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Contesting the UN Guiding Principles on Business and Human Rights from Below

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Contesting the UN Guiding Principles on Business and Human Rights from Below: NGOs, Extractive Industries and the Case of Colombia

List of Acronyms

FARC	Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo
ILO	International Labour Organisation
NAP	National Action Plan
NGOs	Non-governmental organisations
NCP	National Contact Point
MNCs	Multinational corporations
OHCHR	United Nations High Commissioner for Human Rights
OECD	Organisation for Economic Co-operation and Development
OECD Guidelines	OECD Guidelines for Multinational Enterprises
UN	United Nations
UN Guiding Principles	UN Guiding Principles on Business and Human Rights

Abstract

The conduct of multinational corporations (MNCs) heavily impacts the welfare of communities living in the areas of influence of large-scale coal mining operations. To date, the United Nations' (UN) document A/HRC/17/31 outlining the UN Guiding Principles on Business and Human Rights (UN Guiding Principles) represents the most comprehensive international regulatory framework in that regard. In home states of MNCs, the UN Guiding Principles enjoy strong support from governments, non-governmental organisations (NGOs) and private businesses alike. This research paper enquires into their local reception in a typical host state of the global mining business – Colombia. Bogotá-based NGOs occupy an intermediary position between international norm developments and the local corporate-community constellations. This intermediary position formally enables them to translate the UN Guiding Principles which were produced in international spaces to the areas where extractive industries operate. However, due to the document's non-binding nature and lack of situation-specific adaptations, a significant number of NGOs dismiss form and content as a step backwards in their fight against corporate impunity. The rejection interrupts the diffusion process and reduces the widely celebrated normative character of the UN Guiding Principles to a mostly insignificant, seldom evoked, UN document. The arguments expounded base upon field research conducted in Bogotá and La Guajira in the year 2015.

1 Introduction

Coal mining is the extraction of coal from the ground, either through surface or underground mining. In Colombia, informal small-scale mining has a long tradition and has been embedded within communities' social, cultural and economic structures (Ponce Muriel 2014, Echavarria 2014).[1] However, large-scale coal mining – usually defined by the involvement of a large corporation – has increased significantly in the past two decades (Salamanca Garay 2013). Article 332, Chapter I, Title 12 of the Colombian constitution of 1991 defines the State as the sole owner of the subsoil and the natural, non-renewable resources without prejudice to rights acquired and established in accordance with prior laws. In addition, the Mining Code of 2001 declares in its Articles 1 and 13 commodity mining as an activity of public interest.[2] Following from the characterisation of mining as a national public interest, the governments of Álvaro Uribe Vélez (2002–2010) and Juan Manuel Santos (2010–today) defined large-scale extraction of raw materials as one of the engines driving Colombian national development (Ministerio de Minas y Energía 2016). The Colombia's Constitutional Court and the central government disagree about the questions whether there exist any restrictions or limitations to foreign investments in the mining sector and thus whether the national granting of concession titles can bypass local and regional decisions (Dejusticia 2017).[3] Since the 1990s, Colombia's natural resource sector has become a favoured destination of foreign direct investments despite the centuries long internal armed conflict. Between 2002 and 2009, the area of resource extraction grew significantly from 10'000 km^2 to 84'000 km^2. In 2014, Colombia represented the fifth largest coal exporter on earth (ANDI 2015). The largest coal mines generating the most exports are located in the departments of La Guajira and El Cesar in the north of the country. The coal mine El Cerrejón, situated in La Guajira, is one of the biggest open pit coal mines in the world. El Cerrejón is co-owned in equal shares by the three multinational corporations Glencore, BHP Billiton and Anglo American. In the department of El Cesar, the coal is mined in several smaller open pit mines. Currently, the operating enterprises are Drummond, the Prodeco Group and Colombian Natural Resources.

1.1 Large-scale mining related conflicts

Such large-scale operations heavily impact the environment and livelihood of the people that live in the area of influence of mining exploration sites (UNCTAD 2007; UNHRC 2016). By 2010, the mining sector had become a centre for social and environmental conflicts (Weitzner 2012). The Dutch NGO PAX published a report in 2014 which claims that one mining corporation active in El Cesar – Drummond – had provided financial and logistical support to the paramilitaries Autodefensas Unidas de Colombia that committed a series of gross human rights violations against the local population (Moor and van de Sandt 2014). In a different study, ABColombia, a UK-based NGO coalition, counted more than 50 anti-mining protests in the country in 2011 alone (ABColombia 2012). Displacement of local communities without proper consultation processes or sustainable development models, environmental damage, water and air pollution and loss of farming lands belong to the most common adverse consequences of large scale mining projects in Colombia (Wright 2008).

1 In 2001 the principle of "first in time, first in right" that had informed the development of informal small-scale mining was replaced by a formal concession application process. The land belongs to the person or company that first appears in the Mining Registry as the legal concession holder.

2 Ley 685 de 15 Agosto 2001, El Congreso de Colombia.

3 Sentencia C-366/11, Corte Constitucional, Demanda de inconstitucionalidad contra la Ley 1382 de 2010, "Por la cual se modifica la Ley 685 de 2001 Código de Minas." Bogotá D.C., once (11) de mayo de dos mil once (2011).

Typically, human rights address the relationship between individuals and states (Alston 2005). The human rights situations in regions dominated by large-scale mining activities, however, is not only dependent on governments' but also on multinational corporations' conduct. Limited presence of government agencies in the regions of mining activities increases the importance of corporate behaviour in regard to human rights.[4] In the 1970s, the United Nations (UN), the International Labour Organisation (ILO) and the Organisation for Economic Co-operation and Development (OECD) had already recognised the problematic corporate-community constellations in areas characterised by weak rule of law. In 1973, the UN Economic and Social Council appointed a group of experts to a Commission on Transnational Corporations with the aim to formulate a code of conduct (Sagafi-Nejad 2008). However, a Global North/South divide thwarted the respective attempts (Muchlinski 2007, 660–62). Initiatives which were envisaged as non-binding had more political backing by developed countries that at that time represented the typical home states of multinational corporations. The OECD adopted their first Guidelines for Multinational Enterprises in 1976 and the ILO passed the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy in 1977.[5] To date, however, various examples of litigation by victims of alleged corporate misconduct show that national and international legal systems have not yet succeeded in embedding a globalised economy that transcends national borders (Ruggie 2013). This imbalance between the economic and the legal systems poses a fundamental challenge to victims of corporate harms seeking justice at the 'places of power', meaning the home states of multinational corporations.

The recognition of the difficulty to adopt binding national or international norms to govern the relationship between multinational corporations and local communities, has triggered the development of non-binding guidelines, codes of conduct and industry standards. Until now, the UN document A/HRC/17/31 which outlines the UN Guiding Principles on Business and Human Rights, also called 'Ruggie Principles' due to the authorship of UN Secretary-General's Special Representative John Ruggie, has become the authoritative reference docu-ment in the area of business and human rights (Mares 2012).[6] The document is divided into three pillars. The first pillar addresses the state's duty to protect, also against human rights abuses by business enterprises. The second pillar discusses the corporate responsibility to respect human rights and the third pillar proposes reformed and novel remedy procedures. The document's division in three parts has structured subsequent actions and policies. For instance, the Office of the United Nations High Commissioner for Human Rights (OHCHR) adopted different implementation guides for the UN Guiding Principles' respective parts.[7]

The UN Guiding Principles were produced as a UN document which differentiate them significantly from public-private initiatives in the sphere of business and human rights, such as the Voluntary Principles on Business and Human Rights to which the owners of El Cerrejón and part of the mining companies in El Cesar adhere to.[8] It also sets them apart from private codes of

4 For more information on governance in areas of limited statehood, consult the Collaborative Research Center of the Freie Universität Berlin on the issue: http://www.sfb-governance.de/en/ueber_uns/index.html (accessed on 13 November 2017).

5 For webpages dedicated to the OECD Guidelines and the ILO Tripartite Declaration, see http://www.oecd.org/corporate/mne/ and http://www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm (accessed on 13 November 2017).

6 Based on the UN Guiding Principles the Business & Human Rights Resource Centre was created which runs an online knowledge hub. According to their information they receive over 235'000 visits monthly and their weekly update e-newsletter has over 18'000 subscribers, https://business-humanrights.org/en/about-us (accessed on 13 November 2017).

7 See http://www.ohchr.org/EN/Issues/Business/Pages/Tools.aspx and http://www.ohchr.org/EN/Issues/Business/Pages/OHCHRaccountabilityandremedyproject.aspx (accessed on 13 November 2017).

8 http://www.voluntaryprinciples.org/ (accessed on 13 November 2017).

conducts developed in the business world, such as the Global Business Initiative on Human Rights (Buhmann 2016, 700).[9] As a UN document, the UN Guiding Principles exhibit a public nature and were adopted in a way similar to how the UN usually seeks to govern the human rights conducts of states. Despite this, the document's three-pillared structure conveys a clear-cut division between a state's and a corporation's obligation which is reflected in the manner in which various institutions have appropriated the UN Guiding Principles. States, companies and NGOs alike continue to voice their support of the UN document and claim to adhere to the principles that apply to them. Twelve countries, including Switzerland, have so far published National Action Plans (NAP) on business and human rights in which they envisage the national implementation of the UN Guiding Principles. During the drafting process of the UN document, influential NGOs such as Amnesty International, Human Rights Watch and the International Federation for Human Rights strongly criticised John Ruggie for having undermined efforts to strengthen corporate responsibility and accountability (Williamson 2011; Amnesty International et al. 2011). Nonetheless, the resulting document has become a wide-spread reference and knowledge resource for non-governmental groups. The Swiss Responsible Business Initiative ('Konzernverantwortungsinitiative') is a case in point. The initiative committee primarily relies on and legitimises their political venture by referring to the UN Guiding Principles. On the campaign's website, the UN document features prominently: "The mandatory due diligence instrument is based on the United Nations Guiding Principles on Business and Human Rights".[10] In the private sector, the UN Guiding Principles have had strong appeal during the development process as well as after the UN Human Rights Council's endorsement of the document. Several multinational companies commit to the UN document within their corporate social responsibility policies and business associations have drafted their own guidelines based upon them.[11] The Thun Group of Banks Discussion Paper on the implications for corporate and investment banks of Principles 16–21 of the UN Guiding Principles on Business and Human Rights is one such example (The Thun Group of Banks 2013).[12] It also shows that the UN document's three demarcated compartments are directly assumed by outside institutions. Whilst efforts to transform MNCs into subjects of international law are on-going, the mainstream discourse reflects the three-pillared structure in which a corporation's responsibility is limited to a responsibility to respect.

1.2 UN document A/HRC/17/31

In the sector of the extractive industries, the UN document A/HRC/17/31 was developed in order to improve the governance of the relationship between large multinational business and local communities. In the words of their creator John Ruggie:

> "The main problem was the lack of authoritative standards and guidance for states and businesses with regards to their respective obligations in the area of business and human rights. (...). In different industry sectors, and in different regions of the world, you have different manifestations

9 El Cerrejón is a member of the initiative, http://www.global-business-initiative.org/members/ (accessed on 13 November 2017).

10 http://konzern-initiative.ch/initiativtext/?lang=en (accessed on 26 April 2017).

11 Database on companies' endorsement of the UN Guiding Principles. Currently, featuring 90 different businesses https://business-humanrights.org/en/company-action-platform (accessed on 29 April 2017).

12 De Felice criticises the Thun Group of Banks' paper for relying on a subsidiary approach, avoiding a discussion of effective remedy and downplaying the importance of engagement with affected stakeholders (Felice 2015).

> of the problem. (...). In the extractive industry, it has to do with community relations and inadequate consultation for land, and with physical security of persons" (Bernard 2012, 892).

The wide-spread endorsement and examination by different actors has led to the perception of the document as reflecting a new international norm (De Felice and Graf 2015; Segerlund 2013). The document has been lifted out of its UN context and the most important part of the document's title "UN Guiding Principles on Business and Human Rights" has been evoked in various policies, political agendas and development programs by a plurality of actors which range from grassroots NGOs to large multinational corporations.

The document was drafted and adopted within the UN institutions but their development included a regional and local consultation process. During the consultation, NGOs from different Latin American countries claiming to represent affected communities demanded four instead of three pillars. The fourth pillar should have enshrined the affected communities' rights to resist corporate violations and protect human rights defenders. Also, they proposed a systematic consultation process with communities and the establishment of a People's Permanent Tribunal. In regards to remedy procedures, the group of NGOs recommended the creation of a universal and global judicial mechanism (ACIJ et al. 2009).

Scholars agree that the potential of human rights norms to positively affect vulnerable communities depends significantly upon the inclusion and empowerment of local actors (Sikkink, Risse-Kappen, and Ropp 2013). Lutz and Sikkink observe that human rights norms unfold impacts when they "open up new pathways at the domestic level, and hence provide agency or power to actors not previously involved" (Lutz and Sikkink 2000). Accordingly, it has been noted that the effects of human rights norms is dependent upon the communicative links between pressure groups such as NGOs and the opposing parties – governments and corporations (Keith 2002; Hathaway 2002).

This paper takes its cue from the voiced critiques in the consultation process leading up to the development of the UN document. It enquires into the perceptions and applications of the document in the settings which had given rise to the development of the United Nations' business and human rights agenda, therefore in areas where extractive industries operate. In those areas, multinational corporations encounter local communities that are especially affected by their conduct. Such an endeavour entails a discussion about the relationship which the UN Guiding Principles were set out to govern – the relationship between local communities and multinational business. First, this paper proposes that national NGOs represent crucial actors in regard to the reception of the UN document outlining the UN Guiding Principles within situations of human rights related conflicts between local communities and MNCs. As local actors, the NGOs accompany the communities in their confrontations with the corporations. As transnational actors, the NGOs collaborate with foreign organisations, move in international settings and

maintain multiple relationships with their counterparts in European and North American countries. The second argument reads that national NGOs – as the central actors in the translation of the UN document from international to local settings – reject it because they perceive the international development process to be exclusionary, and because of the document's non-binding nature.

Due to the rejection, the UN document remains confided within its initial scope of reach that includes NGOs in the home states of corporations, states and MNCs. At first sight, the main argument for the rejection – the non-binding nature – seems paradoxical since the NGOs are highly critical of the effectiveness of their legal system and the implementation of binding law. However, this paper will submit that the prima facie paradox overshadows an underlying conflict between the evocation of the UN document in the legal or the economic system. Multinational corporations have begun to incorporate the UN Guiding Principles into their corporate codes of conducts. As such the UN Guiding Principles as soft law occupy a "juridical no man's land" (Teubner 2009). Without a state's primary legislation in the subject area, the UN Guiding Principles' de facto implementation cannot be enforced by legal sanctions but they might be perceived as morally binding. Since the NGOs do not believe in the moral character of the mining corporations, they locate the corporations' acclaimed adherence to the UN document within the economic sphere of marketing and self-promotion. Notwithstanding the weak enforcement system, litigation is seen as a powerful tool against corporations and therefore improvements to corporate accountability should come from within the legal system. Accordingly, the NGOs support the already mentioned on-going attempts to develop a binding UN treaty on transnational businesses and human rights. As an international treaty, the instrument would be part of the body of international law and as such binding.

1.3 Methodology

This working paper builds on field research conducted in spring 2015. I accompanied Bogotá-based NGOs in their work and interviewed different government officials, private business, community and NGO representatives. The NGOs which form part of this investigation all defined business and human rights as one of their main areas of work. However, the specific foci ranged from environmental to peace process related questions. The accompaniment took place in Bogotá and the coal mining area of La Guajira. The NGOs spent approximately one week per month with the affected communities and provided political, social and legal support. During their stays in the mining regions, they attended and organised meetings with the corporations, international organisations and state officials. I interviewed and accompanied the following NGOs: Tierra Digna - Centro de Estudios para la Justicia Social, PAS - Pensamiento y Acción Social, Indepaz - Instituto de estudios para el desarrollo y la paz, Red por la Justicia Ambiental en Colombia, Colectivo de Abogados Joseé Alvear Restrepo, Centro de Investigación y Educación Popular, Censat Agua Viva. In the following chapters, I will not connect the NGOs as well as the names of the representatives to

9 El Cerrejón is a member of the initiative, http://www.global-business-initiative.org/members/ (accessed on 13 November 2017).

10 http://konzern-initiative.ch/initiativtext/?lang=en (accessed on 26 April 2017).

11 Database on companies' endorsement of the UN Guiding Principles. Currently, featuring 90 different businesses https://business-humanrights.org/en/company-action-platform (accessed on 29 April 2017).

12 De Felice criticises the Thun Group of Banks' paper for relying on a subsidiary approach, avoiding a discussion of effective remedy and downplaying the importance of engagement with affected stakeholders (Felice 2015).

individual statements and observations in order to preserve their anonymity.

This paper proposes that the evaluation of the research puzzle – the (missing) reception of the UN Guiding Principles at places of large-scale resource extraction – calls for a qualitative approach. Before any grand assertation can be made, the difficulty to measure perception and individual reception of the UN Guiding Principles should be addressed. The study takes a first step into this direction and puts forward some observations and classification of processes in which norm diffusions from the international arena to local situations had not taken place.

This paper is structured as follows. Section 2 discusses the problematic constellation between multinational mining corporations and the local public, which the UN Guiding Principles seek to govern. It introduces the coal mining sector in Colombia as the background to the study and frames the accompanying work of non-governmental organisations as transnational advocacy network. The next part embeds the UN Guiding Principles within the development of the international business and human rights agenda. Section 4 presents the empirical findings and sheds light on Bogotá-based NGOs' perception and reception of the UN Guiding Principles. Section 5 summarises the main insights and suggests potential future avenues for thinking about ways in which to govern the relationship between multinational corporate groups and local communities.

2 Multinational corporations, affected communities and NGOs

2.1 Multinational mining corporations and the welfare of local communities

Multinational mining corporations exert great influence on the regions in which natural resources are exploited. They alter the geographical surface and change the life of communities. The welfare of the population living in close vicinity to large-scale mining projects can be positively or adversely affected by the mining companies (UNCTAD 2007; UNHRC 2016). Examples for positive impacts include the building and improving of basic services such as schools and hospitals, employment opportunities and revenue generation at the local level (Jain 1981; Welker 2016). Areas of resource extraction are usually dominated by the mining industry and only little other investments occur (Kirsch 2014). Researching a mining project in Indonesia, Welker observes that it was difficult for the multinational company to find alternative workplaces for the local people outside of their mine (Welker 2014, 82). In addition, rural areas are often characterised by a limited presence of the state and mining projects are turned into sites of governmental activities (Sawyer 2004). In Welker's account of a gold mine in Asia, local people perceived the mine as more responsive than the state and an elementary school teacher referred to the company as "our government" (Welker 2014, 83).

In regard to the provision of welfare state-like tasks such as health and economic development programs, mining corporations have been successful in collaborating with NGOs and international aid organisations. These politics of engagement (Kirsch 2014, 116) take place on a local level but also on an international level in form of multi-stakeholder initiatives. Within multi-stakeholder initiatives, corporations, NGOs and governments jointly develop answers to the negative externalities of the mining industry. In most of the cases, the collaborative efforts have resulted in guidelines and codes of conduct to which companies, states and NGOs can adhere to. The large mining corporations Glencore, BHP Billiton and Anglo American include those codes of conducts into their corporate social responsibility (CSR) policies and publicise their involvement. Rajak, in her research on a multinational mining corporation in South Africa, argues that the practice of CSR has reinscribed older relations of patronage and clientelism between the corporation and the local public. She holds that people living in close proximity to the mine became dependent on the mine and the discourse overshadowed the inequitable distribution of wealth and resources (Rajak 2008, 139).

Besides the enduring unequal access to land and resources, non-governmental organisations in various parts of the world relentlessly document corporate-related grievances. In the public discourse, the grievances are framed as human rights harms. At the centre figures the human rights to health and adequate standard of living as codified in Articles 7, 11 and 12 of the International Covenant on Economic, Social and Cultural Rights. The rights are negatively impacted on by mining-related air and water pollution as well as through hazardous working conditions. Closely linked to large-scale mining projects are displacements and resettlements of communities. Before the

mining of commodities can begin, they must make way for the production process of multinational corporate groups. Only through spatially removing the communities from resource rich sites, corporations are enabled to take the first step of what is to become a global commodity supply chain. So to speak, local communities make production possible through making place. NGOs report that often the right of indigenous people to free, prior and informed consent as asserted in the UN Declaration on the Rights of Indigenous Peoples (2007), in the ILO Convention 169 and the Convention on Biological Diversity is disregarded by mining companies. Free, prior and informed consent gives indigenous people the right to give or withhold their consent to projects that might affect their land. The principle implies informed and non-coercive consultations between investors, states and the communities. Depending on the jurisdiction the principle has been enshrined into national law and broadened to include non-indigenous communities (Wilson and Buxton 2013). Investments into regions affected by conflicts might increase the risk of severe human rights violations including enforced disappearances and murder.[13]

2.2 Colombia's coal mining sector

For a long time, Colombia's coal mining sector was characterised by informality and an absence of regulation. The first Mining Code of 1988 (Decree 2655) represents a formalisation effort through the recognition of diverse types of mining and the creation of special zones for ethnic groups. In addition, the Decree allocated non-renewable resources and the subsoil to the central state and defined mining as a public interest activity. Importantly, it prohibited mining activities without official titles.[14] A further formal shift, from the recognition of subsistence and informal mining activities to the provision of a favourable regulatory framework for industrial mining and foreign direct investment, was induced by the passing of the National Mining Development Plan in 1997 and the adoption of the New Mining Code in 2001 (Law 685). They introduced tax incentives and online applications, which increased the popularity of the Colombian mining sector. In 2013, the formalisation Decree 933 was passed to solve the legal void for almost 4000 requests for formalisation. It introduced a formalisation procedure for traditional mining which, however, was criticised for ignoring the reality of many small-scale miners in regard to the used hectares of land and the required documentation for the applications (Martínez et al. 2013). Decree 4134 of 2011 established the National Mining Agency, which is in charge of executing the title and registration processes.

The Constitution of 1991 recognises territorial ownership of ethnic groups, which includes the rights of indigenous, Afro-descendants and mixed communities. Therefore, all corporations seeking to mine must carry out prior consultation processes. For indigenous people, the right to prior consultation of natural development projects that may affect them is also asserted in the International Labour Organisation Convention No. 169 to which Colombia is a party to. The Constitutional Court of Colombia elevated the Convention to the rank of a constitutional provision.[15] Further, the Court expanded the right

13 See as an example the (unsuccessful) litigation against BP in the UK for the oil company's complicity in his kidnap and torture, https://www.theguardian.com/environment/2015/may/22/colombian-takes-bp-to-court-in-uk-alleged-complicity-kidnap-and-torture.

14 Decreto 2655 de 1988, República de Colombia, Minesterio de Minas y Energía, Unidad de Planeación Minero Energética.

15 Constitutional Court of Colombia, Judgment SU-039/97, February 3, 1997.

to free, prior and informed consultation to Afro-descendant communities.[16] If the concession is granted, members of the communities should be employed and the necessary training provided. In 2010, Law 1383 was adopted to amend the Mining Code. However, it was later declared unconstitutional by the Constitutional Court due to the lack of provisions for prior consultation processes for ethnic groups.[17]

The large-scale commercial mining of coal in the Northern Colombian district La Guajira began in the 1970s with the founding of the state-owned enterprise Carbocol S. A. (Carbones de Colombia S. A.) together with Intercor (International Colombia Resources Corporation), at the time a subsidiary of the U.S. corporation Exxon (today ExxonMobil). In January 1999, the Colombian government extended the concession of the Cerrejón mine for a further 25 years.[18] In 1995, Glencore acquired parts of the mine and in 2002 the Colombian State and ExxonMobile sold their shares to equal parts to Glencore, BHP Billiton and Anglo American. The three multinational corporations set up the subsidiary Mine Carbones del Cerrejón.[19] In 2006, Glencore sold its shares to the Swiss commodity corporation Xstrata of which Glencore was the biggest shareholder. In 2013, Xstrata and Glencore merged to form Glencore plc. The continuing expansion of the mine has had severe impacts on the communities living on the territory or next to the mine. In 2007, attempting to hold the corporations accountable, the Swiss NGO Arbeitsgruppe Schweiz-Kolumbien together with the Colombian lawyers' collective Corporación Colective de Abogados filed an OECD complaint against BHP Billiton with the Swiss and Australian National Contact Points.[20] Attempting to depopulate the area to expand the mine, in 2001 the residents of Tabaco were forcefully evicted.[21] The other communities alleged that the corporations had taken action to dislodge them. The UK National Contact Point (NCP) organised a meeting in London with the management of the mine, the companies, complainants and the Australian and Swiss NCP. After the initiation of a Third Party Review initiated by Cerrejón, an agreement between the coal mine and township of Tabaco which included financial remedies and some further mediation meetings in Australia, in 2009 against the will of the complainants the case was closed (NCP Australia 2009). The Swiss NCP issued a statement supporting the decision of the Australian one (NCP Switzerland 2009). Since then the communities and NGOs have accused Cerrejón of violent and forced evictions, collaborations with private security forces, of disrespecting their right to free, prior and informed consent, of causing water shortages and health problems due to high pollution.[22]

2.3 NGOs and the corporate-community constellation

Communities living in close vicinity to mining projects represent specially affected groups. The degree of power imbalances between them and multinational corporations is blatant. Usually, multinational corporations enter into a concession agreement with the state without any direct involvement of the specially affected groups. In most of the cases, the concession agreement is embedded in the investor-state dispute settlement (ISDS) system which allows for individual corporations to sue states for alleged violations of bilateral

16 Constitutional Court of Colombia, Judgment C-030/08 of January 23, 2008.
17 Constitutional Court of Colombia, Judgment C-66, 2011.
18 http://www.Cerrejón.com/site/nuestra-empresa/historia.aspx (accessed on 29 April 2017).
19 http://www.Cerrejón.com/site/operacion-integrada/mina.aspx (accessed on 29 April 2017).
20 https://www.oecdwatch.org/cases/Case_121 and https://www.oecdwatch.org/cases/Case_153 (accessed on 29 April 2017).
21 See for more information on the case of Tabaco https://www.theguardian.com/sustainable-business/cerrejon-mine-colombia-human-rights, http://www.minesandcommunities.org/article.php?a=169 and https://business-humanrights.org/en/colombia-afro-descendant-community-allegedly-forcibly-displaced-from-its-hometown-by-cerrejon-coal (accessed on 13 November 2017).
22 See for example http://www.globaljustice.org.uk/blog/2014/aug/8/eviction-tabaco-13-years-struggle and https://casotabaco.wordpress.com/ (accessed on 13 November 2017).

investment treaties (BITs) concluded between the state in which the corporation is headquartered and the state of investment (Dolzer 2012). However, as soon as the exploration phase begins local communities are deeply entangled with the mining projects. Their relationship is one of proximity conditioned upon territorial vicinity. Neither of the two parties – the coal mining corporations nor the communities – had chosen to be so closely located to each other. In resource rich regions, space is scare and multinational enterprises and local communities see themselves confronted with an unavoidable co-existence and a "terrifying simultaneity" (Massey 1992, 83). Suddenly, farmer and indigenous communities find themselves opposite multinational corporations negotiating the terms of resettlement or access to land and water. However, due to the multinational character of the corporation, the corporate-community relationship is lifted out of a local into an international setting. NGOs in the countries to which the coal is exported and in the countries in which the mining enterprises are headquartered have sought to influence the abovementioned constellation (Yaziji and Doh 2009). Acting on the impression that, on the one hand, local communities suffer from the impacts of foreign direct investments and, on the other hand, that the national legal and political system is not capable of accommodating those impacts, international NGOs have become active on different levels. They try to pressure their governments into developing new legislation, lobby against pension funds' investments into mining corporations or initiate litigation cases. In the words of the constructivist scholars Keck and Sikkink, such pressure groups can be described as transnational advocacy networks (Keck and Sikkink 1997). Transnational advocacy networks consist of social movements, international organisation, media, churches, unions, intergovernmental organisations and parts of local governments. They try to influence policy through collaborating transnationally, sharing information, circulating personnel and funds. The networks are likely to emerge in cases in which domestic groups do not have access to their governments, when "political entrepreneurs' see potential in networking and when an arena for contacts is available. Keck and Sikkink describe the objectives of the groups with the metaphor of the boomerang. Domestic groups work together with activists of another country. These citizens seek to pressure their government into pressuring the offending regime (Keck and Sikkink 1997, 1999; Sikkink, Risse-Kappen, and Ropp 2013). The NGOs of the countries in which the corporations are headquartered or to which coal is exported work together with Colombian NGOs. They collaborate in producing reports, pressuring the board members directly within General Assemblies and organising campaigns. The international NGOs depend on the information and knowledge provided by Colombian NGOs and the latter often rely on the funding by Western organisations. Colombian NGOs, at times assisted by international ones, seek to interfere into the corporate-community relationships, which are characterised by stark power inequalities. They accompany the communities to their meetings with the corporations and often claim to represent them in public appearances or legal proceedings.

3
Attempts to govern the relationship between corporate groups and local communities

The relationships between multinational businesses and local communities in the Global South are poorly governed. Victims of corporate misconduct seldom find an effective forum through which they can seek effective remedies. After the UN's unsuccessful attempts to formulate an international code of conduct after 1970, the efforts to develop binding international norms accelerated at the end of the 1990s and beginning of 2000. In 1998, the UN Sub-Commission on the Promotion and Protection of Human Rights established the Working Group on Transnational Corporations, which, in 2003, submitted the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (the Norms). The Norms were approved by the Sub-Commission in its Resolution 2003/16 (Sub-Commission on the Promotion and Protection of Human Rights 2003). Notwithstanding the decades long considerations of the issue of corporate respect for minimum international human rights standards within international organisations, the Norms were dismissed by the UN Commission on Human Rights in April 2004 and never achieved legal standing.[23] To date, 13 years later, no binding international instrument governing corporations' human rights conduct has been adopted. Nonetheless, attempts towards a treaty are on-going. In 2014, Ecuador and South Africa tabled a resolution, also signed by Bolivia, Cuba and Venezuela, towards such an end. Some 20 countries supported it and an intergovernmental working group "with the mandate to elaborate an international legally binding instrument on Transnational Corporations and Other Business Enterprises with respect to human rights" was established (HRC 2014).

3.1 Multinational corporations and human rights

Traditionally, the concept of human rights seeks to influence the relationship between individuals and states. States should abstain from extensive interference with an individual's liberty, should protect and ensure individuals' wellbeing. This includes the responsibility to protect individuals from harmful acts of third parties. Human rights are codified in different international treaties, national constitutions and laws. The recognition that not only states but also private actors are in a position to negatively affect the human rights situation of individuals has led several authors to posit a "governance gap" when speaking of multinational corporations and human rights (Simons and Macklin 2014). 'Multinational corporations and human rights' has become a conceptual term to think about the impact of production processes within and around economic entities on workers and communities near production sites (De Schutter 2006; Deva 2011; Blumberg 2002). John Ruggie, UN Special Representative for Business and Human Rights, observes in his book Just Business that "multinational firms were unprepared for the need to manage the risks of their causing or contributing to human rights harm through their own activities and business relationships" (Ruggie 2013, 27). Ruggie in his Report 2008 made it clear that corporations have a responsibility to protect human rights. He defined this responsibility as follows:

23 For the draft history of the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights see Weissbrodt and Kruger (2003).

> "[The corporate] responsibility to respect is defined by social expectations - as part of what is sometimes called a company's social licence to operate ... [and] ''doing no harm'' is not merely a passive responsibility for firms but may entail positive steps. To discharge the responsibility to respect requires due diligence. This concept describes the steps a company must take to become aware of, prevent and address adverse human rights impacts."

This statement conveys a particular image of corporations as closed economic entities with relationships towards third parties that can have negative impacts on the latter. This view has been adopted by large parts of the Business and Human Rights scholarship. Corporations are considered as forming part of a global capital economy which push the boundaries of national legal systems (McCorquodale and Simons 2007). In addition, multinational mining corporations often assume welfare state functions within the regions in which they operate. El Cerrejón, for example, provides for public services through its four foundations. Scholarship programmes are implemented, hospitals built and economic plans for the regions developed (Szegedy-Maszák 2008). The mining corporation takes on 'welfare state'-like functions through three main channels: a court might order it, the concession agreement between the investor and the host state could intend for some direct involvement in the welfare structures of the region of investment (Peels et al. 2016), or the engagement evolves out of the day-to-day intertwined relationships between the corporation and the surrounding communities (Rajak 2009).[24] Due to their economic power and entanglement with national welfare states, the use of the concept of human rights seems an obvious approach to take. However, as already stated, multinational corporations are seldom directly addressed by international or national human rights law (Alston 2005).

3.3 The UN Guiding Principles on Business and Human Rights

Seeking to address the insufficient governance of the relationship between multinational mining corporations and local communities, in 2011 the UN Human Rights Council unanimously endorsed the Report A/HRC/17/31 which presented the UN Guiding Principles on Business and Human Rights (HRC 2011). The UN Guiding Principles implement the UN 'Protect, Respect and Remedy' Framework, adopted by the UN Human Rights Council in 2008 (HRC 2008). Both documents were developed by UN Special Representative of the Secretary-General John Ruggie during his mandate on the issue of human rights and transnational corporations and other business enterprises (Ruggie 2013; Aaronson and Higham 2013). The Framework as well as the UN Guiding Principles propose a three-pronged structure. The first pillar addresses the state duty to protect against human rights abuses by business enterprises. The second one discusses the corporate responsibility to respect human rights and the third pillar proposes reformed and novel avenues for greater access by victims to effective remedy.

24 Sentencia T-256/15, Corte Constitucional, Acción de tutela instaurada por miembros de la comunidad ancestral de negros afrodescendientes de los corregimientos de Patilla y Chancleta del Municipio de Barrancas, La Guajira, contra la empresa "Carbones del Cerrejón Limited", Bogotá D.C., cinco (5) de mayo de dos mil quince (2015).

In the commentary to Principle 2, Ruggie outlines that currently "[s]tates are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction" (HRC 2011, 3). However, home states of corporations are not prohibited from doing so and in Principle 3 he proposes a smart mix of measures to "foster business respect for human rights" (HRC 2011, 5). In his commentary to Principle 4 the doctrine that states are the primary duty-bearers under international law is repeated. He reminds state officials that a failure to ensure that businesses which perform welfare state services act in accordance with the State's human rights obligations "may entail both reputational and legal consequences for the State itself" (HRC 2011, 8). Principle 7 deals with business operations in conflict-affected areas. In such areas, the 'host state' might be unable to protect the human rights of its citizens due to a lack of control. Ruggie comments that in such circumstances the 'home states' of transnational corporations "have roles to play in assisting both those corporations and host States to ensure that businesses are not involved with human rights abuse" (HRC 2011, 9). Ruggie postulates in relation to Principle 11 that the corporate responsibility to respect human rights amounts to "a global standard of expected conduct for all business enterprises wherever they operate" (HRC 2011, 13). Principle 12 outlines what the UN Guiding Principles mean when speaking of 'human rights': Business enterprises should respect the recognised human rights as contained in the International Bill of Human Rights consisting of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights coupled with the principles concerning fundamental rights in the eight ILO core conventions as set out in the Declaration on Fundamental Principles and Rights at work. In Principle 13, Ruggie tackles the difficulty with defining the term 'business relationships'. The UN Guiding Principles understand them to include "relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services" (HRC 2011, 15). In order to identify, prevent, mitigate and account for human rights risks companies should carry out human rights due diligence (Principle 17) which includes assessing the human rights context prior to a proposed business activity, and at regular intervals since human rights situations are dynamic (Principle 18). In the third Pillar, different forms of access to remedy are proposed and discussed. Besides state-based judicial mechanisms, non-judicial grievance mechanisms and non-state based ones are thought through (HRC 2011, 27–35).

4
The UN Guiding Principles and the corporate-community relationships

It is difficult to evaluate the effects of a soft law instrument that is supposed to initiate regulatory processes but does not create new rights or obligations. Neither clear provision for implementation nor straightforward cause-effects relationships exist and impact studies are of necessity case sensitive and as such limited in their generalisability. Even if measurable standards or thresholds were to exist, their implementation would be voluntary which opens the way to different and unregulated modes of receptions. With regard to states and companies, the UN Guiding Principles have triggered the development of the National Action Plans for the former and the alignment of corporate social responsibility programs with human rights for the latter. In terms of those two actors, therefore, on paper implications of the UN Guiding Principles are evaluable. De Felice and Graf, for instance, offer a systematic analysis of the development processes and potentials of various National Action Plans (Graf 2013; De Felice and Graf 2015) and the European Parliament's Policy Department reviewed the progress of implementation in non-EU countries (Faracik 2017).

Their effects of the UN Guiding Principles on the relationship between multinational corporations and communities is subtler and therewith difficult to account for. Within discussions and disputes on resettlement processes and other issues, reference to the UN document could clarify the human rights responsibilities of the corporations involved, initiate the development of business-internal grievance mechanisms or open the way to a more formal mediation between the parties. The latter has been possible since the OECD revised their OECD Guidelines for Multinational Enterprises (OECD 2011) in 2011. With this most recent revision, the UN Guiding Principles were integrated into the OECD's Guidelines and complemented with a mediation mechanism. The OECD Guidelines oblige adhering states to set up so-called National Contact Points (NCPs) that should inform the public about the existence of the Guidelines and act as mediating party between multinational enterprises and applicants if a breach of the Guidelines is alleged (Ruggie and Nelson 2015). The OECD's database documents over 360 instances in more than 100 countries in which a dispute has been submitted to the NCP.[25] Besides the 34 member states 12 non-states signed the Guidelines, including Colombia. Before Colombia signed claims could be brought in front of NCPs of the home countries of the multinational corporations. As already mentioned, in 2007 the Swiss NGO Arbeitsgruppe Schweiz-Kolumbien together with the Colombian lawyers' collective Corporación Colective de Abogados filed, in the name of the village Tabaco and five other communities, an OECD complaint against BHP Billiton with the Swiss and Australian National Contact Points.[26] The UK NCP organised a meeting in London with the management of the mine, the companies, complainants and the Australian and Swiss NCP. After the initiation of a Third Party Review by Cerrejón, an agreement between the coal mine and township of Tabaco was reached, which included financial remedies and some further mediation meetings in Australia. In 2009, against the will of the complainants the case was closed (NCP Australia 2009). The Swiss NCP issued a statement supporting the decision (NCP Switzerland 2009). Colombia became a signatory party to the OECD Guidelines in 2011.[27] However, to date Colombia's National

25 http://mneguidelines.oecd.org/ncps/ (accessed on 2 July 2017).

26 https://www.oecdwatch.org/cases/Case_121 and https://www.oecdwatch.org/cases/Case_153 (accessed on 29 April 2017).

27 http://www.oecd.org/corporate/mne/colombiaadherestotheoecddeclarationoninternationalinvestment.htm (accessed on 2 July 2017).

Contact Point has only received two complaints, both of them by trade unions. The complaint against the multinational company Hoteles Decamerón Colombia S.A.S Hodecol S.A.S was declined because of its overly legal character.[28] The second complaint against the multinational mining enterprise Drummond is ongoing.[29] Asked about the mismatch between conflicts surrounding large-scale mining projects and the recourse to the mediation mechanism, the minister of the Colombian NCP struggled to find a satisfactory explanation and pointed towards its limited publicity. The NGOs rejected this explanation vehemently and argued that the non-use of the institution grounds in its lack of legitimacy and accountability. The NCP's missing legitimacy was connected to the perceived ineffectiveness of the UN Guiding Principles.

NGOs' dismissal of the NCP's mediation procedures indicates the complexities of the translation process of an international document such as the UN document in question. Before the UN document can exhibit any effects within the local context of coal mining exploration, Bogotá-based NGOs first need to acquire the specific knowledge about the international document. Bogotá-based NGOs are situated in an intermediary position between the local corporate–community constellation and the international arena, which would have allowed them to act as translators between the different spheres. Having said that, knowledge in itself did not produce any effects related to implementation since a general approval of the UN document turned out to be a second precondition for effective reception. The lack of acceptance hindered the diffusion process of the UN Guiding Principles since the NGOs were aware of the UN document but opposed it. At times, however, diffusion took partly and superficially place when financial support from NGOs located in home states of multinational corporations was conditioned upon the idea that the UN Guiding Principles would represent a productive instrument on which further projects should be based.

4.1 Bogotá-based NGOs as intermediaries

The blatant inequality in bargaining power between multinational corporations and the local public had given rise to a transnational network of non-governmental organisations (Keck and Sikkink 1997). Colombian NGOs based in Bogotá accompany different communities to the meetings with representatives of the corporations and support them in legal, social and political issues. For example, one of the NGOs took on the task of applying for a special status for indigenous communities, which in case of recognition would bring them a more favourable position in terms of legal representation.[30] For the application, a document containing a "Plan de Vida" (life plan) was required that gave an overview of the history, the cultural practices, the political and legal institutions of the community. Since the indigenous community in question had no written records of their history, practices and knowledge, the NGO assembled the community members in a circle and led them through the different questions of the application form. Representatives of the NGO organised workshops and brainstorming sessions to explore their different stories about their origin,

28 See for the National Contact Point's argument http://www.mincit.gov.co/loader.php?lServicio=Documentos&lFuncion=verPdf&id=81148&name=Decision_PNC_-_Caso_SINTHOL_-_HODECOL_S.A.S._VF.pdf&prefijo=file (accessed on 14 November 2017).

29 See for the initial evaluation http://www.mincit.gov.co/loader.php?lServicio=Documentos&lFuncion=verPdf&id=80029&name=Evaluacion_Inicial_Sintradem_Drummond.pdf&prefijo=file (accessed on 14 November 2017).

30 I use the past tense to indicate the observations that resulted from my accompaniment of the NGOs. The present tense is used to refer to general observations that are still valid.

native customs and way of life in order to construct a clear narrative in which the majority of the community's voices were reflected. The same NGO maintained regular contacts with European NGOs and travelled often to the home countries of the corporations forging new alliances and conveying their knowledge about the local situation between the multinational corporation in question and communities. Through its relationship with foreign NGOs, the NGO became aware of the legal and political developments in different European countries and could later refer to them in the community's meeting with the corporations.

The described NGO was not an isolated case and mirrors renowned anthropologist Sally Engle Merry's account of intermediary actors that work at various levels to negotiate between local, regional, national, and global systems of meaning (Merry 2006, 39). Merry (2006) researched how transnational ideas such as specific human rights approaches become meaningful in local settings. She undertook studies on the translation processes of the international human rights discourse on violence against women in such diverse setting as China, India, Peru and the United States. The attention is being directed towards the gap between cosmopolitan ideas of human rights and local sociocultural understandings of the issues in question. She found that translation processes from the international to a local level were conditioned upon NGOs engagement in human rights advocacy work as intermediary actors. Importantly, even though all the organisations drew on the international human rights framework, their interpretation and assigned meaning differed greatly. Instead of trying to directly apply ideas of international human rights harms to local situations, representatives of NGOs redefined and adapted the normative content to the particular context. Merry calls this process vernacularization. The global is not directly connected to the local but contingent upon the communicative translation by NGOs that find themselves in an intermediary position. International discourses about human rights are appropriated and locally adapted. "Vernacularizers" are "people in between" (Levitt and Merry 2009, 449) which puts them into a position of both power and vulnerability. They have contacts to international and local actors and control the flow of information between them. Such a position opens the actors up to "suspicion, envy and mistrust" (Levitt and Merry 2009, 449).

The Bogotá-based NGOs that are engaged in advocacy work within the coal mining sector, are prime examples for what Merry describes as intermediary actors and vernacularizers. They maintain regular and good contact to the NGOs in the home countries of the mining corporations and are in constant exchange with especially affected groups. Their staff is well educated; they often speak good English, had studied at one of the prestigious private universities in Bogotá and had spent a few months at European, Australian or American universities. The conversations between meetings and on long journeys reflected their informed awareness about political and social developments in Europe and other parts of the world. The rise of right-wing parties in different European countries and the refugee crisis dominated many discussions. At some point, the NGOs under consideration had all received funding from

European or international NGOs. In return, Bogotá-based NGOs pass on new information about on-going conflicts between the mining corporation and the communities. Because of those collaborations, a transnational advocacy network around the issue of coal mining evolved. Member organisations shared common values and beliefs, exchanged information, circulated personnel and engaged in an intensive dialogue with each other (Keck and Sikkink 1997, 8–10). For example, a group of NGOs had formed a human rights and environment observatory around Glencore plc. by the name Red Sombra – Observadores de Glencore.[31] So, whilst international NGOs depended upon the information disclosed by Bogotá-based NGOs as national translators, the latter in turn often receive a significant amount of funding by European or North-American non-governmental organisations. This funding has influenced their work since donors often demand a specific working method or result (Merry 2006, 40). In the context of Colombia, the vulnerable position of translators had been augmented by the conflicting parties within the internal violent conflict. Representatives of NGOs that were perceived as too close to a multinational corporation received threats by opposing parties. On the other side, NGO representative that infamously rejected any kind of dialogue with the corporations also received threats by armed groups.

Typically, the Bogotá-based NGOs spent one week per month in the community. One NGO representatives' journey to the mining region began in the first-class lounge of the airport El Dorado in Bogotá to which they had access as regular travellers. A few hours later, they were sitting in a circle with residents of communities undergoing resettlement processes. The residents informed the NGO about the most recent developments with an emphasis on the on-going problem of the lack of drinking water. After the move to new settlement the quality of the water had changed drastically. The farmers spoke of salty water which was also intolerable for their domesticated animals. As a result, the community had to go to the next village in order to buy bottled water. Whilst the corporation paid for the water bottles the people of the community expressed their financial worries about the bus fare.

The relationship between the community and the NGOs was shaped by distance. Not only by geographical distance – from Bogotá, it takes a two-hours flight and a few hours by car to reach the community – but also by cultural distance. One of the NGO's representative portrayed his awareness of the distance by changing the way he dressed and spoke every time before having entered the community. Nevertheless, when the same representative introduced the process for applying for "resguardo" (a special formal recognition) the elected leader of the indigenous community translated every word from Spanish into the native language. However, all of the people present spoke Spanish as their second language. The rationale for the translation did not root in a lack of understanding, but in an effort to lend more legitimacy to what had been said. Through the translation into the indigenous language, the leader sent a signal to the community that what had been said was legitimate and true. The elected leader served himself as an intermediate between the Bogotá-based NGO and the community. So, whilst the national NGOs were in a

31 http://observadoresglencore.com/ (accessed on 29 April 2017).

position to, for example, frame local grievances in the internationally recognised human rights language – water pollution became a violation to the right to water – they found themselves in a situation in which a further translation was needed.

The brief insights into the dynamics of the collaboration between affected communities, national NGOs and the transnational mining advocacy network illustrate the central position of Bogotá-based NGOs. In regard to the extractive industry, UN document A/HRC/17/31 was adopted so that the UN Guiding Principles would positively affect the corporate-community relationship. However, the Principle's local reception might depend upon intermediary actors such as national NGOs that move between international spaces and the areas where extractive industries operate.

4.2 Developing knowledge about the UN Guiding Principles

The NGOs which form part of this study moved on two different levels of embeddedness in transnational advocacy networks. The first group of NGOs maintained regular contact with foreign NGOs, had participated in international conferences and considered the exchange with European or North-American organisations as almost more important than the collaboration with other Colombian NGOs. The second group on the other hand focused its attention nearly solely on structures and developments within the nation state. In their view, multinational corporations had been local actors and internal change should be induced by bottom-up approaches focusing on communities and their perception and future ideas. Thus, a prevailing factor for a domestic NGO's profound knowledge about foreign and international norms developments consisted in the degree of inter-linkage into a transnational advocacy network focusing on business and human rights. This inter-linkage led to a conception of the business and human rights issue as a global and not just as a local problem. With such a conception had come the willingness to find and support international answers to local problems arising out of corporate misconducts.

The process of the familiarisation with an international instrument had arisen out of collaboration as much as out of European expectations attached to the provision of funding. An example for the former was remembered by one of the representative of one of the NGOs accompanied in their work with communities that, in 2002, got to know the Dutch NGO Centre for Research on Multinational Corporations (SOMO) at a conference on the Colombian peace process. SOMO works on the accountability of European multinational corporations for their human rights conduct. According to the Colombian NGO, the contact to SOMO had been decisive for their own reorientation from a focus on the peace process in general to a focus on the role of multinational business in the internal conflict. The interviewed representative pinpointed the mentioned 2002 conference as the starting point for their new focus area. Since 2002, the

Colombian NGO has been in regular contact with their Dutch counterpart. Through SOMO it is kept up to date about legal and political developments in the Netherlands and beyond. On the other side, the Colombian NGO had informed SOMO about the developments on the ground and provided the Dutch advocacy group with material for their campaigns and projects in Europe. The representative of the NGO remembered that within the framework of this collaboration he had learnt about different soft law initiatives and was introduced to the development process of what should later become UN document A/HRC/17/31 outlining the UN Guiding Principles.

However, not all of the collaborations within the transnational advocacy network had occurred in such a harmonious manner. One of the NGOs was in close contact with German and Swiss NGOs. Asked about the collaboration, it was stated that in order to secure funds from the European NGOs the organisation feels obliged to refer to external initiatives and instruments such as the Voluntary Principles on Security and Human Rights and the UN Guiding Principles within their work. The reason consisted in the fact that the Ruggie Principles have become the "only, nearly holy truth for Europeans".[32] Therefore, whether a Colombian NGO liked to work with the UN Guiding Principles was irrelevant as they came to represent a prerequisite for securing funds from European organisations. The reason for the negative attitudes towards the UN Guiding Principles will be explored in the subsequent chapter.

Besides the formal collaboration between European and Colombian NGOs, international forums provide a platform for knowledge transfers. Members of the Bogotá-based NGOs prepared themselves for the participation at the UN Human Rights Council meetings concerning the project of a binding treaty for transnational corporations and human rights. The trips to Geneva had been sponsored by British, Swiss and German NGOs. The journey to Switzerland would not only be crucial for the future business and human rights agenda but almost more importantly interpersonal networks could be established and expanded. Colleagues with whom contact had only taken place via email could be met face to face. Further, the meeting would be important to strengthen collaborations between Latin American groups since her NGO engages much more with European than other Latin American NGOs. This imbalance in exchange and information sharing within Latin American groups as compared to between Latin American and European NGOs was connected to, according to one interviewee, a persisting colonial mind set in which Europeans were more knowledgeable than their Latin American counterparts. This observation was mirrored in different statements, which conveyed the impression that "being in touch with international and foreign NGOs is almost more important than collaborating with Colombian ones".[33] The NGOs that shared this opinion all had especially close partnerships with one European organisation.

Not all of the NGOs under investigation exhibited the same international attitude towards the multinational corporations. For an environmental organisation, which focused on water issues in the moor region Páramo that had supplied large parts of the country with portable water, multinational

32 Interview with senior staff of a Bogotá-based NGO that accompanied a community in resettlement, Bogotá, 10 April 2015.

33 Interview with senior staff of a Bogotá-based lawyer collective, Bogotá, 5 May 2015.

corporations were part of the local constellations. They became a relevant actor for the NGO when they entered the moor regions with the intention to mine gold. The NGO worked with a nation state-centred focus and considered multinational corporations primarily as national players. "They mine Colombian raw materials, have an office in our capital Bogotá and employ Colombians. Why shouldn't we treat them like national actors?"[34] For the NGO representatives, the international developments had taken place on a distant level. "Firstly, we should address the political and legal system of our country, then, if this does not work, we can go to the Inter-American Court. The UN is much too far away".[35] In a similar vein, another NGO, which had been trying to develop a common platform for different Colombian NGOs, focused its work mainly on organisations based in Bogotá. The NGO's prime concern consisted in the coordination of national NGOs working on the subject of multinational mining corporations. "We in Colombia are everyday wasting resources because nobody knows exactly what the other does. I aim at improving the exchange of information amongst domestic NGOs. Since this is difficult enough I cannot not as well worry about foreign or international NGOs".[36]

A team of one of the largest and oldest NGOs in Bogotá closely accompanied communities that are affected by the extractive industry. During their accompaniment, they employed an in-depth view on the respective people. "Firstly, we have to understand the history and sociocultural understanding of the community. We must understand how the community within our country got to this point. You know, in Colombia we have communities that were firstly displaced by the Paras (paramilitary), then by the FARC (largest Guerilla organisation) and currently by transnational corporations. And now they should get resettled to other places. But first of all, try to find regions which are not given away to some multinational corporations".[37] According to the interviewee, a change in the national policy allocating land titles was only possible when employing a bottom-up approach. "Indigenous and Afro-Colombian communities should be able to tell their story on a nation-wide platform. Understanding our country will help us much more than any international attempts which had been developed detached from any local contexts."[38]

4.3 Reception of the UN Guiding Principles

The NGOs under consideration were very critical towards the UN Guiding Principles. The majority of the interviewed representatives rejected the instrument in one way or another. The three key reasons were the UN document's voluntary nature and a lack of enforcement mechanism, the missing practicality, as well as the UN Guiding Principles' underlying premise that a socially viable corporate-community co-existence could be found. The procedural criteria for objection was related to the NGOs' feeling that the UN Guiding Principles were "forced" upon them by their international donors. Asked about the UN Guiding Principles several organisations reacted in a similar way, which is exemplarily captured in the statement "why does my or my NGO's opinion matter?"[39] One of the NGO representative continued by explaining that "in general our position is so weak that we have to use every

34 Interview with senior staff of a Bogotá-based environmental NGO that provided counsel for different communities living in areas affected by mining activities, Bogotá, 30 April 2015.
35 Interview with senior staff of a Bogotá-based environmental NGO that provided counsel for different communities living in areas affected by mining activities, Bogotá, 30 April 2015.
36 Interview with senior staff of a Bogotá-based umbrella organisation that seeks to further collaborations between different Colombian NGOs, Bogotá, 30 April 2015.
37 Interview with senior staff of a Bogotá-based Center for conflict mediation and accompaniment of communities that had been especially affected by the internal conflict or mining activities, Bogotá, 28 April 2015.
38 Ibid.
39 Interview with senior staff of a Bogotá-based NGO that accompanied different communities in resettlement, Valledupar, 17 April 2015.

tool, binding or non-binding, international or national. You see, it should not really matter what I or my NGO think."[40] This was the only view, which expressed a neutral or even positive attitude towards the UN Guiding Principles. The representative's NGO pursued a pragmatic approach and "applies everything which somehow exists".[41] In theory, further NGOs supported a similar approach. "Actually, NGOs acting as representatives of communities should use every legal or quasi-legal instrument which once has been drafted. They cannot afford to despise one instrument due to some moral issues".[42] However, at the same time the interviewee notes that his organisation would not work with the UN Guiding Principles. "Of course, it would be great to include the UN Guiding Principles into our work but where should we find money for an additional employee?"[43] Due to a lack of resources, the interviewee explained that they would concentrate their forces on national laws since they could assess a law's effect beforehand whilst the implications of drawing a reference to a UN document were difficult to estimate.

Other NGOs expressed a much clearer and less resource-oriented opinion. One interviewee stated that:

> "We are wasting too much time with these soft law instruments. At some point, they will become hard law anyway. But, here in Colombia, we do not have this time. People from Europe and North America treat the UN Guiding Principles as if they were the only truth existing. Forget it, nobody will ever change the thinking of a corporation. They will not suddenly acquire a conscience. They will always do everything which lies in their power to find the holes in legislation because that is a corporation's nature."[44]

The NGO rejected the UN Guiding Principles primarily due to their non-binding character. Further the statement above illustrates how the representative took it for granted that the UN Guiding Principles "will become hard law anyway".[45] However, he showed no intention to actively participate in this process. On the contrary, it seems that he had relied on a division of labour between different NGOs: NGOs that strictly reject the norm, NGOs which advocate the implementation of the UN Guiding Principles through legislative action and NGOs which consider a soft law instrument as being more useful than a classical international treaty and thus actually work with these tools. A lawyer of one of the human rights organisations that form part of this study expressed a similar thought, albeit in more legal terms. She was deeply concerned about the tendency to translate human rights into voluntary instruments. According to her, human rights existed to counterbalance the power of capitalist actors. This counterbalance would be lost as soon as human rights were framed in some non-binding language, which would imply that judicial bodies could decide whether to adhere to some initiatives. The NGO representative was not really surprised by the UN's conservative attitude towards powerful corporations and human rights but she expected a firmer stance on human rights as a compulsory requirement for every institution by European NGOs. She concluded her thought with the strong statement that "the Ruggie Principles are a farce and joke for our

40 Interview with senior staff of a Bogotá-based umbrella organisation that seeks to further collaborations between different Colombian NGOs, Bogotá, 30 April 2015.
41 Ibid.
42 Interview with senior staff of a Bogotá-based NGO that accompanied different communities in resettlement, Valledupar, 17 April 2015.
43 Ibid.
44 Interview with senior staff of a Bogotá-based NGO that accompanied a community in resettlement, Bogotá, 10 April 2015.
45 Ibid.

human rights regime" and would represent "a huge step back in our struggle for human rights".[46] The majority of the NGOs articulated such a view of the UN document under interest. One of the interviewee explained that since "transnational corporations are often more powerful than states"[47] human rights should be directly binding upon them. In her view, it would be highly problematic that the UN Guiding Principles "reformulate human rights into a voluntary provision".[48]

The majority of the NGOs under consideration expressed the opinion that it would be rather naïve to think that soft law instruments like the UN Guiding Principles have the potential to become quasi-binding for corporations through enough negative publicity. The naivety was related to the fact that as long as "the West depends upon Latin American coal nothing will change".[49] A similar conclusion was reached by a different NGO arguing that "essentially, we do not have a legal but an economic problem. As long as your governments in the West do not think sufficiently about alternative energy supplies, the transnational corporations will always be powerful players that can do whatever they want to."[50] Those NGO representatives all held that soft law instruments would, in the end, only serve corporations. Without any control mechanisms, they would allow corporations to affirm their compliance on their websites and in their sustainability reports. By doing so, it became the activists' task to examine the corporate assertions. Further, the UN Guiding Principles as a soft law instrument would rely to large parts on the willingness to dialogue between different stakeholders. However, in the Colombian context it has been enormously dangerous to engage too closely with a corporation. At least three of the interviewed NGOs documented that they and their members had received death threats in the past weeks by groups of the left-wing Guerrilla for the reason of "being too close to the evil".[51]

The UN Guiding Principles were deemed unhelpful in the daily work and the rhetorical question was asked "[h]ow should an international soft law instrument improve the situation, if Colombia does not even succeed in enforcing its binding national laws?"[52] Human rights problems would not arise due to an insufficient legislation but due to weak enforcement mechanisms:

> "We Colombians have adopted one of the most beautiful constitutions in the world; it reads like a fairy tale. What Colombia does not have is a strong state with a functioning legal system. Here, everyone is corrupt. The politicians in Bogotá have no interest in farmers or indigenous communities who live in the borderlands to Venezuela."[53]

Different NGOs contemplated on an international enforcement mechanism, which was to function independently from the nation state. It was remarked that "processes in which the Colombian state holds a key position are hopeless from the beginning"[54] Interviewed representatives wished for a supranational institution with a mandate to observe the human rights situation around multinational corporations and the power to investigate individual complaints against companies.[55] Additionally, the idea of extraterritoriality came up since

46 Interview with senior staff of a Bogotá-based lawyer collective, Bogotá, 5 May 2015.
47 Interview with senior staff of a Bogotá-based lawyer collective that represent communities in resettlement processes, Bogotá, 13 May 2015.
48 Interview with senior staff of a Bogotá-based lawyer collective that represent communities in resettlement processes, Bogotá, 13 May 2015.
49 Interview with senior staff of a Bogotá-based lawyer collective, Bogotá, 5 May 2015.
50 Interview with senior staff of a Bogotá-based NGO that accompanied a community in resettlement, Bogotá, 10 April 2015.
51 Interview with senior staff of a Bogotá-based NGO that accompanied a community in resettlement, Bogotá, 10 April 2015.
52 Interview with senior staff of a Bogotá-based Center for conflict mediation and accompaniment of communities that had been especially affected by the internal conflict or mining activities, Bogotá, 28 April 2015.
53 Interview with senior staff of a Bogotá-based environmental NGO that provided counsel for different communities living in areas affected by mining activities, Bogotá, 30 April 2015.

"ultimately, they are your corporations, so your legal system could open the doors for our human rights victims."[56] This statement was founded in the belief that a foreign legal system would be in a more effective and powerful position to make corporations accountable for their human rights conduct than Colombian courts.

A different reasoning against the UN Guiding Principles was introduced by different NGOs that work closely with indigenous groups. In their view, the UN Guiding Principles should be dismissed since they had been based on the premise that mining activities could be conducted in a socially responsible manner. The fundamental question had not been about the very existence of large-scale multinational mining explorations but only about the modalities of such activities. So, the UN Guiding Principles were to be rejected irrespective of their exact content and nature since they would legitimate the existence of a globalized economy and posit that it could be socially viable.

Multiple times during the interviews and fieldwork, it was recounted how NGOs felt compelled to work with the UN Guiding Principles due to the Europeans' celebration of the instrument. Representatives explained that only through the engagement with the international soft law instrument, will the NGOs be able to secure future funding by European NGOs. Within this financial dilemma, comparisons were drawn to the colonial past of Latin America and constellations of post-colonialism. "Now, we have European NGOs telling us we should apply an international instrument to resolve our local human rights problems".[57] He continued by explaining that "Colombia is solely responsible for the decisions taken and the handling of multinational corporations".[58] Another NGO expressed a similar discomfort with the UN Guiding Principles as an international attempt to solve local human rights problems. The interviewee explained various times: "We cannot stand the word solidarity. We do not have a situation that requires any kind of solidarity; we are not the west's victims anymore. Now, we have to talk about co-responsibility."[59] The alleged victimization discourse gave rise to a lot of resentment. NGOs made up of young professionals referred to themselves as a "new generation" seeking to differentiate themselves from the "old left".[60] These activists rejected any discourses of solidarity and claimed that in today's inter-connected world everyone would be partially responsible for the occurrences in different regions of the world. Countering an outdated view of the country, representatives stated that "we are as educated as you are" and "do not need your solidarity".[61] Further, the younger NGO representatives explained "even though we are good enough educated to encounter work in Europe or so we prefer to stay in Colombia in order to change the country we want to live in".[62]

54 Ibid.

55 Their views are echoed in Kozma's, Nowak's and Scheinin's 2011 proposal of a World Court of Human Rights which would decide in a final and binding manner on complaints of human rights violations committed by state and non-state actors alike and provide adequate reparation to victims (Nowak 2007; Scheinin 2012). The initiative was sponsored by Switzerland.

56 Interview with senior staff of a Bogotá-based Center for conflict mediation and accompaniment of communities that had been especially affected by the internal conflict or mining activities, Bogotá, 28 April 2015.

57 Interview with senior staff of a Bogotá-based NGO that accompanied a community in resettlement, Bogotá, 10 April 2015.

58 Ibid.

59 Interview with senior staff of a Bogotá-based lawyer collective that represent communities in resettlement processes, Bogotá, 13 May 2015.

60 Ibid.

61 Interview with senior staff of a Bogotá-based NGO that accompanied a community in resettlement, Bogotá, 10 April 2015.

62 Ibid.

5 Conclusion

This paper has sought to shed light on the complex situations the UN Guiding Principles aim at governing. It argued that Bogotá-based NGOs could play a crucial role as intermediaries in the translation of a regulatory document A/HRC/17/31 that had been developed within international spaces of the UN. They inhabit a position 'in the middle', know the local and international settings, are able to move between different fora and can adjust their discourses and appearances. The NGOs had worked within a transnational advocacy network in which collaborations between NGOs located in typical home and host states of multinational corporations took place. The depth of knowledge about international developments depended on the degree of embeddedness within the network. However, as the limited use of the NCP's mediation mechanism indicates, the UN Guiding Principles were almost exclusively met with a firm rejection. Bogotá-based NGOs dismissed them because of their non-binding nature, the envisaged closeness to the corporations and the development process outside of the local context. Due to the soft law character, the NGOs perception of the UN document was more economic than legal. In their view, the document's non-binding nature allowed the corporations to use it as a marketing tool by branding themselves as responsible entities. Legally, however, it would not have any impact since no international enforcement mechanism existed. Through operational-level grievance mechanisms and corporate obligations owned to affected stakeholders, the UN document intends to bring corporations and the public closer. In Colombia's context of conflict, however, such closeness as well as the explicit rejection of such can bring along physical dangers for the NGOs. In addition and linked to the previous observation, the NGOs voiced critiques concerning the development process of the UN document. It was perceived as too international, elitist and too far away from the actual corporate-community constellations that it was set out to govern.

This working paper concludes with four observations that hold implications for policy developments concerning the governance of multinational corporations' human rights conduct. First, the impressive approval and support of the UN Guiding Principles by governments, corporations and NGOs in typical home states of multinational businesses had been met with cautious rejection in a typical host country by NGOs as gatekeepers between the international and local levels. The constellations within the problematic situation which the UN Guiding Principles had set out to improve – the human rights' environment of multinational corporations – seemed to present too complex a picture for a regulatory instrument developed outside of the specific context. Second, however, it became apparent that the perception of the problem differed greatly between the individual actors. Whilst some Bogotá-based NGOs perceived of the multinational corporations as Colombian actors and the problem related to large-scale mining activities as national issues, others stressed the international dimension of the coal mining business. Framing the issues at stake as international led to the location of the problem in typical home states of the corporations. Within such a framing, victims should have access to legal remedies in the states in which the corporations are headquartered, and those governments should regulate the conduct of 'their' corporations. Framing the

issues at stake as mainly Colombian problems, however, implied suspicion towards regulatory approaches and ideas that had been developed outside of the problematic context. The difference in perception, definition and localisation of the problem illustrated the not yet entirely clarified nature of a multinational enterprise which encompasses a variety of subsidiary corporations in diverse jurisdictions. Thirdly, this working paper has drawn attention to actors, which are positioned between the constellations surrounding coal mining sites and the international sphere. In most of the cases, information and knowledge did not flow directly from the local setting – the constellation around coal mines – to NGOs in home states of corporations but were mediated by Bogotá-based NGOs. Such an information network raises the question of representation and legitimate knowledge. It must be asked how 'truths' about the local constellations between communities and multinational corporations are formed and which actors can claim legitimate representation. Fourthly, the term 'local' raised obstacles difficult to overcome. In this working paper, the term was used to describe the constellations around coal mines which mainly included communities and multinational corporations. In doing so, the geographical as well as cultural, political and social distance between the mining sites and Bogotá-based NGOs was made a subject of discussion. Due to the multi-layered structure of the corporations in questions, they can hardly be described as local actors since they represent meaningful national and international players at the same time. The unease with the term 'local' is, again, connected to the difficulty in defining the nature and localisation of the problems connected with global business.

To conclude, the attempt to follow the UN document A/HRC/17/31 which outlines the UN Guiding Principles from the international spaces of UN meetings and working groups to the areas where extractive industries operate came to a halt at the level of Bogotá-based NGOs. The UN Guiding Principles which had been celebrated as a new international norm by NGOs, governments and companies of typical home states were reduced to a UN document without much local impact. In the accompaniments and interviews, the celebratory character vanished and the NGOs under consideration alluded to the document's development history as a UN project without enough governmental support for binding provisions.

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