

De-contextualized Corporate Human Rights Benchmarks: Whose Perspective Counts? See Disclaimer

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I. INTRODUCTION

In this piece I examine the recent trend of corporate benchmarks in the business and human rights (BHR) field. The most well-known benchmarking initiative is the Corporate Human Rights Benchmark (CHRB), which I discuss along with the Responsible Mining Index (RMI).

I argue that these initiatives, managerialistic in nature, fall short of including the voices of those whose rights are impacted by the corporations that they rank highly. In short, the benchmarks appear to be de-contextualized and ahistorical. Therefore, caution should be exercised when considering these benchmarks, because ranking certain corporations implies human rights performance despite disclaimers that mention their reliance on self-reported corporate data on human rights and, to a much lesser extent, information from select secondary sources, namely the Business & Human Rights Resource Centre (BHRRC). In short, I argue that the benchmarks are misleading in terms of human rights and corporate responsibility when considered from a rights holder perspective.

To illustrate the shortcomings of these benchmarks, I use empirical secondary data from socio-environmental conflicts in which some extractives companies with high rankings on these benchmarks allegedly harm human rights. I also discuss the implications in relation to the growing interest in socially responsible or environmental social and governance (ESG) investing.¹ I recommend that these benchmarks should be re-named to reflect more accurately their content and what they actually measure: corporate-reported human rights ‘inputs’. Moreover, I argue that BHR benchmarks should incorporate data on pertinent socio-environmental conflicts pertaining to their

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¹ John G Ruggie and Emily K Middleton, ‘Money, Millennials and Human Rights: Sustaining “Sustainable Investing”’ (2019) 10:1 *Global Policy* 144.

projects in order to provide a more contextualized, balanced and holistic picture of corporate human rights or responsible mining performance.

Although we should applaud the initiatives and corporations for their well-meaning attempts to improve respect for human rights, via a ‘race to the top’ that drags laggards up with it, this piece questions the value they offer to rights holders. Of still greater concern is how the burgeoning ESG investment sector will use the results of these initiatives to decide on investment criteria. The gap between corporate rhetoric and reality on the ground is often played out vocally and emotionally during certain events and instances such as at the annual United Nations (UN) Forum on Business and Human Rights in Geneva. These encounters and reactions to corporate human rights claims have played a role in motivating this piece.

This piece begins by providing a description of the CHRB and RMI. This is followed by highlighting the problem of top ranked companies causing significant human rights abuses, thus raising questions about deficiencies in the methodology of these benchmarks, including concerning the absence of including affected people’s voices. The piece concludes with some solutions as a way forward for benchmarks in the BHR field.

II. CORPORATE BENCHMARKS ON HUMAN RIGHTS AND THEIR THEORY OF CHANGE

The CHRB, established in 2013, spent its first years consulting with over 400 diverse stakeholders about how best to compile the benchmark. The CHRB published its first ranking in 2017 using the following criteria: human rights policies and commitments; embedding of human rights in management systems and culture; human rights practices and grievance mechanisms; responses to serious allegations; and transparency levels.²

The RMI, a benchmark specific to the mining sector, was launched in 2018.³ It benchmarks 30 mining corporations. Half of its criteria are closely related to human rights, including community wellbeing, working conditions and environmental responsibility.

The CHRB states within its aims a desire to appeal to ESG/sustainable investors, and the RMI can also be employed by the responsible investing community to steer their investment decisions. The CHRB refers to a group of around 80 investors representing over US\$5 trillion in assets who lend their full support to the benchmark.

These benchmarking and reporting initiatives base their analysis largely on self-reported corporate data on internal policies, controls and practices. The aim of creating more robust controls and procedures in order to enhance business respect for human rights can only be commended. The top-down theory that underlies these benchmarks proposes that if corporations implement their human rights policies, controls and procedures internally, and also apply them to their suppliers, then human rights abuses will be mitigated, and eventually eliminated. This managerialist perspective places its hope and trust firmly in the power of corporations to push and pull certain levers and

² CHRB, ‘Corporate Human Rights Benchmark Methodology 2017’, <https://www.corporatebenchmark.org/2017-results> (accessed 10 April 2019).

³ RMI, ‘Responsible Mining Index 2018’, <https://www.responsibleminingindex.org/en> (accessed 10 April 2019).

controls to manage their human rights impacts. Furthermore, corporate benchmarks place their faith in the innate desire of businesses to always win, as argued by Gerbrand Haverkamp, executive director of the World Benchmarking Alliance.⁴ This credence should be questioned, as I will show in this piece, based on the voices of victims of human rights abuses caused by mining companies ranked highly on these benchmarks.

The truth at the ground level is quite distinct from the picture painted by the corporate benchmarks. This managerial conviction disregards the potential and power of contextual factors beyond the control of a corporation to affect human rights, such as local cultures, the desire for self-determination, the political economy and ecology, and the subjective perceptions of rights holders. Despite objective criteria to define human rights, levels of compliance and impact on these rights can only be subjectively experienced and assessed by the affected rights holders.

The CHRB's methodology assesses corporations across six different themes. The most relevant for this piece is Theme E (responses to allegations of serious negative impacts on human rights), which is given a weighting of 20 per cent of the final score. Theme E is based on allegations from external sources; however, 'only sources covered by Vigeo Eiris, BHRRC and RepRisk will be considered and each source will be shared with the Companies assessed.'⁵ Importantly, we are not informed of what exactly takes place when each source is shared with the companies assessed. For example, can the companies object to the source and request it be disregarded?

Both RepRisk and Vigeo Eiris cater for corporate clients, emphasize 'risk management', and appear to have no direct connection with affected rights holder groups.⁶ It would appear that the CHRB does not use other conflict-related databases such as the European Union funded Environmental Justice Atlas (EJ Atlas)⁷ or the Latin American Mining Conflicts Observatory (Observatorio de Conflictos Mineros en América Latina – OCMAL in Spanish)⁸ as well as data from national human rights institutes from countries such as Chile, who have their own map of business and human rights socio-environmental conflicts,⁹ and Peru, who compile monthly reports on this subject.¹⁰ Such conflict-specific databases, which include extensive case studies of human rights-related conflicts and impacts, are often reported by grassroots organizations directly from affected territories.

⁴ Oliver Balch, 'The Disruptors: The Man Holding Companies to Account on SDGs' (9 April 2019), <http://ethicalcorp.com/disruptors-man-holding-companies-account-sdgs> (accessed 10 April 2019).

⁵ CHRB, 'Corporate Human Rights Benchmark Methodology 2019 for the Agricultural Products, Apparel and Extractives Industries', 100, <https://www.corporatebenchmark.org/sites/default/files/CHRB%202019%20Methodology%20AGAPEX%2016Jan19.pdf> (accessed 11 April 2019).

⁶ See, e.g., RepRisk, 'About Us', <https://www.reprisk.com/about-reprisk> (accessed 11 April 2019).

⁷ The Environmental Justice Atlas documents and catalogues social conflict around environmental issues. It aims to make these instances of mobilization more visible, highlight claims and testimonies, and to make the case for true corporate and state accountability for the injustices inflicted through their activities; see: www.ejatlus.org (accessed 11 April 2019).

⁸ Observatorio de Conflictos Mineros en América Latina, <https://www.ocmal.org> (accessed 11 April 2019).

⁹ Instituto Nacional de Derechos Humanos, <https://mapaconflictos.indh.cl/#/> (accessed 11 April 2019).

¹⁰ Defensoría del Pueblo, <https://www.defensoria.gob.pe/se-registraron-tres-conflictos-nuevos-conflictos-sociales-en-el-mes-de-agosto/> (accessed 11 April 2019).

III. REFLECTIONS FROM THE FIELD

I have worked as a researcher in contexts of extractives projects and corporate social responsibility (CSR) since 2008, including three years as a BHR practitioner advising multinational corporations. As such, I have repeatedly visited communities in Chile, Brazil, Peru and Guatemala. During this time, I have been privileged to listen to rights holders' views on corporate responsibility practices. Much of my fieldwork has been done in an ethnographic-like manner via snowballing techniques, with local informants acting as 'door openers' to further meetings and conversations with locals, activists and authorities to further my understanding of the conflicts. I have also conducted interviews with representatives of corporations, civil society and government.

I have undertaken field visits with community residents and workers affected by corporations considered as leaders by both human rights initiatives, such as BHP and Vale¹¹ in Samarco joint venture in Mariana (Brazil), Barrick Gold in the Huasco Valley (Chile), Newmont in Cajamarca (Peru), Antofagasta Minerals in Caimanes (Chile), and Anglo American at Pedra Branca (later sold off in 2013) and Barro Alto (Brazil).

Throughout my community visits, only rarely have I heard locals say the company is respectful of their human rights. The vast majority of responses have ranged from a stern 'no' to one of annoyed bewilderment, often with accusations that I am naïve for asking such questions. This contrasts with corporate communications on the subject of CSR and human rights. The most striking issue is the absence of community voices that are in conflict with and resistant to the companies ranked in the corporate benchmarks. According to EJ Atlas, high-ranking companies in the CHRB and RMI are involved in multiple socio-environmental community conflicts. More specifically, there are currently 28 community conflicts involving Rio Tinto, 18 related to BHP, 27 linked to Vale, and 15 with Barrick Gold.¹²

A further consideration that emerged from field research is the ahistorical nature of the benchmarks. It was curious to observe that BHP and Vale were ranked third and sixth,¹³ respectively – until late January 2019 – considering the collapse of their joint venture, Samarco's tailings dam (Fundão) in November 2015. It was only three days after Vale's second tailings dam (Córrego do Feijão) collapse on 25 January 2019 – which has claimed over 249 lives so far – that the CHRB finally decided to withdraw Vale from the benchmark via a statement.¹⁴

BHP nonetheless continues to be ranked in third place despite the earlier Fundão dam disaster in November 2015. The Fundão disaster dumped 35 billion tonnes of iron-ore reject and mud, killing 19 people and affecting the lives of 23,000 families, wiping out villages, leaving hundreds homeless and destroying the livelihoods of fishermen in the

¹¹ Vale was included by CHRB until 28 January 2019, after which it was expelled for a year due to a second fatal tailings dam disaster at Brumadinho, Minas Gerais, Brazil.

¹² Environmental Justice Atlas, note 7.

¹³ The first version of this piece was submitted to the journal in December 2018.

¹⁴ 'CHRB Response to Brumadinho Dam Disaster – Vale Suspension from Human Rights Benchmark' (2019) <https://www.corporatebenchmark.org/sites/default/files/CHRB%20Response%20to%20Brumadinho%20Dam%20Disaster%2029Jan2019.pdf> (accessed 29 January 2019).

Rio Doce basin.¹⁵ In July 2016, during an interview with an affected woman victim from Bento Rodrigues, the most affected settlement (of historical heritage) flattened by the disaster affirmed that her community saw nothing ‘humane’ in the corporation’s actions and that the community felt hopeless in its predicament. The only justice the community had obtained to date was thanks to the state prosecutor and not to the actions of Samarco. During a visit in January 2019, other residents thought it was perverse that they had to request the company who had committed the ‘crime’ to manage their remediation as victims.

Around eight months after the Fundão dam disaster, Samarco (together with the Brazilian state) created the ‘Fundação Renova’ (Renewal Foundation) to deal with all compensation and resettlement claims from the community. The Foundation works with 42 programmes that aim to provide reparations, compensation and revitalize the area damaged from the dam burst. Despite its immense budget of R\$11.6bn reais (US\$2.87bn) a common remark heard from *atingidos* (community victims) during conversations has been a play on the name of the Renewal Foundation, calling it instead ‘Fundação Enrola’ (which in English means it intentionally slows down and complicates the process). Others have commented on how apt the name is, as the Foundation manages to ‘renew’ the disaster on a daily basis (referring to the social impacts of its actions) or relating the name to its constant and frequent ‘renewing’ of staff. The main areas of grievance are around the lengthy delays for the compensation and resettlement process (something the Foundation acknowledges, although it attributes this to its intricate multi-stakeholder governance system); the harm to local social cohesion; and discrimination felt by dwellers in the city of Mariana who gossip about, and blame the rural *atingidos* (temporarily housed in Mariana since December 2015) for bringing an end to mining activities, which the city depends on; and the further stigmatization of the *atingidos* by urban residents for the (rightful) compensation they receive (after undergoing grueling judicial battles) whilst the city endures economic hardship.

The CHRB, on the other hand, justified the inclusion of Vale in its benchmark until 28 January 2019, stating in its communication that ‘Vale’s scores improved in terms of their systems for providing remedy and in demonstrating how they responded to allegations of serious human rights impacts’.¹⁶ When contrasting the CHRB statement with the testimonies from the affected community, one begins to appreciate the chasm between the perspectives of victims and corporations when it comes to understanding human rights and remedy.

Other high-ranking mining transnational corporations in the RMI, such as Newmont, have also been associated with human rights abuses in the recent past, despite their human rights efforts. This includes the deaths by Peruvian military police forces of at least four human rights defenders who were opposing the Conga mine in Cajamarca, Peru in late 2011.¹⁷ Anglo American’s Minas-Rio project in Brazil has faced two lengthy suspensions

¹⁵ ‘Globonews Vale prevê mais dois anos para reparar danos do desastre da Samarco, diz presidente’, <https://g1.globo.com/economia/noticia/vale-preve-mais-dois-anos-para-reparar-danos-do-desastre-da-samarco-diz-presidente.ghtml> (accessed 9 January 2019).

¹⁶ CHRB, ‘Response to Brumadinho Dam Disaster’, note 14.

¹⁷ BBC Peru, ‘State of Emergency over Conga Mine to Expire’ (2012), <https://www.bbc.com/news/world-latin-america-19454440> (accessed 29 January 2019).

ordered by the Brazilian state due to concerns over the project's impacts.¹⁸ Furthermore, Barrick Gold's Pascua Lama mine was permanently shut down by Chilean authorities in January 2018 due to multiple instances of poor environmental management.¹⁹

Communities threatened by the siting of extractives projects, particularly in Latin America, have also organized referendums to demonstrate local sentiment toward these projects. Of note is the case of Anglo Ashanti's (ranked fourth for community wellbeing in the RMI) La Tolima project, which 98 per cent of residents in Cajamarca, Colombia voted against in 2017.²⁰ However, it is important to point out that the benchmarks pre-empt these criticisms of gaps between rhetoric and reality via brief disclaimers, as discussed below.

IV. LIMITS OF BENCHMARK DISCLAIMERS: HUMAN RIGHTS CAN NEVER BE FULLY MEASURED, BUT WE WILL PRODUCE A BENCHMARK ANYWAY!

The idea of measuring and developing indicators for human rights is not new. In 2012, the UN Office of the High Commissioner for Human Rights (OHCHR) published a guide entitled 'Human Rights Indicators: A Guide to Measurement and Implementation'. The 188-page document provides a disclaimer on the limits of indicators for human rights through a statement made in 2000 by Thomas Hammarberg, the former Council of Europe Commissioner for Human Rights: 'Human rights can never be fully measured in statistics; the qualitative aspects are too essential. The conclusion, however, is not that the human rights community should avoid using quantitative facts, but rather learn how to use them.'²¹

The emphasis of the qualitative aspects of human rights is also made by the Chair of the Board at the CHR, Steve Waygood:

At the CHR we want to emphasize that the results, based on publicly available information, are a proxy for corporate human rights performance and not an absolute measure of performance. This is because, while there is extensive work being undertaken to understand and value respect for human rights, there are no agreed fundamental units of measurement for human rights ... Human rights are fundamentally qualitative and hard to measure, which makes it difficult for any assessment to do justice to the complexity of the issues involved. For this reason ... it will only ever provide a proxy rather than an absolute measure of human rights performance.²²

¹⁸ America Economía, 'Reguladores de Brasil ordenan a Anglo American frenar nuevamente operaciones en el país tras filtración', <https://www.americaeconomia.com/negocios-industrias/reguladores-de-brasil-ordenan-anglo-american-frenar-nuevamente-operaciones-en-el> (accessed 29 January 2019).

¹⁹ Superintendencia Medioambiente de Chile, 'SMA sanciona con la clausura definitiva al proyecto minero Pascua Lama', <https://portal.sma.gob.cl/index.php/2018/01/18/sma-sanciona-a-pascua-lama-2018/> (accessed 29 January 2019).

²⁰ Registraduría Nacional del Estado Civil, https://wsp.registraduria.gov.co/atipicas/_BOLETINES/Boletin_CP_10_29022.pdf (accessed 29 January 2019).

²¹ OHCHR, 'Human Rights Indicators: A Guide to Measurement and Implementation' (OHCHR, 2012) 27, citing the address of the Council of Europe Commissioner for Human Rights (2006–2012) at the Montreux Conference, 'Statistics, Development and Human Rights' (September 2000).

²² CHR, 'Corporate Human Rights Benchmark Methodology 2019', note 5.

The RMI similarly disclaims itself by affirming that it ‘does not attempt to measure the actual outcomes (positive or negative) achieved on ESG issues. Assessing company performance in this way would be highly problematic, as outcomes are not directly comparable between companies’.²³

The disclaimers offered by the benchmarks refer to their focus on measuring the input side of corporate respect for human rights (policies, procedures, controls and self-stated practices) and disregard the outcomes as perceived by the rights holders. Consequently, the title ‘CHRB’ fails to reflect what it actually measures and ranks, i.e., corporate self-reported practices, policies, controls and procedures. The official names of CHRB or RMI conjure up images of companies being ranked on their performance on human rights and responsibility. In reality, they are benchmarks of company inputs towards achieving human rights respect and responsibility, or ‘proxies’, as noted by the Chair of the CHRB’s Board. If part of the US\$26 trillion ESG investment industry in the US begins to make decisions based on the CHRB or RMI, investors may be unknowingly funding human rights harms.

BHR benchmarks do not seem to reveal the darker side of business practices, such as abuses of human rights, which appear to be a material aspect of BHR for investors and their followers at large.²⁴ Perhaps the answer to this point is also covered by the disclaimers provided by the respective initiatives.

V. CONCLUSION AND RECOMMENDATIONS

The managerialization of human rights began before the endorsement of the UN Guiding Principles on Business and Human Rights (UNGPs) by the Human Rights Council in June 2011. The due diligence concept at the core of Pillar II of the UNGPs enables and promotes the managerialization of human rights by focusing on the input or top-down approach by business, albeit with stakeholder consultations. This has led to companies treating human rights as a risk management concern. Allowing business to address human rights in a managerial manner makes sense, as it is in the nature of business to want to manage and control its resources and issues. However, the managerialization of human rights (ironically) distracts from the affected rights holders, encouraging a de-contextualization of the lived realities as demonstrated by the gap between the ranking of leading mining companies in the CHRB and RMI and the voices from the territories where they operate.

Should these BHR benchmarks achieve their goal of channelling more investment into the high-ranked companies where affected rights holders continue to have their human rights disrespected, the initiatives could be at risk of doing more harm than good. Although the initiatives and participating companies deserve plaudits for their good intentions and their ‘race to the top’ (or to move further up, in the case of laggard

²³ RMI, *Responsible Mining Index 2018*, https://responsibleminingindex.org/resources/RMI_2018_report-WEB.pdf (accessed 11 April 2019).

²⁴ The CHRB should be acknowledged for withdrawing Vale from its benchmark after the Brumadinho dam disaster in late January 2019.

companies), it is imperative that they find a way to include the voices of affected rights holders within their benchmarks and reporting frameworks so investors can make a truly informed choice about ethical investments. The current method of including Theme E (responding to serious allegations), weighted at just 20 per cent of the final score by the CHRB, does not seem to be effective from a rights holder perspective. Perhaps further weight should be given to Theme E by the CHRB, including finding a way to include the voices of rights holders on the receiving end of ‘companies’ appropriate action’ (E3) to address serious allegations, thus allowing for more contextualized BHR benchmarks.

Moreover, the mechanics of the CHRB and RMI should incorporate sections that provide details and affected voices from pertinent socio-environmental conflicts from the present and recent past that relate to projects from featured companies. At the very least, this addition would provide a further qualitative, balanced and more holistic insight into corporate human rights performance. We already know that corporate responses to serious allegations are included in the CHRB. However, a new segment on community conflicts or resistance to corporate projects would lend substantial credibility to these benchmarks, and possibly encourage engagement from more (grassroots) civil society organizations, leading to more rights holder-inclusive benchmarks. Such a new segment could include information on episodes of contestation of the corporations’ projects. If the private regulation of BHR is to be considered legitimate and credible, then businesses and their advisors must take a humbler approach and place rights holders at the centre of their human rights efforts.²⁵ Failing this, questions will be continued to be asked about the value of corporate benchmarks to impacted rights holders.

²⁵ See UN General Assembly, ‘Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises’, A/72/162 (18 July 2017).