

Appropriation of discourses: justice and corporate social responsibility in an artisanal mining community of rural Colombia

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Abstract

This article seeks to contribute to the academic debate on self-regulatory mechanisms such as corporate social responsibility (CSR) by identifying and exploring the significance of disparities in the discourses – ways in which ‘aspects of the world’ are ‘construed’ – of a multinational corporation and the community in which it operates. It focuses on a case study of a natural resource-extracting corporation in rural Colombia. In the terminology of this special issue, it is concerned with both the discourses of appropriation and the appropriation of discourses. The case study findings suggest that corporate self-regulation allows CSR to be used by corporations as a means of appropriating the discourse of justice, and at the same time leaves the impression (at least with the community) that CSR discourse is a ‘discourse of appropriation’. The paper argues that this appropriation takes place in the context of Teubner’s new economic and law paradigm, based on the ‘almost world-wide institutionalisation of economic rationality’.

Introduction

This article seeks to contribute to the academic debate on self-regulatory mechanisms such as CSR by identifying and exploring the significance of disparities between the discourses² of corporations and communities. It focuses on a case study of a natural resource-extracting multinational corporation in rural Colombia. La Toma is an Afro-Colombian community located in the spectacular hills of Northern Cauca department, Colombia, where it was founded by escaped slaves over 500 years ago.³ Since its foundation, the community’s main economic activities have been independent, traditional artisanal mining and subsistence agriculture. AngloGold Ashanti has had a long-standing interest in beginning large-scale gold-mining in the area but has been met with fierce community opposition.⁴

1 Independent researcher. Dedicated to my inspirational father, Kenny Bell, who died while I was researching this paper. With special thanks to Amanda Perry-Kessaris for advice and support, and Ian Middleton and Mario Noveli for helpful and insightful comments.

2 Rose has defined discourse as ‘groups of statements which structure the way a thing is thought, and the way we act on the basis of that thinking. In other words, discourse is a particular knowledge about the world which shapes the way the world is understood and how things are done in it’: G Rose, *Visual Methodologies: An Introduction to the Interpretation of Visual Materials* (2nd edn, Sage Publications 2001) 142.

3 Interview with Francia Marquez, 10 August 2011.

4 Ibid.

In the terminology of this special issue, this article is concerned with both the discourses of appropriation and the appropriation of discourses. It demonstrates what insights might be gained if academics and policy makers were to take account of 'alternative, unspoken' discourses in their often somewhat narrow and self-referential debates. It is particularly timely given the 2011 adoption by the UN Human Rights Council of Professor John Ruggie's Guiding Principles on Business and Human Rights. Now the key international regulatory reference point for business and human rights, the Principles have been criticised by key groups of grassroots stakeholders for not having been incorporated in a meaningful way.⁵

The case study shows huge disparities between the discourse of the corporation and that of the community leader. It suggests that, in relying upon corporate voluntary self-regulation as a means of regulating corporations, we allow CSR to be used by corporations as a means of appropriating the discourse of justice. At the same time, the perception of supposed beneficiaries of the company's CSR initiatives is that its CSR talk is a 'discourse of appropriation', employed in an attempt to gain societal legitimacy for the corporation. The paper places the 'discourse appropriation' of CSR and corporate voluntary self-regulation in the context of Teubner's new economic and law paradigm, based on the expansion of the global market and the 'almost world-wide institutionalisation of economic rationality'.⁶

Corporate social responsibility

Economic globalisation⁷ has arguably been the defining feature of the world economy during the twentieth century. Law is integral to this process, playing a facilitating or hindering role 'by either ensuring the free movement of services, goods and capital, or by erecting barriers against them'.⁸ The increased mobility afforded to multinational corporations has been an important factor in what Guy Standing has termed 'the increase in the redistribution of power towards the interests of finance and industrial capital'.⁹ In the context of economic globalisation, governments compete with one another to attract and retain foreign investment and thus a share of the global market, while multinational corporations are the 'drivers of the global economy, exercising dominant control over global trade, investment and technology transfers'.¹⁰ Thus, in the globalised modern economy, multinational companies wield 'considerable political leverage in domestic and international spheres'.¹¹

The economic power of multinational corporations, particularly in relation to developing countries, has given rise to concerns over the apparent lack of means for holding them accountable when they abuse that power.¹² As private actors, corporations

5 See May 2009 statement of NGOs participating in the Latin American regional consultation in Buenos Aires <www.business-humanrights.org/SpecialRepPortal/Home/Consultationsmeetingsworkshops/Regionalconsultations/under2008-2011mandate> accessed 1 October 2011. See also August 2010 letter by a group of human rights NGOs in the Democratic Republic of Congo www.esecr-net.org/usr_doc/Collectif-Letter-JohnRuggie-final-eng.pdf> accessed 1 October 2011.

6 G Teubner, 'Alter Pars Audiatur: Law in the Collision of Discourses' in R Rawlings (ed), *Law, Society and Economy* (OUP 1997) 150.

7 M Wolf, *Why Globalisation Works* (Yale University Press 2004) 14.

8 B Heppel, *Labour Laws and Global Trade* (Hart Publishing 2005) ch 2, 5.

9 G Standing, 'Global Governance: The Democratic Mirage?' (2004) 35 *Development and Change* 1065, 1072.

10 D Kinley and J Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations in International Law' (2004) 44 *Virginia Journal of International Law* 933.

11 *Ibid.*

12 Kinley and Tadaki (n 10) 934.

may be held legally accountable under domestic laws (including, in some cases, by the extraterritorial application of a state's jurisdiction),¹³ however they may not be held directly legally accountable under international law. Kinley and Tadaki argue that the lack of direct international legal obligations has meant that multinational corporations have been able to operate in a 'legal vacuum',¹⁴ particularly given the context of deregulation and the 'withdrawal of the state from high levels of mandatory regulation in the business sphere', or in situations where the state is unwilling or unable to regulate.¹⁵ This can be particularly problematic in a context where human rights violations or armed conflict are taking place.

. . . AS REGULATION

Multilateral efforts to regulate multinational corporations can be traced back to the 1970s. The New International Economic Order initiative at the UN, driven in part by concern over the economic power of multinational corporations and recognition of their capacity to inflict harm, sought *inter alia* to protect host state economic sovereignty and led to the establishment of UN bodies responsible for producing a UN Code of Conduct on Transnational Corporations (TNCs), an initiative which ultimately failed.¹⁶ The most recent attempt at a multilateral initiative to regulate multinationals through binding obligations under international law was the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (UN Norms), which were endorsed by the UN Sub-Commission on Human Rights and the main international human rights non-governmental organisations (NGOs), but which met with firm opposition from the international business community, which rejected the notion of binding obligations for corporations.¹⁷ The proposal was subsequently spurned by the UN Commission on Human Rights.¹⁸

Following the rejection of the UN Norms in 2005, the UN Secretary General appointed Professor John Ruggie to the role of UN Special Representative for Business and Human Rights, with a mandate to 'identify and clarify international standards and policies in relation to business and human rights'.¹⁹ In 2011, Professor Ruggie's 'Protect, Respect and Remedy' framework (henceforth the Ruggie Principles) was adopted by the UN Human Rights Council. The guiding principles take traditional international law as their starting point and reject the idea of direct legal obligations under international law for corporations, instead outlining a 'corporate responsibility to respect . . . a standard of expected conduct that is acknowledged in *virtually every voluntary and soft-law instrument related to corporate responsibility* . . . and . . . now . . . affirmed by the Human Rights Council' (my emphasis).²⁰ To the disappointment of those hoping for an evolutionary step in international law, Professor Ruggie has followed the traditional approach, whereby only states have the obligation to protect the human rights of their private citizens from violations by other private citizens (both legal and natural persons), and corporations, as private legal persons, are only

13 The issue of extraterritorial jurisdiction in the regulation of multinational enterprises is beyond the scope of this paper. For an in-depth analysis, see P Muchlinski, 'Multinational Enterprises and the Law' (2nd edn, OUP 2007) ch 4.

14 Kinley and Tadaki (n 10) 935.

15 Muchlinski (n 13) 113.

16 *Ibid* 120.

17 J Ruggie, *The Evolving International Agenda* (Harvard University John F Kennedy School of Government Faculty Research Working Paper Series 2007) 4.

18 UN Human Rights Commission Resolution 2004/11, UN Doc E/CN4/2004/L73/Rev 1 (20 April 2004).

19 Ruggie (n 17) 4.

20 *Ibid* 7.

accountable under domestic legal regimes.²¹ Beyond domestic legal regimes, he stresses the voluntary, soft-law nature of the international responsibilities of multinational companies. Thus, the Ruggie Principles represent the pinnacle of the rise to prominence, since the 1980s, of voluntary corporate self-regulation 'as part of a business friendly climate created by the neoliberal ascendancy'.²² Professor Ruggie's work in developing the guiding principles has been criticised by key groups of stakeholders, such as communities affected by business activities and victims' groups, for not incorporating them in a meaningful way.²³

Voluntary corporate self-regulation falls under the umbrella of CSR. As is suggested by the name, CSR is based on the idea that a corporation bears a responsibility which extends beyond its legal duty to its shareholders to the society in which it is operating. It is a broad term which can cover a wide range of activities, 'from a philanthropic project, to engaging in political dialogue to define and redefine the standards of legitimate business behaviour'.²⁴ It includes voluntary self-regulation, such as corporate codes of conduct, or voluntary multilateral soft-law initiatives such as the Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises.²⁵ Much has been written about CSR and this paper seeks to contribute by bringing in the crucial but little heard perspective of the communities which are recipients of some of the assumed benefits of CSR initiatives.

Joel Bakan has set out how the first real wave of CSR emerged during the 1930s, in response to public concern over the role which large corporations had played in causing the Great Depression, and in an effort to offer an alternative to the trend towards increased business regulation. The most recent wave of CSR began in the 1990s, after revelations about sportswear giant Nike's use of sweatshops in Asia. Such revelations led to increased scrutiny and pressure from civil society on corporations to sign up to voluntary codes of conduct, with particular emphasis on human rights and environmental protection.²⁶ Two defining elements can be identified in both waves: first, that CSR is a response to a decline in the poor public image of corporations and thus an attempt to improve public image and regain legitimacy; and, second, that CSR is presented as an alternative to formal sources of regulation.

High-profile allegations of involvement in human rights abuses, corruption scandals and, more recently, the financial crisis have seriously damaged corporate legitimacy over the past decade, to the point that public opinion has begun to see corporations as 'the enemies of public interest'.²⁷ According to Kostova and Zaheer, legitimacy has become one of the most important issues for multinational corporations.²⁸ The second wave of CSR initiatives can be seen as a response to the crisis of corporate legitimacy. Today CSR is a vital part of any large corporation's public relations strategy. A corporation may spend millions of pounds annually on CSR initiatives. An 'attendant industry' has grown up around them.²⁹

21 For a comprehensive look at the parameters of the legal debate, see Kinley and Tadaki (n 10).

22 Muchlinski (n 13) 113.

23 See NGOs Buenos Aires consultation (n 5) and human rights NGOs letter (n 5).

24 I Castello and J Lozano, 'Searching for New Forms of Legitimacy through Corporate Responsibility Rhetoric' (2011) 100(1) *Journal of Business Ethics* 2.

25 See *OECD Guidelines for Multinational Companies 2011 Version* (OECD Publishing 2011) <www.oecd.org/daf/internationalinvestment/guidelinesformultinationalenterprises/48004323.pdf>.

26 L Roseberry, 'Towards a Discourse Analysis of the Corporate Social Responsibility/Accountability Debate' (Copenhagen Business School Center for Corporate Social Responsibility, Working Paper 02 2007) 8.

27 Costello and Lozano (n 24) 1.

28 T Kostova and S Zaheer, 'Organizational Legitimacy under Conditions of Complexity: The Case of the Multinational Enterprise' (1999) 24(1) *Academy of Management Review* 64–81.

29 Roseberry (n 26) 1. For further reading, see also A Crane, 'Corporate Greening as Amoralization' (2000) 21(4) *Organisation Studies* 673.

Legitimacy has been defined by Suchman as a ‘generalised *perception or assumption* that the actions of an entity are desirable, proper or appropriate within some socially constructed system of norms, values, beliefs and definitions’ (my emphasis).³⁰ Key here is that legitimacy comes from a *perception or assumption* that the entity, in our case a corporation, is behaving in a way which society deems acceptable. That does not necessarily mean that the perception or assumption actually does reflect the reality, or that the corporation is necessarily concerned that it should reflect the reality: indeed, the corporation’s central objective in its CSR activities is to gain legitimacy in the eyes of certain sectors of society. For Bakan, the legal make-up of corporations, whereby they are legally bound to prioritise the objective of creating profits for their shareholders above all else, means that they cannot be trusted to promote the public interest,³¹ and thus sounds a note of caution over CSR initiatives and voluntary self-regulation: ‘No one would seriously suggest that individuals should regulate themselves . . . yet we are asked to believe that corporate persons . . . should be left free to govern themselves.’³²

In order to ascertain whether scepticism about CSR is well-founded, academics and policy makers must move beyond and beneath the corporate narrative. We must test the closeness of fit between that narrative and the perceived reality of those who experience first-hand the impacts of a corporation’s presence, and supposedly benefit from its CSR initiatives.

. . . AS DISCOURSE

If the main aim of CSR initiatives is to construct societal legitimacy, a key way in which corporations construct such legitimacy is through discourse.³³ Rose has defined discourse thus: ‘Discourse . . . refers to groups of statements which structure the way a thing is thought, and the way we act on the basis of that thinking. In other words, discourse is a particular knowledge about the world which shapes the way the world is understood and how things are done in it.’³⁴ Discourse – that is, the way that corporations communicate their CSR – can therefore be seen as a ‘strategic resource’ for corporations.³⁵ Consequently, a rich academic literature is emerging which focuses on CSR discourse. This paper builds on that literature, using discourse as a primary source.

The CSR debate has been characterised by Roseberry as one of ‘competing discourses reflecting different subjective interpretations of the nature and activities of corporations, and their effects on humans and world’.³⁶ Underlying this debate is the ‘assumption that CSR can be shaped and controlled by business’.³⁷ If business is allowed to define the CSR debate, there is a danger that corporations may seek to ‘engineer moral legitimacy by manipulating public discourse’.³⁸ For example, Roseberry frames the CSR debate as one between legal discourse incorporating elements of environmental and human rights law and business-oriented discourse. This is not untypical of the lop-sided academic framing of the CSR debate. The success or otherwise of a particular discourse lies in its ‘persuasiveness in

30 M Suchman, ‘Managing Legitimacy: Strategic and Institutional Approaches’ (1995) 20(3) *Academy of Management Review* 574.

31 Bakan (n 32) 109.

32 J Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (Constable 2004) 110.

33 C Hardy et al, ‘Discourse as a Strategic Resource’ (2000) 53(9) *Human Relations* 1230.

34 Rose (n 2) 142.

35 Hardy et al (n 33).

36 Roseberry (n 26) 2. Coupland agrees with this characterisation and points to a certain amount of ‘neglect’ on the part of academics to recognise and study how CSR is ‘defined through argument’. C Coupland, ‘Corporate Social Responsibility as Argument on the Web’ (2005) 62(4) *Journal of Business Ethics* 355.

37 Coupland (n 36) 355.

38 Castello and Lozano (n 24) 11.

light of available alternative versions of company behaviour'.³⁹ Coupland does recognise that 'CSR activities are being negotiated in interaction in the light of often unspoken, alternative perspectives' and seeks to illuminate these through analysis of the CSR discourse of corporations.⁴⁰

AngloGold Ashanti in Colombia

Colombia, located at the northwestern tip of South America, is a country of around 47 million people, of whom 15.2 million live in poverty according to government figures. In rural areas, 46.1 per cent live in poverty, and 22.1 per cent in extreme poverty.⁴¹ Internal conflict between the Colombian state, left-wing guerrilla groups and paramilitary forces aligned to the government has been ongoing for more than 40 years. An apparent demobilisation of the paramilitaries in 2003 provided false hope and many of the same organisations continue to operate under different names.⁴²

Amnesty International reports that all sides in the conflict continue to be responsible for 'serious human rights violations and violations of international humanitarian law'.⁴³ Indeed, Colombia's most prominent human rights defender, the Jesuit priest Father Javier Giraldo, asserts that the paramilitaries were created by the Colombian state during the 1980s as part of a 'dirty war strategy'⁴⁴ to deliberately target sections of civil society deemed to be opposed to the state.

Human Rights Watch reported in 2010 that 'human rights defenders, journalists, community leaders, trade unionists, indigenous and Afro-Colombian leaders, displaced persons' leaders, and paramilitaries' victims seeking land restitution or justice are frequently the targets of threats and violence by armed actors',⁴⁵ with paramilitary organisations the main culprits. In January 2011 the national prosecutor's office (*Fiscalía general de la nación*) announced that it had documented 173,183 civilian murders and 34,467 cases of forced disappearance by paramilitary organisations.⁴⁶

Many multinational companies operating in Colombia have been accused of bearing responsibility for human rights violations by the Colombian army and paramilitaries. The widely respected international opinion tribunal Permanent Peoples' Tribunal (PPT)⁴⁷ in 2008 condemned 30 TNCs for 'clear, persistent and grave violations of general norms and principles and of international conventions which protect the civil, political, economic,

39 Coupland (n 36) 357.

40 Ibid 362.

41 Departamento Administrativo Nacional de Estadística, press release, 17 May 2012, <www.dane.gov.co/daneweb_V09/files/investigaciones/condiciones_vida/pobreza/cp_pobreza_2011.pdf> accessed 25 February 2013.

42 Human Rights Watch, *Report: Paramilitaries' Heirs: The New Face of Violence in Colombia* (Human Rights Watch February 2010) <www.hrw.org/en/reports/2010/02/03/paramilitaries-heirs-0> accessed 25 July 2011.

43 Amnesty International, *Annual Report 2011*, Colombia section <http://thereport.amnesty.org/sites/default/files/AIR2010_AZ_EN.pdf#page=55> accessed 7 July 2011.

44 J Giraldo, 'Paramilitarism: A Criminal Policy of the State which Devours the Country' (2005) <www.javiergiraldo.org/spip.php?article131> accessed 23 July 2011.

45 Human Rights Watch, *World Report*, Colombia section (Human Rights Watch 2010) <www.hrw.org/en/node/87513> accessed 23 July 2011.

46 *El Espectador* (newspaper report), 'La Fiscalía tiene documentados 173,183 homicidios cometidos por "paras"' <www.elespectador.com/noticias/judicial/articulo-244826-fiscalia-registra-173183-homicidios-cometidos-paras-de-2005-2010?page=12> accessed 23 July 2011.

47 The PPT succeeded the Russell Tribunal which was initially set up to investigate war crimes committed by US forces against the Vietnamese people. The tribunal's panel is made up of prominent academics, lawyers and politicians. Its judgments carry moral, as opposed to legal, weight.

social, cultural and environmental rights of communities, nationalities and peoples'.⁴⁸ But admissions of guilt, such as that offered by Chiquita Brands,⁴⁹ and successful legal cases are rare. The majority of those companies which were condemned by the PPT reject such allegations flatly. They have also invested heavily in CSR initiatives. Colombia is, then, an ideal location in which to explore the discourses of corporations and communities, as they can be expected to differ widely.

AngloGold Ashanti, a South-African gold-mining corporation listed on the London Stock Exchange, is one of the largest gold-mining corporations in the world, and also one of the most controversial. Associations between natural resource extraction and human rights abuses generally are 'well-documented',⁵⁰ but AngloGold Ashanti has an especially poor reputation. In 2011 it was named by Greenpeace and *Private Eye* as the 'nastiest' corporation in the world for its alleged responsibility for human rights abuses and environmental degradation in Ghana.⁵¹

AngloGold Ashanti arrived in Colombia in the form of a subsidiary company in 2000 and, as in several countries in Africa, its presence has been highly controversial. It requested licences for over 13 million hectares for mining exploration, of which around 9 million were granted.⁵² Although none of these projects has entered into the production phase, the corporation has been accused of benefiting from the ongoing conflict referred to above with its attendant human rights abuses, and of bearing responsibility for human rights violations against rural communities committed by regular state forces. It is also alleged that trade unionists who campaigned against the company's activities have been murdered by army units contracted to protect AngloGold Ashanti.⁵³ The corporation itself denies all allegations of wrongdoing and points to its substantial investment in CSR initiatives for the benefit of local communities.⁵⁴ In the case of La Toma, AngloGold Ashanti has had a long-standing interest in gaining access to the territory in order to start large-scale gold-mining and has got as far as carrying out exploration studies, but has not proceeded beyond that. According to Francia Marquez, this is partly because of the community's vociferous opposition to its presence.⁵⁵ As mentioned above, independent artisanal mining and agriculture are the community's key economic activities, both of which the community feels would be negatively impacted by large-scale mining.⁵⁶

48 The full version of the PPT's verdict is available in Spanish at <<http://colombia.indymedia.org/news/2008/07/90686.php>>.

49 In 2007 Chiquita Brands admitted to having paid Colombian paramilitaries for 'protection'. 'Chiquita admits paying fighters' (*BBC News*, 14 March 2007) <<http://news.bbc.co.uk/1/hi/world/americas/6452455.stm>> accessed 23 July 2007.

50 Muchlinski (n 13) 125.

51 'South African Corporation "Wins" public eye award' (Greenpeace, 31 January 2011) <www.greenpeace.org/africa/en/News/news/South-African-Corp-Wins-Public-Eye-Award/> accessed 11 July 2011.

52 Meeting between Rafael Herz, President of AngloGold Ashanti Colombia, and and CSC, 7 June 2011 (transcription available).

53 Report by the NGO War on Want, *Anglo American: The Alternative Report* (2007) 2 <www.waronwant.org/campaigns/corporations-and-conflict/mining-conflict-and-abuse/inform/14777-anglo-american-the-alternative-report> accessed 14 July 2011.

54 Anglo Gold, formerly one of the main shareholders in AngloGold Ashanti, issued a response to the War on Want report <www.angloamerican.com/media/releases/2007pr/~media/Files/A/Anglo-American-Plc/media/releases/2007pr/2007-08-09/2007-08-09.pdf> accessed 14 July 2011.

55 Interview with Marquez (n 3).

56 Ibid.



Community member surveys the landscape of La Toma, Northern Cauca, Colombia

Comparing discourses . . .

The aim of this article is not to judge the truth or otherwise of the claims of the community or the corporation, nor to try and prove the corporation's responsibility or otherwise for any wrongdoing. It simply seeks to highlight and explore the possible significance of differences between the discourses. Empirical observations underlying this paper are drawn from conversations with the president of AngloGold Ashanti Colombia and a community leader.

The data collected for the company discourse is taken mainly from an on-the-record, official meeting which took place between Rafael Herz, President of AngloGold Ashanti Colombia, and the Colombia Solidarity Campaign (CSC), a London-based organisation which campaigns for the protection of human rights in Colombia. Some data was also taken from company publications.

Data from the community leader was collected via semi-structured interviews using an ethnographically informed approach, which allows the interviewer to be flexible within the interview, and allow the interview to flow, deciding on its direction as the interview progresses, while having an overall framework and list of issues which are to be covered.⁵⁷ This gave a natural feel to the interview, allowing a rapport to be built with the interviewee, so that she might relax and speak more freely. This flexible approach also allowed the interviewer to be an 'active listener', in order to make constant judgments about what may or may not be relevant to the research focus and ask questions accordingly.⁵⁸ The utmost care was taken with regards to ensure the safety of this interviewee, in light of the nature of the information discussed, the risk of violent retribution against community leaders and civil society figures who speak out in Colombia, and the history of paramilitary intimidation

⁵⁷ M Hammersley and P Atkinson, *Ethnography: Principles in Practice* (Routledge 1995) 152.

⁵⁸ *Ibid* 153.

and violence against social leaders who have opposed AngloGold Ashanti in recent years.⁵⁹ After a lengthy discussion, the community leader interviewed, Marquez, decided that being named would not increase the risks that she and her community, La Toma, already face.

How do AngloGold Ashanti, on the one hand, and a community leader, on the other, construe the presence of the company and its impacts? The remainder of this section explores six different facets of that question through the discourse of each.

JUSTICE

The discourse of AngloGold Ashanti Colombia president, Herz, reveals a strong sense of the company having a moral and social responsibility extending far beyond its legal responsibility to the interests of its shareholders. This responsibility was seen to extend well into the realm routinely associated with the state. For example, community members were encouraged to report human rights abuses directly to the company's internal mechanisms, including an 'anonymous complaints and reporting system',⁶⁰ and a 'human rights voluntary principles register [under the UN Voluntary Principles on Security and Human Rights] – a corporate register which records any accusation against the company. It isn't public, but it demands that you [the company] investigate'.⁶¹ With regard to the most serious allegations against the company – that is, links to paramilitary death squads, responsibility for human rights violations and corruption – Herz stated on several occasions that the company had carried out 'exhaustive investigations'⁶² into its own actions and had been able to find no evidence of any wrongdoing. So Herz's discourse is suggestive of an almost quasi-judicial role for the company.

Marquez is a member of the community council (*consejo comunitario*) of La Toma.⁶³ The community's main economic activities are artisanal mining⁶⁴ and subsistence agriculture. The discourse of Marquez diverged from that of Herz in almost every aspect. In direct contrast to the portrayal of a company with a strong sense of extended moral and social responsibility extending to quasi-legal functions, the company described by Marquez is criminal and immoral, bearing some responsibility for human rights violations:

Before this multinational company (AngloGold Ashanti) became interested in our area, we hadn't suffered what we are suffering today. We hadn't had threats from armed groups that say that we are against mining; we hadn't had the murders which have happened here, nor the massacres; we hadn't had forced displacement of our leaders, nor the threat of forced displacement of all of our community in La Toma. So as soon as this company appears, so did all of these problems and human rights violations that have occurred – it may be that the company isn't directly responsible, but we are clear that they have benefited . . . so we began to investigate, and we realised . . . that AngloGold Ashanti had violated the human rights of people in South Africa, that it had financed armed actors, and we also realised that in 2001 they had been in Sur de Bolivar region in the middle of all of the human rights violations that paramilitary groups committed there.⁶⁵

59 Hammersley and Atkinson (n 57) 71. The project proposal was given ethical approval by the SOAS, University of London <www.soas.ac.uk/researchoffice/ethics/>.

60 Herz and CSC (n 52).

61 Ibid.

62 Ibid.

63 Interview with Marquez (n 3).

64 Artisanal mining is small-scale, subsistence mining.

65 Interview with Marquez (n 3).

The company's assurances that it has carried out 'exhaustive' investigations into its own behaviour in line with the UN Voluntary Principles inspired no confidence in the communities and highlights problems with corporate self-regulation.

DEVELOPMENT

A second noteworthy element in Herz's discourse is the tendency to portray the company in the role of benevolent educator, a role in which it is cast in relation to both the Colombian army and local communities in which it is operating. He explains how the company gives 'human rights workshops to soldiers and army officials – there is no soldier that works under the agreement [between the Colombian army and AngloGold Ashanti] that hasn't been through our human rights training'. AngloGold Ashanti talks of how in Colombia it has increased its spending on 'education initiatives, public awareness programmes and economic development projects',⁶⁶ with the aim of the 'upliftment [sic] of communities'.⁶⁷ In both of these examples, there is a sense of the benevolent corporation bringing human rights or social projects to help the army or the local community to better themselves.

Marquez, however, is sceptical about the company's CSR investment in her community.

[The company] arrived to speak to the municipal administrations to request permission to mine in the area, but they had already made the official requests to the Ministry of Interior, without previous consultation with the communities in the area. Then whilst the requests were being processed, they began to arrive to the communities and to show their money – what they say is social responsibility – so they began to put on parties for the community . . . so that people would say that the company was really good and bringing benefits. When the company announced it was leaving the community they said they had invested 120 million pesos [US\$60,000], but they were giving a few pesos to each person . . . they organised a Christmas party and gave money for it, and two years ago, the road was in bad condition so the company took some pipes to fix it. But in reality, in terms of the impact that grand scale mining can have, and in terms of threatening the future existence of our community and our quality of life, I think this is disproportionate. Although they've given things, in no way have they changed the lives of people or made a difference . . . they're just tiny bits, and when you add it all up its a lot of money but in real terms its hasn't made an impact but it has divided some of the community because as they start to give these little presents, some people start to change their opinion about the company.

I feel that the company speaks about social responsibility and everything but it sees us as little paupers and all they need to do is give us some crumbs because we have some basic needs, so it takes on the state's responsibilities so that it can obtain benefits for itself and carry out its activities, but it knows that what it is going to do will be to the detriment of our culture in our community.⁶⁸

Marquez's view indicates that AngloGold Ashanti's CSR initiatives in La Toma community have failed to gain legitimacy for the company in the eyes of the community leadership. It appears that the company incurred the community's mistrust from the start by applying for a mining licence in the area without prior consultation with the community. The way that

66 AngloGold Ashanti 2010, *Sustainability Report Supplementary Information* <www.anglogold.com/Sustainability> accessed 14 July 2011.

67 Ibid.

68 Interview with Marquez (n 3).

Marquez describes the company's CSR activities in the community, for example, organising parties for the community and giving out 'crumbs' to individuals, is impossible to reconcile with the company's claim to seek the 'upliftment' of communities. What Marquez's discourse describes is a cynical tactic aimed at buying the support of individuals in the community and in this way avoiding community resistance to the corporation's activities, while acting at the same time to create divisions within the community.

PROTECTION

Third, Herz portrays the corporation as protector and friend of local communities, including those who may oppose the company, such as community leaders and artisanal miners. Herz states that the agreement which AngloGold Ashanti has with the Colombian army is 'not only for the protection of the company, but also to protect the communities'.⁶⁹ Herz talked about a situation where a landowner whose land deeds the company was negotiating to buy in Marquez's territory, La Toma, was planning to forcibly evict the Afro-Colombian mining community which inhabits the area. He stated that, upon becoming aware of this, the company 'went straight to the High Councillor of Human Rights of the Vice-Presidency of Colombia, and we said look, we have this information, and as a company we don't agree with this. He did an investigation, and found that the company had nothing to do with the eviction.'⁷⁰ Here the company is cast in the role of the concerned citizen, going above and beyond the call of duty to look out for the welfare of the local community.

On the subject of artisanal miners he said:

We consider artisanal miners as partners . . . the law has created a situation which makes enemies of the artisanal miner and the company, it demands that you say 'Mr Mayor, I've identified illegal miners in my mining concession area', and he must theoretically evict them, and if you don't report it then you're breaking the law . . . in a lot of cases, the company hasn't done it.⁷¹

Here, the company is cast again as the friend and protector of the artisanal miner, going as far as to break the law in order to protect the artisanal miner, while the blame for creating tensions between the miners and the company is deflected to the Colombian legal system. 'We always seek to talk to and inform communities, even when the law doesn't demand it.'⁷² The image given here is of a dialogue-based approach by the company, seeking to engage important stakeholders who are opposed to the mine and overcome differences even if this involves considerable cost to the company.

This image is again difficult, if not impossible, to reconcile with Marquez's discourse, which displays a deep-rooted mistrust of the company: a sense that the company's public declarations are not to be believed, and that the company's friendly posturing hides its true, ruthless nature:

I feel that it is a company that is very false, it's false because it has a very beautiful-sounding discourse but the reality is very different, and although we couldn't say that they are directly violating human rights, we can say that since they arrived in our community our human rights situation has deteriorated.⁷³

69 Herz and CSC (n 52).

70 Ibid.

71 Ibid.

72 Ibid.

73 Interview with Marquez (n 3).



Artisanal miner at work in La Toma, North of Cauca region, Colombia

With regards to the proposed eviction of her community, Marquez rejected Herz's version of events:

I am *convinced*, convinced, that the company was behind it [the proposed eviction], because they said that the only land deeds that they were interested in were Sarria's . . . they hadn't done a deal because they were waiting for him to carry out the eviction so that they didn't get the blame . . .⁷⁴

They said that they understand that they are today portrayed as monsters by many in this country, and that they accept and respect all positions and want dialogue, but in reality what we see in our communities is different – it's very nice to say they want dialogue, but they are always denying or doubting what we say about our situation . . . when we asked them 'why are they violating our human rights in your name', for example, the threat we received that said that we [are being targeted because we] are opposed to large-scale mining by multinationals – they don't say 'you oppose AngloGold Ashanti's mining' but if the multinational that is interested in La Toma is them, we can deduce that they are threatening us for this company's interests. So when we asked that company about it, they said 'hey, but did it explicitly say AngloGold Ashanti?', I said no, but you are the multinational which is interested in our area . . . but it's

⁷⁴ Interview with Marquez (n 3).

complicated because they don't accept that directly or indirectly they are benefiting from the human rights violations.⁷⁵

Again, the salient point for present purposes is the distance between the two discourses, in particular the contrast between the deceitful, false image proposed by the community representative; and the friendly, amenable, dialogue-seeking image put forward by the mining company. Marquez acknowledges that dialogue has taken place with the company, but clearly feels that the company did not engage in a meaningful way.

INVOKING INTERNATIONAL STANDARDS

The discourses of both the company and the community repeatedly invoke international standards, including voluntary standard-setting initiatives and also US legislation, in talking about its activities.

From Herz, there were the following instances: 'Please, I ask organisations that they make known to us any human rights accusations, we are signatories of the UN Voluntary Principles [on Security and Human Rights] and we act on this basis';⁷⁶ and 'The army has agreement with lots of companies, especially in the extractive industries, and our agreement is signed under the Voluntary Principles.'⁷⁷ When asked about allegations of corrupt payments by the company to local government officials in the areas where AngloGold Ashanti is operating, Herz replied:

Our shareholders demand a high standard . . . not because of altruism, but because the share price falls if the company isn't meeting those standards. We are also under the Foreign Corrupt Practices Act – if any of these allegations that you mention occur . . . we take this very seriously.⁷⁸

Here, Herz invokes the possibility of the company's share price falling, as well as the possibility of prosecution in the United States, as reasons why the company would not indulge in corruption in Colombia.

Marquez, like Herz, invoked international standards several times, arguing that the Colombian state is in breach of its international obligations and that the company is a knowing beneficiary:

They [AngloGold Ashanti] are benefiting from the State's violation of international treaties . . . even the Colombian constitution recognises that Colombia is a pluri-ethnic and multicultural country and that the state must protect the human rights which it has ratified in international treaties . . . for example, [ILO] Convention 169 says that previous consultation should be done with communities before [approving a mining project], and Colombia ratified it and approved it, but when they brought out the Mining Code it says they can do it afterwards, but afterwards is useless because if they already signed my territory over to someone what's the point in consulting me?⁷⁹

ROLE OF THE STATE

As well as the invocation of international standards, the discourses display a lack of confidence on both sides with regards to the Colombian justice system. As already mentioned, Herz referred several times to the fact that the company has its own internal

75 Interview with Marquez (n 3).

76 Herz and CSC (n 52).

77 Ibid.

78 Ibid.

79 Interview with Marquez (n 3).

mechanisms for reporting and investigating human rights violations. While this is part of the company's CSR strategy in terms of creating an extended social and moral role for itself, it is also an implicit recognition of the lack of credibility of the Colombian justice system both nationally and internationally with regard to its ability to ensure that justice is done, particularly in relation to human rights violations.

Despite this shared acknowledgment of the inefficiency of the Colombian justice system, the positions of both interviewees in this regard are markedly different. Marquez's discourse clearly shows her perception that the inefficiency of the system is an important element in allowing the company to benefit from human rights violations and not having to worry about legal repercussions at national level due to the impunity that surrounds so many cases of human rights violations in Colombia:

We asked them, 'ok, if you're not violating human rights, why don't you speak out when the Black Eagles paramilitary group threaten us?' and the AngloGold Ashanti community liaison representative said, 'We didn't even know you had been threatened'. He went on to say that if we were being threatened or having our human rights violated then there are national mechanisms that we could use to report it, and they recommended that we went to the authorities to report it, when we know that that guarantees nothing here . . . somebody goes to report a human rights violation and days later either they get killed too or they have to leave, because the state doesn't guarantee security. The company knows that, everybody knows that. It wouldn't be difficult for them to make a public statement [condemning the human rights violations], but they don't, because it suits them that our human rights are violated.⁸⁰

The Colombian legal system's lack of credibility leads both the community and the company to seek legitimacy for their discourses by invoking international standards. However, Marquez's discourse clearly shows that the community feels that the Colombian state is on the side of the multinational company, leading to a sense of helplessness on the part of the community.

Central to the debate around AngloGold Ashanti's conduct in Colombia are the persistent accusations that army forces, acting under contracts between the company and the Colombian state to protect the company, and paramilitary forces, acting on behalf of the company, have committed human rights violations on behalf of the company, including murdering social leaders who have opposed the company's activities.⁸¹ Herz:

We have two security schemes. One is the Colombian army, which is constitutionally the armed forces, whether you like it or not. It has agreements with companies in many sectors [for the protection of the companies], and especially in extractive industries. These agreements are signed under the [UN] Voluntary Principles scheme . . . and the company gives human rights inductions to soldiers and officials, the company does these seminars. There is no soldier who works under the agreement who hasn't been through this induction scheme. I also want to clarify that it doesn't mean payment for arms or munitions, it's simply for the soldiers' logistics, for food etc. It isn't for attack, it's only for the protection of the company, and it's also for the protection of the community.⁸² . . . Our second security scheme is with a private, unarmed company, they are simply watchmen who let people come and go from the Project . . . that company is also a signatory to the Voluntary Principles . . . Look, in the case of Mr Uribe,

80 Interview with Marquez (n 3).

81 War on Want report (n 53) 2.

82 Herz and CSC (n 52).

these accusations of links with paramilitary groups in Sur de Bolivar date from before I arrived at the company. From the moment we arrived, an exhaustive investigation has been carried out, and no evidence of these links exists.⁸³

Marquez rejected the premise that the company's agreements with the army are also aimed at protecting local communities:

If we look at the example of [Spanish multinational energy company] Union Fenosa in La Salvajina area of Suarez, the army always protected the company but never the community, and members of the community were always subject to abuses – the soldiers would grab people as they passed the dam and throw their things away, break their work tools, assault them . . . so no, I don't believe that the company's agreement seeks to protect the community. Before the company came here we didn't need protection because we didn't have these problems in our community.⁸⁴

The company is clever . . . It may be that it isn't directly responsible, but they have benefited from what the paramilitaries do . . . [this company has] violated the human rights of people in South Africa, financed armed actors, and done the same in Sur de Bolivar [region of Colombia].⁸⁵

Marquez makes repeated, serious criminal allegations against the company, which Herz flatly denies.

BALANCE OF POWER

There is also a strong sense within Marquez's discourse of a mismatch between the company and the community in terms of power and influence: the company is seen as having the ability to influence national and international public opinion, as well as state policy:

Unfortunately we are located in a territory that is rich in a mineral which interests the multinationals, and especially AngloGold Ashanti, and we don't have the economic and political power that this company has . . . I think that a community could never be a 'partner' in equal terms with a company that is the third biggest mining multinational in the world, how can a community like La Toma compete and say I'm going to go into partnership with the biggest company in the world, when there is such a gigantic inequality between us[?]. . . state policies guarantee what the company wants, and violate community rights . . . We don't have the possibility to go to the US or England to the international community to tell them about the situation we are living, but they can because they have all of the money in the world and all the contacts to travel at any moment . . . so they have more possibility to be heard, and they also have the media on their side.⁸⁶

Discussion

The above excerpts lay bare the huge differences in how local communities and AngloGold Ashanti construe the corporation's presence. The gap between the discourses is so wide that it almost seems as if they could be talking about two different corporations. This raises serious questions not only for academic study of CSR, but also about the viability and legitimacy of the increasing role of voluntary CSR initiatives as a means of regulating business. As noted above, CSR is based on the idea of business having a responsibility which goes beyond its shareholders to the society in which it is operating; and from a

83 Herz and CSC (n 52).

84 Interview with Marquez (n 3).

85 Ibid.

86 Ibid.

corporate point of view, the key aim of CSR is for business to construct legitimacy. The above analysis of discourses raises two possibilities. The first is that AngloGold Ashanti's CSR efforts have overwhelmingly failed to construct legitimacy with a key stakeholder. The second possibility is that CSR initiatives which purport to be undertaken out of concern for the local communities were intended to construct legitimacy not in the eyes of local communities but in the eyes of other actors, such as shareholders, national and international policy makers, and the mass media.

The community leader interviewed for this research regarded the company as not only manipulative and untrustworthy, but also as (at least partly) responsible for crimes including human rights violations and corruption. The obvious place for such allegations between private individuals to be addressed is in a domestic court of law, however, there was a feeling from the community leader that the company is able to act with impunity, because the Colombian state is also implicated in many of the alleged crimes and is perceived as biased towards the corporation. Both sides' discourses revealed reservations about the effectiveness of the Colombian legal system. For Marquez, the company's CSR discourse is very much a 'discourse of appropriation', employed with an unstated objective: to secure access to the precious natural treasure underground in the community's territory: gold.

More importantly for this paper, the case study raises a deeper issue around power relations and the appropriation of the discourse of justice in an economically globalised world society. As mentioned in section one, Fairclough has shown how, within a social order, some discourses will be 'dominant or mainstream', while 'others are marginal, oppositional, or alternative', that is, some discourses will inevitably be more prominent than others, depending on the underlying social power relations and the position of the social actors which are deploying them.⁸⁷ My case study shows a clear clash of discourses, with both sides laying claim to the concept of justice and claiming it for their own discourse. AngloGold Ashanti's CSR discourse lies firmly within what Teubner describes as a 'new economic and law paradigm', claiming 'to be the new victorious paradigm which eliminates older moral-political orientations of law', and is 'justified by almost world-wide institutionalisation of economic rationality'.⁸⁸ This new economic and law paradigm is based on the expansion of the global market and holds a particular model of economic development as the Holy Grail for developing countries. The new paradigm can be seen clearly when the president of AngloGold Ashanti says that the company could not indulge in corrupt practices because 'the share price will drop if we don't meet standards',⁸⁹ as opposed to offering a moral reason for not indulging in such practices.

The success of this paradigm is reflected in the growing reliance upon voluntary CSR initiatives for the regulation of business: in the competition between discourses which characterises Teubner's plurality of discourses, the economic and law paradigm has thus far emerged as the victor, so much so that it is making a strong case to replace the state in many of its justice-related functions.

The discourse of community leaders such as Francia Marquez, as well as making a strong claim of its own to the concept of justice, contains a strong rejection of the company's justice claims. In standing outside of and in opposition to the dominant paradigm, the community's discourse falls clearly into the 'marginal, oppositional or

87 N Fairclough, *Media Discourse* (OUP 1995) 77.

88 Teubner (n 6) 150.

89 Herz and CSC (n 52).

alternative' category defined by Fairclough.⁹⁰ By opposing the company's discourse, the dominant paradigm, the community is deemed to be standing in the way of economic development, a model with which it may not necessarily agree but which has achieved such global currency that opposition to it comes to be defined as radical and old-fashioned. This immediately puts the community at a huge disadvantage, and more so when we consider how much easier it is to access the company's discourse: with huge financial resources, consultants, lawyers, a website, and better access to decision makers and influential circles, the community cannot compete, as Marquez made clear in her interview. With their scant resources, distance from centres of power and influence, and oppositional stance, the community's disadvantage is compounded.

Conclusion

This pilot case study highlights the pressing need for the policy makers and academics to make much more effort to bring communities into their debates on CSR. Further studies should be carried out on a larger scale looking at similar issues in different contexts. It is not enough to recognise the new-found dominance of CSR discourse, nor to recognise how business defines and shapes the debate. It is up to academics and policy makers to ensure that the discourses of those directly affected by the presence of corporations (and the main target beneficiaries of CSR initiatives) are represented within the CSR debate.

This need is particularly pressing given the emphasis of Professor Ruggie's 'Protect, Respect and Remedy' framework upon voluntary, soft-law standards on business and human rights. The fact that a company, which, according to its own discourse, prioritises its CSR activities and seeks to adhere to an array of voluntary mechanisms, could at the same time face serious criminal allegations and have such a lack of legitimacy in the communities in which it is operating should be a cause for concern for proponents of corporate self-regulation. Analysis of Marquez's discourse suggests that, under the new economic and law paradigm, voluntary regulation for corporations is inadequate because it allows corporations to use CSR to appropriate the discourse of justice for themselves at the expense of other oppositional, marginalised actors, such as the inhabitants of La Toma community in the hills of rural Colombia.

90 N Fairclough, 'A Dialectical-Relational Approach to Critical Discourse Analysis in Social Research' in R Wodak and M Meyer (eds), *Methods of Critical Discourse Analysis* (Sage Publications 2009) 16.

