclosure statements. Know the Chain is a partnership of anti-slavery organizations, religious organizations, and investors including Free the Slaves, the Coalition to Abolish Slavery and Trafficking, the Interfaith

36 Id.
37 Amnesty International and Global Witness, Digging for Transparency: How U.S. Companies are Only Scratching the Surface of Conflict Minerals Reporting (April 2015)
The resource is not technically an indicator as it only relies on numbers in a very limited way but does it does allow for some measure of comparative assessments to be made of different companies. For example, my review of the February 2014 list found that Whole Foods was among “companies that have posted a SB 657 disclosure statement” while Fresh Market was listed among companies for which KTC “have not yet identified a SB 657 disclosure statement.”

Using a standard search methodology, the resource research team of KTC reviewed each company website for information outlining the procedures used to detect human trafficking in their supply chains. The resource provides a record of which companies do and do not yet have statements in compliance with the law.

The author spoke with an attorney in the California State’s Attorney General’s Office in 2012. He expressed concern that the law would be all but impossible to monitor and enforce. In January 2014 Know the Chain started its own form of citizen civil society enforcement contacting each company it identified without a statement or with an incomplete statement and providing information about the law. In April 2015 the California Attorney General’s Office sent the first enforcement action letters to companies requesting self-reporting of compliance. There is an interesting interplay with legal enforcement at play with rights activists using information strategies to influence corporate conduct.

IV.
PUTTING PRINCIPLES INTO PRACTICE: REPORTING AND RANKING RESPECT FOR RIGHTS

The previous section surveyed a sampling of rankings, ratings and reporting frameworks that are related to the impact of business enterprises on the enjoyment of human rights. This section explores trends and themes as these efforts inform the ecology of global governance and influence corporate governance. How the producers of these indicators coordinate to create them is examined. The lack of significant contestation on the part of the business entities that are the subjects of these indicators is explained.
Finally, the ways in which information in the form of rankings influence the interrelationship between law, policy, and the production of knowledge about the human rights impacts of particular business practices is sketched below.

Creation and Coordination

Efforts to coordinate are more prevalent than competition in indicator generation for evaluating the impact of business on human rights. Far from seeing competition among producers of indicators in the business and human rights realm, frequently there is collaboration among coalitions of activists to create ratings and rankings. There is often broad public consultation with notice and open comment periods to contribute to the process of creating a rating or ranking. With the exceptions of the rankings and scorecards produced by Oxfam and Enough Project on specific issue areas within single industries, the emerging indicators are coming from blended stakeholder constituencies composed of investors and activists. Know the Chain is composed of no less than ten different organizations. The RDR Index, the CHRB Benchmark, and RAFI all piloted survey questions and sought public comment.

RAFI, as a new entrant to human rights reporting, states that in December 2013 it signed a memorandum of understanding with the popular and widely used Global Reporting Initiative, to “underline their mutual commitment to advancing meaningful corporate human rights reporting.”38 Consistent with this understanding, RAFI will seek to “through an open and multi-stakeholder consultative process, to identify opportunities for the language of the reporting and assurance frameworks to dovetail to the greatest extent possible with the GRI Sustainability Reporting Guidelines.”39

Conditions favor cooperation for the non-profit producers of indicators. Ranking producers are under resourced relative to the enterprises they are ranking so pooling resources rather than competing or duplicating efforts would favor conditions for coordination. NGO activists motivated by specific issues and non-profits presently

38 Email Caroline Rees, Shift Project to author, re Launch of the UN Guiding Principles Reporting Framework, February 24, 2015.
39 Email Caroline Rees, Shift Project to author, re Launch of the UN Guiding Principles Reporting Framework, February 24, 2015.
dominate the space, not intergovernmental or international agencies like the World Bank as is the case with most indicators examined in the literature that follows the work of Davis, Kingsbury and Merry.

Perhaps a benefit from coordinated efforts of indicator producers is that more consultative inputs go into the creation. More broad inputs in creating indicators may lead to more legitimacy and efficacy. Most of the emerging indicators are the result of processes that are transparent. Many of the activist organizations are accorded a moral authority in the eyes of certain segments of the public. It is this group of conscious consumers and investors that those engaged in creating business and human rights rankings wish to reach.40 Still for the single issue or single issue ratings systems put forward by a single NGO like Oxfam or Enough Project there is an aura of authority based on expertise and experience that offers the indicators legitimacy.

The nature of the power imbalances between the ranked and those doing the ranking is not so clear cut as it might intuitively appear. Activists interviewed were often very knowledgeable about context and impacts of corporate action in say the Congo, while a corporation should in theory possess more information about its practices. Activists explain that business do not know because businesses do not ask. Indicators present an opportunity to learn. Several of the indicators rely on survey data and self-reports from companies. Failure to answer a question can cost points in the final rankings so there is incentive for a brand sensitive and motivated company to gather information about potential human rights impacts.

The very few reporting self-assessment standards to advance human rights created by business-only organizations have stalled. For example, the Human Rights Matrix of the Business Initiative, a business-led program with 14 corporate members including GE, HP, the Gap Inc., and Coca-Cola among others ceased operation in 2009 after a short span of activity. So, it seems the source of an indicator may matter for it to become salient.

Competition

While the organizations that are the source of these new rights impact reports and rankings are cooperative evidence suggests that the subjects of the rankings engage in competition. A representative of a food and beverage industry sector company told the author that he aspired to get the company to “best in class” in the rankings.41 The more effective rankings seem to list companies that are in competition with one another. Where a company is vulnerable to brand damage or reputation injury, such as those appearing on Oxfam’s Scorecard; or where the company is in an industry that has confronted a prominent public relations crisis like the pharmaceuticals sector, it may be more readily responsive to rankings. Through interviews with industry representatives, the author has learned that some in the business community, especially those charged with the responsibility for implementing corporate social responsibility and sustainability initiatives actually appreciate the external pressure as it provides them with leverage to justify the need for change internally.42

Information Inputs and Outcomes

Information in the process of indicator construction can play an instructive role. For instance the interplay between the asking of questions by the producers and those providing answers provide an opportunity for human rights education. For instance, Leerveld of the Access to Medicines Index admitted:

*I see it as very important if we don’t ask the companies they will not learn what we want from them. Companies simply don’t know what the world wants from them. We invite them here we explain for a day what we want, we explain the questions—otherwise they don’t understand our questions we explain why we are asking the questions. I am not interested in an index for measuring. I am

42 See Christine Bader, Why Corporations Fail to Do the Right Thing, The Atlantic, April 21, 2014 (“If we are to stop harm associated with business, we have to understand why people fighting the good fight inside companies fail, and what they need in order to succeed.”).
interested in progress. I want to make them better. I want to teach them to learn. We ask questions when we know they don’t have that system in place to answer because they have not organized themselves, but they know for next year they need to get better organized.43

The most common form of data collection for business and human rights related rankings is to conduct a survey. For example, the Ranking Digital Rights and Enough Project instruments rely primarily on surveys. Oxfam’s scorecard draws data from multiple publicly available sources and the availability of information varies.44 In a sense these indicators are still self-reporting for business enterprises with some added scrutiny. Over time, however, it would not be unreasonable to expect to get more and more information about of corporation as the influence of an indicator becomes stronger.

Contestation by Corporate Actors

Surprisingly, the author’s research has not revealed a strong and organized corporate counter-strategy to combat human rights rankings beyond the usual commercial advertising that presents a given business enterprise in a positive light. Nor are businesses ignoring the rankings. If anything, according to those who generate them, indicators are becoming important because industry sectors are treating them as important.

Where the stakes are adverse reputational impacts for a corporation or industry, it would not be unreasonable to expect corporations to launch a coordinated attack on the legitimacy of the organizations responsible for the rankings. However, this strategy could be risky and backfire where the organization is well respected and well established. Another strategy could be to create a ranking by business for business. Again, this strategy could backfire as it could be perceived as lacking the legitimacy of an independent assessment and provide NGOs fodder for comparing what a company says it

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43 Interview with Leerveld, supra.
44 Presentation Annual Forum Panel, Geneva, December 1, 2014
does with respect to rights to what adverse impacts could be attributed to company conduct. Another strategy would be to distract the intended targets of the indicator by identifying a worse issue or industry sector. For example, one representative in the electronics sector reported “buying time” with NGO activists by pointing out how much worse the jewelry industry was and would be a more appropriate starting point for an intervention. Finally, it would be reasonable to expect that contestation on the part of corporations could take the form of silence—refusing to cooperate in surveys and self-reporting, saying nothing. The downside of this strategy however would be giving rights activists the space to create a narrative about a corporation’s commitments and conduct and where there is silence. A corporation’s failure to comment on allegations, explain conduct, or convincingly communicate a policy commitment with respect to rights may lead to further escalation of public actions to embarrass the brand. Moreover, in many of the indicator measurement systems a failure to respond could result in a lower ranking or last place. One representative of a consumer products company informed the author that the best-case scenario would be to have an adverse external NGO say something positive about progress. It is generally more credible to be commended by former critics than to engage in self-congratulatory public relations campaigns. Accordingly, it may be strategic for a business enterprise sensitive to brand pressures to comply rather than contest corporate responsibility and human rights indicators.

Interaction and Influence: Alignment with Law and Policy

There is a significant degree of interaction between indicators in the business and human rights realm and law and policy. Often indicators make direct reference to international and or domestic laws, regulations or polices. For instance the RDR makes express reference the International Covenant on Civil and Political Rights. The RAFI was designed to assess corporate performance against the U.N. Guiding Principles on Business and Human Rights which provide: “the responsibility of business enterprises to respect human rights refers to internationally recognized human rights—understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles
Presently, it is at the domestic level the strategic linkages between indicators and law seem the strongest. The Enough Project’s rankings of conflict minerals predate reports mandated by federal law. Prior to the law’s passage and implementation, the Project’s ranking included an assessment of a company’s position on the proposed law. The Enough Project considered whether a given company supported or opposed disclosure requirements in reviewing where a company would rank with respect to a commitment to transparency. The Enough Project was essentially informing business enterprises of legal obligations to report pursuant to a state law by publicly reporting on the level of compliance with the state law that different businesses attained.

Institutional Interactions: Advancing Rights Reporting

Some of these emerging human rights ranking systems interact with governmental and intergovernmental institutions charged with monitoring human rights. The successor institution created by the Human Rights Council to continue the work of the Special Representative, the U.N. Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, has recently provided a platform for dialog and dissemination of developing business and human rights indicators.

The Group’s mandate provides that, among other things, it should endeavor to:

- Promote the effective and comprehensive dissemination and implementation of the Guiding Principles and the United Nations “Protect, Respect and Remedy” Framework;

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45 UNGP 12.
• Provide support for efforts to promote capacity-building and the use of the Guiding Principles, as well as, upon request, to provide advice and recommendations regarding the development of domestic legislation and policies relating to business and human rights;

• Work in close cooperation and coordination with other relevant special procedures of the Human Rights Council, relevant United Nations and other international bodies, the treaty bodies and regional human rights organizations;

• To develop a regular dialogue and discuss possible areas of cooperation with Governments and all relevant actors, including relevant United Nations bodies, specialized agencies, funds and programmes, in particular the Office of the United Nations High Commissioner for Human Rights, the Global Compact, the International Labour Organization, the World Bank and its International Finance Corporation, the United Nations Development Programme and the International Organization for Migration, as well as transnational corporations and other business enterprises, national human rights institutions, representatives of indigenous peoples, civil society organizations and other regional and subregional international organizations;

• To guide the work of the Forum on Business and Human Rights;49

The U.N. Working Group is composed of five independent experts, reflecting regional representation. These experts enjoy the discretion to “identify strategic opportunities to further embed the Guiding Principles into global governance frameworks.”50


49 Id.
50 See A/67/285 Sixty-Seventh Session Item 70 (c) of the provisional agenda, Promotion and Protection of Human Rights: Human Rights Situations and Reports of Special Rapporteurs and Representatives. 10 August 2012.
51 The working group reports annually to the Human Rights Council and the General Assembly. For more background information, see http://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx

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consists of high-level plenary sessions and parallel sessions organized by the Working Group and the OHCHR. There are also approved parallel sessions organized by external stakeholders. Under the leadership of the Working Group, the 2014 Forum theme “Advancing Business and Human Rights Globally: Alignment, Adherence and Accountability” focused on key strategic issues and current trends—including indicators.

The Working Group and OHCHR sponsored a parallel session: “Improving Human Rights Reporting: The Contribution of the Reporting and Assurance Frameworks Initiative.”52 In addition, the Access to Medicines Index, the Ranking Digital Rights Project, the Human Rights Performance Benchmark Project and Oxfam’s Behind the Brands Scorecard, were all given time on the formal Forum Agenda in a parallel session: “Ranking Business and Human Rights: The Potential of Benchmarking the Corporate Respect for Human Rights.”53 While the authors of these indicators did not explicitly address the nature of their interaction with international human rights institutions participation in the Forum demonstrates that there is active engagement and dialog with U.N. entities. The Working Group is coordinating with various treaty bodies that monitor human rights to assist in the development of general comments and concluding observations and the framing of questions relevant to putting the guiding principles into practice that can be posted to State parties during the review of country reports.54

The U.N. Working Group is well situated to lend legitimacy to emerging indicators consistent with the charge contained in its mandate to build capacity. Indicators could provide incentives for business to create internal capacity to identify and avoid potential adverse human rights impacts to improve brand rankings. To a certain extent indicators are being used as educational tools by the organizations promulgating them. For instance, a representative the Enough Project explained that the organization initiated engagement with corporations in the consumer electronics industry to bring awareness to the issue of conflict minerals.55 The founder of the Access to Medicines

55 Interview with Lezhnev, supra.
Index expects that the preparations a company will need to take to report and respond to rankings assessment inquires will also require becoming more cognizant of human rights impacts.56

The U.N. Working Group is well situated to expand support for emerging indicators to other international entities and agencies consistent with the charge contained in its mandate to develop possible areas of cooperation with these entities and with governments.

In addition to these institutional interactions in the global policy arena, or perhaps further solidifying the interconnections between various institutional actors like the OHCHR and the U.N. Working Group, there are individuals who carry experience and expertise between institutions as they change affiliations. For example, some of the key staff of Shift, the independent non-profit center developing the Human Rights Reporting and Assurance Framework Initiative, previously had been members of the U.N. Special Representative’s team central to drafting the U.N. Guiding Principles.57 Shift lists among its “partner institutions” members of the U.N. Global Compact Network, the International Labor Organization (ILO), the International Organization of Employers (IOE) and Oxfam. It has partnered with institutions that have demonstrated the capacity to influence changes in law and policy.

Finally, information contained in indicators may influence the institution of the market or may serve to support the effective implementation of regulatory efforts to require reporting on non-financial performance as a condition of accessing certain capital markets. For instance, under a recent directive adopted by the European Union some companies will be required to disclose non-financial information, including human rights impacts by 2017. The creators of the Human Rights Reporting and Assurance Framework Initiative maintain that its standardized framework can catalyze change and make required reporting more meaningful.58 Reporting could be the first step towards a meaningful rights ranking.

56 Interview with Leerveld, supra.
Criticisms

Interestingly, some of the loudest critics of the use of indicators to assess the human rights impacts of business are leading members of the human rights movement. For instance, as Arvind Ganeshea of Human Rights Watch puts it “would we conceive of two or three extra judicial killings as equivalent to ten instances of torture?” What some rights activists are resisting is false “commensuration and cognition.”59 As explained by Espel and Sauder, the risk presented by commensuration, or put another way, the process of converting qualities into quantities that can share the same metric is that “commensuration removes information from the particularity of its context and standardizes it.”60 Indeed, a focus on numbers to the exclusion of narrative can numb decision-makers to nature of abuse and atrocity.

Beyond commensuration and cognition concerns, there is a risk of methodological mismatch. Malcolm Langford and Sakiko Fukuda-Parr explain how the qualitative methods dominant in human rights practice are at variance with the “audit”-like tool of indicators.61 They argue that quantitative indicators could on occasion compensate for shortcomings in qualitative approaches but on other occasions will simply be “ill-fitting proxies.”62

Other challenges to the use of business and human rights indicators include the concern that indicators, as currently produced by private civil society actors could serve to disempower the legitimate centers of regulatory power that should more properly govern the area, such as the Human Rights Council or national governments.63

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59 Wendy Nelson Espel and Michael Sauder, The Dynamism of Indicators in GOVERNANCE BY INDICATORS: GLOBAL POWER THROUGH QUANTIFICATION AND RANKINGS 92 (Kevin E. Davis, Angelina Fisher, Benedict Kingsbury and Sally Engle Merry, eds.)
60 Wendy Nelson Espel and Michael Sauder, The Dynamism of Indicators in GOVERNANCE BY INDICATORS: GLOBAL POWER THROUGH QUANTIFICATION AND RANKINGS 92 (Kevin E. Davis, Angelina Fisher, Benedict Kingsbury and Sally Engle Merry, eds.)
61 Malcolm Langford and Sakiko Fukuda-Parr, The Turn to Metrics, 30 NORDIC JOURNAL OF HUMAN RIGHTS 222-238 (2011)
62 Id.
To be sure, there are authorized and recognized public forums for developing policy but the proliferation of indicators created by private actors can be a way of empowering members of civil society to exert influence. There does not appear to be a high barrier to entry, it seems anyone can start an index. A low barrier to entry in the creation of indicators could create opportunities for recalibration of the existing power and information asymmetries between rights activists and business enterprises.

The challenge to the use of business and human rights indicators from the business community centers on concerns over the proliferation of competing initiatives. Business representatives present at Forum discussions on developing human rights indicators for business warned against “moving goal-posts” for performance and emphasized the importance of having realistic expectations of what it is possible for business to achieve.64

**CONCLUSION**

In the expanding ecology of global governance these new business and human rights indicators will provide rights advocates with greater power to influence change by creating performance incentives. Business and human rights indicators have the potential to play an important role in solidifying emerging soft law standards and strengthening corporate self-regulation. The strategic use of indicators in the business and human rights realm could ultimately prove to make the voluntary commitments contained in corporate codes of conduct to respect human rights obligatory.

This Chapter has examined the emergence and evolution of selected ranking and reporting frameworks in the realm of business and human rights advocacy. Specifically, it examined how indicators in the form of rankings and reports evaluating the conduct of transnational corporate actors serve as regulatory tools to bridge a global governance gap that has given rise to human rights risks by providing interested constituencies with actionable information upon which to base decisions. It explained the conditions that

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64 Panel Discussion, Geneva, December 1, 2014.
have led to coordination and collaboration among entities engaged in creating reporting frameworks and rankings. It described how certain indicators rely upon the competitive impulses of the business enterprises being ranked to assert influence over the businesses. It also identified why the businesses that are being ranked have been slow to deploy effective counter-strategies despite efforts to contest legally biding reporting requirements. It considered the interaction of selected business and human rights indicators with recent laws regulating supply chain transparency in the United States and with recent global policy initiatives calling for business enterprises to conduct human rights impact assessments. Finally, it reviews some of the methodological and moral risks raised with respect to ranking rights. These risks can be reduced by ensuring narratives are not wholly overtaken by numbers.