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# Corporate Social Responsibility and Social Media Corporations: Incorporating Human Rights Through Rankings, Self-Regulation and Shareholder Resolutions

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## **CORPORATE SOCIAL RESPONSIBILITY AND SOCIAL MEDIA CORPORATIONS: INCORPORATING HUMAN RIGHTS THROUGH RANKINGS, SELF-REGULATION AND SHAREHOLDER RESOLUTIONS**

ERIKA GEORGE

### ABSTRACT

*This article examines the emergence and evolution of selected ranking and reporting frameworks in the expanding realm of business and human rights advocacy. It explores 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 often places human rights at risk. Specifically, this article examines the relationship of transnational corporations in the Internet communications technology sector (ICT sector) to human rights and the risks presented to the right to freedom of expression and the right to privacy when ICT sector companies comply with government demands to disclose user data or to conceal information users seek. Specifically, it explores the controversial role of transnational ICT corporations in state censorship and surveillance practices. The article explains how conflicts over corporate complicity in alleged abuses served to catalyze change and lead to the creation of the Global Network Initiative, a private multi-stakeholder project, and the Ranking Digital Rights Initiative, an industry independent market-based information effort. Both aim to promote more responsible business practices in the social media industry sector. In conclusion, the article argues that regulating corporate reporting of information relevant to*

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*assessing the potential for adverse human rights impacts is necessary.*

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Chinese journalist Shi Tao did not report on the 2008 Olympic Games in Beijing because he was serving a ten-year prison sentence for divulging a “state secret.” Using his Yahoo! e-mail account, Shi Tao sent a message about China’s restrictions imposed on local journalists to the U.S.-based Asia Democracy Foundation. Chinese government authorities tracked him down with the assistance of Hong Kong based Yahoo Holdings Ltd., a Yahoo! foreign subsidiary that provided China’s state security apparatus with details allowing the communications to be traced back to Shi Tao’s computer. Privacy rights and free expression advocacy organizations accused the company of complicity in the government’s violation of Shi Tao’s rights. When challenged by rights activists concerning his corporation’s role in the journalist’s imprisonment, Jerry Yang, Yahoo’s U.S.-based co-founder, reportedly claimed his company was simply complying with local laws.

Freedom is not a reality in much of the world. Maintaining that sufficient corporate social responsibility simply entails abiding by local law and making profits in new markets misses the fact that business enterprises could, consistent with local laws, end up accused of aiding and abetting human rights abuses. In particular, corporate social responsibility in the

social media space must require more of business enterprises. Implementing and improving human rights due diligence and disclosures could help users and hinder would be rights abusers. Ranking and rating the human rights performance of communications technology companies could provide a path for reforms to improve conditions.

### I. SOCIAL MEDIA AND SOCIAL CHANGE

We live in the Age of Information where social media can drive social change. Activists around the world are using social media to voice dissent and demand change. For example, the Internet played an important role in the uprisings of the Arab Spring in 2011 as activists used various forms of new media to register their opposition, organize protests, and expose state abuses. Images of the self-immolation of Mohamed Bouazizi, the young Tunisian man who set himself alight in protest before a local government office, circulated in cyberspace before being broadcast by Middle East media corporation al-Jazeera. Observers credit his act, witnessed around the world, with sparking the Jasmine Revolution and leading to the removal of President Zine el-Abidine Ben Ali after twenty-three years in power. In Egypt, a Facebook page administered by a Google marketing executive helped mobilize a march of thousands to Tahrir Square in Cairo. Despite the government's attempt to stop the protests by shutting off the Internet and using violence against protesters and journalists, Egyptian activists remained in the Square until President Hosni Mubarak resigned after thirty years in power. In Libya, activists and amateur citizen journalists opposed to the rule of Col. Muammar el Gaddafi used Twitter to expose Gaddafi's violent acts of repression and the consequences of deepening conflict with the old regime in the last days of Gaddafi's rule.

The spread of such uprisings—dubbed “Revolution 2.0” to highlight the importance of new media both in coordinating protesters and in developing social networks and strategies in advance of the uprisings—demonstrates that new media can play a crucial role in empowering pro-democracy protesters to start and sustain their movements. Efforts by repressive regimes to curtail the circulation of embarrassing information further attest to well-founded fears that the efficient distribution of information by dissenters could be enough to destabilize a country. While some users on social media platforms intend to promote constructive change through peaceful means, others use their platform to promote violence and intolerance or to provide misinformation creating risks to human rights and democratic governance in open societies. Investigations

into the use of social media platforms to spread “fake news” during the 2016 presidential election in the United States highlighted these risks.<sup>1</sup>

Given the power and influence of private corporations to create platforms used by members of the public who share news, ideas, and often even personal information, it is important to better understand the ways in which human rights issues implicated by the policies and practices of social media companies.

## II. HUMAN RIGHTS RISKS AND CORPORATE RESPONSIBILITY

When U.S. internet communications technology companies began to enter the Chinese market, they entered a complicated context.<sup>2</sup> Soon several companies became complicit in the country’s censorship and surveillance efforts.<sup>3</sup> Conduct consistent with Chinese law but at variance with international rights to freedom of expression and privacy became company policy as a matter of course.<sup>4</sup>

It was Shi Tao’s case that called into question the nature of industry’s collaboration with the Chinese government in repressing dissent and opened debate on the responsible course of conduct. When Reporters Without Borders (RWB), a media rights group released a report on Yahoo!’s connection to Shi Tao’s case, the story received concentrated news coverage in the international media. Headlines highlighted the company’s role and editorials condemned the company for complicity. *The Financial Times* reported “Yahoo! Accused of Helping China Convict Journalists.”<sup>5</sup> *The International Herald Tribune* headline read “Yahoo!

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1. See e.g., Sheera Frenkl & Katie Benner, *To Stir Discord in 2016, Russians Turned Most Often to Facebook*, N.Y. TIMES, Feb. 17, 2018, <https://www.nytimes.com/2018/02/17/technology/indictment-russian-tech-facebook.html>; Scott Shane, *How Unwitting Americans Encountered Russian Operatives Online*, N.Y. TIMES, Feb. 18, 2018, <https://www.nytimes.com/2018/02/18/us/politics/russian-operatives-facebook-twitter.html>.

2. See, e.g., REBECCA MACKINNON, CONSENT OF THE NETWORKED: THE WORLDWIDE STRUGGLE FOR INTERNET FREEDOM 31–40 (2012) (explaining how the Chinese system for Internet censorship serves to facilitate a new “networked authoritarianism”).

3. See, e.g., HUMAN RIGHTS WATCH, “RACE TO THE BOTTOM”: CORPORATE COMPLICITY IN CHINESE INTERNET CENSORSHIP 25–27 (2006) (offering comparative analysis of search engine censorship through website de-listing and blocking certain keywords).

4. See *id.* at 30–72 (documenting the ways policies and practices by Yahoo!, Microsoft, Google, Inc. and Skype served to aid the Chinese government in suppressing sensitive content and silencing dissent).

5. Mure Dickie & Richard Waters, *Yahoo Accused of Helping China Convict Journalist*, FINANCIAL TIMES, Sept. 7, 2005, <https://www.ft.com/content/97ba5be0-1f62-11da-853a-00000e2511e8>.

Helped Chinese to Prosecute Journalist.”<sup>6</sup> *The New York Times* reported “Yahoo! Role Documented in Chinese Trial.”<sup>7</sup> *The Wall Street Journal* reported “Yahoo! Arm’s Data Helped China Jail Journalist.”<sup>8</sup>

After admitting involvement, the company’s efforts to explain made headlines: “Yahoo! ‘Following Law’ in China Internet Case,”<sup>9</sup> “Yahoo! Founder Explains China E-Mail Move,”<sup>10</sup> “Yahoo! Defends E-Mail Tip-Off”<sup>11</sup> and “Yahoo! Says it Had to Help China Probe Journalist.”<sup>12</sup> Activist reactions to the company’s response also received coverage: “Boycott Threat Shames Yahoo!”<sup>13</sup> and “Yahoo! Faces Flak Over Jailed China Journalist.”<sup>14</sup> Rhetoric ratcheting up responsibility on the ICT industry to align conduct with respect for rights began to appear in editorials of media outlets, with headlines such as: “Yahoo! Has Power to End Chinese Net Censorship.”<sup>15</sup> The issue of corporate complicity remained in international news headlines with reports and editorials implicating Yahoo! in human rights abuses recurring almost annually on the anniversary of Shi Tao’s imprisonment for the duration of his detention.

#### A. FUNDAMENTAL HUMAN RIGHTS: FREE EXPRESSION AND PRIVACY PROTECTION

International human rights law protects privacy and the rights of people to exchange ideas and information. Expression is central to individual human development, open democratic institutions, and systems of governance. Protecting privacy and freedom of expression can serve to protect both individuals and open societies. The 1948 Universal

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6. Joseph Kahn, *Yahoo Helped Chinese to Prosecute Journalist*, N.Y. TIMES, Sept. 8, 2005, <http://www.nytimes.com/2005/09/08/business/worldbusiness/yahoo-helped-chinese-to-prosecute-journalist.html>.

7. Joseph Kahn, *Yahoo Role Documented in Chinese Trial*, N.Y. TIMES, Sept. 8, 2005, <http://www.nytimes.com/2005/09/08/technology/yahoo-role-documented-in-chinese-trial.html>.

8. Wall Street Journal Abstracts, September 8, 2005 (US).

9. *Yahoo: ‘Following Law’ in China Internet Case*, VOICE OF AMERICA, Oct. 31, 2009, <https://www.voanews.com/a/a-13-yahoo-following-law-in-china-internet-case/307307.html>.

10. *Yahoo Founder Explains China Email Move*, ASSOCIATED PRESS, Sept. 12, 2005, <https://www.smh.com.au/news/breaking/yahoo-founder-explains-china-email-move/2005/09/10/1125772733089.html>.

11. *Yahoo! Defends E-mail Tip-Off*, THE INDEPENDENT, Sept. 12, 2005, at 25.

12. *Yahoo! Says it Had to Help China Probe Journalist*, BUFFALO NEWS, Sept. 11, 2005.

13. Michael Logan, Bien Perez, & Jamil Anderlini, *Boycott Threat Shames Yahoo*, SOUTH CHINA MORNING POST, Sept. 13, 2005, <http://www.scmp.com/print/article/516008/boycott-threat-shames-yahoo>.

14. Mure Dickie & Richard Waters, *Yahoo Faces Flak over Jailed China Journalist*, FINANCIAL TIMES, Sept. 8, 2005, at 14.

15. Danny O’Brien, *Yahoo Has Power to End Chinese Net Censorship*, IRISH TIMES, Sept. 30, 2005, <https://www.irishtimes.com/business/yahoo-has-power-to-end-chinese-net-censorship-1.499366>.

Declaration of Human Rights (the UDHR) provides that “[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers.”<sup>16</sup> Article 19 of the International Covenant on Civil and Political Rights (ICCPR)<sup>17</sup> also protects access to information through recognizing the rights to seek and receive information. Freedom of expression encompasses not only the freedom to speak and share information but also the freedom to seek and receive information across all borders through any form of medium. Article 17 of the ICCPR protects the right to privacy: it prohibits invasions of privacy that are unlawful or arbitrary.

While the right to expression is not unlimited, there are limits on how and when a State party may limit expression. First, restrictions on expression must be “provided by law” and laws must be proportionate to the competing interests the State is regulating to protect. Similarly, laws that limit the privacy right or permit invasion must detail the precise circumstances under which interference will be authorized and must provide safeguards to ensure authorities do not arbitrarily invade individual autonomy.

The protection provided to freedom of expression under international law supports the realization of another important right recognized by international law—participation in public affairs and self-governance. Article 25 of the ICCPR makes clear: “Every citizen shall have the right and the opportunity, without any of the distinctions [based on race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status] and without unreasonable restrictions . . . to take part in the conduct of public affairs, directly or through freely chosen representatives . . . .”<sup>18</sup> The ability to make informed choices about issues of interest to the public can be compromised by censorship. Indeed, democratic deliberations depend in significant part on the exchange of information and ideas. The recognized right to participate in self-governance is strengthened when those who participate are allowed access to information about issues and the interests at stake.<sup>19</sup>

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16. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948), at 19.

17. Mar. 23, 1976, 999 U.N.T.S. 171.

18. *See id.* at art. 2 (anti-discrimination).

19. For a discussion of the importance of free speech to democratic processes, *see generally*, ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948) and Alexander Meiklejohn, *The First Amendment is Absolute*, 1961 SUP. CT. REV. 245, 255-257.

## B. NEW TECHNOLOGIES AND RETHINKING RIGHTS PROTECTIONS

Today, our ability to exchange ideas and information has been enhanced by new media. Information and ideas now travel farther and faster than ever before. We are also subject to higher levels of surveillance due to our use of mobile devices. In exchange for ease and convenience consumers willingly or unwittingly share personal information. For example, fitness apps on mobile devices monitor user location to track distance. The use of these technologies can have unintended consequences with implications for our rights to privacy and our ability to seek and receive information. Recognizing new realities, international institutions have offered guidance on how rights protections must be revised to address them.

In 2011, the Human Rights Committee, the institution responsible for monitoring compliance with country commitments made pursuant to the International Covenant on Civil and Political Rights, issued General Comment 34 and explained that in light of new communications technologies: “State parties should take account of the extent to which developments in information and communication technologies, such as internet and mobile based electronic information dissemination systems, have substantially changed communication practices around the world.”<sup>20</sup> Accordingly, the Committee maintains that: “States parties should take all necessary steps to foster the independence of these new media and to ensure access of individuals thereto.”<sup>21</sup>

In 2013, the United Nations General Assembly, the body which includes all U.N. member states, adopted Resolution 68/167 on the Right to Privacy in the Digital Age, expressing deep concern “at the negative impact that surveillance and/or interception of communications . . . may have on . . . human rights.”<sup>22</sup> Resolution 68/167 affirms that the human rights individuals hold offline must be respected online. Therefore, the right to privacy must be protected and respected in digital communications. Resolution 68/167 calls on States to review their laws and policies related to communications surveillance and personal data collection for inconsistency with the obligation to protect privacy rights.

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20. U.N. Human Rights Comm., General Comment No. 34: Article 19, Freedoms of opinion and expression, para. 15, U.N. Doc. CCPR/C/GC/34 (Sept. 12, 2011).

21. *Id.*

22. G.A. Res. 68/167, U.N. GAOR, 68<sup>th</sup> Sess., Supp. No. 49, U.N. Doc. A/Res/68/179, at preamble (Dec. 18, 2013).

With respect to the specific aspects of privacy relevant to the ICT industry, the Committee in General Comment 16 speaks to issues of data protection and electronic correspondence:

The gathering and holding of personal information on computers, databanks and other devices, whether by public authorities or private individuals or bodies, must be regulated by law. Effective measures have to be taken by States to ensure that information concerning a person's private life does not reach the hands of persons who are not authorized by law to receive, process and use it, and is never used for purposes incompatible with the Covenant. In order to have the most effective protection of his private life, every individual should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes. Every individual should also be able to ascertain which public authorities or private individuals or bodies control or may control their files. If such files contain incorrect personal data or have been collected or processed contrary to the provisions of the law, every individual should have the right to request rectification or elimination.<sup>23</sup>

With respect to the specific aspects of privacy relevant to the ICT industry, the Committee in General Comment 16 says of electronic correspondence:

Compliance . . . requires that the integrity and confidentiality of correspondence should be guaranteed *de jure* and *de facto*. Correspondence should be delivered to the addressee without interception and without being opened or otherwise read. Surveillance, whether electronic or otherwise, interceptions of telephonic, telegraphic and other forms of communication, wire-tapping and recording of conversations should be prohibited.<sup>24</sup>

### C. FACEBOOK IS NOT FRANCE: CORPORATE RESPONSIBILITY TO RESPECT DIGITAL RIGHTS

If Facebook was a country, it would be larger than China.<sup>25</sup> Over 1.9 billion people are estimated to use the social media platform each month.<sup>26</sup> Approximately two in seven of the world's population use Facebook.<sup>27</sup> International human rights law is understood to regulate the conduct of nations, yet the conduct of transnational corporate actors can also

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23. U.N. Human Rights Comm., General Comment No. 16: Article 17 (Right to Privacy) The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, para. 10, U.N. Doc. HRI/GEN/1/Rev.1 (Apr. 8, 1988).

24. *Id.* para. 8.

25. Henry Taylor, *If Social Networks Were Countries, Which Would They Be?*, WORLD ECONOMIC FORUM, Apr. 28, 2016, <https://www.weforum.org/agenda/2016/04/facebook-is-bigger-than-the-worlds-largest-country/>.

26. *Id.*

27. *Id.*

contribute to adverse human rights impacts. While international human rights law and advocacy generally emphasizes *State* responsibility to protect, promote and fulfill fundamental human rights guarantees, concerns over the role of *non-state* actors in aiding and abetting rights abuses have become increasingly prominent.

Debates over the social responsibility of transnational business enterprises similarly have gained ground as their influence is perceived to be out of proportion to the ability of any one State's ability to regulate commerce. International soft law instruments now offer some aid to companies confronting human rights challenges.

#### D. THE UNITED NATIONS FRAMEWORK AND GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS

The United Nations Framework and Guiding Principles on Business and Human Rights unanimously endorsed by the U.N. Human Rights Council in 2011 sets forth the roles and responsibilities of country governments and commercial enterprises with respect to human rights. States are obligated to protect rights while businesses are obligated to respect rights. The U.N. Guiding Principles on Business and Human Rights (UNGPs) provide that in order 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."<sup>28</sup> Among other things, the corporate obligation to respect human rights mandates that a business enterprise put in place a "human rights due diligence" process "in order to identify, prevent, mitigate and account for how they address their adverse human rights impacts . . . ."<sup>29</sup>

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 changes. 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."<sup>30</sup> Further, the UNGPs provide that business enterprises should track whether their human

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28. Office of the U.N. High Comm'r for H.R., *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect, and Remedy" Framework*, para. 11 at 13, U.N. Doc. HR/PUB/11/04 (2011).

29. *Id.* para. 17 at 17.

30. *Id.* para. 18 at 19.

rights impacts are being addressed and suggest that tracking should “be based on appropriate qualitative and quantitative indicators.”<sup>31</sup>

Had the social media companies that have come under scrutiny for contributing to human rights risks undertaken due diligence processes to assess the potential impacts of their products and services earlier, perhaps the problems that emerged later could have been avoided. When Mark Zuckerberg the CEO of Facebook faced questions in April 2018 from members of Congress concerned about the role of the company in violating the privacy rights of its users, the issue of whether more could have been done to detect and avoid risks was raised.<sup>32</sup> Cambridge Analytica, a data firm used information obtained from an estimated 87 million Facebook users to target potential voters in the 2016 election.<sup>33</sup> In his testimony before the United States House of Representatives explaining Facebook’s failure to protect user information, Zuckerberg conceded, “We were too slow to spot and respond to Russian interference.”<sup>34</sup> Before the United States Senate, Zuckerberg admitted, “There’s no question that we should have spotted Russian interference earlier.”<sup>35</sup>

### III. INDICATORS AND INFORMATION TO ENFORCE RESPECT FOR RIGHTS

The strategic use of indicators to enforce corporate adherence to the principle that business enterprises have a responsibility to respect human rights holds promise. Just as indicators are being used to compare and rank the performance of nation states for different purposes, such as the World Bank’s Doing Business Rankings, reporting frameworks and ranking formats are being developed to measure the human rights impacts of different influential industry sectors—including ICT.

Indicators could help 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 the demands that businesses meet the obligation to respect human rights are becoming more

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31. *Id.* para. 20 at 22.

32. See, Sheera Frenkel & Linda Qiu, *Fact Check: What Mark Zuckerberg Said About Facebook, Privacy, and Russia*, N.Y. TIMES, Apr. 11, 2018, <https://www.nytimes.com/2018/04/10/technology/zuckerberg-elections-russia-data-privacy.html>.

33. For a description of services offered, see CAMBRIDGE ANALYTICA: POLITICAL, <https://ca-political.com/> (last visited Apr. 13, 2018) (“We find your voters and move them to action.”).

34. *Hearing Before the H. Comm. on Energy & Commerce*, 115th Cong. 4 (2018) (statement of Mark Zuckerberg, Chairman & CEO of Facebook, Inc.).

35. *Hearing Before the S. Comm. on the Judiciary & S. Comm. on Commerce, Sci., & Transp.*, 115th Cong. 5 (2018) (statement of Mark Zuckerberg, Chairman & CEO of Facebook, Inc.).

clearly articulated, calls for some means for measuring progress have increased in certain industry sectors.

#### A. RANKING DIGITAL RIGHTS

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 RDR Project's Corporate Accountability Index ranks the most powerful companies in the Internet and telecommunications sector on respect for freedom of expression and privacy using the disclosed commitments, policies and practices provided to the public by the companies.

The Ranking aims to:

- “Encourage companies to develop, deliver and manage products and services in a manner consistent with international human rights norms;”<sup>36</sup>
- “Identify what specific legal and political factors prevent or hinder companies from respecting users’ and customers’ human rights;”<sup>37</sup>
- “Inform companies, individual users, civil society, academics, investors, governments, and the public about the relationship between the ICT sector and human rights.”<sup>38</sup>

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 in early phases of development RDR planned to assign a weighted value to assessing the quality of a company's answer. A “strong” company would provide a detailed explanation to users. A “fair” company would provide a general explanation. A “weak” company might mention that content was restricted without providing a reason. Variable weights are given to different responses.<sup>39</sup>

Based on the information gathered on a range of questions pertaining to rights and remedies for rights violations, the RDR Project ranked 22

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36. RANKING DIGITAL RIGHTS, ABOUT THE PROJECT, <https://rankingdigitalrights.org/about/> [<https://web.archive.org/web/20160812024245/https://rankingdigitalrights.org/about/>].

37. *Id.*

38. *Id.*

39. PHASE 1 PILOT METHODOLOGY, RANKING DIGITAL RIGHTS 1–14 (2014), [https://rankingdigitalrights.org/wp-content/uploads/2014/10/RDRmethodology\\_v3\\_2Oct2014.pdf](https://rankingdigitalrights.org/wp-content/uploads/2014/10/RDRmethodology_v3_2Oct2014.pdf).

companies in 2017. Taken together, the 22 companies researched for RDR's Corporate Accountability Index provide services to nearly half of the world's 3.7 billion Internet users. RDR found that, to date, company disclosures relevant to policies and practices with the potential to adversely affect human rights have been inadequate across the board. According to RDR, "[e]ven the better performing companies had significant gaps in disclosure on key issues that affect what a user can and cannot say or do, as well as who knows what about their activities."<sup>40</sup> RDR's review found that "[m]ost companies communicate less about what they are doing to protect users' security than what users should do to protect themselves."<sup>41</sup> The presumption then is perhaps a burden shifting of rights protection onto the person entitled to enjoy the right. RDR concluded that "[c]ompanies don't disclose enough for users to understand risks and make informed choices."<sup>42</sup> Freedom of expression and privacy continue to be compromised by corporate actions and inactions.

## B. RANKINGS AS REGULATION

In their investigation of the significance of indicators in socio-legal processes, Kevin E. Davis, Benedict Kingsbury, and Sally Engle Merry observed that there is no consensus on the meaning of the term "indicator," but offer the following functional definition: "[a]n indicator is a named collection of rank-ordered data that purports to represent the past or projected performance of different units. The data are generated through a process that simplifies raw data about a complex social phenomenon."<sup>43</sup>

While social realities may be captured in a myriad of ways, Davis and his 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 Ranking Digital Rights. Put simply by Davis, "[i]ndicators cater to the demand for (and receptivity to) numerical, rank-ordered and comparable data."<sup>44</sup> Where investors and consumers can compare and make informed choices there is a chance to incentivize improvement in rights performance.

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40. RANKING DIGITAL RIGHTS, 2017 CORPORATE ACCOUNTABILITY INDEX 7 (2017).

41. *Id.* at 8.

42. *Id.*

43. Kevin E. Davis, Benedict Kingsbury & Sally Engle Merry, *Indicators as a Technology of Global Governance*, 46 *LAW & SOC'Y REV.* 71, 73 (2012).

44. *Id.* at 75.

Davis and his colleagues have set forth some salient characteristics of indicators. An effective indicator will have a name establishing its authority to make measurements. For example, RDR is descriptive in that it tells observers what it purports to measure—rights in the digital realm. An effective indicator will frequently take the form of a rank ordering that envisions “improvement” and allows for movement in the measurement. RDR is a case in point because it orders companies relative to others based on performance with respect to rights. For example, Facebook is ranked lower than Google because Facebook had less effective overall disclosure of policies affecting users’ freedom of expression and privacy, among other reasons. Because the rankings give reasons, “improvements” can be made by businesses to improve performance relative to their competitors in the industry sector. An effective indicator has the capacity to take complex information about social phenomena and simplify it to enable ease of comparison across difference. Freedom of expression and privacy are complex and compete for priority with other values such as maintaining national security interests against threats, real, imagined, or invented, in different contexts. Finally, an effective indicator can be used to inform decisions and make evaluations.<sup>45</sup> RDR includes specific recommendations for improvements. For example, RDR advises Facebook to, “publish data about content and accounts it removes for violations of its rules, improve its transparency reporting on content removals, and improve disclosures about how it handles user information.”<sup>46</sup> RDR has also issued a guidance on how investors might use information in making determinations concerning the human rights performance of firms in the information communications technology sector.<sup>47</sup>

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.

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45. *Id.*

46. RANKING DIGITAL RIGHTS, *supra* note 30, at 52.

47. *See generally*, RANKING DIGITAL RIGHTS, INVESTOR RESEARCH NOTE: POOR DIGITAL RIGHTS PERFORMANCE—WHO PAYS THE PRICE? (2017), [https://rankingdigitalrights.org/wp-content/uploads/2017/09/RDR\\_2017InvestorNote.pdf](https://rankingdigitalrights.org/wp-content/uploads/2017/09/RDR_2017InvestorNote.pdf).

#### IV. INDUSTRY SELF-HELP SOLUTIONS FOR RIGHTS RISKS: THE GLOBAL NETWORK INITIATIVE

Founded in 2008, the Global Network Initiative (GNI) is a voluntary multi-stakeholder group formed in response to the controversy over alleged corporate complicity in human rights violations after Shi Toa's case captured international attention. The GNI brings together representatives from industry, investors, non-governmental organizations (NGOs), academic institutions and others.

In response to past controversy and in recognition of increasing pressure from governments on companies in the ICT sector to conduct business in ways that could undermine fundamental human rights of privacy and freedom of expression, the GNI was founded to aid industry to meet challenges and to respond to government requests in a principled manner.<sup>48</sup> To that end, the GNI was founded to accomplish four aims: (1) to provide a framework for companies in the ICT sector informed by international human rights standards; (2) to ensure accountability of ICT sector companies through assessments by independent third parties; (3) to promote opportunities for engagement in the development of public policy; and (4) to facilitate opportunities for learning and sharing among different stakeholders.<sup>49</sup>

The founding corporate members of the Initiative were Yahoo!, Google and Microsoft—firms that received significant public scrutiny from rights activists.<sup>50</sup> More recent GNI “participants” include Facebook and LinkedIn.<sup>51</sup> Civil society organizations participating include: Human Rights Watch, the Center for Democracy and Technology and the Committee to Protect Journalists, among others.<sup>52</sup> Investors participating include Trillium Asset Management, the EIRIS Risk Network, and Boston Common Asset Management, LLC, among others.<sup>53</sup>

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48. *See generally, About Us*, GLOBAL NETWORK INITIATIVE, <https://www.globalnetworkinitiative.org/about/index.php> (last visited March 24, 2018).

49. *Id.*

50. *See, e.g.,* Andrew Jacobs, *Yahoo Is Sued Over \$17 Million Fund for Chinese Dissidents*, N.Y. TIMES, Apr. 11 2017, <https://www.nytimes.com/2017/04/11/business/yahoo-lawsuit-china-dissidents-fund.html> (discussing recent human rights litigation brought against Yahoo! for complicity in abuses).

51. *Participants: ICT Companies*, GLOBAL NETWORK INITIATIVE, [http://globalnetworkinitiative.org/participants/index.php?qt-gni\\_participants=1#qt-gni\\_participants](http://globalnetworkinitiative.org/participants/index.php?qt-gni_participants=1#qt-gni_participants) (last visited March 24, 2018).

52. *Participants: Civil Society Organizations*, GLOBAL NETWORK INITIATIVE, [http://globalnetworkinitiative.org/participants/index.php?qt-gni\\_participants=3#qt-gni\\_participants](http://globalnetworkinitiative.org/participants/index.php?qt-gni_participants=3#qt-gni_participants) (last visited March 24, 2018).

53. *Id.*

The core commitments of the GNI are set forth in three founding documents: (1) The Principles;<sup>54</sup> (2) The Implementation Guidelines;<sup>55</sup> and (3) The Governance, Accountability and Learning Framework.<sup>56</sup> The Principles outline the commitment of members to collaborate to advance the freedom of expression and privacy rights of users. The Principles are designed to give general guidance to the ICT industry on how “to respect, protect and advance user rights to freedom of expression and privacy, including when faced with government demands for censorship and disclosure of users’ personal information.”<sup>57</sup>

The GNI effort is intended to inform development of good practice and responses to demands from governments based on a diversity of perspectives drawing upon the experience and expertise of GNI members and participants. The GNI principles encourage participants in the business community to be proactive rather than waiting for risks to arise. Central principles involve recognizing that rights issues deserve to be integrated into the company board level decision-making, risk reviews, oversight, relationship management, and operations.<sup>58</sup> Participants should identify risks with new products and markets.<sup>59</sup> GNI members and participants should also inform people to empower them to make decisions to protect themselves against risks to their digital rights.<sup>60</sup>

A lesson to take away from the GNI initiative is that effective communication is critical to advancing rights and reconciling tension between competing responsibilities. Too often, company positions and policies are not clear; therefore, the solution is transparency.

#### V. PRESSURES TO IMPROVE RIGHTS PERFORMANCE: PROXY PROPOSALS AND INVESTOR INTEREST

Investors make up a significant constituency seeking greater clarity from companies on the human rights impacts of business practices. My review of shareholder resolutions proposed by investors in GNI member

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54. *See generally, Principles*, GLOBAL NETWORK INITIATIVE, <http://globalnetworkinitiative.org/principles/index.php> (last visited Mar. 30, 2018).

55. *See generally, Implementation Guidelines*, GLOBAL NETWORK INITIATIVE, <http://globalnetworkinitiative.org/implementationguidelines/index.php> (last visited Mar. 30, 2018).

56. *See generally, Accountability and Learning Framework Policy*, GLOBAL NETWORK INITIATIVE, <http://globalnetworkinitiative.org/content/accountability-policy-and-learning-framework-0> (last visited Mar. 30, 2018).

57. *Core Commitments*, GLOBAL NETWORK INITIATIVE, <https://globalnetworkinitiative.org/core-commitments/> (last visited Sept. 14, 2014).

58. *Implementation Guidelines*, *supra* note 45.

59. *Id.*

60. *Id.*

companies Microsoft, Google, Yahoo! (now Oath), and Facebook from 2000-2015 found a total of 19 proposed resolutions raising human rights issues. Primarily these shareholder resolutions are put forward seeking policy commitments and performance disclosures. For example, a 2014 proposal put before Facebook shareholders sought the formal adoption of sustainability reporting on the firm's social and environmental impacts:

Shareholders request Facebook issue an annual sustainability report describing the company's short- and long-term responses to ESG-related issues. The report should be prepared at a reasonable cost, omit proprietary information, and be made available to shareholders by October 2014. Supporting Statement: The report should address relevant policies, practices, metrics and goals on topics such as: greenhouse gas emissions, water management, waste minimization, energy efficiency, and other relevant environmental and social impacts. The report should include objective quantitative indicators and goals relating to each issue, where feasible. We recommend Facebook consider using the Global Reporting Initiative's (GRI) Sustainability Reporting Guidelines to prepare the report. The GRI is an international organization developed with representatives from business, environmental, **human rights** and labor communities. The Guidelines cover environmental impacts, labor practices, **human rights**, product responsibility, and community impacts. The Guidelines provide a flexible reporting system that allows the omission of content irrelevant to company operations.<sup>61</sup>

Immediately following reports that Facebook failed to adequately protect user data, shares in the company fell sharply.<sup>62</sup> Investors filed class action lawsuits against Facebook after the value of the company decreased and in the wake of revelations of how Facebook policies may have put privacy rights at risk, the number of lawsuits against the company has increased.<sup>63</sup> Among other claims, investors are accusing Facebook of violating federal securities law, breaching fiduciary duty, and wasting corporate assets.<sup>64</sup> One suit specifically alleges Facebook failed to disclose violations of privacy policies to investors.<sup>65</sup> Information about potential adverse rights impacts and risks to rights do matter to investors.

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61. FACEBOOK, INC. 2014 PROXY STATEMENT 55.

62. Ben Chapman, *Facebook Shareholders Sue as Share Price Tumbles in Wake of Cambridge Analytica Scandal*, INDEPENDENT (UK), Mar. 21, 2018, <https://www.independent.co.uk/news/business/news/facebook-cambridge-analytica-shareholders-sue-lawsuit-share-price-falls-data-privacy-scandal-a8267081.html>.

63. Francesca Fontana, *Lawsuits Against Facebook Over Data Privacy Issues Are Piling Up*, STREET, Mar. 29, 2018, <https://www.thestreet.com/story/14536213/1/everyone-who-is-suing-facebook-for-cambridge-analytica.html> (counting 16 cases against Facebook as of March 2018 and providing short summary of allegations contained in plaintiff complaints).

64. *Id.*

65. Chapman, *supra* note 62.

In the ecology of global governance, where market forces do motivate corporate policies and practices, the new business and human rights indicators could provide concerned investors and other constituencies with greater power to the extent that knowledge is power. Indicators have the potential to play an important role in solidifying emerging soft law standards and strengthening corporate self-regulation as investors take indicators into account in assessing relative risks and the rights performance of different firms. 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 where access to capital is a concern. Even if not a formal legal requirement imposed by the state, corporate self-regulation could result from investors relying on indicators that provide information on human rights risks.

#### VI. INFORMATION AND THE CORPORATE RESPONSIBILITY TO RESPECT RIGHTS

Information regulation is necessary. To that end, it is imperative that law makers seriously consider regulating the reporting of information relevant to assessing human rights impacts that are likely to be of interest to affected communities, investors, and consumers. The 2011 United Nations Guiding Principles on Business and Human Rights contain provisions recognizing the importance of information in ensuring that States protect human rights and that businesses respect human rights. Principle 3(d) provides that States should “encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts.” Principle 21 explains that businesses should communicate their human rights impacts and report on how they will address impacts especially in instances where stakeholders raise concerns. The inability to access information compromises the ability of victims of business-related human rights violations to seek remedy. One proposal of the Treaty Initiative, a collective of non-governmental rights groups advocating for a binding agreement to regulate transnational corporations, posits that: “to ensure the enjoyment of human rights in a way that recognizes the increasing influence and power of corporations, it may be necessary to take more concrete steps to ensure that members of the public have the right to request information directly from corporations.”<sup>66</sup>

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66. ESCR-NET & FIDH, TEN KEY PROPOSALS FOR THE TREATY: A LEGAL RESOURCE FOR ADVOCATES AND DIPLOMATS ENGAGING WITH THE UN INTERGOVERNMENTAL WORKING GROUP ON TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES 48 (2016).

The 2011 OECD Guidelines for Multinational Enterprises devote an entire section to disclosure, explaining that: “[e]nterprises should ensure that timely and accurate information is disclosed on all material matters regarding their activities, structure, financial situation, performance, ownership and governance.”<sup>67</sup> Relevant for avoiding complicity in human rights abuses, the OECD Guidelines do not limit disclosure to financial results; rather disclosures provided to the public should also include “foreseeable risk factors”<sup>68</sup> and could include “information on relationships with workers and other stakeholders.”<sup>69</sup>

There is a general trend favoring greater transparency. There are growing demands for disclosures beyond the customary financial information business enterprises usually provide. A range of different constituencies are increasingly seeking information from businesses; not just about the quality of products but about the conditions of production as well. Consumers are calling for information on product labels to facilitate consumption choices consistent with their moral or ethical commitments. Investors are increasingly interested in information about risks associated with the environmental and social impacts of a business. Global exchanges are entertaining integrated reporting systems combining social and financial information.

## VII. CONCLUSION

This article is intended to contribute to closing a gap in the literature on business and human rights by emphasizing the role of informed communities as potential “enforcers” and “regulators” of corporate behavior. Too often these efforts are invisible, marginalized or seen as irrelevant to “hard” legal processes such as courtroom advocacy or binding international accords. It is my hope that this research will encourage further strategic and analytical inquiry into how informed communities can influence the progressive development of corporate governance and international standards in the absence of agreement on a binding international instrument to regulate the environmental and social impacts of global business enterprises.

The digital rights performance indicator, the industry self-regulation initiative, and the shareholder resolutions examples are presented here to show it may be possible to improve business and human rights outcomes by reducing the risk of abuses occurring in the first instance through

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67. ORG. FOR ECON. CO-OPERATION AND DEV. (OECD), OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 27 (2011).

68. *Id.*

69. *Id.* at 28.

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mandating disclosure of information concerning business policies and practices that place human rights at risk. Information about human rights impacts could be used by the public to help shape priorities. It could enable interested observers to encourage businesses to adhere to commitments to respect human rights. It could benefit businesses interested in avoiding complicity in human rights abuses. Regulating business reporting could promote human rights protection.