The ambiguity of human rights in Corporate Social Responsibility institutionalization in Colombia: disciplining society, destabilizing enforcement regimes?

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Introduction: On the ambiguous political function of the language of human rights

Debates on the topic of a "rights-based approach to development" often revolve around a paradox: on one hand, the human rights framework can help challenge structures of exclusion or domination; on the other hand, it can serve to reproduce and legitimize those very structures (see Roy Grégoire, Campbell and Doran in this issue). The extractive industry provides a useful context in which to examine this paradox, as it involves a number of actors (governments, businesses, Indigenous Peoples, civil society, environmentalists, etc.) who draw on the notion of human rights for purposes that are sometimes diametrically opposed. How, then, are the different uses of human rights to be discerned from each other? Drawing on theoretical tools developed by proponents of "global law," this article examines the institutionalization of Corporate Social Responsibility (CSR) in Colombia in an effort to shed some light on this question.

The global extractive sector is a dynamic producer of norms, of which a significant number are put forward by the private sector under the rubric of CSR. In the academic literature, as well as in public debates, rights-based approaches are often set against the voluntary and

self-regulatory nature of CSR (for example Coumans 2011; Wettstein 2009), something that logically follows from the fact that "[t]he arena of 'business and human rights' has […] expanded amid clashes between a rights-based approach to development and market-based notions of access and entitlement to resources" (Kemp and Vanclay 2013: 86-87).

Nevertheless, it is also a fact that human rights language is increasingly used in CSR codes, and that these codes increasingly refer to international human rights instruments.[1] Voluntary measures initiated by the private sector also hold a prominent place, for example, in the UN Guiding Principles on Business and Human Rights (UN 2011) – a set of guidelines that have been largely accepted by States and businesses. Have the contradictions thus been resolved? Or could it be that, as Mayer suggests (2009: 576), the various debates regarding human rights and CSR simply draw on a common language that masks the underlying differences? The thesis of this article is that the institutionalization of CSR in Colombia, under a professed "human rights approach", are part of a normative project that has disciplinary implications for society. The article also explores the hypothesis that the emergence of this normative project in Colombia could destabilize existing regimes of rights enforcement that create opportunities for emancipatory practices. It thus questions the optimistic interpretation that the incorporation of the language of human rights in the context of CSR would represent an effort to bridge the gap between the State's abilities (and objectives) and the market forces unleashed by globalization.

We begin by outlining the theoretical issues related to the introduction of a normative project (the institutionalization of CSR) in a context already characterized by a multiplicity of normative orders. We insist on the performative dimension of this project – *i.e.* its historically situated political impact – in relation with two key issues: the kind of social articulations that it implies and its interaction with other normative orders. We then describe the different political arenas in which this normative project is deployed as well as the network of institutional spaces from which it emanates. In the following section, we discuss the "disciplinary" effects of this project, given the synergies that it exhibits with counter-insurgency logics and politico-economic strategies put in place by paramilitaries and their allies. We then examine whether it can be seen as destabilizing existing human rights enforcement regimes. We conclude by discussing whether CSR institutionalization

can effectively be considered as an attempt to "bridge the gap" between the State's abilities and the forces of globalization.[2]

Theoretical Framework: The Performative Dimension of Normative Projects

The concept of performativity has been used in a variety of ways in political philosophy.[3] Here we use it to insist on the political effects of human rights language in a particular historical context, rather than merely examining the referential content of normative instruments.

For example, as Montesinos Coleman indicates,

> [e]ven expansionary articulations of rights can serve to fence-in the holders of those rights at sites of violation, because of *how* rights are affirmed as present, *how* subjects of rights are defined and recognised. [E]xamples of human rights in practice indicate that exclusion and dispossession can be written into the recognition of rights (2015: 1066).

On the other hand, however, the *a priori* indeterminacy of "the human", its radical openness, also confers an emancipatory potential to human rights (Montesinos Coleman 2015: 1066; see also Zagrebelski 2003 and Sieder 2011).[4]

The ambiguous role of human rights results in part of their location at the junction point of the political and legal realms: human rights can both represent the codification of political settlements and constitute the grounds for legitimizing new political claims. As such, they can be used to either close or open political processes. This performative dimension has been central to debates around CSR and business and human rights. While some argue that human rights are used to "depoliticize politics itself" (Douzinas 2007: 102, cited in McKernan and Li 2016: 8), and serve to foreclose any substantial political change, others argue that the "radical equality" that is inherent to human rights, when inscribed in the realm of corporate governance, can be used in emancipatory ways. For McKernan and Li, for example, the UN Guiding Principles on Business and Human Rights "imaginatively [extend] the space for the staging of egalitarian claims", at once breaking up the "dogmas of statism [and] legalism", thus offering new opportunities for opening up the political process (McKernan and Li 2016: 19).

Building on the notion of global law developed by members of the Brussels School of Philosophy of Law, this article contributes to this debate by focusing on the kinds of normativity underlying various uses of human rights language in Colombia. It also pushes the debate further in that it examines the political implications of normative interventions not only in and of themselves, but also in the way they interact with other normative orders. Indeed, the notion of "global law" is based on the realization that:

> the law is no longer deemed to provide a framework within which social interactions take place, as is the case in the sovereignty model, [but] has become a contested issue in and of itself and a means of action for actors who no longer make moves according to the rules (or not), but also try to create or modify the rules to their advantage (Frydman 2007: 45).[5]

This school of thought argues for an examination of "the relationships among legal systems[,] the emergence of new, diverse and fragmented institutionalized regulatory systems, [and] the destabilization of systems as a result of the various strategies used by actors" (Frydman et Chérot 2012: 12). It highlights the need to measure empirically the effects of normative or legal interventions that may "cross [...] State [or] legal order boundaries, as well as conceptual ones, drawing on [...] notions borrowed from different systems, and branches of law, and mixing them […] with new institutions" (Frydman 2007: 42). In this article, we analyse the institutionalization of CSR as one such phenomenon, where human rights language is coupled with different normative logics and politico-economic strategies in the name of co-regulation. Co-regulation, in turn, denotes a distancing from institutional regulation based on coercion and a move towards an "economic regulation" based on incentives and according to which public authorities and private companies cooperate with each other (Frydman 2004: 231).

In this article, however, we go beyond the most common uses of "global law" in that we do not only study the regulatory implications of these interacting normative orders (Frydman et Chérot 2012: 26), but that we also interrogate the dialectical relationship that they establish with the fundamental structure of political communities. Indeed, laws and norms relate not only to regulation, but also to social articulations more broadly. Accordingly, we analyze the institutionalization of CSR as what Berns calls a *normative project* (Berns 2007: 51-52) which presupposes "different way[s] of considering how behaviours are restricted or regulated" (Berns 2007: 51-52) and which entails *global*

systems of coherence "which define the subjects and objects with which [it] interact[s]" (Berns 2007: 53).

We thus consider CSR institutionalization to be performative in two related ways: on the one hand, it constructs social actors according to "global systems of coherence"; on the other hand, it impacts political communities through its dynamic interaction with other normative orders.

Linking three major Colombian political arenas

Colombia provides a particularly suitable context in which to examine the ambiguous role of human rights and the interaction of several normative projects. Since the new Constitution of 1991, the language of human rights has been ever-present in the country's political and legal arenas. A broad spectrum of rights and freedoms is now formally recognized; international human rights treaties enjoy the same weight as the Constitution itself, as a way of maximizing their protection (Constitución Política de Colombia, 1991, art. 93); and a great number of institutions and mechanisms, including the Constitutional Court, have been established to enforce such rights and freedoms. On several occasions, traditionally marginalized groups have won significant cases in the Constitutional Court and the Inter-American Human Rights System (see CNMH forthcoming; and CNMH 2014: 54). Although judicial strategies can undoubtedly be very taxing on social actors, it is possible to affirm that these enforcement mechanisms have, amongst other impacts, been used in emancipatory ways by Indigenous and Afro-descendant communities, for example, to claim political spaces in relation to mining (Rodríguez-Garavito 2011; Weitzner 2015).

We illustrate below how CSR institutionalization plays a role in three important Colombian "political arenas", in which human rights language is significant. First, we highlight the multiple transitional political processes related to the internal armed conflict. Examples include the current negotiation process between the Colombian Government and the Revolutionary Armed Forces of Colombia (FARC), the process for demobilization of the United Self-Defense Forces of Colombia (AUC) that concluded 2006, and the legal-

political process that led to the present constitution. It is worth noting that the present Colombian Government seeks a "revolution that is unique in the history of [Colombia]: *a peace revolution*" (DNP 2014: 4, emphasis in original). Parallel to these processes, different actors make use of legal strategies that seek opposing results regarding how human rights violations are to be addressed. In some cases, these strategies favour the political and economic interests of paramilitary groups and their allies (Hristov 2009). In other contexts, they have sought to circumvent impunity enclaves in the national judicial system by recurring to supra-national (Sikkink 1993) or transnational jurisdictions (Restrepo Amariles 2008).

A second political arena in which human rights language operates is the extractive sector itself. This sector is characterized by the transnationalization of its governance; the predisposition of its various stakeholders to bring forward normative and legal innovations (Frydman and Chérot 2012: 35; Rodríguez-Garavito 2011: 268) – often formulated using human rights language; the fragmentation of authority among national, local and transnational actors; as well as blurred boundaries between public/private, law/contract, and State/market realms (Hennebel and Lewkowicz 2007: 150). As Szablowski indicates, States that apply neoliberal policies – as is the case of Colombia – have developed a "strategy of selective absence" whereby the effectively delegate the "responsibility for the social mediation of mining development" to private project operators (Szablowski 2007: 58). As will be discussed, the social mediation of mining development in Colombia necessarily implies addressing a context of widespread gross human rights violations.

These two political arenas overlap extensively. Much of Colombia's political violence relates to territorial control (CGR 2013: 19); and by 2012 more than a third of the country's territory was subject to mining licenses (either requested or granted) or had been designated as "strategic mining areas" (CGR 2013: 24).

As will become clear, by incorporating human rights language the institutionalization of CSR explicitly articulates these two major political arenas (the debates around mining and the debates around peace and human rights) with a third: Colombia's international relations. The next section describes how the normative project to institutionalize CSR,

through a loosely articulated network of institutional spaces distributed among these three political arenas, establishes political-normative coherence systems, defines political identities[6] and enables particular relationships among social groups involved in, or impacted by, the armed conflict and/or extractive industries.

The Performativity of CSR Institutionalization: Defining and Structuring Social Actors

As was conclusively documented by the Comptroller General of the Republic (an independent government oversight agency) in a 2013 report, mining activity in Colombia is intimately linked to serious human rights problems (CGR 2013).[7] Nevertheless, in recent years, the country's mining and energy sector has grown in relative importance, going from 9.7% of the gross domestic product (2006-2009) to 11.2% (2010-2013). In response to the Government's policy to attract foreign investment in this sector, such investments rose from US$4.961 billion in 2010 to US$8.281 billion in 2013. In 2013, 32% of Colombia's revenue came from mining and energy royalties, a 75.4% increase from 2010 (DNP 2014: 175-176).

Parallel to this rise in foreign direct investment, from the beginning of his administration in 2010, President Juan Manuel Santos has placed the mining and energy sector at the center of his economic policy. As a result, the "mining locomotive"[8] has become a key element of the National Development Plan, which highlights the vital contribution expected from the sector to finance "programs that seek to build a country at peace" (DNP 2014: 72; 175). To achieve that goal, the Government pledges to "[send] clear public policy signs to private investors [and to] adjust current regulations to fit the reality of the sector" (DNP 2014: 189).

These policies are consistent with the neoliberal reforms implemented in Colombia since the 1980's, especially in relation to mining (see CGR 2013: 180-194). Colombian laws have long been in line with the principle of "free mining" (see Laforce, Campbell, and Sarrasin 2012). In fact, the current mining code considers the mining sector to be of "public and social interest in all of its realms and phases," and prioritizes the interests of the mining

authority (*i.e.* the government agencies that regulate mining) and title holders in land use planning (CGR 2013: 185; 188). According to the Comptroller General, the mining code also "include[s] articles that shield the sector from rights granted in the [Constitution,] such as rights to a clean environment, life [and] livelihood" (CGR 2013: 201).

It is in this context that a number of policies foster the institutionalization of CSR by establishing a model of public-private co-regulation. In 2011 the Ministry of Trade and Tourism which, among other tasks, is responsible attracting foreign investment, launched a "National Competitiveness System," to strengthen the coordination between the private sector and the Government (VDE 2011). In 2014, the President appointed a High Presidential Counsellor for Public and Private Management (Noticias RCN 2015) whose duties include "harmonizing economic activities with public policies, strengthening mutual trust (between companies and society), improving conditions for foreign investment, and maximizing private sector contributions for sustainable development" (Acevedo Guerrero *et al*. 2013: 310). Meanwhile, the Colombian Government asserts that it uses a "Human Rights-Based Approach" in its policies and proposes that "Human Rights be the common conceptual framework for State and private sector partnerships" and "that companies carry out their [CSR] activities within this framework" (PPDHDIH 2014: 9; 44; 48; footnote 33).

The various policies that address the complex human rights issues related to extractive activities configure a network of institutional spaces that consistently refer to one another but lack any formal articulation. Three interrelated elements characterize this network: the omnipresence of human rights language; a focus on "strengthening" the relationships between extractive companies and surrounding communities, including the institutionalization of "CSR commitments" agreed upon by companies and civil society; and a recognition of companies as legitimate political actors which may even be called upon to enunciate certain norms.

These instruments and policies correspond to what Berns describes as "the construction, presentation and designation of a new actor, a new mediator[:] the company […] which thus becomes a political actor in its own right [in] a new global construction of coherence, in the context of fostering coherence between the economy and human rights" (Berns 2007: 64-65). In the case of Colombia, this "global construction of coherence" emerges through

four interrelated dynamics. In addition to the institutionalization of CSR (1), the legislation also assigns private companies a legitimate role in the peace process and in reparations mechanisms directed at the victims of the armed conflict (2); human rights language is incorporated into the CSR instruments of companies (3) and CSR plays a significant role in Colombia's foreign relations, especially when these concern human rights issues (4). These dynamics overlap in the institutional spaces discussed below.

In the context of its human rights policy, for instance, the Government has created a "National Human Rights and International Humanitarian Law System." This system introduces the concept of co-responsibility (Decreto 4100 de 2011) which, in other official documents, is used to legitimize the role of the private sector in the development of human rights policies (PPDHDIH 2014). The National Human Rights System complements what is generally known as the "Victims Law" (Ley 1448 de 2011), which provides a transitional justice mechanism to respond to the needs of victims of the armed conflict. Its implementation is partly shaped by the principle of "joint participation" (Ley 1448 de 2011, art. 14), according to which "the National Government shall [...] engage civil society and the private sector in the work towards national reconciliation and the realization of victims' rights" (Ley 1448 de 2011, art. 33). As such, in implementing the Victims Law, the Unit for Comprehensive Victim Support and Reparation seeks "[t]o combine the work of the public and private sectors in order to provide victims adequate comprehensive support and to ensure respect of their human rights" (SNARIV 2015).

In other institutional spaces, the Government proposes to use particular human rights protection mechanisms, such as the Early Warnings System,[9] to facilitate the implementation of mining and energy projects, arguing that:

> [d]elays in infrastructure projects […] represent an obstacle for the development of key projects in the country in terms of infrastructure, mining and energy[.] In this sense, and based on a conflict-prevention approach, early warnings systems will be promoted, both to ease the processes for environmental licensing and prior consultation and to prevent conflicts relating to projects that do not require environmental permits (DNP 2014: 200; see also PPDHDIH 2014: 37).

Signed in 2008, the Canada-Colombia Free Trade Agreement (CCOFTA)[10] creates other institutional spaces, such as the elaboration of Annual Reports on Human Rights and Free Trade. These reports focus on the effects of measures taken under CCOFTA on the

situation of human rights, and are to be tabled by each government in their respective legislatures (CTI 2013). The Colombian reports, which are elaborated by eight different public entities[11] with the support of the Canadian Colombian Chamber of Commerce, illustrate the use of co-regulation in addressing human rights issues related to mining, and refer to the strengthening of spaces for three-way dialogues (*i.e.* involving governments, companies and communities) and public-private engagement as set out in the National Human Rights System (CTI 2013: 11).

The creation of the Mining and Energy Committee on Security and Human Rights in 2003 further illustrates the incorporation of human rights language in companies' CSR codes as well as the role played by CSR in the context of Colombia's international relations. The committee was created to provide a "space to examine, reflect and provide recommendations to improve the work of [mining and energy companies] and Government agencies with respect to human rights" (CTI 2013: 16). Its members include eight Colombian Government agencies, sixteen mining-energy companies and industry associations, five national and international civil society entities, and four embassies[12] (CME 2015).

Moreover, in 2012 the Colombian Government created the Environmental and Social Affairs Office, reporting to the Minister of Mines and Energy (MME), to collaborate with authorities in solving conflicts and developing strategies for dialogue and cooperation with communities. MME "provides accompaniment and monitors activities in the mining and energy sector to ensure the strict adherence of national and foreign companies to [human rights] regulations and recommendations" (CTI 2013: 14). However, it frames this objective within the confines of "*previously-established commitments in relation to CSR*" (CTI 2013: 16, emphasis added) – *i.e.* commitments resulting from the companies' CSR programs or negotiated by companies with surrounding communities. Furthermore, as stated in its National Development Plan 2014-2018, the Colombian Government intends to "provide tools for social inclusion and dialogue in order to strengthen socio-cultural awareness of the impact of mining activities […] on human rights [and] anti-corruption practices, in an effort to foster trust in interest groups" (DNP 2014: 191-192).

In 2014, the Colombian Government, through the Presidential Programme on Human Rights and International Humanitarian Law, published a document entitled "Business and Human Rights Public Policy Guidelines" (hereafter referred to as the Guidelines). This document provides an analysis of the relationship between business and the human rights situation and seeks to "strengthen the State's ability to promote, monitor and provide remedy for human rights [...] in relation to private sector activity, ensuring that no action negatively impacts human rights" (PPDHDIH 2014: 34). The process reflects, once again, the central role of CSR and of the private sector in Colombia's foreign relations: for one thing, it fosters the implementation of the United Nations Guiding Principles on Business and Human Rights, while its creation was supported by Spain and Great Britain as well as a number of multi-stakeholder dialogue mechanisms involving foreign diplomats (PPDHDIH 2014: 4; 10).

It is true that the Guidelines include a number of elements that contradict, to a certain point, the logic of the aforementioned policies. For example, the opinions of civil society, gathered during the elaboration of the Guidelines, provide a clear contrast, highlighting a deficiency in regulation, controls and protection mechanisms (PPDHDIH 2014: 26).

On the whole, however, the Guidelines reiterate the elements common to the institutional spaces examined earlier, calling for "multi-stakeholder dialogues to generate guidelines and codes of conduct" (PPDHDIH 2014: 45), and seeking to foster a "human rights culture" in order to "promote dialogue […] to help find solutions to conflicts between companies and civil society" (PPDHDIH 2014: 39). Among the strategies proposed, they suggest "positioning respect for human rights as a competitive factor" (PPDHDIH 2014: 44). Further, they provide action points such as: "to identify and highlight opportunities for collaborative work between the private and public sectors to strengthen development and peacebuilding," and to "[h]ighlight and create opportunities for the private sector to provide support in comprehensive reparation measures for victims of the armed conflict in the country" (PPDHDIH 2014: 48).

In light of the above, it is particularly telling that, in a way, the Colombian Government would have joined the peace train to the mining locomotive. Beyond establishing companies as legitimate and central political actors for the achievement of a transcendental

public objective (peace), this system of coherences also "selects, defines and structures […] an array of actors surrounding [the company itself], such as institutions, [...] but also NGOs [and] civil society, from the standpoint of a shared general interest" (Berns 2007: 65). In other words, this normative project establishes a common interest that incorporates both the interests of the companies and of society. Precisely for that reason, the Business and Human Guidelines "do not set a regulatory policy, but rather […] search for common objectives and establish connections between the public and private spheres so as to foster the country's development and the building of sustainable and long-lasting peace" (PPDHDIH 2014: 8).

This perspective provides a context for the role that the National Development Plan 2014-2018 assigns the State in conflicts related to the extractive sector:

> [e]fforts will be made to establish greater institutional contact with communities in areas with potential for mining and energy projects, so that they may be aware of the roles of public sector entities in relation to the control and oversight of the development of such projects. Steps will be taken to ensure that communities have access to truthful information, that the social management of projects improves their living conditions and that, if and when differences arise, they have access to negotiation and cooperation mechanisms *which may include* State intervention, if needed. This is to occur *without adversely affecting the proactive support provided by State entities to operators, in the context of their roles and responsibilities* (DNP 2014: 199, emphasis added).

The fact that State intervention is seen as suppletive to the negotiation or cooperation mechanisms set out by the private operators and that, further, it is seen as subordinated to the support provided to operators, is a good illustration of the normative project at hand: though it formally refers to the regulation of companies, performatively it grants those companies a leading role in the pursuit of the common good – a defining intervention that also structures the role and political identity of surrounding social actors.

Opening Avenues for the Disciplining of Civil Society?

We now analyse the type of normative project set forth by the institutionalization of CSR by examining the potential disciplinary logic that it implies for society. We argue that the logic underlying the institutionalizing of CSR in Colombia – despite its continuous

reference to human rights – upholds relations of coherence with strategies that involve human rights violations.

If the ultimate goal of achieving peace is to be accomplished through mining activity, and if human rights are to be protected by merging society's interests with those of the private sector, it is particularly concerning to note the frequent aligning of interests of companies, Illegal Armed Groups[13] – especially paramilitaries – and security forces in ways that foster the violation of human rights.

Despite their official demobilisation in 2006, paramilitary organizations have continued operating in Colombia under different names, often maintaining ties with the military and the police (Hristov 2009). Moreover, paramilitary organizations are part of powerful networks involving local and national politicians as well as members of the economic elite (López Hernández *et al*. 2010). Since their creation in the 1980s the paramilitaries have played an important role in reordering Colombia's territory in favor of these elites by producing the majority of its more than 6 million internally displaced (Elharawy 2008; IDMC 2016). They have also established relationships with transnational companies (see Restrepo Amariles 2008).

Industrial mining activity provides paramilitary organisations with new opportunities for resource acquisition (which can happen, in theory, independently of actions or omissions from the private operators themselves). These opportunities include extortion of companies, accessing royalties paid to local governments through corruption and electoral manipulation, providing "protection", controlling subcontractors, and using the sector's structure for money-laundering (Massé and Camargo 2012: 6-33). In some instances (and, once again, without benefitted companies necessarily being aware), paramilitaries facilitate the arrival and operations of mining companies through the forced displacement of the population, the terrorizing of those in opposition, the control exerted over the labour force, etc. As indicated by Massé and Camargo,

> [l]ocal communities' reluctance and rejection of large-scale extractive projects on their territories, or the social protests against the social and environmental impacts of these companies […] seem to have triggered illegal armed actors into confronting social protests as a strategy to ease the work of the private sector (Massé and Camargo 2012: 25).

As for the security forces, the Colombian Government "has assigned high-level government officials to strengthen their synchronicity with companies" and allocates about 5,000 troops to protect the infrastructure of more than 100 companies (Massé and Camargo 2012: 34). In a number of instances, mining-energy companies and the Armed Forces have signed private agreements according to which companies pay for protection. In this context, Massé and Camargo note that "local communities […] tend to associate [the presence of security forces] with the protection of the interests of large extractive companies as opposed to the protection of their own security in the midst of the armed conflict" (Massé and Camargo 2012: 35).

Elite units within the Military Forces have also been created to "protect the subsoil" (Massé and Camargo 2012: 35) and to carry out intelligence and control operations, ostensibly, to prevent Illegal Armed Groups from exploiting minerals (Massé and Camargo 2012: 35). Nevertheless, a number of case studies in Colombia indicate that it is not uncommon for the army to conflate these legitimate targets with civilians, especially artisanal and small-scale miners opposed to industrial mining, with lethal consequences (MiningWatch Canada *et al.* 2009: 27-37; Massé and Camargo 2012: 36-37).

In the Colombian context, it thus seems that CSR's normative logic easily establishes synergies with counter-insurgency logics enacted by security forces or the paramilitary. [14] It may result not only in preventing the State from regulating the extractive sector through laws and enforcement, but also in the affirmation of a kind of "public-private Reason of State," thus positively *redefining* the notion of the common good. This new logic presents mining – as is already stated in the Colombian mining code – as vital to the common interest. As a result, mining opponents become a segment of population deserving of sanctions. And indeed, a number of United Nations reports highlight the threats faced by those in Colombia who do not deem mining to be a "common interest" shared with companies, and those who consider that the mining locomotive is more likely to derail the peace train than to move it onwards (UN 2014a: 9; 2014b: 19 and 2015: 20-21).

Destabilizing the Enforcement of Human Rights?

As argued above, the incorporation of human rights vocabulary through the institutionalization of CSR corresponds to disciplinary logics that foster or enable human rights violations. Can this normative project, however, be considered an explicit attempt to replace and repel "the emotions and morality […] that support human rights claims?" (Berns 2009: 14). Does it contribute to the destabilization of regimes that seek to enforce human right, thus closing spaces for emancipatory legal practices?

Although we find indicative that none of the government documents consulted in our research referred in any explicit way to the abundant constitutional jurisprudence on issues related to extractive activities recently reviewed by the Comptroller General (CGR 2013: 23-57), the exact nature of the interaction between human rights enforcement regimes and the institutionalization of CSR remains to be studied in further details.

It seems, however, that two opposing definitions of political identity are projected on Colombian society. The Colombian Constitution indicates that the fundamental goals of the State include "to ensure the fulfillment of rights[;] to facilitate the participation of all subjects in the decisions that affect them and in the economic, political, administrative and cultural life of the nation[;] to ensure peaceful coexistence and a just order" (Constitución Política de Colombia, 1991, art. 2). On the other hand, under the logic underpins CSR institutionalization "the subject of rights collapses into the figure of the 'stakeholder,' a functional part of the population […] whose very existence implies the inevitability of the process of accumulation" (Montesinos Coleman 2013: 182). According to these two opposing identities, members of society may be seen as political subjects and bearers of rights on one hand, and as actors who affect the functionality of the mining locomotive, on the other hand. Consequently, two different normative logics seem to determine the use of human rights vocabulary: human rights can refer to the preservation of human dignity; or they can be considered a competitive factor.

This raises the question of whether the use of human rights in the context of "overlapping responsibilities" between the State and companies (PPDHDIH 2014: 30) actually undermines the constitutional understanding of "rights". Our preliminary examination indicates that both normative frameworks do not coexist without friction. We identify two main sources of friction: the notion of *effectiveness* and the merging of public and private

interest, with the ensuing collapse of the distinction between the economic and legal realms.

With regards to the first, CSR pertains to governance models in which legitimacy claims are formulated, first and foremost, in terms of effectiveness (Berns 2011: 159; Supiot 2005: 227). Thus, the focus on voluntary measures within the United Nations Guiding Principles on Business and Human Rights is justified in part by the postulated ineffectiveness of a governance model grounded on State sovereignty and its emphasis on enforceable rights: "[T]he root cause of the business and human rights predicament today lies in the governance gaps created by globalization – between the scope and impact of economic forces and actors, and the *capacity* of societies to manage their adverse consequences" (UN 2008: 3, emphasis added). A similar formulation is found in the Colombian Business and Human Rights Guidelines (PPDHDIH 2014: 36). The pivotal importance of effectiveness in CSR's normative project is particularly well illustrated by the emphasis put on private non-judicial grievance mechanisms, both in the Guiding Principles (UN 2011: 28) as well as in the Colombian Guidelines (PPDHDIH 2014: 49).

Nevertheless, the jurisprudence of the Constitutional Court clearly addresses the potential for conflict between the principle of effectiveness and the principle of a constitutionally defined common good, noting that

> the potential conflict between the effectiveness of [...] the State's administrative capacity and its need to fulfill social duties [must be resolved] in favour of the latter, because it is unfathomable that the former should prevail over the superior good of fulfilling the valuable social duties of the State (Sentencia C-035 de 27 de enero de 1999, cited in: CGR 2013: 39).[15]

Regarding the second source of friction – the merging of public and private interest –, the Comptroller General refers to constitutional principles when stating that

> [mining must be subject to a] certain hierarchy and subordination of rights including fundamental, community, and land ownership rights, the expectations of having a right to the subsoil and the subsequent expropriation of land, and [the right] to land restitution for victims affected by mining licenses" (CGR 2013: 19).

More fundamentally, however, Berns deems that

> paradoxically, [CSR] corresponds to a sort of official affirmation [...] of mutual self-restriction on the part of institutions and companies, where liberalism only upholds two openly parallel and heterogeneous discourses (economy and law) without seeking their reconciliation, effectively ridding liberal thought of this constitutive distinction (Berns 2007: 74).

One possible consequence of the collapsing of the distinction between private and public interest is that it does away with the ideological reference points, the conceptual categories deeply rooted in modern political thought, that allow for the notion of corruption, for example, to be conceived within political and legal realms.[16]

Interestingly, it has been noted that "if we consider the content of each CSR instrument [implemented in Colombia], it is not difficult to find corresponding components of [already existing] hard law […] that would bind the companies directly" (Acevedo Guerrero *et al.* 2013: 327). This begs the question of whether the institutionalization of CSR could be conceived as a process of *softening* "hard" regulations. It might then rightly be regarded "not as an unachieved [or complementary] form of law, but as an attempt to circumvent the law to the greatest possible extent" (Berns 2007: 73).

Conclusion

Our analysis brings to light the omnipresence of the language of human rights in the context of CSR institutionalization in Colombia, and posits that CSR institutionalization is located at the junction of various dominant legal-political arenas. This leads us to insist on the wide-ranging impacts of the normative projects that accompany mining activity – impacts that go well beyond the regulation of the extractive sector. We believe that this opens an interesting field of investigation on the synergies and interferences among multiple normative projects, legal orders and politico-economic strategies.

We have sought to step beyond an analysis of human rights language and its impact on CSR practices to highlight the normative logics underpinning CSR institutionalization and their historically situated effects. We have thus shed light on the patterns of coherence that connect this normative project to the disciplining of society, and have also explored its potential interference with the mechanisms instituted for the enforcement of rights.

In Colombian mining territories, at least two types of normativity underpin the use of human rights, whether these are rooted in human dignity, or are conceived as a competitive factor. In accordance with this latter conception, the rights-based approach professed in the context of CSR institutionalization is concomitant with the recognition of companies as legitimate political actors, as central protagonists in the search for peace and as holding legitimate authority to manage conflicts and human rights violations related to their activities. Furthermore, it postulates a merging of the general interest with those of extractive companies. In the particular historical context studied here, as long as this newly defined common good helps align the interests of paramilitary organizations, companies and public security forces, it is coherent with practices that seek to discipline society by violating human rights.

A new private-public Reason of State thus appears to be emerging through this normative project, with a focus on clearing the path for the mining locomotive.

It is worth highlighting that the historical processes addressed in this article maintain a degree of openness. Civil society actors, for instance, may well make emancipatory use of certain aspects of the Business and Human Rights Public Policy Guidelines. However, the analysis offered in this article does not support an understanding of CSR institutionalization in Colombia as an effort to "bridge the gap" between the State's abilities and the forces of globalization, in a way that would harness these forces towards human rights fulfillment. On the contrary it paints an image of CSR institutionalization as a governance strategy that supports specific interests – interests that would perhaps be hindered by a strong notion of a "Social State based on the Rule of Law" ("*Estado Social de Derecho*") as defined by the Colombian constitution of 1991 (art. 1).

In other words, CSR institutionalization might well constitute a strategic use of the limitations that globalization imposes on States to put forward a kind of "public-private sovereignty", assorted with its own kind of disciplining normativity, and with a twofold purpose: on the one hand, to free certain actors from the requirements set out by the rule of law; and on the other hand, to restrict the political spaces made available by human rights enforcement mechanisms, thus averting emancipatory actions by marginalized and vulnerable sectors of society.

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[Add Roy Grégoire, Campbell, Doran, this issue (Introduction)].

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[1] One has but to consult the website of the Human Rights and Business Resource Center (www.business-humanrights.org).

[2] As per the famous phrase – discussed below – of Special Rapporteur John Ruggie : "[T]he root cause of the business and human rights predicament today lies in the governance gaps created by globalization – between the scope and impact of economic forces and actors, and the *capacity* of societies to manage their adverse consequences" (UN 2008: 3, emphasis added).

[3] Adapted from linguistics, where it refers to statements that are made to produce *effects* rather than to *describe* (Austin 1975: 6), performativity has notably been used and popularized by political philosopher and gender theorist Judith Butler. According to Butler, speech acts are performative in that subjects and identities do not pre-exist, but an effect of discursive practices (Butler 1990: 18).

[4] Zagrebelski considers that the malleable nature of the law allows for the integration of new and heterogeneous values and enables societies to be rid of dogmatic interpretations inherited from the past (see Martínez Martínez 2009: 419). Sieder for her part considers that "[l]egal systems and engagements with the law can […] be understood as contested sites of meaning where dominant ideals and values provide the framework for contestation and for advancing alternative understandings and practices […] [L]aw is constantly negotiated and reshaped in a dynamic dialectic between hegemonic projections and counter-hegemonic actions" (Sieder 2011: 242).

[5] The context of globalization is undoubtedly pertinent here even if, as noted by Sieder, the processes described by Frydman and Chérot are not new. Sieder argues, however, that they have been exacerbated by "the increasingly complex legal pluralism generated by economic and legal globalization [and] the accelerated fragmentation and de-centering of State sovereignty which has occurred as a consequence of […] neoliberal policies encouraging ever greater outsourcing of the traditional functions of government" (Sieder 2011: 242).

[6] In this article, we use Szablowski's definition of political identity. For him, "[law] is […] both an obstacle and a resource for social actors in their efforts to achieve their goals[;] 'political identity' [refers] to a particular way in which a legal order may play these constraining or facilitative roles"(Szablowski 2007: 303).

[7] In particular, the Comptroller General fears that "[there] may be processes in which State institutions are seized, co-opted and reconfigured by companies which may be transnational and/or national, legal, grey (whose actions occur in the grey zone dividing that which is legal from that which is not) and openly illegal[,] with the added challenge that in the next few decades the struggle to monopolize the soil and subsoil may become one of the main factors, if not *the* main factor, in the creation and deepening of conflicts and violence[.] [This is particularly concerning] in a country like Colombia, which has witnessed a never-ending struggle for land as a tool to gain political and economic power, through various illegal and illegitimate avenues, though not excluding others of an apparently legal nature" (CGR 2013: 19).

[8] The National Development Plan 2011-2014 establishes five "locomotives" which "lead economic growth in Colombia," including the "mining locomotive," to which a "crucial role" has been granted (DNP 2011: 53).

[9] The Ombudsman's Early Warnings System constitutes "an important mechanism for identifying and preventing human rights violations[.] Through the System, the Ombudsman gathers, verifies and examines information about civilians in vulnerable situations or at risk as a result of the armed conflict, and informs authorities in charge of protection, so that the corresponding timely and comprehensive response may be coordinated and implemented for the affected communities" (UN 2010: 6).

[10] Canada is the most significant source of foreign direct investment in the Colombian extractive sector. According to the Canadian Colombian Chamber of Commerce, 82% of the 70 Canadian companies operating in Colombia in 2013 were from the mining and energy sector (CTI 2013: 29-41). For more information about Canadian companies in Colombia, see Colombia Working Group 2015.

[11] Ministries of: Foreign Affairs, Commerce, Industry and Tourism, Labour, Mines and Energy, the Presidential Programme on Human Rights and International Humanitarian Law, the High Council for Coexistence and Citizen Security, Proexport, and the National Planning Department.

[12] Government: Presidency and Vice-presidency of Colombia, Defence Ministry, Ministry of Foreign Affairs, Armed Forces High Command, National Army, Private Security and Surveillance Agency, National Police; Companies: Anglo American, AngloGold Ashanti, Asociación Colombiana de Petróleo, Cerrejón, Ecopetrol, Equion, Ecooro, ISA, Isagen, Oxy, Río Tinto, Talisman. Embassies: United States, United Kingdom, the Netherlands, and Canada. Civil society: Institute for Human Rights and Business, Fundación Ideas para la Paz, Universidad Externado de Colombia, International Alert, and Fundación País Libre (CME 2015).

[13] The term "Illegal Armed Groups" is often used to refer indistinctly to guerrilla, criminal or paramilitary post-demobilization groups. Each of these actors, however, function according to very different political logics. With regards to the extractive sector, they also prioritize different strategies. While a discussion of these different politics and priorities is beyond the scope of this article, it must be noted that our argument relates more specifically to paramilitary organisations.

[14] Indeed, Berns compares the normative project of CSR with contemporary counter-insurgency war practices in a way that is particularly evocative: "[I]n reflecting on new forms of war or military interventions [...] it is possible to note a shift of attention from the line separating the two sides, as in a Clausewitzian war, to a focus on the population. This shift is due to a valuing of a range of tactics, rooted in colonial wars and counter-insurgency practices[.] [Its] main objective […] is to conquer the hearts and minds of the populations, which is to say precisely that which was to be considered […] impossible, irrelevant in a context where the focus of reflection is sovereignty – and even dangerous for the confusion it creates about the status of war targets" (Berns 2011: 159-160).

[15] It is significant to note that the tension between the imperative of effectiveness and the rights of victims is not unique to this context. With regards to non-judicial grievance mechanisms implemented by companies, for example, United Nations bodies have not yet resolved whether the legal immunity that some companies

seek to ensure through these mechanisms is compatible with their Duty to Respect Human Rights as set out in the Guiding Principles (see Coumans 2014: 7).

[16] Corruption impacts human rights in numerous ways and is, in and of itself, difficult to confront within the Colombian extractive sector (Massé and Camargo 2012: 41-42).