

Closing protection gaps in the human rights and business context: what transnational cooperation between the National Human Rights Institutions of Germany and Colombia has achieved

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Closing protection gaps in the human rights and business context

What transnational cooperation between the National Human Rights Institutions of Germany and Colombia has achieved

Information

The UN Guiding Principles on Business and Human Rights (UNGPs) were developed to close human rights protection gaps in the context of transnational economic activities. The UNGPs confirm that National Human Rights Institutions have an important role to play in implementing the principles. Their task is to provide guidance on human rights to states, business enterprises and other non-state actors. Transnational cooperation among National Human Rights Institutions (NHRIs) can help to promote the implementation process. The purpose of this paper is to share the German Institute for Human Rights' experience with international NHRI cooperation and provide food for thought about how other NHRIs might benefit from lessons drawn from it.

Over the last two decades, coal has gained considerable significance for Colombia's foreign trade, and now comprises up to 13 percent of the country's exports. Colombia's largest coal mines are located in the departments Cesar and La Guajira. These mines are entirely owned by foreign companies, the largest of which are Drummond, Glencore/Prodeco, Murray and Caribbean Resources. Colombia's coal production growth came at a cost of negative impacts on the environment and human rights. Residents of the mining regions have suffered greatly from the destruction of livelihoods, resettlements and violations of labour rights. Nevertheless,

vast amounts of Colombian coal continue to be imported by Germany's energy groups – RWE, Vattenfall Deutschland, E.ON and EnBW to name but a few. With the growing coal demand and decreasing coal production in Germany, Colombia has become the second most important coal supplier of Germany's energy sector.

This transnational background translates into shared responsibilities on both ends of the coal supply chain for the human rights issues in Colombia's mining sector. However, the protection of human rights in global supply chains is a difficult task. The increase in transnational economic activity has led to a governance gap that presents challenges for the human rights protection system. In the face of intensified global competition inducing corporations to move their value and supply chains from one state to another to take advantage of weak regulations and lower costs in another jurisdiction, many home and host states remain reluctant to regulate business activities or incapable of enforcing existing regulations. Yet the resultant governance gaps ultimately amount to gaps in human rights protection that need to be filled. The UN Guiding Principles on Business and Human Rights were developed to close these gaps. The challenge is to promote the effective implementation of the principles in order to protect, respect, and fulfil human rights. National Human Rights Institutions can play an important role in promoting the implementation process.

Towards Transnational NHRI Cooperation

NHRIs are tasked with the promotion and protection of human rights in their respective countries, and this responsibility includes an extraterritorial dimension. The importance of NHRIs in the effective implementation of the UNGPs is explicitly acknowledged in the Guiding Principles themselves.

UN Guiding Principles on Business and Human Rights

“National Human Rights Institutions that comply with the Paris Principles have an important role to play in helping States identify whether relevant laws are aligned with their human rights obligations and are being effectively enforced, and in providing guidance on human rights also to business enterprises and other non-State actors.”
Commentary to Principle 3

Depending on their mandates, NHRIs use different instruments to promote the UNGPs, such as policy advice and recommendations, review of legislation, human rights education or handling individual complaints. NHRIs that are accredited with ‘A’ status according to the Paris Principles act as independent institutions without governmental interference. The independence of an NHRI guarantees that it can serve as a legitimate and credible intermediary with the potential to create and facilitate effective communication among all stakeholders.

NHRIs have established several regional and global networks, such as the European NHRI Network, the NHRI Network for the Americas and the Global Alliance of National Human Rights Institutions (GANHRI). This makes them especially well equipped to monitor transnational business activities on both ends of the supply chain. With their networks, they have created important platforms that connect the NHRIs at both ends of a supply chain and support the exchange of ideas, experiences and methods in the context of business and human rights between them. This helps NHRIs to find creative ways to address human rights issues jointly, thereby contributing to the closure of protection gaps that originate from cross-border

business activities. To live up to this potential, however, NHRIs need to increase their institutional capacities for transnational cooperation.

The German-Colombian Cooperation

Colombia and Germany each represent one end of a coal supply chain. The German energy sector imports large amounts of coal from Colombia, while Colombia’s population is exposed to various negative human rights impacts through regional mining activities. To improve this situation, the Colombian Defensoría del Pueblo (Defensoría) and the German Institute for Human Rights (Deutsches Institut für Menschenrechte, DIMR), the National Human Rights Institutions of Colombia and Germany, respectively, started a cooperation in October 2015. Their aim was to address business-related human rights issues arising from coal mining in Colombia. Both NHRIs wanted to improve their institutional capacity and strategies for a more effective implementation of the UN Guiding Principles.

The initial design of the cooperation between the Defensoría and the DIMR was based on a network model that is particularly adapted to the needs of NHRIs dealing with transnational business and human rights issues. The model illustrates the basis on which communication between NHRIs functions, what legitimates requests that one NHRI makes of another, and the resources they can use for mutual undertakings. It assigns forms of NHRI interaction to one of three analytical dimensions.¹

- 1 Communication among individual NHRIs: in order to communicate with one another, NHRIs need a shared knowledge of the field of cooperation, a common understanding of the mission/goals/procedures and an agreed language. This allows the development of a framework of understanding that makes the form of interaction that is “communication” possible (and vice versa).
- 2 Requests that individual NHRIs can legitimately make of one another: for this, NHRIs need a set of rules and norms, such as declarations (e. g. the Edinburgh Declaration), memoranda of understanding, etc. These are conducive to mutual recognition and facilitate the institutionalisation of cooperation. Through forms like

memoranda of understanding, NHRIs create a structure of legitimacy that makes the form of interaction involving issuing and acting upon requests possible (and vice versa).

- 3 Mutual undertakings/joint utilisation: for this, NHRIs must use some of their resources: human and financial capital, travel costs, rents for conference space, etc. However, cooperation both uses and generates resources: e.g. cost sharing, output of synergies such as computer software programs for complaint handling or online learning tools. Here a structure of resources makes possible the action of mutual commitments regarding joint undertaking of projects and joint utilization of resources (and vice versa).

This network-model for NHRIs is action centred, but takes the need for resources into account. This is particularly important since NHRIs (and other human rights entities) often report that they have a lack of resources, in terms of time or funding, and that communication is slow and requests are not heard. This model shifts the perspective from one that is focused on a structural deficit to the possibility of action. For further elaboration of the model see Schuller/Utlu 2014.

Against this background, the Defensoría and the DIMR implemented a set of measures that promoted exchange, common research and capacity building. Both NHRIs have the mandate to advise their respective governments and used this role to link the human rights issues in Colombia's mining sector to decision-making in Germany. To mobilise this potential, the Defensoría took advantage of its geographical proximity to approach companies operating in Cesar and La Guajira, such as Drummond and Cerrejón, as well as local civil society organisations and affected communities. The DIMR, for its part, approached German enterprises, such as EnBW and Vattenfall, and civil society and the German government. As an independent actor, the DIMR was able to facilitate dialogue between the parties and soften hardened positions.

The project is an example of good practice and can be replicated by other NHRIs in other sectors and scaled up, particularly if the supply chain is fairly straightforward, as is the case in parts of the

extractive sector. This project demonstrates that transnational NHRI cooperation can make a valuable contribution towards closing existing gaps in human rights protection across differing business and country contexts.

Achievements

Dialogue: A multi-stakeholder conference in Bogotá in March 2016 initiated a dialogue among different stakeholders. The conference brought together representatives from mining companies, business associations, NGOs, communities, government officials, including the Presidential Office for Human Rights (Consejería), responsible for the National Action Plan on Business and Human Rights, and a number of the Defensoría's regional offices. It contributed to a shared understanding of the human rights issues in Colombia's mining regions and increased awareness of their transnational dimension. Secondly, all stakeholders recognised the significance of the role that NHRIs can play as convenors of multi-stakeholder platforms and in the prevention of business-related human rights violations.

Exchange: The NHRIs of Colombia, Guatemala, Paraguay, Peru, Mexico, Ecuador and Bolivia met in Bogotá for a conference on human rights protection and risk assessment in the extractive sector. The conference was organized by the DIMR in cooperation with the Defensoría and CREER. This exchange among NHRIs in the Americas on common human rights issues in the extractive industries identified areas for joint action. NHRIs also acknowledged their key role in facilitating dialogue between communities and corporations. In order to speak with an effective, regionally orchestrated voice when communicating with stakeholders for the purpose of protecting human rights, NHRIs in the region should develop a common understanding of human rights due diligence and establish a monitoring system of business activities with a transnational perspective in mind.

Training: Engaging with business and human rights requires particular capacities relating to the UNGPs and monitoring. The Defensoría committed itself to train the staff at its regional offices, and 35 of 36 regional bureaus took part in workshops conducted by the DIMR and the Colombian research institution CREER (Centro Regional de

Empresas y Emprendimientos Responsables). The overall aim was to promote expertise on business and human rights. At the training events it emerged that the regional bureaus knew little about the UNGPs and the area of business and human rights, even though they have been working on topics in this field for years now. The regional bureaus demonstrated awareness of issues arising out of the state's duty to protect environmental and indigenous rights. Yet they did not appear to be very familiar at all with the issue of corporate responsibility. Firmly embedding their existing efforts within the UNGPs framework will be crucial to increasing the effectiveness of the NHRI's work however. The UNGPs framework would enable them to see not only the State and its obligations but also corporations and their responsibility to respect human rights.

Research: Field visits and qualitative interviews with stakeholders in the coal sector in the departments of Cesar and La Guajira were jointly conducted by the Defensoría and the DIMR, with the support of CREER, in order to gather first-hand information from all stakeholders and enhance knowledge of existing human rights challenges. The interviews showed that main topics included:

- Judicial and non-judicial grievance mechanisms in the coal sector
- Points of conflict between local communities and companies and their perceived root causes
- Existence and effectiveness of communication channels
- Preconditions for interaction based on trust among all stakeholders
- Role of state entities and participation and consultation structures as perceived by local communities

Impact

Through strategic and coordinated efforts, the DIMR and the Defensoría both increased their institutional capacities and improved their work in the context of business and human rights,

benefiting equally from their cooperation. The **Defensoría** has gained a comprehensive overview of the perspectives and needs of all relevant stakeholders. The interviews and field visit revealed uncertainties regarding the responsibilities of the different stakeholders as well as an urgent need to strengthen state monitoring, enforcement and grievance mechanisms at the regional level. As a result, the Defensoría has started to develop an institutional action plan for business-related human rights violations. This plan includes a policy guideline that specifies the duties that the Defensoría intends to fulfil in the area of prevention, monitoring and access to remedy. These principles will be integrated into internal work processes through standardised procedures, guidelines and methodological training for Defensoría staff. Such an intra-institutional alignment will ensure greater efficiency, as every staff member will follow the same conceptual framework and response plan. The capacity-building of employees primarily serves to prepare them to implement effective strategies for interacting with affected right-holders, state entities, and companies.

The **DIMR**, in turn, has used the results of the cooperation to develop two sets of recommendations. One set was presented to the German government and is addressed to German development policymakers. The other set of recommendations was discussed with German civil society and representatives of businesses in the energy sector. The latter signalled that they are prepared to improve their due diligence processes, for instance by integrating more external human rights expertise. The DIMR also facilitated a meeting between German energy groups and the Defensoría in Colombia. This resulted in recognition by the companies of the fact that NHRIs can be a key agent in assessing and addressing human rights risks.

Both NHRIs have agreed to intensify their cooperation in order to further increase their institutional capacities. A transnational monitoring mechanism, a coordinated scheme to evaluate human rights impacts, and the issuance of joint statements on human rights issues were highlighted as areas for future cooperation.

Challenges

NHRI cooperation is not merely a matter of training in the sense that one NHRI engages with another with the aim of strengthening the second institution's capacity. Indeed, NHRI cooperation can be fruitful for both parties and strengthen the capacity of all actors involved. For instance, DIMR profited from the knowledge that the Defensoría was able to gather with the help of its regional offices close to the mining activities. This knowledge is crucial when thinking about what human rights due diligence in the coal importing German energy sector actually can mean in practice. Ideally, cooperation will result in an increase of knowledge and competence on both sides. However, there are often certain challenges that need to be met. NHRIs vary in their mandates, structure and size, for example. The diversity of institutional arrangements needs to be taken into account. Otherwise, arrangements that facilitate the effective exchange of information might be lacking, and needs arising in the course of cooperation go unmet. Memoranda of understanding have helped to successfully coordinate communication needs and connect contact persons.

The Defensoría has strong regional offices, which is why its focus was initially limited to the local dimension of human rights issues in the coal sector. As a result, it took some awareness-raising regarding the potential of transnational cooperation before Defensoría staff were prepared to take active responsibility for implementing the approach. On-site discussions helped to build trust among the cooperation partners and to foster the idea that joint action along transnational value chains is mutually beneficial with respect to human rights protection.

Experience has shown that some companies adapt to the language of the UNGPs without actually doing justice to its principles. Therefore, effective UNGPs implementation requires that NHRIs, civil society and other stakeholders look beyond businesses' policy declarations and State regulations at how these translate into impacts on right-holders.

Lessons learnt

NHRIs in all regions could improve their institutional capacities to work with and profit equally

from a cooperative approach to business and human rights, provided that they do so on the basis of a cooperation model that takes the different historical circumstances of each region and country sufficiently into account. The German-Colombian experience shows that in order to succeed, transnational NHRI cooperation needs effective mechanisms to manage communication between stakeholders and coordinate activities. Addressing adverse human rights impacts on both ends of the supply chain can activate several channels of influence at the same time, so that maximum leverage can be achieved.

It is important to note, however, that joint NHRI efforts, in the form of policy advice or guidance to companies, for example, will not immediately lead to changes in corporate or state governance. Nonetheless, transnational interaction with all relevant stakeholders is a basis for narrowing the gaps in human rights protection. Continuity is crucial in order to consolidate the position of NHRIs as key contacts for both governments and businesses.

NHRIs contemplating similar endeavours might consider the following lessons learnt:

- **Focal points:** Having a business and human rights focal point within each NHRI greatly facilitates cooperation and communication; it is important to ensure that information is quickly transferred to the responsible actor. The Defensoría, for example, can now easily reach out to DIMR if a human rights issue arises in connection with one of the coal mines relevant for the German energy sector. In such a case, the DIMR could approach civil society and German companies and ask them, for instance, to intervene or to contact their business partners.
- **Management support:** Management-level support at the NHRI for the cooperation between the business and human rights focal points should be clearly documented in a MoU; this step helps to ensure that changes at the leadership level of the NHRI board will not jeopardise the activities of the experts. This is especially important for institutionalising the cooperation.

- **Multi-stakeholder approach:** NHRIs should use their convening power to ensure that the different perspectives of all actors involved are heard.
- **Involve regional networks:** Countries within a given global region may differ greatly in their history and administrative organization, but often the rights-holders in such countries experience similar human rights problems. Therefore, cooperation outcomes should be shared with other regional NHRIs through their regional networks.
- **Set clear priorities:** The extractive sector in Colombia is complex and highly political. Focusing on one sub-sector, like coal mining in this case, reduces that complexity.
- **Mutual learning/mutual strengthening:** NHRIs in the home and host states of companies should see themselves as equal partners that learn from each other. Cooperation strengthens the capacity on both sides.

1 Schuller, Christopher / Utlu, Deniz (2014): Transnational Cooperation in Business and Human Rights. A model for analysing and managing NHRI networks. Berlin: German Institute for Human Rights.

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