

# ABC Colombia

CAFOD, Christian Aid, Oxfam GB, SCIAF, Trócaire  
Working for Peace and Human Rights in Colombia

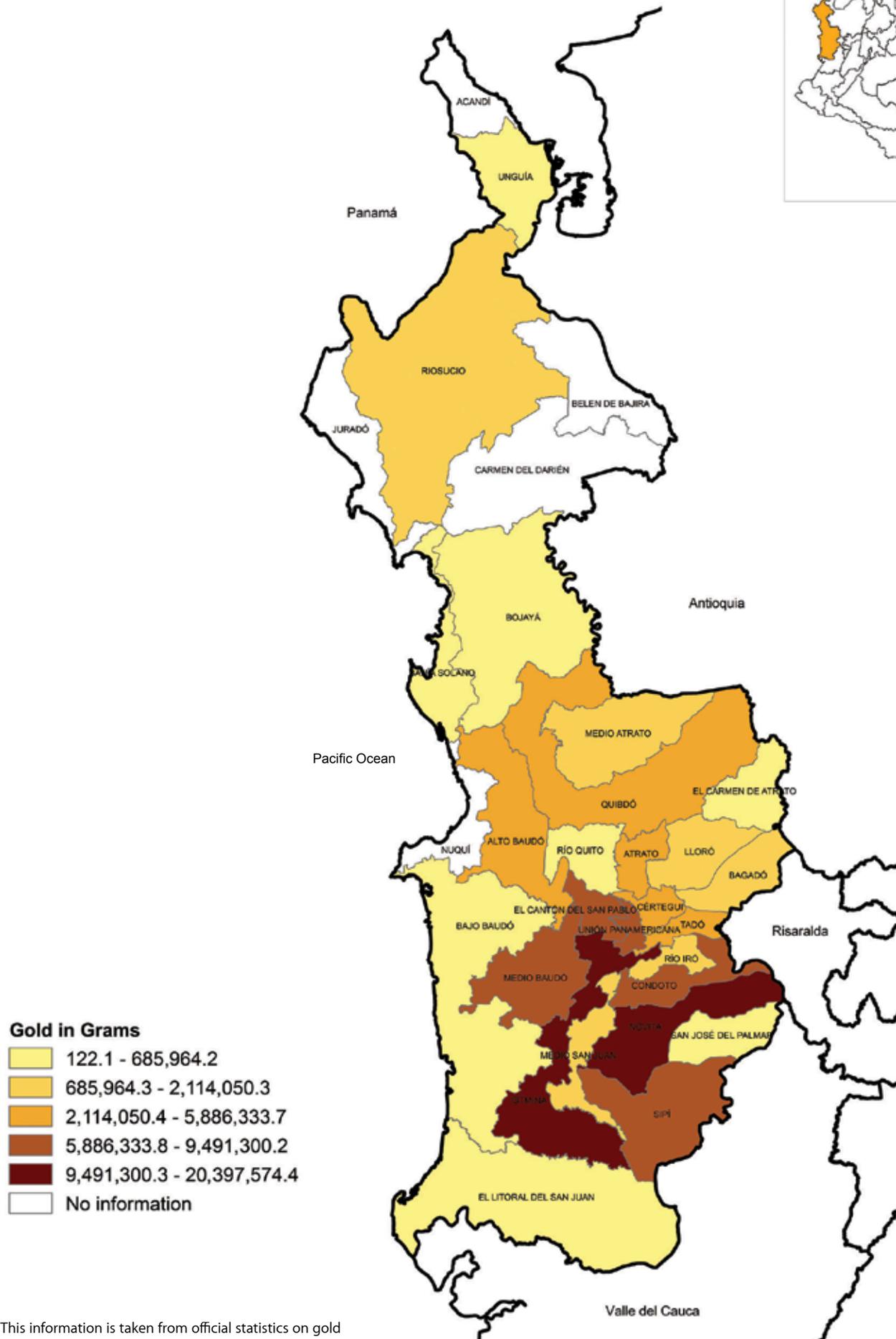


# Fuelling Conflict in Colombia:

The impact of gold mining  
in Chocó

# Chocó Department

## Production of gold in grams, 2001-2013



This information is taken from official statistics on gold production in Chocó. However, it is important to note that this refers to where the gold was commercialised, not (necessarily) the area from which it was extracted. Programa por la paz

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# Executive Summary

**It is no coincidence that Chocó, a region rich in natural resources, has also been one of the focal points of the Colombian conflict, with thousands of people killed or forcibly displaced. Uncontrolled small-scale mechanised mining in Chocó has proved to be a lucrative business for illegal armed groups, helping to fuel the conflict and exploit it. These groups operate in territories belonging to indigenous and Afro-descendant communities, spreading violence and fear, with opponents of the mining threatened, attacked and killed. As well as generating violence, these mining operations have serious health and environmental impacts, threatening the lives and livelihoods of the population and damaging large areas of one of the world's most biodiverse regions.<sup>1</sup>**

**These communities now face a new challenge as they discover that much of their territory has been granted in concessions to multinational companies (MNCs). Investment by MNCs in Chocó is a policy actively promoted by the Colombian Government, one which is already associated with militarisation and social conflict.**

**The majority of concessions granted to MNCs are in the early exploratory stage but they are already generating legal challenges and social protest. With 96 per cent of land in Chocó being collectively owned by indigenous or Afro-descendants, it is vital that there are genuine processes of Free, Prior and Informed Consent (FPIC) before MNCs invest further in mining operations in the region. While international norms and Colombian Constitutional Court judgments have strengthened the guarantees for Indigenous and Afro-descendant Peoples to FPIC processes, recent Colombian Government legislation appears to seek to circumvent these rights.**

Chocó is situated between the Darién Gap on the border with Panama and the departments of Antioquia and Valle de Cauca. It is one of the planet's hidden tropical treasures, classified as a Forest Reserve<sup>2</sup> and home to approximately 56 per cent of Colombian bird species and 11 per cent of all known bird species in the world.<sup>3</sup>

Unlike any other Colombian Department, 95 per cent of the population is indigenous and Afro-descendant, living on collectively owned land. For these ethnic groups, their territory embodies the essence of life and development. Therefore territory in Colombian law for these groups is considered a fundamental right. Their livelihoods revolve around hunting, fishing, farming and small-scale artisanal mining. This way of life has preserved the rich biodiversity of this exceptional corner of Colombia and, in turn, had met the communities' basic needs for centuries. All this changed by late 1990.

Chocó is a remote area of Colombia and, as such, had experienced limited conflict until 1997 when Operation Genesis, a military-paramilitary offensive, began in the north of the department causing terror and mass forced displacement. In that year alone, 27,433 people in Chocó were forcibly displaced as the paramilitaries moved southwards en masse.<sup>4</sup> The river communities from Riosucio to Quibdó felt the force of their violence, with the Observatory for the Presidential Programme on Human Rights and International Humanitarian Law registering an intensity in the conflict 'rarely seen'.<sup>5</sup>

This violence coincided with the application for collective ownership of land by Afro-descendant communities in Chocó, a right incorporated into the 1991 Constitution and enacted through Law 70 of 1993. By the late 1990s many of the communities had established the governing structures required by Law 70 and had started submitting applications to the State for their formal land titles. At the same time the right-wing paramilitary groups *Autodefensas Unidas de Colombia* (AUC), formed into a national structure with one of its prime objectives in Chocó to take control of land on which Afro-descendants had the right to apply for collective title deeds under Law 70 of 1993. The leaders of Community Councils (governing body of collectively owned land) applying for collective land rights were threatened, disappeared, attacked, murdered and dismembered. These brutal targeted attacks and killings continue to this day.<sup>6</sup>

1 Critical Ecosystem Partnership Fund, Ecosystem profile: Chocó-Manabí Conservation Corridor, Colombia and Ecuador, 2005.

2 Ministerio de Ambiente, Vivienda y Desarrollo Territorial. Dirección de Licencias, Permisos y Trámites Ambientales. Oficio No 2400-E2-95921 de 02/09/2010. Suscrito por Magda Constanza Contreras Morales – Coordinadora Grupo de Relación con Usuarios.

3 Critical Ecosystem Partnership Fund, Ecosystem profile: Chocó-Manabí Conservation Corridor, Colombia and Ecuador, 2005.

4 Verdadabierta.com, El Atrato: Dos décadas de guerra, 23 November 2014. Centro de Recursos para el Análisis de Conflictos.

5 Observatorio del Programa Presidencial de Derechos Humanos y Derecho Internacional Humanitario, cited in Verdadabierta.com, El Atrato: Dos décadas de guerra, 23 November 2014.

6 Programa Somos Defensores, Los Nadies, August 2015.

7 Conferencia Episcopal de Colombia, Atrato: entre la tragedia, el destierro y el abandono, July 2002; Inter-American Commission on Human Rights (IACHR) hearing on the human rights situation of displaced Afro-Colombians, 131st regular session, 12 March 2008; IACHR hearing on racial discrimination and access to justice of Afro-descendants in Colombia, 133rd regular session, 23 October 2008.



In some parts of the country it is clear that the actors have been linked to the armed conflict and with economic interests, and that it is this link that is one of the main causes of forced displacement” – Judge from the Land Restitution Tribunal of Quibdó (2013).

The civilian population suffer human rights violations and abuses by all armed actors. These violations include economic blockades, kidnapping, threats, persecution, massacres, torture, killings, dismembering of bodies, selective executions, forced disappearances, sexual violence, intimidation, anti-personnel mines, burning of villages and acts of ‘social cleansing’.<sup>7</sup> The majority of these are perpetrated by paramilitary groups; these abuses against the civil population are the most brutal and numerous of the Colombian conflict.

The Colombian Security Forces in Chocó operated in collusion or in joint operations with the AUC,<sup>8</sup> leaving the population completely exposed to the violations and abuses with no authorities to turn to for protection. By 2001, in Chocó the AUC numbered over 8,000. In 2005, the AUC underwent a demobilisation process. However, the middle ranking commanders did not demobilise but continued to operate, and the groups they command are referred to today as Post-Demobilised Paramilitary Groups (PDPGs) or BACRIM (criminal gangs) by the Colombian Government.

Various left-wing guerrilla groups also operate in Chocó, the two largest ones being the Revolutionary Armed Forces of Colombia (*Fuerzas Armadas Revolucionarias de Colombia* - FARC) and the National Liberation Army (*Ejército de Liberación Nacional* - ELN). Colombia is at a crucial moment in its history, finalising peace talks with the FARC. As of September 2015 it has agreements on four of the six agenda items. The FARC and the Government have set the date of 23 March 2016 for signing the final peace accords.<sup>9</sup> Once the accords have been signed, Civil Society Organisations (CSOs), Human Rights Defenders (HRDs) and community leaders will have a crucial role to play in the construction of a sustainable peace. If civil society is to invest in this process a variety of visions for development will have to be incorporated into Colombia’s national and regional development plans. If this does not happen, especially in areas where mining is opposed by local communities, Colombia is likely to experience growing social conflict.

Attacks against the civilian population and killings of HRDs remain extremely high despite the dramatic reduction in killings

of combatants, both legal and illegal. The main perpetrator of this violence against HRDs continues to be the PDPGs. The continued existence of the PDPGs and the non-participation of the ELN in the peace talks pose a major threat - especially in rural areas – to the safety of the civilian population, community leaders and HRDs. The government needs to demonstrate to its citizens that it is able to bring down this high level of violence before signing peace accords in March 2016, this will be essential for the safe engagement of people in the rural areas in the construction of peace.

### The gold rush in Chocó

Chocó is a department rich in mineral resources, particularly gold and platinum. For centuries artisanal mining (without the use of toxic chemicals) in Chocó had benefited the indigenous and Afro-descendant communities. However, in the 1980s a gold rush in the south of the department saw miners arrive with mechanical diggers and dredgers. Using mercury to separate out gold, they wash the residue into the rivers, along with other chemicals. At the end of the 1990s and early 2000s, mercury pollution had built up in the rivers of Chocó as a result of the rapid growth of small-scale mining operations. In 2009 a government commission revealed that four tons of mercury had been washed into Río Quito, one of the tributaries of the Atrato River.<sup>10</sup> By 2010 Colombia was the world’s worst mercury polluter per capita from small-scale mechanised gold mining and Chocó one of the worst areas in Colombia.<sup>11</sup>

Small-scale mechanised gold mining became a lucrative business for illegal armed groups, increasingly important to them as a means of funding the conflict. Both paramilitary and guerrilla groups extort ‘rents’ in exchange for providing ‘protection’, rent machinery to these small-scale operations and, in some cases, become the owners of these mining operations. Also in some cases the small-scale mining is operated by the communities or they have given permission for it to operate in their territory. As well as intensifying the conflict, the presence of these illegal armed actors prevents or severely limits the

8 See, for example, Inter-American Court of Human Rights, Case of the Afro-descendant Communities displaced from the Cacarica River Basin (Operation Genesis) v. Colombia, Judgment of November 20, 2013, (Preliminary objections, merits, reparations and costs), paragraphs 278 and 279, and testimony of paramilitary leader Freddy Rendón, Verdadabierta.com, <http://www.verdadabierta.com/la-historia/716-perfil-freddy-rendon-herrera-alias-el-aleman>.

9 Presidencia de la República, Address by President Juan Manuel Santos about the agreement on justice matters in the Peace

Process with the FARC, 23 September 2015. <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Documents/address-by-president-juan-manuel-santos.pdf>

10 Fiscalía General de Nación, Comunicado del 21 de abril de 2009, Bogotá cited by UPME (Unidad de Planeación Minera Energética) in Panorama del Sector Minero, August 2014. <http://www.simco.gov.co/LinkClick.aspx?fileticket=ILqW%2B6SYV18%3D&tabid=289&mid=1438>

11 UNIDO, Antioquia, Colombia: the world’s most polluted place by mercury: impressions from two field trips, 2010.

# Executive Summary continued

possibility for the communities to engage in their traditional artisanal mining, further harming their livelihoods, already reduced by the environmental damage to the rivers. This has forced some women to seek work in the mining camps, cooking and cleaning. There are frequent reports of women in these camps being forced into providing sexual services for the men at the camps, and of a general increase in violence against them. Small-scale mechanised mining has damaged the social fabric of many communities. In addition to this form of mining, the interest of multinational corporations (MNCs) in mining in Chocó also increased in the 2000s.

## Multinational corporations in Chocó

Chocó is just over half the size of Scotland and has 41 per cent of its total land area subject to mining concessions (granted or requested), 75 per cent of which have been applied for or granted to MNCs. The possibilities for a social conflict are huge since 96 per cent of Chocó's collective territory belongs to Afro-descendants and Indigenous Peoples. The vast majority of these mining projects are at the application or exploration stage. Although applications for mining concessions date as far back as the 1980s, the majority were made from the early 2000s. The ferocity of the conflict in Chocó combined with its remoteness of the department has meant that, in the main, as with the three case studies featured in this report (COCOMOPOCA, Alto Andágueda Resguardo and Alto Guayabal, Uradá-Jiguamiandó Resguardo) these mining projects have stalled at the early stage. Despite this, there have been protests against the companies. All three communities featured in the case studies have taken their cases to the Colombian Courts, two of which have received rulings in their favour, and one is awaiting a decision. This level of social protest and the lack of adherence to the rights of the communities both prior to and at the exploration stage of the projects should be of concern to MNCs.

The Dojura Project (in COCOMOPOCA's territory – one of the case studies in this report) is an example of multiple legal issues and of conflicting government policies. Law 70, for Afro-descendant communities, does not allow the State to grant mining concessions on land which is in the process of being

adjudicated for collective land titles without application to a Technical Committee, which in this case did not happen.<sup>12</sup> Equally, as Afro-descendant Peoples, the affected communities had the right to FPIC regarding large-scale projects on their land, which again did not happen. The companies involved in this project stated, 'following our inquiry at the Ministry of the Interior, we were aware of no claims by any community on this land.'<sup>13</sup> The communities are pursuing their rights through the Colombian judicial system. In the other two case studies – the Emberá Katío in Alto Andágueda and Alto Guayabal – there was the same issue of failure to carry out, or carry out adequately, an FPIC process, and both won their cases in the Colombian Courts.

## Government policies

One of the major concerns regarding Government policies is that they appear not to take into account alternative visions of development. Instead, the focus is on large-scale projects with foreign direct investment (FDI), including mining, to the exclusion of other competing economic projects that local communities wish to pursue, such as medium and small-scale agriculture.<sup>14</sup>

Despite already high levels of social protest against mining, not only in Chocó but in other regions of Colombia, the Colombian Government continues to introduce policies in this sector that weaken the protections afforded by the Colombian Constitution to indigenous and Afro-descendant communities. The main focus of these policies is the facilitation of FDI, and includes policies like that of 'Strategic Mining Areas' (SMAs).<sup>15</sup> SMAs are large swathes of land that have been identified as rich in mineral resources and have been parcelled up for auction to the highest *multinational* bidder. As of July 2015 there were 17 SMAs marked out in Chocó, three of which are in COCOMOPOCA's territory.<sup>16</sup> SMAs potentially could circumvent the right to FPIC and, as a result, the policy has been contested by Non-Governmental Organisations (NGOs) and previously created SMAs have been suspended by the Council of State<sup>17</sup> until there is a full hearing.

12 CAFOD Interview with COCOMOPOCA leader January 2014.

13 AngloGold Ashanti letter to ABColombia dated 9 October 2015 page 6. Similar statements were made by CGL Buritica in a telephone interview, 9 October 2015.

14 2013 saw 1,027 social protests on this issue for more information see ABColombia Report Civil Society Voices Agendas for Peace in Colombia, May 2015.

15 For further information see ABColombia report, Giving it Away, November 2012. [www.abcolombia.org.uk/downloads/Giving\\_it\\_Away\\_mining\\_report\\_ABColombia.pdf](http://www.abcolombia.org.uk/downloads/Giving_it_Away_mining_report_ABColombia.pdf)

16 ABColombia interview with Centro de Estudios para la Justicia Social Tierra Digna (Centre for Social Justice Research – Tierra Digna), 7 September 2015.

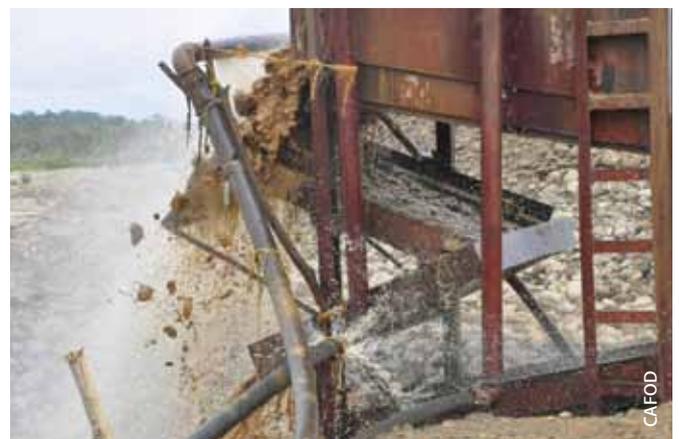
However, legislation introduced in 2015 - Law 1753 of 2015 which implements Colombia's National Development Plan 2014-2018 - effectively revives the SMA model. The constitutionality of this law is therefore also being challenged by CSOs, on these as well as other grounds. James Anaya, the former UN Special Rapporteur on the Rights of Indigenous Peoples, stated that if companies are to act with due diligence, they should ensure that FPIC has been carried out, not only when initially applying for mining titles from the State, but also when acquiring a title previously granted to another company.<sup>18</sup> Therefore, MNCs should be very cautious about bidding for SMAs.

In recent years there has been a global call for multinational companies to take far more seriously the impact that their operations are having on local communities. As a result of these concerns various international standards have been developed. These are designed to provide guidance on minimum requirements and expectations as to how companies should operate. There are a considerable number of these but all of them are voluntary guidelines. They include the Voluntary Principles on Human Rights and Security (VPs), the OECD Guidelines for Multinational Enterprises, and the UN Guiding Principles on Business and Human Rights (UNGPs). Growing civil society awareness of company complicity in human rights abuses, as well as the environmental impact of the extractives industry, has led to the development of ethical investments and seen growing support for the fair-trade movement, as well as consumer brand boycotts.

For voluntary guidelines to ensure the rights of the most vulnerable, in situations where there are huge power disparities, there also have to be statutory provisions and access to the legal system in the countries of origin of these MNCs; without a legal threat there is little deterrent for companies who fail to comply with voluntary principles. Special Representative of the UN Secretary-General for Business and Human Rights, John Ruggie, praised the UK as a positive example of access to the

UK Courts for victims of rights violations by MNCs; however, subsequent reforms of the legislation have had a devastating effect on access to justice for overseas victims of human rights abuses committed by UK MNCs.<sup>19</sup> This move by the UK is in direct contrast to the direction that international norms and legislation in other countries are moving, that is, towards greater protections of human rights and the rights of vulnerable communities.

The European Union (EU) is developing legislation on conflict minerals which, although limited - covering only four minerals (tin, tungsten, tantalum and gold) - it will make a difference for countries like Colombia whose conflicts are intensified by trade in conflict minerals.<sup>20</sup> The EU legislation on conflict minerals was presented by the European Commission to the Parliament as a voluntary set of principles. But instead of taking a backwards step and approving another set of voluntary principles, the European Parliament decided to accept the proposals of INGOs and voted for an amendment to make the requirements legal and binding. If the UK government wants to fulfil the commitment made during the previous coalition government to not downgrade human rights to commercial interests, it will have to ensure that the European Parliament proposal on conflict minerals is not only mandated by legal requirements but also ensure that the implementation is vigorous. The UK also has to address the backward step taken in national legislation on access to the UK Justice System for the victims of UK registered or headquartered companies.<sup>21</sup>



Small-scale mechanised gold mining

17 Colombia's highest administrative court.

18 Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, Extractive industries and indigenous peoples, A/HRC/24/41, 1 July 2013, para. 54.

19 Both the success fee and the After the Event (ATE) insurance premium now has to be paid for out of the compensation awarded to victims. Taken together these costs are likely to wipe out potential damages awarded and makes the claim financially unviable at the outset.

20 SOMO paper, There is more than 3TG The need for the inclusion of all minerals in EU regulation for conflict due diligence, January 2015.

21 For further information on the Legal Aid Law see: <https://www.thebureauinvestigates.com/2011/10/28/analysis-human-rights-abuse-claims-to-lose-out-if-legal-aid-reform-goes-through/>

# Recommendations

## To the UK, Scottish and Irish Governments

- Ensure companies listed or headquartered in the UK and Ireland do not contribute to or cause human rights abuses overseas as a consequence of their operations, or those of their subsidiaries or joint venture partners.
- Ensure that people whose human rights are adversely affected by the overseas operations of companies headquartered or listed in your jurisdiction can access effective remedy in the UK and Ireland, including access to the courts.
- Remove the limited liability for parent companies with wholly-owned subsidiaries operating abroad.
- Ensure that Stock Exchange Listing Authorities require ethical reporting from companies and require specific disclosures on any claims that may exist over the land on which exploration or mining activity is being carried out, including any ancestral claims; a company's record in dealing with concerns of local governments and communities over its mining and exploration activities, and any breaches in compliance requirements of the World Bank/International Finance Corporation (IFC) and the OECD.
- Support with funding and technical expertise the efforts of the communities to rehabilitate Rio Quito and other tributaries of the Atrato River destroyed by mercury.
- Urge the Colombian Government to revise laws that conflict with international human rights obligations and which potentially violate the rights of Indigenous and Afro-descendant Peoples, conflict with provisions for land restitution to victims of forced displacement, or undermine the protection of ecologically sensitive areas.
- Member states should support the European Parliament's proposal for EU conflict mineral legislation which comprises a mandatory (supply chain) due diligence system that better aligns with existing international standards—principally the OECD.

## To the Colombian Government

- Review current legislative frameworks to align them with the UN Declaration on Indigenous Peoples, Constitutional Court and international jurisprudence, making clear provisions for obtaining 'Free, Prior and Informed Consent' (FPIC) in all projects and plans affecting Afro-descendant collective territories, and Indigenous Peoples' resguardos and ancestral territories, including SMAs and PINES. This should be undertaken by working groups which include indigenous and Afro-descendant leaders, and their appointed experts.
- Take action to investigate and end impunity in cases of human rights abuses and violations committed against indigenous and Afro-descendant leaders and community members as a means of preventing repetition and as a further step in ensuring the appropriate conditions for FPIC.
- When planning land use, support alternative visions of development, especially those of victims of the conflict returning to their land under Law 1448 of 2011 and to indigenous and Afro-descendant territories under Special Decrees 4635 and 4633 of 2011, taking into account the vocation and productive allocation of territories, socio-cultural characteristics of the populations that inhabit them, environmental management of land, natural resources and important ecosystems.
- Dismantle illegal alliances, including those between the PDPGs (BACRIM) and members of the Security Forces so that there are guarantees of non-repetition, and investigate and prosecute officials who collaborate with illegal armed groups.
- Develop mechanisms to ensure greater involvement of Civil Society Organisations in decision making processes. Set up official consultative groups on specific issues with the aim of allowing voices of the poor and marginalised to be heard when policies are being formulated, at both local and national levels.
- Ensure that there are official consultations with CSOs following the peace agreements so that they can participate in the formulation of policies related to the agreements and monitor their implementation.
- Ensure the participation of the victims of forced displacement by encouraging their input in the design, execution and follow-up to the land restitution policy.
- Ensure the rapid development of public services in rural areas, including health, education and infrastructure, as well as the development of local economies, including markets for local produce.
- Prioritise and ensure that sufficient resources, which include dedicated judges and investigators, are provided to the Human Rights Unit in the Attorney General's Office to move forward on the investigation and prosecution of those responsible for crimes against human rights defenders, including land restitution leaders and claimants, so that justice may be done.
- Improve the capacity of the National Protection Unit to respond immediately to HRDs and community leaders' requests for risk analysis and rapid delivery of allocated protection measures that incorporate a differentiated approach to gender and ethnicity.

## To the European Union

- Support the efforts of the communities to rehabilitate Rio Quito and other tributaries destroyed by mercury with funding and technical expertise.
- EU Member States and the EU Commission should examine the possibilities for providing financial support to victims of alleged human rights violations, to enable them to bring cases in the European Union.<sup>22</sup>
- Member states should support the European Parliament's proposal for EU conflict mineral legislation which comprises a mandatory (supply chain) due diligence system that better aligns with existing international standards—principally the OECD.
- Hold processes of consultation with CSOs in order to identify the priorities for EU funding and political support post-signing of any peace accords.
- Increase EU donations over the medium term to Colombia to support the construction of a sustainable peace.
- Provide EU aid and political support to civil society organisations and groups<sup>23</sup> that have been marginalised in the conflict as substantial stakeholders in the construction of peace:
  - EU Funding to CSOs and victims groups should be independent (without conditions of working with the State or other actors) and accompanied by political support;
  - Financial Resources should be targeted at the reduction of poverty and inequality and the strengthening of human rights and democracy;
  - EU aid should be targeted at the development of public services in rural areas, including health, education and infrastructure, as well as the development of local farmers markets and local economies.

## To Companies

### With respect to consultation and consent processes:

- Companies should adopt and make public an explicit and unambiguous policy which outlines: its commitments FPIC with implementation guidelines; and how it will take into account and address the significant power imbalances between the companies and the affected communities in terms of technical capacity and access to information.
- All companies should undertake a thorough and participatory monitoring and evaluation of FPIC processes being implemented in Colombia.
- Comply with international treaties and incorporate existing national and international jurisprudential standards, and respect FPIC from the earliest stages of mining projects, i.e. from when the concessions are first granted.
- Ensure 'free, prior and informed consent' has been obtained for projects to extract natural resource in the territories of Indigenous and Afro-descendant Peoples, as an exercise of their sovereignty in line with the ILO Convention 169, the UN Declaration on the Rights of Indigenous Peoples, and recent Constitutional Court decisions as set out in the international legal and policy framework in the report of the UN Special Representative on Indigenous and Tribal Peoples.
- Companies should demonstrate gender-sensitive human rights due diligence. A key component of this should be an analysis of their impact on women's rights which should be included in social and environmental impact studies and reported on in the UK under the human rights section of the Companies Act.

### With respect to land rights and victims of the conflict:

- **Avoid investments in regions most affected by the armed conflict**, particularly places where victims are in processes of land restitution or return, for the purpose of ensuring guarantees of non-repetition: the lack of a national land registry means that corporations undertake a reputational risk when investing in land. The current Land Restitution and Victims Law does not guarantee that lands stolen through human rights abuses and violations will not be provided with de facto legal status.

<sup>22</sup> See ICAR and CORE The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business December 2013.

<sup>23</sup> Here we are referring to women, peasant farmers, Afro-Colombian and Indigenous Peoples.

# 1.0 Chocó, Biodiversity, Governance and the Conflict

## 1.1 Chocó Department

The department of Chocó is one of the most biologically diverse hotspots on the planet.<sup>24</sup> With a total area of 46,530 km<sup>2</sup>, it is just over half the size of Scotland. Its abundant water resources centre on three river basins: the Atrato (40,000 Km<sup>2</sup>), San Juan (15,000 km<sup>2</sup>) and Baudó (5,400Km<sup>2</sup>).<sup>25</sup> It has two coastlines - one to the north, the Caribbean Sea, and the other to the west, the Pacific Ocean, making it a strategic location for maritime routes to the Pacific and the Atlantic. It comprises 30 municipalities, with approximately 50 per cent of the population concentrated in the principal urban centres - Quibdó, Alto Baudó, Istmina, Tadó and Bajo Baudó. Rich in natural resources its topography isolates it from the rest of the country with little road access; its rivers are its principal means of transportation.<sup>26</sup>

Approximately 96 per cent<sup>27</sup> of land in Chocó is subject to collective land titles belonging either to Indigenous Peoples or Afro-descendant communities. These ethnic groups hold strong cultural beliefs that their territory embodies the essence of life and development, their culture, spiritual life, integrity and economic survival. Therefore, under Colombian law, territory for these groups is considered a fundamental right subject to special protection.<sup>28</sup> 95 per cent of the population of Chocó are either indigenous or Afro-descendant.

## 1.2 Poverty, services and conflict

Despite Chocó's wealth of natural resources it is the poorest department in Colombia and the situation in this already poverty-stricken province is worsening. This impoverishment is linked to conflict, to corruption and – according to Bishops of the region – to mining.<sup>29</sup> According to the national statistics agency DANE, 65.9 per cent of Chocó's population now lives below the poverty line. Between July 2014 and June 2015, poverty increased by 2.8 per cent. This upward trend is in stark contrast to the rest of the country which, on average, saw poverty decrease by 2.1 per cent in the same period. Poverty in Chocó is much higher compared

to rural areas of the country, where the average poverty rate is 40.1 per cent.<sup>30</sup>

Some analysts link the high levels of poverty with the high levels of corruption by local authorities.<sup>31</sup> According to the Inspector General's Office (*Procuraduría*),<sup>32</sup> there are more disciplinary procedures against local officials in Chocó than anywhere else in the country.<sup>33</sup> In addition to this, a rapid turnover of public officials has resulted in a lack of policy continuity; from March 2010 there were four different governors of Chocó in the space of 12 months.<sup>34</sup> Not all of the changes are due to corruption; some have had to withdraw from office due to threats from illegal armed groups whilst others, forced to move out of their municipalities, have governed from the capital, Quibdó.<sup>35</sup>

In April 2015, Colombia's Constitutional Court and Congress highlighted a health crisis due to lack of adequate services and poverty in Chocó - the maternal mortality rate was more



A woman from a COCOMOPOCA community carries out traditional fishing

24 Critical Ecosystem Partnership Fund, Ecosystem profile: Chocó-Manabí Conservation Corridor, Colombia and Ecuador, 2005; Foro Interétnico Solidaridad Chocó (FISCH) and Centro de Estudios para la Justicia Social Tierra Digna, Comunicación CIDH: Minería Ilegal Río Quito, 2011. There are several National Parks, with numerous endemic species, including the Great Green Macaw and the Chocó Toucan, the endangered howler monkeys, as well as the Cana, hawksbill and leatherback turtles. The region is estimated to contain 9,000 vascular plant species.

25 Centro de Estudios para la Justicia Social Tierra Digna, Comunicación CIDH: Minería Ilegal Río Quito, 2011.

26 Banco de la República, ¿Por qué es pobre El Chocó?, Jamie Bonet.

27 Defensoría del Pueblo Colombia, Crisis Humanitaria en Chocó, 2014, page 16.

28 Centro de Estudios para la Justicia Social Tierra Digna, Comunicación CIDH: Minería Ilegal Río Quito, 2011.

29 Pastoral Social, Obispos del Chocó envían SOS al Estado para responder a crisis humanitaria, 8 July 2014.

30 Colombia Reports, Colombia's poorest region got even poorer, contrary to the rest of the country, 10 June 2015.

31 Chocó had one of the lowest transparency figures (49.2 of 100) in the 2008-2009 Departmental Transparency Index.

32 The Procuraduría is an autonomous body which controls and monitors the public function of state employees.

33 Amalgamation of information bulletins from April 2011 to November 2014 from the website of the Attorney General.

34 El Colombiano, Chocó, sin gobernador en firme, 23 March 2011.

By 2014 the National Ombudsman's Office reported that mercury had contaminated at least eight of the major rivers in Chocó: the Atrato, San Juan, Andágueda, Apartadó, Bebará, Bebaramá, Quitó and Dagua.

than eight times that of Bogotá and in children under one the mortality rate was three times higher than Bogotá.<sup>36</sup> The armed conflict together with policies such as aerial, rather than manual, eradication of illicit crops is contributing to increasing malnutrition (aerial fumigation due to its imprecision is falling on and destroying staple food crops). The poor health system means that children are dying from preventable diseases.<sup>37</sup>

In July 2014, gravely concerned about the humanitarian crisis facing Chocó, the Bishops of the Dioceses of Quibdó, Apartadó and Istmina-Tadó highlighted the issues that needed urgent attention. Their analysis was that poverty and many of the problems in the region were also linked to mining.<sup>38</sup>

The lack of public service provision in Chocó has created a feeling amongst the population that it has been abandoned by the State. In an apparent effort to address this, and the poverty and corruption, the Colombian Government is seeking a loan from the Inter-American Development Bank (IDB) to help finance 'Plan PaZcífico' that will make investments in water supply, sewers, energy infrastructure and urban development.<sup>39</sup>

### 1.3 Overview of the conflict in Chocó

*'The planes bombed during the day and the mosquitoes finished us off at night... I felt ill and asked God to help me reach shelter so that the child would not be born in the countryside. At five the pain started and I gave birth at six. During the march through the rainforest, seven children died from exhaustion, hunger and drowning during river crossings.'* (Young woman forced to flee her home in Bajo Atrato)<sup>40</sup>

Despite its strategic location on the Pacific and Caribbean coasts and its wealth of natural resources, Chocó remained on the margins of the conflict for many years due to its remoteness. This

all changed from 1997, with a dramatic increase in violence in the north of the department as a series of military-paramilitary offensives, known as Operation Genesis, forcibly expelled indigenous and Afro-descendant communities from their homes. Their goals included the furtherance of economic interests, including mining, and coincided with important developments in relation to land in the region. The Colombian Security Forces and the paramilitaries not only colluded in Chocó but also actively planned and carried out joint operations.<sup>41</sup>

Under the changes to the 1991 Constitution, Afro-descendants, who made up 75 per cent of Chocó's population, had achieved recognition of collective land rights to territory which they had occupied ancestrally. Law 70 of 1993 enacted these changes, and also enshrined protection of Afro-descendants' cultural practices and traditional uses of natural resources, as well as guaranteeing the economic and social development of their communities. By 1996, many had formed the required community structures and had received their formal land titles or were in the process doing so. In the same year there arose the possibility of the construction of an inter-oceanic link between the Pacific Ocean and the Caribbean Sea and land prices in Chocó increased by about 1000 per cent.<sup>42</sup>



In just one year (1997), 27,433 people in Chocó were displaced by the conflict

35 Semana, Chocó: entre riqueza, corrupción y olvido, Uriel Ortiz Soto, 14 November 2014.

36 Source: Ministry of Health and Social Protection.

37 Addendum of the Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Colombia, A/HRC/28/3/Add.3, 23 January 2015.

38 ABC Statement In the Crossfire: thousands of Indigenous and Afro Colombians flee their territory in Chocó, July 2014.

<http://www.abccolombia.org.uk/subpage.asp?subid=549&mainid=23>

39 Colombia Reports, Santos meets with IDB to discuss post-conflict Colombia, 9 September 2015. Colombia is the country with the second highest number of loans from the IDB.

40 Amnesty International, Colombia, Return to Hope: Forcibly displaced communities of Urabá and Medio Atrato region, AI Index: AMR 23/23/00, June 2000.

<https://www.amnesty.org/en/documents/amr23/023/2000/en/>

41 This has been well-documented by numerous human rights entities and testified to by the paramilitaries themselves. See, for example, Inter-American Court of Human Rights, Case of the Afro-descendant Communities displaced from the Cacarcia River Basin (Operation Genesis) v. Colombia, Judgment of November 20, 2013, (Preliminary objections, merits, reparations and costs), paragraphs 278 and 279; voluntary testimony of paramilitary leader Freddy Rendón provided under Justice and Peace Process, part of the paramilitary demobilisation process, Verdadabierta.com, <http://www.verdadabierta.com/la-historia/716-perfil-freddy-rendon-herrera-alias-el-aleman>.

42 Amnesty International, Colombia, Return to Hope: Forcibly displaced communities of Urabá and Medio Atrato region, AI Index: AMR 23/23/00, June 2000.

<https://www.amnesty.org/en/documents/amr23/023/2000/en/>

The number of paramilitaries in Chocó grew from around 850 in 1992 to over 8,000 by 2001.<sup>43</sup> Their modus operandi followed the same pattern as in other parts of the country: systematic acts of violence against the civilian population, economic blockades, threats, persecution, massacres, torture, killings, dismembering of bodies, selective executions, forced disappearances, sexual violence, intimidation, burning of villages and acts of 'social cleansing'.<sup>44</sup> These crimes were carried out with the intention of extending control over the territory and appropriating territories belonging to Afro-descendant and indigenous communities through forced displacement, terrorising the civilian population into abandoning their land.<sup>45</sup> One of their objectives was to take control of land on which Afro-descendants had the right to apply for collective title deeds under Law 70 of 1993.<sup>46</sup> The leaders of Community Councils applying for collective land rights were threatened, attacked and murdered and this continues today.

### Ana Maria (not her real name)

*'...the conflict has been present, ever since I can remember but...when there is more than one armed actor in the area the situation is much more complicated...giving a glass of water to a person becomes a dangerous action...for that action alone one could become a military target .... you couldn't refuse a glass of water to a person carrying a gun and yet that very act made you in the eyes of another armed group a "collaborator"..." [When the paramilitaries came] we were forced to sleep with the door of the houses open... [my family] all slept ... in the same bedroom... we would listen to the sound of guns... I was just 12 years old when they killed a person in front of me, I am 30 now and I still haven't been able to forget that day... when I close my eyes I remember how they shot my neighbour... I [also] saw my cousin raped in front of me by 20 men.... I was nearly assassinated, lying on the floor face down and with my hands on my head, just waiting for the bullet to enter... little by little I am getting over it. I say "getting over it" in quotations marks because in reality you can never get over something like that....'<sup>51</sup>*

According to the Conflict Analysis Resource Centre (CERAC), in 1997 alone 27,433 people in Chocó were displaced as the paramilitaries moved en masse towards the south of Chocó.<sup>47</sup> The river communities from Riosucio to Quibdó felt the force of their violence, with the Observatory for the Presidential Programme on Human Rights and International Humanitarian Law registering an intensity in the conflict 'rarely seen'.<sup>48</sup> The humanitarian crisis created by the conflict also impacted on neighbouring countries, as approximately 1,000 people forcibly displaced in Chocó went north and crossed or camped on the borders with Panama, seeking international protection.<sup>49</sup>

Despite a demobilisation process of the AUC in 2005, middle ranking commanders continued to operate and are known as Post-Demobilised Paramilitary Groups (PDPG). The PDPG continue to terrorise, control and displace communities today and are a major threat to the construction of peace in Colombia.

In addition to the paramilitaries, various units of the FARC and Colombia's second largest guerrilla group, the ELN, operated in the department of Chocó from the 1980s onwards. In response to the paramilitary advances across Chocó, in 2000 the FARC and the ELN reinforced their troops in the Medio Atrato region. The presence of armed actors (AUC, guerrilla and Security Forces) in Chocó has led to confrontations, often with the civilian population caught in the middle. One of the most tragic incidents in the history of the Colombian conflict occurred in the village of Bojayá in May 2002 when the FARC and the AUC used the community as a human shield. This resulted in a massacre with 119 people killed and more than 80 wounded.<sup>50</sup>

Gold mining and the drugs trade in Chocó provides a lucrative source of income for all the illegal armed groups which continue to fuel the conflict in Chocó with devastating impacts on the local population.

43 The paramilitary groups had its roots in the 1980s when militias were established by landowners to combat kidnappings and extortion by the guerrillas. The paramilitary groups operating in Chocó became part of the national paramilitary structure known as the Autodefensas Unidas de Colombia (United Self-Defence Groups of Colombia - AUC), formed in April 1997.

44 Conferencia Episcopal de Colombia, Medio Atrato: entre la tragedia, el destierro y el abandono, July 2002; IACHR hearing on the human rights situation of displaced Afro-Colombians, 131st regular session, 12 March 2008; IACHR hearing on racial discrimination and access to justice of Afro-descendants in Colombia, 133rd regular session, 23 October 2008.

45 IACHR, Preliminary Observations of the Inter-American Commission on Human Rights after the Visit of the Rapporteurship on the Rights of Afro-Descendants and Against Racial Discrimination to the Republic of Colombia, OEA/Ser.L/V/II.134, Doc. 66, 27 March 2009. This highlights how the Afro-descendant community councils in the Urabá region on the banks of the Atrato River and its tributaries were targeted because of their claims to collective title deeds on land under Law 70. [http://www.cidh.org/countryrep/ColombiaAfrodescendientes/ColombiaAfros2009cap3-4.eng.htm#\\_ftnref16](http://www.cidh.org/countryrep/ColombiaAfrodescendientes/ColombiaAfros2009cap3-4.eng.htm#_ftnref16);

46 IACHR hearing on the human rights situation of displaced Afro-Colombians, 131st regular session, 12 March 2008 and IACHR hearing on racial discrimination and access to justice of Afro-descendants in Colombia, 133rd regular session, 23 October 2008.

47 Verdadabierta.com, El Atrato: Dos décadas de guerra, 23 November 2014.

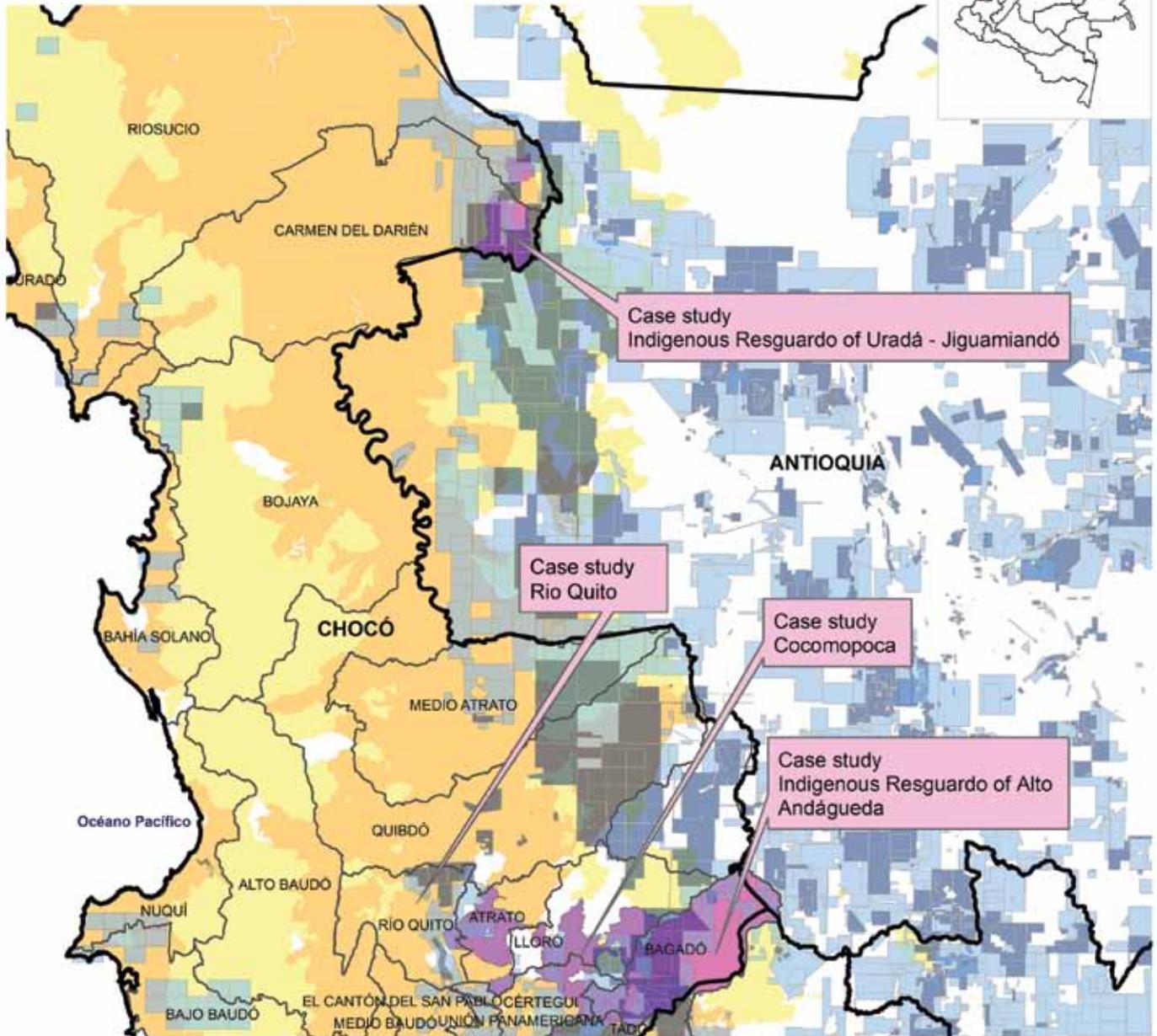
48 Ibid.

49 UNHCR Evaluation and Policy Unit, Protecting Colombian refugees in the Andean region: the fight against invisibility, Working Paper 81, March 2003.

50 Conferencia Episcopal de Colombia, Medio Atrato: entre la tragedia, el destierro y el abandono, July 2002.

51 ABColombia interview with a community leader in Quibdó, September 2014.

### Location of emblematic case studies on ethnic territories and mining titles in the Department of Chocó



- Communities featured in the case studies
- Requested mining titles , July 2012
- Mining Titles Granted, July 2012
- Land belonging to Afro-descendant communities
- Indigenous Resguardos (2010)

## 2.0 Informal Mining in Chocó

One of the difficulties in understanding what is happening in Chocó with respect to mining is the terminology used and its significance (see box below). There are many different forms of mining carried out; some by the communities themselves and others by miners from outside the department who have arrived with machinery for extracting gold from the river bed. All of these have different impacts depending on whether they are artisanal, traditional, mechanised, and whether or not they are controlled or 'protected' by illegal armed groups. The Comptroller General's Office (Contraloría) in 2013 explained that illegal mining is informal mining but that not all informal mining is illegal, as in the case of informal mining practices such as ancestral, artisanal and to a certain measure, traditional mining.<sup>52</sup> Under the 2001 Mining Code, certain types of traditional mining effectively became illegal because the miners were unable to understand what they needed to do to comply with a new and very bureaucratic and costly process and/or because they were unaware of the new regulations.

The department of Chocó has a long history of artisanal mining by Indigenous and Afro-descendant Peoples to extract gold and platinum. This practice, combined with agriculture, fishing, hunting, small-scale logging and gathering of wild fruit, has been their way of life for more than 200 years, and preserved the immense biodiversity of Chocó. Although various local companies and one multinational (*Chocó Pacífico*) started exploiting gold at the beginning of the 20th century, the real influx of small-scale miners started in the 1980s in the South of the department. The miners, from Brazil and departments neighbouring Chocó (known locally as 'foreign miners') brought with them machinery and toxic chemicals for exploiting gold. However, it was not until the latter part of the 1990s that paramilitaries and the guerrillas really began to see small-scale mechanised mining as a potentially lucrative business. At that point, the resulting increase in violence, combined with the continual pollution of the rivers, started to have serious impacts on the communities' way of life.<sup>53</sup>

### Different forms of small-scale mining in Chocó

**Artisanal Mining:** Non-mechanised mining. It does not employ toxic chemicals to separate out the gold. It uses various techniques to collect the gravel from the river banks and terraces during the summer months. During the winter months, the miner (usually a woman) dives to the bottom of the river or stream and using traditional tools they collect the gravel with gold and platinum content into their pan. Once they are at the surface they wash off the sand leaving just the gold and platinum. Panning for gold is also practised.<sup>54</sup>

**Small-Scale Ancestral Mining:** This method as used by the Indigenous and Afrodescendent Peoples in Chocó, applies artisanal techniques but can also employ the use of crushers, mills and mechanised sluice boxes powered by electricity – it is referred to as small-scale ancestral mining, a practice that pre-dates colonisation.<sup>55</sup> It does not use mercury or other toxic chemicals.

**Small-Scale Mechanised Mining:** Mining conducted with heavy machinery from impromptu mining camps (*entables*). These can be floating or on land, and miners both live and work there. The heavy machinery, such as diggers (*retroexcavadoras*) and dredgers (*dragas*), move large sections of earth, either suctioning from the river or digging on the river bank. Mercury is then used to separate the gold with the residues washed into the river, contaminating it. Additionally, the heavy machinery causes sedimentation which changes the course of the river. These operations are generally 'protected' or owned by illegal armed groups.

**Green Small-Scale Gold Mining (Oro-Verde):** Nine afro-descendent communities in the municipalities of Condoto and Tadó mine gold in a commercial and responsible way using ancestral techniques. They are part of a unique Certified Green-Gold Project.<sup>56</sup>

52 Contraloría, La Explotación Ilícita de Recursos Minerales en Colombia, 2013.

53 Acción popular por la violación de los derechos colectivos consagrados en los literales a), c), f), g) del artículo 4 de la Ley 472 de 1998, Consejo Comunitario de Paimadó. [www.tierradigna.org/attachments/article/17/Accio%CC%81n%20Popular%20Ri%CC%81o%20Quito%20%28Def%29.pdf](http://www.tierradigna.org/attachments/article/17/Accio%CC%81n%20Popular%20Ri%CC%81o%20Quito%20%28Def%29.pdf).

54 Instituto de Investigaciones Ambientales del Pacífico, Diagnóstico situacional de la minería artesanal y en pequeña escala desarrollada por afrocolombianos en territorios colectivos de comunidades negras en el Chocó Biogeográfico, June 2005, and from interviews with communities and NGOs.

55 The North-South Institute, Proceso de Comunidades Negras and Resguardo Indígena Cañamomo Lomapieta, 'Holding Extractive Companies to Account in Colombia: An evaluation of CSR instruments through the lens of Indigenous and Afro-Descendent Rights', 25 July 2012.

The Emberá Katío are one of the indigenous groups named by the Colombian Constitutional Court as being at risk of cultural or physical extinction.

## 2.1 Informal gold mining and the intensification of the conflict

The Afro-descendant communities live on collectively owned land along the river banks of the Atrato River and its tributaries; the influx of small-scale mechanised mining was into these same rivers. This mining not only contaminates the rivers but also offers another way of funding illegal armed groups (PDPGs and guerrillas) and therefore of fuelling the country's internal armed conflict. The ways in which these groups profit from the mining include: directly owning the mine through 'testaferros' (front-men), hiring out 'decommissioned' machinery or through extortion (offering 'security').<sup>57</sup> According to the Inspector General's Office, in a small town near Quibdó called Bebaramá there are as many as 400 diggers. Whilst the owning of mines through front-men is mainly a PDPG activity, the Inspector General's Office estimated that somewhere between 10 and 20 per cent of those owned by illegal armed groups in Chocó are directly owned by the guerrilla.<sup>58</sup> Owners of the machinery also pay corrupt public officials (mayors and other officials, Security Forces etc.) in order to operate in the region.<sup>59</sup>

The 'protection' or 'ownership' of these small-scale mechanised mining operations is what prevents communities from being able to control the explosion of mining in their territory and prevent the destruction of their resources 'When these miners arrived in our communities they started taking our resources, this left the community without opportunities, before, we managed this activity, but in a traditional, artisanal way.' 'I am telling you this frankly, because it is not a secret: the subject of mining also entails the presence of armed groups who 'own' them or demand 'protection money'.'<sup>60</sup>

Women in particular face immense violence and poverty in Chocó as a result of this form of mining. '...many women have been sexually affected by these guys who come here to mine, they offer them jobs and end up raping them and then other men [at the camp] continue raping them ... there are women who are psychologically traumatised by what has happened to them... in order to work they have gone to these mining camps and because the mine owners are mixing together with the armed actors, the women are seen as collaborators and this affects them considerably because they are stigmatised as collaborating with armed groups...



Small-scale mechanised gold mining Rio Quito

*the lives of women are controlled by those who dominate their territory... they control their sexual life, the way in which they dress, everything... They start looking at them as women when they are only 10 years old.'*<sup>61</sup>

*'... [T]he chemicals used in mining affect the women's bodies... you see women with skin blemishes on their bodies as a result of exposure to chemicals used in mining. Sometimes they have babies with deformities...'*<sup>62</sup>

## 2.2 Divisions in communities

Mechanised small-scale mining has created tensions and divisions in communities. Extreme levels of poverty which is related to the conflict disrupting their traditional way of life, is compounded by the state's lack of provision for health and education, which has resulted in some community members seeing no other economic alternative but to negotiate with miners. Although these kinds of negotiations are not permitted by the Community Councils (governing body of collectively owned land) the divisions caused can be so serious that members of the territory, with conflicting views, set up an opposing Community Council. At other times, individual families ignore the Community Council by entering into individual agreements with the machine owners. In other cases, Community Councils may be oblivious of the possible consequences, and decide to form a small company with the miners. The whole of the community's territory in this case can end up dedicated to mining, with the resulting destruction leaving very few alternative ways to make a living.

56 Oro Verde has won a variety of national and international awards for its environmentally sustainable practices (winner of the Colombian Ventures 2003 business awards, BBC World Challenge competition finalist in 2008, and Gold Medal winner in the 2009 SEED Awards, an initiative of the United Nations Development Programme (UNDP). Unfortunately activity had been suspended when ABColombia visited Quibdó in October 2014.

57 ABColombia interview with the Procuraduría Ambiental y Agrario (Inspector General's Office for the Environment and Agriculture) of Chocó in Quibdó in October 2014.

58 Ibid.

59 Observatorio Pacífico y Territorio, Prácticas mineras en el día a día: ¿Contradicciones con el discurso de las organizaciones étnico-territoriales? 28 February 2015.

60 ABColombia interview in Rio Quito, October 2014.

61 ABColombia interview in Medio Atrato with a woman community leader working for an NGO in Quibdó, October 2014.

62 Ibid.



### 2.3 Communities' sense of abandonment by the State in Chocó

Communities looking to State institutions for help have been disappointed and left to manage the situation on their own. State officials acknowledge that one of the main factors creating a conducive environment for displacement of Afro-descendant communities in Chocó is mining linked with the armed conflict. However, despite the acknowledged scale of the threat, communities have often found the state's response to be inadequate.<sup>63</sup>

In an interview with ABColombia in September 2014, a community spokesperson from Río Quito explained that just reporting these mining operations puts their lives in danger, but leaders were willing to take that risk to try and stop the destruction of their way of life, *'you put yourself in real danger... this kind of situation creates fear and terror... not everyone has the courage to confront it. When they start killing people, they can annihilate a community ...This really worries us...'* However, leaders report finding little if any response from the authorities, *'the authorities ... are very slow. For them to act we have to be right on top of them and sometimes there is no confidentiality even within these [state] institutions. For example, if you report that you don't want a miner to be mining the way they are doing it, you run the risk that they will kill you.'*

There is also a lack of confidentiality within the State institutions this leaves those reporting extremely vulnerable - if they are identified they are likely to be threatened and/or killed. As a result the communities feel that they have to try to tackle the

situation themselves by reasoning with the miners and the armed groups, *'We are in the middle of lots of criminals and as a human rights defender one has to meet with anyone in the community, although we are uncertain of their background. However courts decide against us without really understanding the situation they will condemn us for just for talking to those illegal groups or for denouncing certain mining cases. This is very worrying'*. Another member of the community explains *'as leaders ...if we go to them and say: 'Please, sir, respect my life and the life of that person' ... it is implied that we are members of a criminal gang... the judiciary accuses us they say 'well, you had a meeting with that guy, and that guy has a criminal background, so we have to arrest you and charge you with a criminal act'... And that's what's happened here.'*<sup>64</sup> This has resulted in the criminalisation of community leaders.

In the case of this particular community, the only official support they felt they had received was from the Human Rights Ombudsman (Defensoría): *'The Human Rights Ombudsman attends to us when we requested it and they know that there are physical attacks against people in our community. When a young man was killed, the Human Rights Ombudsman called upon the criminal gangs to respect the right to life.'* The communities told ABColombia what they wanted was a state administration that worked with them to address these problems, *'[t]he public officials should be working hand in hand with us, recognising that we are facing a very thorny issue.'*



The devastating impacts of mining on Río Quito

63 Constitucional Court. Auto 005 de 2009. Protección de los derechos fundamentales de la población afrodescendiente víctima del desplazamiento forzado, en el marco del estado de cosas inconstitucional declarado en la sentencia T-025 de 2004, 26 January 2009.

64 ABColombia interview with community leader in Río Quito, September 2014.

65 El Tiempo, Decomisan 24 dragas por explotación ilegal de oro en Chocó y hallan peces contaminados con mercurio, 21 April 2009.

66 The commission was made up of representatives from the following state entities: Inspector General's Office, Attorney General's Office (Fiscalía), Army, Police, Navy, and the Ministries of Mines and Energy and the Environment.

67 Fiscalía General de Nación, Comunicado del 21 de abril de 2009, Bogotá, cited by UPME (Unidad de Planeación Minera Energética) in Panorama del Sector Minero, August 2014. <http://www.simco.gov.co/LinkClick.aspx?fileticket=ILqW%2B6SYV18%3D&tabid=289&mid=1438>

## Case Study: Río Quito

Río Quito is a tributary of the Atrato River whose entrance is 10 minutes from Quibdó, the departmental capital. There are four small towns along this river. The Afro-descendant communities have collective land titles in three of these: Villa Conto (29,026 hectares), San Isidro (12,851 hectares), and Paimadó (17,292 hectares), and in the fourth, La Soledad, the community is in the process of gaining collective title to 4,373 hectares. Their traditional way of life involves agriculture (growing corn, rice, cocoa, coconut, sugar cane, bananas etc.), fishing and artisanal gold mining. Their livelihoods revolve around the family unit.

At the end of the 1990s, Río Quito experienced a gold rush of 'foreign' small-scale mechanised mining. The first mechanical diggers (*retros*) were stationed in and around Paimadó in 1999; by 2009 they numbered 24, each of them extracting on average 300 grams of gold per 20 hour day.<sup>65</sup> In 2009, a government inter-agency commission<sup>66</sup> revealed that this small-scale mechanised mining had dumped approximately four tons of mercury and 35,000 gallons of fuel into the river Quito, created 250,000 tons of sediment in the river, and destroyed 400 hectares of virgin forest.<sup>67</sup> The ecological damage to the river was incalculable, affecting flora, fauna, aquatic resources and damaging public health.<sup>68</sup>



Diggers used in small-scale mechanised mining



Community Council (Consejo Comunitario) of San Isidro, one of the afro-Descendant communities along the Río Quito

In April 2009, as a result of the commission, the 24 *retros* were removed from the river. However, the failure to arrest and prosecute the owners and/or operators of the machinery, in spite of their identities being known, meant the practice continued.<sup>69</sup> By 2014 the National Ombudsman's Office reported that mercury had contaminated at least eight of the major rivers in Chocó: the Atrato, San Juan, Andágueda, Apartadó, Bebará, Bebaramá, Quitó and Dagua.<sup>70</sup>

Official sources report that the small-scale mechanised mining has massively degraded indigenous and Afro-descendant communities' territories.<sup>71</sup> *The impacts of the mining activities have been disastrous for us; we are not the same communities as 10 years ago. We have experienced many crop failures; mercury causes disastrous problems in our community. In particular as farmers we experience the full impact... We do not use the waters from the river ... the fish are no longer edible due to the mercury. People who eat the fish get stomach pain and diarrhoea.*<sup>72</sup>

Communities downstream from the mining are also impacted ... *women cannot use the water because the contamination causes vaginal problems, children are suffering from fungal skin infections ... Here there is no mine, and we will not allow them to enter our territory... we feel sad because we are not the same communities anymore.*<sup>73</sup>

68 Statement by the Attorney General Mario Iguarán cited in El Tiempo, Decomisan 24 dragas por explotación ilegal de oro en Chocó y hallan peces contaminados con mercurio, 21 April 2009.

69 Corporación Autónoma Regional para el Desarrollo Sostenible del Chocó – CODECHOCÓ, Oficio Radicado No 2010-3-1145 del 20 de septiembre de 2010. Cited in class action taken by Paimadó Community Council: Acción popular por la violación de los derechos colectivos consagrados en los literales a), c), f), g) del artículo 4 de la Ley 472 de 1998, Consejo Comunitario de Paimadó. [www.tierradigna.org/attachments/article/17/Accio%CC%81n%20Popular%20Ri%CC%81o%20Quito%20%28Def%29.pdf](http://www.tierradigna.org/attachments/article/17/Accio%CC%81n%20Popular%20Ri%CC%81o%20Quito%20%28Def%29.pdf).

70 Between 2002 and 2010, Chocó's annual production of gold increased from 605.89 kg to 16,925.3 kg, for silver from 6,986 kg to 11,538 kg, while platinum production increased from 651.82 kg to 668.67 kg, peaking in 2007 with 1521.04 kg. Observatorio Pacífico y Territorio, Y la minería en el Chocó qué? 27 January 2011.

71 Defensoría del Pueblo, Defensoría Delegada para los Derechos Colectivos y del Ambiente, Minería de Hecho en Colombia, December 2010, page 12.

72 ABColombia interview with communities in Río Quito, October 2014.

73 Ibid.

## 2.4 Alternative strategies

Not all the small-scale mechanised mining in Chocó is controlled by illegal armed groups, some of it belongs to communities. Communities are trying to find ways forward to address the issue of uncontrolled mining, mining controlled by illegal groups and rehabilitation of rivers damaged by mercury so that they can develop other traditional livelihoods and commercial produce and move away from mining. They have engaged in a variety of activities to address these issues, three of which are examined here.

### 2.4.1 The Roundtable on Mining in Chocó (*Mesa Minera de Chocó*)

The Roundtable on Mining (*Mesa Minera*) in Chocó is a space that brings together key actors: State institutions, miners associations and Afro-descendant Community Councils. Attending as observers of this process are the Catholic Church and the indigenous associations (although some indigenous groups have withdrawn from the *Mesa Minera*). Amongst other issues this roundtable is exploring how to bring small-scale mining under control. The approach it has adopted is to develop strategies that specifically address issues in the context of Chocó. Their aim is to continue small-scale mining but under strict conditions: that it is legally registered and operates in accordance with responsible mining practices, the guidelines for which they are in the process of developing.

### 2.4.2 Rehabilitation of the river

In the second activity, the Community Council of Paimadó in the Río Quito is pursuing a case against the State with regards to the community's rights to health, environmental and ecological rights.

The State's failure to address the invasion of these small-scale mechanised mining operations in their territories has allowed the rivers to become dangerously contaminated with mercury, which poses a major risk to the health of the communities, particularly children, and to the environment. In the knowledge, that they need to address these issues if they are to stay in their territory, the communities in Río Quito have taken out a Class Action against the State under Article 88 of the Constitution and Law 472 of 1998<sup>74</sup> for violation of their collective rights. These include: the right to a healthy environment; the right to ecological balance and the management and rational use of natural resources to ensure their sustainable development, conservation, restoration or replacement; the right to public health and safety; and the protection of the nation's cultural heritage.<sup>75</sup>

The Class Action taken by communities focuses on the negligent behaviour of State authorities and their failure to prioritise legalisation of small-scale mechanised mining within a strict framework that includes environmental criteria.<sup>76</sup> It asks the Tribunal to order the State to establish a comprehensive programme of rehabilitation for Río Quito and a health care plan for the local population. The Communities of Paimadó presented this to the Administrative Tribunal in Bogotá in 2011. However the slowness of the judicial system means that as of October 2015 there still had been no decision; meanwhile the river continues to be contaminated.



A family in Chocó prepare fish

<sup>74</sup> Tribunal Administrativo de Cundinamarca. Acción Popular. Radicado No: 25000-23-24000-2011-00655-01, page 6.

<sup>75</sup> Class action under the terms of Article 88 of the Constitution and Law 472 of 1998, for violation of the following collective rights: (i) healthy environment; (ii) the existence of ecological balance and the management and rational use of natural resources to ensure sustainable development, conservation, restoration or replacement; (iii) the right to public health and safety; (iv) protection of the cultural heritage of the nation.

<sup>76</sup> Tribunal Administrativo de Cundinamarca. Acción Popular. Radicado No: 25000-23-24000-2011-00655-01

### 2.4.3 Agricultural projects

Some communities wish to develop alternative livelihoods to mining and are asking for support to develop agricultural projects ‘...We are also working on other projects to produce Chocó products, but the problem is that we do not have the machines and tools we need to process them, so the projects are on ice. For example, last year we lost around 20 tons of crops because we did not have the machines we had been promised by the DPS<sup>77</sup>... We hope that we can become market producers and process our regional products...’<sup>78</sup>

These kinds of projects need local infrastructure to get the product to market and initial start-up subsidies. ‘[B]efore every

family had their own agricultural activity and income, but not today, because the mercury destroys all the plants...We even have to buy plantains from Quibdó now!’<sup>79</sup>

Other ways to make it more difficult to mine in Chocó would be to restrict the availability of mercury and prevent heavy machinery from entering the region - it currently enters through the towns in Chocó apparently with the full knowledge of public officials.<sup>80</sup> The fact that much of the machinery generally passes through towns means there should be ways of preventing its onward journey at that point, because once these machines are established in the river, the communities live in fear of a backlash against them if they are removed by the authorities.



Sediment is clearly visible in Rio Andaguada, close to Lloro

77 'DPS' is the Departamento para la Prosperidad Social (Department for Social Prosperity).

78 Interview with communities in Rio Quito, Chocó, October 2014.

79 Ibid.

80 Ibid.

## 3.0 Multinational Mining investments in Chocó

This section gives an overview of Colombian Government policies in relation to Foreign Direct Investment (FDI) in the mining sector. Their impact on the rights of grassroots communities is examined through three case studies, chosen because one or more of the companies involved are, or were at the time of the investment, registered on the London Stock Exchange.

All of the case studies illustrate the impacts of the conflict, forced displacement and other human rights violations and abuses. They relate to collectively owned land by indigenous and Afro-descendant communities who have special protection of their rights related to territory because land is the fundamental basis of their culture, spiritual life, integrity and economic survival.<sup>81</sup> As part of the Transitional Justice measures, two of the studies have added significance as the communities involved have taken their cases to the Land Restitution Tribunals under the Victims and Land Restitution Law 1448 of 2011, and under Decrees 4635 and 4633 of 2011 which apply to Afro-descendant and Indigenous Communities respectively.

### 3.1 Colombian Government policies

In the 1990s Colombia's economic development policies began a period of change with the introduction of liberalisation in line with the Washington Consensus, which focussed on competitiveness, facilitation of foreign direct investment (FDI) and integration into the world economy.<sup>82</sup> In order to facilitate these policies Colombia entered into a large number of trading and investment agreements, including ones with the EU and the UK.<sup>83</sup> These policies resulted in the UK being for a few years the second largest investor in Colombia. While the UK has continued to be one of the top investors, by 2014 it had moved into fourth position, accounting for just under 7 per cent of the FDI coming into the country; these investments are largely in the mining and energy sectors. The other three largest investors are Spain (13.4%), the USA (17%) and Switzerland (17.5%).<sup>84</sup> The UK's main investments are in oil and mineral extraction.

FDI increased in Colombia with a strong growth spurt between 2010 and 2013, rising from \$6.8 billion to \$16.8 billion.<sup>85</sup> However, with over half of the exports during that period being oil and minerals, Colombia's economic growth is reliant on the exportation of raw materials. The Comptroller General's Office - the government's oversight agency - raised concerns regarding the ecologically unsustainable nature of Colombia's mining policies,<sup>86</sup> particularly in light of the weakness of the environmental governance mechanisms.<sup>87</sup>



Río Andágueda

### 3.2 FDI and its impact on displacement

Policies designed to facilitate FDI in the mining sector have the potential to further violate the rights of victims of land grabs and other human rights violations committed during the conflict. Recent government policies designed to facilitate FDI in the mining sector include the establishment of 'Strategic Mining Areas' (SMAs).<sup>88</sup> NGOs concerned that this policy will violate the fundamental rights of Indigenous and Afro-descendant populations are challenging the legality of this policy. SMAs are large areas of land that have been parcelled up for auctioning to the highest *multinational* bidder for mineral extraction. Currently there are 516, which collectively amount to a little

81 Inter-American Court of Human Rights, *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of August 31, 2001.

82 Centro de Estudios para la Justicia Social Tierra Digna, *Seguridad y Derechos Humanos ¿Para quién? Voluntariedad y militarización, estrategias de la empresas extractivas en el control de territorios*, 2015.

83 Such as The Bilateral Investment Treaty between Colombia and the United Kingdom was signed on 10 March 2010 and came into force on 10 October 2014. The Free Trade Agreement between Colombia and the United States of America which was signed on 22 November 2006 and which came into force on 15 May 2012.

84 Procolombia, *Reporte trimestral de inversión extranjera directa en Colombia a 2014*. [http://www.procolombia.co/sites/default/files/reportes\\_de\\_inversion\\_-\\_2014.pdf](http://www.procolombia.co/sites/default/files/reportes_de_inversion_-_2014.pdf)

85 Colombia Reports, *Colombia's foreign investment to decrease further in 2015*, 5 December 2014.

86 *El Tiempo*, 'Colombia está al borde de un desastre ambiental' Sandra Morelli, 13 October 2012.

87 See ABColombia report 'Giving it Away', November 2012 examines the weaknesses in the Colombian governance mechanisms. [www.abcolombia.org.uk/downloads/Giving\\_it\\_Away\\_mining\\_report\\_ABColombia.pdf](http://www.abcolombia.org.uk/downloads/Giving_it_Away_mining_report_ABColombia.pdf)

88 Also discussed in the ABColombia's report, *Giving it Away*. SMAs were created via executive decisions contained in Resolution 18, 0241, 2012 and Resolution 0045, 2012 and Resolution 429, 2013. <http://www.abcolombia.org.uk/subpage.asp?subid=580>



A problem that we have observed is that in 2014 there were no sentences in any part of Colombia relating to threats and killings of human rights defenders. This year [2015] the same situation exists and this is a major concern.’ - UN High Commissioner for Human Rights in Colombia.

over 20 per cent of Colombian territory. They include areas with important ecosystems, rich in biodiversity, such as Chocó and the Colombian Amazon, as well as areas earmarked for land restitution and where Indigenous and Afro-descendant Peoples have collective territories.

Despite the fact that these SMAs include areas within Indigenous and Afro-descendant Peoples’ territory, the policy has not been subject to FPIC with these groups. ABColombia’s partner organisation, the Centre for Social Justice Research – Tierra Digna, has therefore challenged the policy’s legality. Colombia’s highest administrative court, the Council of State, made a ruling suspending the SMAs, citing the **State’s obligation to guarantee FPIC** in relation to all administrative measures and decisions concerning the implementation of development plans and mining in indigenous and Afro-descendants’ collectively owned land. The suspension is an interim measure, pending full consideration of the case by the courts.

On 9 June 2015, Congress passed Law 1753 - issuing the National Development Plan 2014-2018 – which states it is based on three pillars: peace, equity and education. It includes the introduction of Projects of National and Strategic Interest (*Proyectos de Interés Nacional y Estratégicos* – PINES) based on similar principles to the SMAs suspended by the Council of State; Article 20 of Law 1753 effectively revives the SMA model. There are currently 53 PINES - 29 major infrastructure projects, 15 mining and nine energy. The lack of any FPIC process before establishing them once again threatens the fundamental rights of indigenous and Afro-descendant communities. However, in addition to this, under Article 50 of Law 1753 PINES areas<sup>89</sup> **will not be subject to land restitution**, with victims of forced displacement only able to claim compensation. This policy therefore takes precedence over victims’ right to land restitution, as enshrined in Law 1448 of 2011. Furthermore, it is possible that the compensation will be based on the value of the land at the time of displacement and not its current value. The National Development Plan therefore has

the potential to seriously undermine the rights of Indigenous and Afro-descendant Peoples as well as of the victims of forced displacement.

What is also disquieting is the correlation between mining projects, conflict and forced displacement. The Comptroller General’s 2013 report<sup>90</sup> highlights the fact that, of the 1.8 million hectares of land that had undergone *microfocalización*<sup>91</sup> (the first stage in the land restitution process), approximately 40 per cent had industrial (large-scale) projects located on them, and 10 per cent were subject to mining titles. This means that, so far, up to 50 per cent of the aforementioned 1.8 million hectares may be precluded from land restitution.<sup>92</sup> Since the Comptroller’s 2013 report, the mining and energy sectors have continued to expand rapidly and, as of 2015, over nine thousand mining concessions have been granted.<sup>93</sup> This could signify that the area precluded from land restitution is much larger. The Comptroller General’s Office highlighted concerns about government policies giving preference to these economic projects, such as mining and agri-business, over the rights of victims to land restitution, as this was likely to consolidate land dispossession and increase land concentration.<sup>94</sup>



Small-scale mechanised mining in Chocó

89 There are currently no PINES located in the Chocó.

90 “Fuente: Contraloría (2013) con base en UAEGRTD <https://www.restituciondetierras.gov.co>

91 Microfocalización is where small geographic zones (e.g. hamlets) are defined based on criteria related to security conditions for potential victims, the scale of displacement from land and abandonment of land, and conditions for return, as defined by article 76 of Law 1448. The government assigned responsibility for microfocalización to the Special Administrative Unit for the Management of the Restitution of Stolen Land (‘Unidad Administrativa Especial de Gestión de Restitución de Tierras Despojadas’ – UAEGRTD) and under Decree 599 of 2012, stipulated that this body should make these decisions on the basis of information provided by the Ministry of Defence. This Decree also provides for Local Operational Committees for the Restitution and Formalisation of Land Stolen and Forcibly Abandoned (‘Comités Operativos Locales de Restitución y Formalización de Tierras Despojadas y Abandonadas Forzosamente’) which are formed of Land Restitution unit officials and army personnel.

92 Amnesty International, Colombia: National Development Plan threatens to deny the right to land restitution to victims of the armed conflict and allow mining firms to operate on illegally acquired lands, 17 July 2015.

93 Contraloría, La Explotación Ilícita de Recursos Minerales en Colombia, 2013.

94 Contraloría, La Explotación Ilícita de Recursos Minerales en Colombia, 2013.

### 3.3 Integral policies of development, FDI and security

The Colombian Government, with its emphasis on liberalisation and FDI, began increasingly to link development and military security policy. In 1992 the National Planning Department introduced new governance structures for investment promotion. It created a Commercial Development Unit and a Justice and Security Unit, combining for the first time the agendas of FDI promotion with security and defence.<sup>95</sup> Since then this policy of joint agendas has been further developed, the most well-known expression of which being Plan Colombia, introduced in 1999.

The National Armed Forces have increased at an immense rate, growing from 145,000 in 2000 to approximately 435,000 uniformed personnel in 2014.<sup>96</sup> In 2000, as part of a joint strategy, Batallones Especiales Energéticos y Viales (Special Energy and Highway Battalions – BEEVs) were introduced.<sup>97</sup> These special BEEV units were created to provide security for infrastructure, mining and energy operations. By 2014, according to the Ministry of Defence, 24 per cent of the Security Forces were assigned to this task.<sup>98</sup>

MNCs pay a considerable amount of money to the Ministry of Defence for army units to provide security for their mining operations and personnel under Collaboration Agreements. The lack of transparency of these Agreements, which contain clauses designed to keep them secret, makes citizen oversight impossible. Whilst there is long history of such Agreements, information is only available on those from 2010 to 2013; during this period the MNCs paid to the Ministry of Defence just over eight and a half million pounds sterling<sup>99</sup> and by 2014 there were over 100 such Agreements.<sup>100</sup>

### 3.4 Mining concessions

The Colombian State has been promoting the Chocó region to multinationals as an area for exploration since the late 1980s. MNCs mainly applied for mining titles in Chocó after 2000, and at a time when the conflict was at its most intense. Many of these requests were granted in collectively owned territories of indigenous and Afro-descendant communities without complying with the obligation to carry out a prior consultation and consent process. As of July 2015 there were 190 mining titles granted in Chocó,<sup>101</sup> 84 per cent of which are located in the Atrato

and San Juan River basins. In addition to these concessions, 17 SMAs have been established.<sup>102</sup> Many of these are wholly or partly within the collective territory of Indigenous and Afro-descendant Peoples. Whilst a considerable proportion of Chocó is either under concession or earmarked for mining by MNCs, the majority of companies have not yet started operations.



### 3.5 Case studies on FDI in mining in Chocó

The following section will look at three case studies involving British registered companies, or in the case of AngloGold Ashanti (AGA), a British registered company when it applied for the concessions (AGA delisted from the London Stock Exchange on 22 September 2014). Two of the cases have in common a court ruling in favour of the communities, and demonstrate the conflict that exists between the government's land policies and the focus on mineral extraction with foreign investment. They also highlight the terrible human rights violations and abuses that the communities have suffered and how these may have been reinforced by the entrance of large-scale mineral extraction operations. There is a danger that MNCs, as a result, may well end up benefiting from past human rights violations and abuses.

95 Rocha, 2014, cited in Seguridad y Derechos Humanos ¿Para quién? Voluntariedad y militarización, estrategias de las empresas extractivas en el control de territorios.

96 285,000 military personnel and 150,000 police officers. Export.gov, Colombia Commercial Setting and Safety and Security Market Overview, 21 March 2014.

97 Centro de Estudios para la Justicia Social Tierra Digna, Seguridad y Derechos Humanos ¿Para quién? Voluntariedad y militarización, estrategias de las empresas extractivas en el control de territorios, 2015.

98 Mindefensa, Grupo Social y Empresarial de la Defensa, El Sector Defensa comprometido - Infraestructura: una oportunidad para otros sector.

99 Centro de Estudios para la Justicia Social Tierra Digna, Seguridad y Derechos Humanos ¿Para quién? Voluntariedad y militarización, estrategias de las empresas extractivas en el control de territorios, 2015, page 52.

100 Colombia Reports, Colombia Congressman questions security contracts for multinationals, 9 January 2014; Radiosantafe.com, Cepeda pide claridad a Mindefensa sobre convenios de seguridad a la Drummond, 8 January 2014.

101 Only 6 of these concessions have environmental licences.

102 ABColumbia interview with Tierra Digna, 7 September 2015. SMAs are currently suspended by the Consejo de Estado although they could possibly be revived again – see discussion in this report on Law 1753 in Section 'FDI and its impact on displacement'.

103 Tribunal Superior Distrito Judicial de Antioquia Sala Civil Especializada en Restitución de Tierras, Restitución de Derechos Territoriales Resguardo Indígena Embera Katio del Alto Andágueda vs Continental Gold Limited Sucursal Colombia y Otros, Sentencia No.007, 23 September 2014 (Land restitution judgment).

104 Ibid, pages 19-24.

105 There is similar legislation for Afro-descendant communities - Zonas Mineras Negras –ZMN.

### 3.5.1 Case Study: Emberá Katío Resguardo of Alto Andágueda

The Emberá Katío Resguardo of Alto Andágueda covers an area of 50,000 hectares, home to 7,270 members of this indigenous people. The Emberá Katío have suffered many human rights violations and abuses at the hands of all armed groups, legal and illegal.<sup>103</sup> These violations and abuses include armed occupation, torture, social control, forced recruitment of children, sexual violation, killings, bombings, threats, forced displacement and being used as a human shield.<sup>104</sup> The Emberá Katío are one of the indigenous groups named by the Colombian Constitutional Court (T-25/05, Auto 004 of 2009) as being at risk of cultural or physical extinction.

#### Mining in Alto Andágueda Resguardo

As mentioned earlier in the report, Indigenous Peoples in Chocó engage in ancestral mining practices. In recognition of this, the Colombian Government has created Indigenous Mining Zones (*Zonas de Minería Indígena* – ZMIs).<sup>105</sup> This legal framework gives them priority (prelación) over companies to mining rights in their territory.<sup>106</sup> The Emberá Katío People in the Alto Andágueda Resguardo applied for ZMI status, which was granted on 29 September 1996 (Resolution 8-1704) for 16 years, expiring on 11 February 2012.<sup>107</sup> In September 2013, the Emberá Katío People reapplied for the ZMI licence which has been extended for a further 10 years. They suffered two displacements around this time – a small one in December 2011, and the mass forced displacement of some two thousand people in July 2012, when the Colombian Security Forces carried out a bombing raid close to the indigenous village of Conondo.<sup>108</sup>

Mining concessions were applied for by MNCs in the Alto Andágueda Resguardo as far back as 2005.<sup>109</sup> By 2013, at least 62 per cent of the Resguardo's territory was subject to mining titles or to pending applications, some of which appeared to include parts of the ZMI.<sup>110</sup> The majority of mining titles in the Alto Andágueda Resguardo are in a Joint Venture (JV) Agreement between AngloGold Ashanti Colombia SA and Glencore Colombia SAS, and held by Exploraciones Chocó Colombia SAS – which is operated by Glencore SAS. The other MNC with mining titles in Alto Andágueda Resguardo is Continental Gold Ltd Sucursal Colombia (now Continental Gold Buriticá); there are also a few individual titles.

In accordance with Article 79 of Law 1448 (2011)<sup>111</sup> and Decree 4633 (2011), and due to the numerous human rights violations, the Embera Katío applied to the Land Restitution Tribunal in Quibdó for a special protection measure (*medida cautelar*), as a result of which the National Mining Agency was ordered to suspend the mining concessions granted and to nullify the other applications.

In the Quibdó and Antioquia Tribunals the judges made clear that they did not attribute the forced displacement that took place in the Alto Andágueda territory to MNCs, but they highlighted the context that existed when the MNCs requested these concessions. In the Tribunal of Quibdó the Judge, as part of his summing-up of the case stated, '*...apparently some economic actors have allied themselves with irregular armed actors to generate violence within indigenous communities that eliminates or displaces indigenous peoples from their ancestral territories, clearing the way for the implementation of these projects. ... This results from the fact that there are extensive business interests in natural resources in their [the Embera Katío's] territories. In some parts of the country it is clear that the actors have been linked to the armed conflict and with economic interests, and that it is this link that is one of the main causes of forced displacement.*'<sup>112</sup>

This decision to suspend mining titles and applications was upheld by Antioquia's Land Restitution Tribunal which ruled, on 30 January 2013, that the concessions in the Alto Andágueda Resguardo posed a threat to the physical and cultural survival of the Emberá Katío Peoples.<sup>113</sup> **The Tribunal went on to note that the application and granting of mining rights coincided with the intensification of the conflict in the area and that although the Emberá Katío had been violently displaced from their territory due to the conflict, this did not negate their legal rights under Colombian law to prior consultation and consent (Consulta Previa) regarding projects in their territory.**<sup>114</sup> The ruling emphasised the importance of land for the culture and cosmovision of the Emberá Katío Indigenous People. It went on to state that Emberá Katío's fundamental right to FPIC in their territory must be upheld.

Following the decision the Emberá Katío stated, '*we are very happy to see the state finally recognise through the courts the huge shortcomings that have existed over the last 15 years in the process*

<sup>106</sup> However, for the community to have precedence ZMI status must be requested ahead of any application by MNCs – it cannot be awarded to the community once a MNC has applied for mining titles.

<sup>107</sup> Tribunal Superior Distrito Judicial de Antioquia Sala Civil Especializada en Restitución de Tierras, Restitución de Derechos Territoriales Resguardo Indígena Embera Katío del Alto Andágueda vs Continental Gold Limited Sucursal Colombia y Otros, Sentencia No.007, 23 September 2014, para 9.

<sup>108</sup> Ibid.

<sup>109</sup> Expediente GEQ-09C. Código GEQ-09C. Titular 9001937396 in the name of Exploraciones Chocó Colombia S.A.S and AGA.

<sup>110</sup> It is unclear whether this figure is really 62 per cent or 80.63 per cent since two legal documents state different percentages. According to the legal action brought by the Resguardo (Medida Cautelar) it is 80.63 per cent, but in the judgment by the Land Restitution Tribunal in Antioquia it states 62 per cent.

<sup>111</sup> Decree issued specifically for indigenous people in relation to Victims and Land Restitution.

<sup>112</sup> Juzgado Primero Civil del Circuito Especializado en Restitución de Tierras de Quibdó, Informe Secretarial: solicitud de medida cautelar presentada por la Unidad Administrativa Especial de Gestión de Restitución de Tierras Despojadas – Dirección de Asuntos Etnicos a favor del Resguardo Indígena Embera-Katíos del Alto Andágueda, 30 January 2013 p13-14; Emphasis added by the author of the report. Original in Spanish.

<sup>113</sup> Juzgado Primero Civil del Circuito Especializado en Restitución de Tierras de Quibdó, Informe Secretarial: solicitud de medida cautelar presentada por la Unidad Administrativa Especial de Gestión de Restitución de Tierras Despojadas – Dirección de Asuntos Etnicos a favor del Resguardo Indígena Embera-Katíos del Alto Andágueda, 30 January 2013.

<sup>114</sup> Tribunal Superior Distrito Judicial de Antioquia Sala Civil Especializada en Restitución de Tierras, Restitución de Derechos Territoriales Resguardo Indígena Embera Katío del Alto Andágueda vs Continental Gold Limited Sucursal Colombia y Otros, Sentencia No.007, 23 September 2014 (Land restitution judgment).

*for awarding mining rights... which has failed to comply with even the most basic criteria required by the competent authorities, our right to decide on our own development and the right to prior consultation and free and informed consent...all armed actors benefit from this evil business while communities sink deeper into poverty. We welcome this decision for the sake of future generations and to safeguard our survival as a people.'*<sup>115</sup>

This is not to suggest in any way that AGA, Glencore and CGL Sucursal Colombia (now CGL Buriticá) were directly involved in the hostilities or that they directly caused the displacement of the communities, but they risk benefiting from human rights violations and abuses as a consequence of the armed conflict. The Tribunal stated that they had failed to observe the requirement for prior informed consultation and consent with the Emberá Katío.

Although displaced because of the conflict, the Emberá Katío's land rights to the Alto Andágueda Resguardo had been established since 1979.<sup>116</sup> CGL Buriticá state that they were not informed of this and their attention was only drawn to it when the communities made their legal claim, 'we were never able to visit the area to carry out any exploration due to social issues, violence' and 'we would very much like to have been able to work in Chocó but the social situation precluded it.'<sup>117</sup> However, despite this, when the Emberá Katío took their case to the Tribunal CGL Buriticá together with AGA, contested the case and claimed that the Tribunal did not have the appropriate jurisdiction to hear it. In the case of AGA, they state 'there are no grounds to connect the Emberá Katío community's displacement with the award of AGA mining titles, [AGA] had not been involved in the armed conflict, which predates their arrival in the area, but they [AGA] have also been negatively affected by the prevailing situation...'<sup>118</sup>

It is difficult to understand why the companies were not informed by the Ministry of the Interior of the presence of this community given the resguardo was established in 1979. CGL Buriticá have stated they are open to discuss withdrawing their titles, but emphasised willingness to see how they could share profits of exploration with communities.<sup>119</sup>

This stance is probably the only one that CGL can take given that the decision by the Tribunal states that there was clearly no attempt to either consult on the explorations, or potential exploitation, much less under what conditions this could take place. As such, the judge gave no weight to the respondents

claim, which was based on the presumption of legality of the administrative contract which relied on their being able to do a consultation after the fact. The judge emphasised that this would go against the precedent set by the Court on multiple occasion, which stipulated the need for full prior informed consent and ordered the Ministry of Mines to suspend the titles and applications in the Emberá Katío's territory.<sup>120</sup>



### 3.5.2 Case Study: COCOMOPOCA

*'[W]e have already experienced forced displacement because of the presence of illegal armed groups in our territory. But now, with all these licences from the Government to the multinationals, there could be more displacement, maybe on a similar or bigger scale to what we have already experienced.'*<sup>121</sup> Member of the COCOMOPOCA Community.

#### COCOMOPOCA (Organización Campesina y Popular del Alto Atrato)

The COCOMOPOCA communities settled in their ancestral territory about 350 years ago. Their Greater Community Council (*Consejo Comunitario Mayor*) is an autonomous ethnic-territorial organisation formed in accordance with Law 70 and is comprised of 43 Afro-descendant communities with a population of approximately 3,200 families. In 1999 they presented a formal application for the collective land title to 172,000 hectares of their ancestral territory, in the municipalities of Atrato, Lloró, Cértégui and Bagadó. At that time, the COCOMOPOCA communities numbered 30,000 inhabitants. Twelve years later, on 17 September 2011 when they received their land title, only 17,000 people remained in the territory; the conflict had taken its toll primarily due to forced displacement, but also to other human rights violations and abuses including, armed occupation and social control, forced recruitment, killings, kidnappings, bombings,

115 Comunicado Abierto Asociación Orewa, 10 October 2014, published on Codhes website: <http://codhes.org/index.php/component/content/article/9-espacio-114-internacional/132-comunicado-orewa>

116 Resolución 0185 del 13 de diciembre de 1979 de constitución del resguardo indígena del río Andágueda

117 Telephone interview, 9 October 2015.

118 Letter to ABColombia from AngloGold Ashanti, 9 October 2015, page 7.

119 Telephone interview, 9 October 2015.

120 Tribunal Antioquia, pages 37 -38.

121 Scottish Catholic International Aid Fund (SCIAF), Taking Care of Business, August 2014.

122 Centro de Estudios para la Justicia Social Tierra Digna, Seguridad y Derechos Humanos ¿Para quién? Voluntariedad y militarización, estrategias de las empresas extractivas en el control de territorios, 2015.

123 Ibid.

threats and stigmatisation.<sup>122</sup> There was also intense fighting in their territory for military control by legal and illegal armed groups with the population caught in the cross-fire.<sup>123</sup> According to the Land Restitution Unit and the Human Rights Ombudsman, the forced displacement and confinement of the COCOMOPOCA communities was at its worst between 2002 and 2006.<sup>124</sup>

On 17 September 2011, when COCOMOPOCA received the collective land title from the Colombian Rural Development Board (*Instituto Colombiano de Desarrollo Rural - INCODER*), it was for only 73,000 hectares which was under half the community's ancestral land claim of 172,000 hectares. COCOMOPOCA also discovered mining concessions had been granted inside the area covered by their land title which appeared to amount to approximately 55,000 hectares.<sup>125</sup> In addition, they have subsequently discovered that three SMAs have been demarcated which are either wholly or partly within their territory.



### Dojura Mining Project

Dojura is located approximately 30 kilometres southeast of Quibdó, Chocó's capital city, in the Afro-descendant collectively owned territory of COCOMOPOCA. The original mining titles for this project were granted to Robert Allen, the then Chairman of Continental Gold Inc. (CGL) and AngloGold Ashanti Colombia SA (AGAC). According to AGAC all of the mining titles held in COCOMOPOCA's territory are now part of a JV Agreement with Glencore Colombia S.A.S and are held by the Exploraciones Chocó Colombia SAS which is operated by Glencore Colombia S.A.S. From 2008 to 2014 Exploraciones Chocó Colombia SAS entered into a JV with CGL Dojura SAS (a subsidiary of CGL Buritica). CGL Dojura SAS is the operating company for the Dojura mining project.<sup>126</sup> According to CGL's 2014 annual report, the JV between AGAC and CGL Dojura SAS on this project ended in 2014.<sup>127</sup>

The Dojura mining concessions span two collectively owned territories, both of which require FPIC, namely COCOMOPOCA and Alto Andágueda Resguardo. According to CGL, the Dojura Project mining titles cover 45,380 hectares.<sup>128</sup> To date, there has been no FPIC process carried out either with the Emberá Katío (see case study: Alto Andágueda) or with the Afro-descendant communities of COCOMOPOCA. Despite this, AGAC conducted an airborne geophysical survey confirming the mine's potential in 2011.<sup>129</sup>

Of the mining concessions granted inside COCOMOPOCA's territory, several were awarded to *Exploraciones Chocó Colombia SAS* in 2005, at a time when the conflict in the area was at its most intense, and also within the period when COCOMOPOCA's land claim was in the process of being examined by INCODER. According to AGA and CGL, they were unaware that this process was under way when they applied for concessions in this area between 2005 and 2008. In a letter to ABColombia dated 9 October 2015, AGA stated '*[a]t the time, following our inquiry at the Ministry of the Interior, we were aware of no claims by any community on this land (The COCOMOPOCA community land titles were only recognised in 2011)*'.<sup>130</sup> Although the collective land title was not awarded until 2011, COCOMOPOCA's application had been filed in 1999, therefore the State, by accepting applications for mining titles in COCOMOPOCA's territory and subsequently awarding them, did so in violation of Article 17 of Law 70 of 1993, which expressly prohibits this in relation to territories subject to an application for a collective land title.<sup>131</sup> Furthermore, no prior approval had been granted by the Technical Committee of Law 70, another legal requirement. The points made by the Land Restitution Tribunal in Antioquia regarding the conflict can be equally applied to COCOMOPOCA, as their territory is next to the Alto Andágueda Resguardo and, like the Emberá Katío, they had suffered forced displacement. According to the judge, forced displacement of the community in no way released the State or the company from the obligation to carry out an FPIC process.

In its letter to ABColombia, AGA states, 'AGAC takes great care to ensure that land upon which it intends to make a tenement application is not contested by any community – protected or otherwise'. However, the company only refers to having sought information from the Ministry of the Interior (the appropriate authority) prior to making a permit application, 'It is however worth noting that this due diligence covers only the time at which we request that information from the Ministry of the Interior, and does not cover any subsequent community claims that may be made against that property.' However, this is a basic legal requirement and the company could not have proceeded without it.

124 Defensoría del Pueblo. Resolución Defensoría No 064. Crisis Humanitaria en el Departamento del Chocó, 2014.

125 It has been extremely difficult for the communities to establish how many hectares each mining concession covers. 55,000 was the initial figure that they were given in 2011.

126 In its 2014 Annual Report, CG Inc. records an intermediate holding company in Bermuda - CGL Dojura Holdings Limited.

127 'The Continental Gold Inc. received notice from the option holder that they are no longer interested in pursuing the joint venture. As a result, the Dojura Project is no longer subject to an option agreement.'

128 Comprises three registered concessions totalling 12,726 hectares, 13 concessions pending registration, totalling 32,348 hectares and two applications for concessions totalling 306 hectares. Continental Gold Inc, 2014 Annual Report.

129 Continental Gold, Aiming to be The Next High-Grade Gold Producer in Colombia, 20 July 2015.

130 Letter to ABColombia from AngloGold Ashanti, 9 October 2015.

131 Environmental Justice Atlas, Dojura, Chocó, Colombia. <http://ejatlas.org/conflict/dojura-Chocó-colombia>

AGA goes on to say that, '[O]nce an application is granted and the tenement registered, but before field activities AGAC has a protocol of engaging, in person, with local authorities, identified stakeholders and in particular, local community groups, to explain our intentions. Obtaining a social licence to operate is paramount to the success of any project and we recognise that initiating these consultations prior to exploration activities helps us to build trust and common understanding with stakeholders.'<sup>132</sup> Whilst obtaining a social licence to operate is essential with any community, the Constitutional Court clearly states that before undertaking large-scale projects, '...within the territory of Afro-descendant and Indigenous Peoples, it is the duty of the state not only consult those communities, but also to obtain their free, informed and prior consent, according to their customs and traditions....'<sup>133</sup>

CGL Buritica stated also in the COCOMOPOCA case that they were open to discussing withdrawing their titles, but emphasised their willingness to see how they could share profits of exploration with communities.<sup>134</sup> It also stated that it was, at the time, unaware of the communities' land claim and of the restrictions on granting concessions to companies when the land in question was in the process of being considered for collective titles under Law 70 for an Afro-descendant community.



An Embera indigenous woman in Quibdó makes typical jewellery

### 3.5.3 Case Study: Alto Guayabal - Emberá Katío Resguardo of Uradá-Jiguamiandó

The Mandé Norte project consists of nine separate mining concessions, covering 16,000 hectares, granted in February 2005 for a period of 30 years, with 11,000 hectares in the Uradá-Jiguamiandó Resguardo.<sup>135</sup> In addition to this Resguardo, the Mandé Norte mining project will directly impact on the Indigenous Peoples and Afro-descendant communities in the Jiguamiandó river basin: Nueva Esperanza, Pueblo Nuevo, Bella Flor Remacho, Uradá; and the Murindó river basin: Guagua, Isla, Ñaragué, Rancho Quemado, Coredó, Chageradó – Turriquitadó, Turriquitadó Alto and Llano.

#### Mandé Norte mining project

'... [w]e are living in a situation of forced displacement due to the business operations of Muriel Mining and the militarisation of our resguardos and sacred sites, and we will remain in this same situation until exploration and exploitation that they are considering carrying out in our territory ceases. Various babies have died and that is like killing our community, since January there have been only tears, and we hope ... that a spark of humanity will touch the company and the military, and our decision will be respected.' -Community member in Chocó affected by the Mandé Norte mining project.<sup>136</sup>

Mandé Norte is located in the municipalities of Murindó, Antioquia and Carmen del Darien (see map on page 10).<sup>137</sup> It has been a highly controversial mining exploration project. In 2003 British registered mining company Rio Tinto Mining and Exploration Limited (Rio Tinto) and Muriel Mining Corporation Sucursal Colombia (MMC) formed a joint venture with MMC as the operating company.<sup>138</sup> The joint venture agreement meant that Rio Tinto would be providing the lion's share of the funding for MMC to undertake the exploration phase. As of January 2011 Rio Tinto had paid MMC US\$3.83 million.<sup>139</sup> At that time Rio Tinto had the right to acquire a 70 per cent option on the project if the mine became operational. Since then the agreement has been revised and Rio Tinto has an 80 per cent option.<sup>140</sup> According to Rio Tinto, 'Mandé Norte is an early stage exploration project where no exploratory drilling has occurred'. Rio Tinto also stated that it 'does not own, manage or operate the Mandé Norte exploration project. Rio Tinto closed its office in Colombia in 2009 and since that time has not undertaken any exploration activities.'<sup>141</sup>

<sup>132</sup> Letter to ABColombia from AngloGold Ashanti, 9 October 2015.

<sup>133</sup> Colombian Constitutional Court judgment T-769/09 [www.corteconstitucional.gov.co/relatoria/2009/T-769-09.htm](http://www.corteconstitucional.gov.co/relatoria/2009/T-769-09.htm) which cites the Inter-American Court of Human Rights judgment in the case of the Saramaka People v Suriname, 28 November 2007. For further information see also Colombian Constitutional Court judgment T-129/11. [www.corteconstitucional.gov.co/relatoria/2011/T-129-11.htm](http://www.corteconstitucional.gov.co/relatoria/2011/T-129-11.htm)

<sup>134</sup> Telephone interview with ABColombia and CGL, 9 October 2015.

<sup>135</sup> Agencia Presidencial para la Acción Social y la Cooperación Internacional (Acción Social). Consultoría, Análisis y Evaluación del Marco Jurídico y los Procedimientos que Regular la Exploración y Explotación Minera en Colombia, Bogotá, 29 December 2010

<sup>136</sup> Acción Social, Consultoría, Análisis y Evaluación del Marco Jurídico y los Procedimientos que Regular la Exploración y Explotación Minera en Colombia, 29 December 2010, page 35.

<sup>137</sup> Certificado de existencia y representación, Cámara de Comercio de Medellín, Muriel Mining Corporation, sucursal en Medellín: NIT. 800176850-1. cited by CIJP (Comisión Intereclesial de Justicia y Paz) in 'Amicus curie sobre la exploración minera del proyecto minero Mandé Norte' [justiciaypazcolombia.com/IMG/doc/amicus\\_curie.doc](http://justiciaypazcolombia.com/IMG/doc/amicus_curie.doc)

<sup>138</sup> Ibid.

<sup>139</sup> London Mining Network, Rio Tinto plays musical chairs at Mandé Norte, 19 January 2011.

<sup>140</sup> The original JV Agreement between MMC and Rio Tinto was revised 19 November 2010.

<sup>141</sup> Letter from Rio Tinto to ABColombia, 9 October 2015.

<sup>142</sup> Independent Report, Mandé Norte (Murindo) Prospect Chocó and Antioquia Departments, Colombia, Prepared By Dr. Thomas A. Henricksen, QP Pgeo License No. PG - 3069 State Of Wyoming, 12 April 2011.

<sup>143</sup> General Rito Alejo and the 17th Brigade were in charge of Operación Genesis which is discussed in detail in the section 'Overview of the conflict in Chocó' above, which records evidence of this brigade's collaboration with the paramilitaries.

On 14 December 2011, 100 per cent of MMC was sold by Sunward Investments Ltd to Goldplata Mining International Corporation.

### Conflict in the Uradá-Jiguamiandó Resguardo

In December 2000, MMC obtained a prospect for mining from Phelps Dodge.<sup>142</sup> Only a few months earlier, in May 2000, the conflict intensified in the Uradá-Jiguamiandó Resguardo with a bombing raid in the area around the Alto Guayabal indigenous community followed by an incursion of ground troops from the 17th Brigade led by General Rito Alejo del Río.<sup>143</sup> As a result, the majority of the Emberá Katío living in Alto Guayabal fled their homes and took refuge in other indigenous villages. When soldiers of the 17th Brigade entered the village of Alto Guayabal they found a handful of people left. They took five Emberá Katío with them who were subsequently disappeared.<sup>144</sup> According to a Verification Commission these operations by the 17th Brigade were carried out with the 'support and in coordination with paramilitary groups'.<sup>145</sup>

The community remained displaced until August 2008, when they returned to the Resguardo. Four months later in December 2008, the 15th and 17th Brigades together with officials from the MMC entered a village in the Uradá-Jiguamiandó Resguardo. On 3 January 2009 the Company workers brought in equipment for mining exploration in *Cerro Careperro* Mountain, allegedly without the necessary permission,<sup>146</sup> and cleared several hectares of rainforest for a heliport.<sup>147</sup> The mountain of *Cerro Careperro* (indigenous name *Ellausakirandarra*) is sacred to the Indigenous Peoples.<sup>148</sup> The military told the population that they were there to provide protection for Muriel Mining Corporation's explorations.<sup>149</sup> Suggesting that the militarisation of the area was linked to the protection of personnel from the MMC and the exploration operations they were undertaking.

This mine has been strongly resisted by the Emberá Katío People and the Afro-descendant communities of Jiguamiandó. The entrance of the MMC with the army on 3 January 2009 provoked a massive social protest on 5 January 2009 which lasted for 6 weeks. 800 people from the indigenous communities gathered demanding that the MMC leave the sacred mountain.<sup>150</sup> The

protest was initiated and led by the Emberá Katío women who are responsible for the community's spiritual welfare.

Social protest at the Mandé Norte mine was countered by statements from the MMC stigmatising both the Indigenous People and the NGOs supporting them, insinuating that the Inter-Church Justice and Peace Commission (*Comisión Intereclesial de Justicia y Paz* - CIJP), an internationally recognised NGO presenting the legal case against the MMC to the Constitutional Court, and Peace Brigades International (PBI), an internationally renowned organisation, were in some way linked to the guerrilla groups.<sup>151</sup> The ramifications could have been deadly in an area where paramilitaries attack and kill anyone they imagine have links with the guerrilla groups. UN Special Rapporteurs have warned about the dangers of such statements, '[t]hese statements stigmatise those working to promote human rights, encourage an environment in which specific acts of threats and killings by private actors can take place'.<sup>152</sup> Since PBI is a member of ABColombia, and CIJP a partner organisation, letters of protest regarding these actions were sent by ABColombia to the British Government, the Joint Committee on Human Rights and the Business and Human Rights Resource Centre. Following considerable international condemnation of these accusations MMC publicly stated '...It hasn't been the intention of Muriel to discredit any organisation nor to associate the work of anyone with organisations that are on the margins of the law' (the guerrillas).<sup>153</sup>

In January 2010 the communities once again were caught in the crossfire of another operation by the 15th and 17th Brigades. The communities reported helicopters landing with army personnel at the mining operations, planes flying over and large ground troop movements. The Emberá Katío People were forcibly confined to their hamlets, unable to leave to hunt, fish or harvest their crops.<sup>154</sup> Then a bombing raid on 30 January 2010, and a land operation by the 17th Brigade, in the region of the Alto Guayabal Resguardo resulted in four Indigenous People being gravely injured, including a 20-day-old baby as a bomb landed on the house where they were sleeping. The Security Forces airlifted the injured to a local army base. Following complaints that NGOs and the indigenous authorities were being denied

144 Informe Misión Humanitaria de Verificación, Comunidad Indígena Embera Katío de Alto Guayabal-Urada, Jiguamiandó Municipio de Carmen del Darien, Antioquia-Chocó, Días 5 y 6 de febrero 2010. (Report of the Humanitarian Verification Mission, Indigenous Community Embera Katío of Alto Guayabal-Urada, Jiguamiandó, Municipality of Carmen del Darien, Antioquia-Chocó, 5-6 February 2010). Published by the Organización Indígena de Antioquia (Indigenous Organisation of Antioquia). The disappeared are Pablo Emilio Domicó, aged 45, his daughter, Blanca Domicó (16), Regina Rubiano Bariquim (70), Guillermo Niaza Cano (40) and his youngest son, Ibaniel Niaza (10).

145 Ibid.

146 Agencia Presidencial para la Acción Social y la Cooperación Internacional (Acción Social). Consultoría, Análisis y Evaluación del Marco Jurídico y los Procedimientos que Regular la Exploración y Explotación Minera en Colombia, Bogotá, 29 December 2010. MMC applied to the Ministry of the Environment under Ley 2ª del Pacífico (2nd Law of the Pacific) for permission to cut down the forest, but this was refused. They requested an environmental licence from CODECHOCÓ and were informed that this was not the correct authority to grant the licence, and were also informed by the Direction of Indigenous Affairs in the Ministry of the Interior that there were indigenous and Afro-descendant communities with whom they were required by law to carry out a Prior Consultation Process (in accordance with ILO Convention 169). However, according to official body Acción Social, despite receiving all this information, they started work on the exploration process without undertaking a consultation and without the appropriate licences.

147 Report of the Humanitarian Verification Mission, Indigenous Community Embera Katío of Alto Guayabal-Urada, Jiguamiandó, Municipality of Carmen del Darien, Antioquia-Chocó, 5-6 February 2010.

148 AIDA (Interamerican Association for Environmental Defense), Court victory for biodiversity and human rights may be overturned, February 2011; CIJP (Comisión Intereclesial de Justicia y Paz), Indigenous Emberá Communities Resist Invasion by Multinational Mining Corporation in the Bajo Atrato, Colombia, August 2009.

149 Decision of the Constitutional Court 2009, Sentencia T-769/09; Acción Social, Consultoría, Análisis y Evaluación del Marco Jurídico y los Procedimientos que Regular la Exploración y Explotación Minera en Colombia, 29 December 2010.

150 Ibid.

151 Muriel Mining response re Colombia Solidarity Campaign report, 16 May 2009.

152 Statement by Professor Philip Alston, UN Special Rapporteur on extrajudicial executions - Mission to Colombia 8-18 June 2009.

153 Muriel Mining response re ABColombia rejoinder, 6 July 2009.

154 Report of the Humanitarian Verification Mission, Indigenous Community Embera Katío of Alto Guayabal-Urada, Jiguamiandó, Municipality of Carmen del Darien, Antioquia-Chocó, 5-6 February 2010.

access to the survivors, the Security Forces transferred them to the Medellín city hospital. The army admitted their mistake regarding the bombing of the indigenous house and publicly apologised.<sup>155</sup>

In March 2010 the Constitutional Court (T769 of 2009) ruled in favour of the communities and ordered the suspension of the mining project in Mandé Norte. The judges considered that it had not complied with the requirements of FPIC, as the process had not been carried out with the legitimate representatives of the communities, but with others. It also recognised that the project would inevitably alter the ecological balance and biodiversity of the region. In consideration of these and other aspects of the case, the Court ruled that consent was required as the project would have considerable impact on the economic, social and cultural rights of the community.<sup>156</sup> This reflected similar legal decisions issued by the Inter-American Court of Human Rights.<sup>157</sup> The Constitutional Court also recognised the need for environmental impact assessments to be prepared **prior to community consultation and consent.**

In an earlier hearing the judge had also pointed out that the communities had not been given accurate information on the environmental impacts and no ways of mitigating or repairing possible damages caused by the exploration stage had been specified.<sup>158</sup>

ABColumbia is aware that Rio Tinto continues to maintain its right to acquire option on exploitation, should the mining project move to this stage. Indeed, Rio Tinto's 70 per cent option agreement was replaced with a new one in November 2010 increasing its option to 80 per cent. In 2015 Rio Tinto stated, *'please note that only a small percentage of exploration projects advance to the development of a mine and these often take a decade or more to develop. The Colombian Constitutional Court ruled in 2010 that additional consultation and environmental impact assessment must occur prior to further exploration activities at Mandé Norte.'* Rio Tinto subsequently said, *'There is no mine nor any current exploration at Mandé Norte. No exploration can occur unless the project meets the requirements of the Constitutional Court and has the support of the local communities.'*<sup>159</sup>

### 3.6 Human Rights Defenders

*'Human rights defenders, from distinct sectors of civil society, and, in some cases, from state institutions, make fundamental contributions to the existence and strengthening of democratic societies. Accordingly, respect for human rights in a democratic state largely depends on the human rights defenders enjoying effective and adequate guarantees for freely carrying out their activities.'* - Inter-American Commission on Human Rights<sup>160</sup>

Since the beginning of the peace talks, the number of attacks and killings of HRDs in Colombia has seen a year-on-year increase, with over 400 HRDs assassinated in the last five years. This trend has continued into 2015 with on average one HRD killed every five days in the first six months of the year.<sup>161</sup>

Among the HRDs most at risk of persecution are those defending land and victims' rights.<sup>162</sup> Todd Howland, Representative of the UN High Commissioner for Human Rights in Colombia, has identified the PDPGs as a specific threat to them, *'[t]hey are attacking and threatening protectors and defenders of human rights, community leaders, state officials and land claimants in the process of land restitution, when they oppose their political, economic and criminal interests.'*<sup>163</sup>

The Pacific region where Chocó is situated has been singled out as a source of specific concern with leaders seeking to defend their communities' cultural and territorial autonomy targeted for persecution.<sup>164</sup> Ten leaders in the COCOMOPOCA communities were threatened by the PDPGs as soon as they began challenging the legality of the mining concessions granted in their territory to MNCs.<sup>165</sup> For example one leader received the following threatening text messages, *'you will be first...you are against the mining'*.<sup>166</sup> Another community member pointed out that speaking up on mining issues (he was referring to small-scale mechanised mining) was very difficult *'because afterwards they send someone to kill you or silence you'*.<sup>167</sup>

155 Ibid.

156 Decision of the Constitutional Court 2009, Sentencia T-769/09 <http://www.corteconstitucional.gov.co/relatoria/2009/T-769-09.htm>

157 Inter-American Court of Human Rights, Case of the Saramaka People v Suriname, Judgment of 28 November 2007 (Preliminary objections, merits, reparations and costs).

158 Civil Chamber of the Superior Tribunal of Bogotá, Judgment 23 April, 2009, Magistrado Ponente Humberto Alfonso Niño Ortega, page 15.

159 Rio Tinto email response to ABColumbia, 14 October 2015.

160 IACHR, Report on the Situation of Human Rights Defenders in the Americas, OEA/Ser.L/V/II.124, Doc. 5 rev. 1, 7 March 2006, para. 20. <http://www.icnl.org/research/resources/assembly/oas-human-rights-report.pdf>.

161 Programa Somos Defensores, Los Nadies, August 2015.

162 Ibid.

163 El Espectador, "Bacrim son el 'reto principal' de seguridad en Colombia": ONU, 16 March 2015.

164 IACHR, Preliminary Observations of the Inter-American Commission on Human Rights after the Visit of the Rapporteurship on the Rights of Afro-Descendants and Against Racial Discrimination to the Republic of Colombia, OEA/Ser.L/V/II.134, Doc. 66, 27 March 2009. [http://www.cidh.org/countryrep/ColombiaAfrodescendientes.eng/ColombiaAfros2009cap3-4.eng.htm#\\_ftnref16](http://www.cidh.org/countryrep/ColombiaAfrodescendientes.eng/ColombiaAfros2009cap3-4.eng.htm#_ftnref16)

The rate of impunity for murders of HRDs over the past five years stands at around 95 per cent, a level which extends to other crimes against HRDs in Colombia<sup>168</sup>. For example, in the first six months of 2015, 332 HRDs received death threats, but as of June 2015 the Prosecutor's Office has not advanced in a single investigation of any of these cases.

'A problem that we have observed is that in 2014 there were no sentences in any part of Colombia relating to threats and killings of human rights defenders. This year [2015] the same situation exists and this is a major concern. Yes there is an investment of 200 million dollars in the National Protection Unit, but much greater protection is offered when sentences start to be brought against the people who attack these leaders'<sup>169</sup> - UN High Commissioner for Human Rights in Colombia.

Impunity is an issue that has been highlighted by the UN OHCHR (Office of the High Commissioner for Human Rights) in Colombia in its 2015 report, particularly in relation to land activists and communities seeking land restitution: 'Frequent death threats against land activists and related impunity should be firmly addressed. In Chocó, security concerns have prevented ethnic communities from returning to their lands.' The OHCHR goes on to say that 'claims that activists have links with insurgency are often given more attention and resources than cases in which they are victims.'<sup>170</sup>

Whilst the prosecution and conviction of those responsible for these crimes is almost non-existent this apparent reluctance on the part of the State to investigate and prosecute crimes committed against HRDs, including community leaders, is in stark contrast to the increase in the number of spurious legal cases taken against them. In several cases, the authorities have 'fast-tracked' proceedings against them, in breach of international standards for fair trials. In addition, state agents subject HRDs to illegal surveillance as well as direct attacks.<sup>171</sup>

As a result of the attacks by illegal actors, as well as the actions and inaction of the state, the HRDs' capacity to carry out their work safely continues to be reduced, especially for those working on land and victims' issues. Fabricio Hochschild, Coordinator of the Office of the United Nations in Colombia, described the worsening situation as a 'significant step backwards' which was 'highly regrettable' in terms of the protection of HRDs. He went on to note the increased risk faced by Afro-descendant communities.<sup>172</sup> In order to create an environment which



safeguards their lives and promotes justice and the rule of law, it is essential that Colombia starts to prosecute those responsible for attacks and killings of HRDs.

### 3.7 Social protest

The mining industry has also provoked protests by citizens in Colombia, not only in the immediate area of the mine, as occurred with the Mandé Norte Project (see cases studies), but also regionally and nationally. In 2013 there were 1,027<sup>173</sup> protests in Colombia – the highest number in one year since 1975. They arose due to differing visions of development which include the pre-eminence of mining by MNCs. All of these protests saw an excessive use of force by the Security Forces. The UN OHCHR in Colombia undertook an observation visit following the first protest in June 2013 where protesters had been killed and stated 'the bullets that **killed the four protesters** were high velocity which **indicated that the security forces [had] exercised an excessive use of force against demonstrators**'.<sup>174</sup> An early call by the UK Embassy for dialogue was important, as was their request for a full investigation into the killings allegedly by the Security Forces. This social unrest is being generated in no small part by the extensive and rapid rolling out of a development strategy based heavily on the extractives industry, not least because of the precedence it takes over policies designed to provide reparation and land restitution to the victims.

One of the critical tools for protecting and respecting Indigenous and Afro-descendant People's rights in relation to mining and other large-scale projects is FPIC.

165 Consejo Comunitario Mayor De La Organización Popular Campesina Del Alto Atrato – Cocomopoca: Situation Analysis Of The Impact Of Medium And Large Scale Mining On Land And Population

166 SCIAF, Taking Care of Business, August 2014.

167 ABColombia interview in Rio Quito, October 2014.

168 Programa Somos Defensores, Los Nadies, August 2015.

169 "En 2014 y 2015, ni una sentencia por asesinatos y amenazas contra defensores de DD. HH.": Todd Howland, UN High Commissioner for Human Rights in Colombia, 25 March 2015. Unofficial translation.

170 Addendum of the Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Colombia - A/HRC/28/3/Add.3, 23 January 2015.

171 Programa Somos Defensores, Los Nadies, August 2015.

172 Noticias Caracol, ONU denuncia asesinato de 69 activistas colombianos y pide acción del Estado, 19 August 2015.

173 CINEP/PPP, Informe Especial: Luchas Sociales en Colombia 2013, April 2014.

174 Public Statement 'Oficina de la ONU para los Derechos Humanos espera que se llegue a acuerdos que garanticen los derechos humanos de la población del Catatumbo', 10 July 2013. <http://www.hchr.org.co/publico/comunicados/2013/cp1239.pdf>

### 3.8 Multinational companies, international frameworks and norms

*'Conflicts between local communities in developing countries and governments and corporations seeking to exploit natural resources pose a serious threat to investors' bottom lines, as in 82 per cent of the disputes that have occurred since 2000, across numerous emerging economies...the financial risk is certainly significant...many projects that were suspended or abandoned after millions, and in some case billions, had been invested.'* - Findings from research by TMP Systems<sup>175</sup>

#### 3.8.1 Free, Prior and Informed Consultation and Consent (FPIC)

As part of their right to self-determination, Indigenous and Afro-descendant Peoples can establish priorities and strategies for the development or use of their lands and territories.<sup>176</sup> This includes the right, if they so wish, to pursue their own initiatives for resource extraction within collectively owned territories. In Colombia, this is reflected in the fact that, although the State owns subsurface resource rights, Indigenous and Afro-descendant Peoples are given priority (*prelación*) when it comes to the granting of mining concessions in their territory.<sup>177</sup> If these communities do not want to extract these mineral resources, and third parties wish to, then Colombian law and international norms protect their fundamental rights to FPIC.<sup>178</sup> The violation of this fundamental right by MNCs and the Colombian State has been the basis of the judgments by the Colombian Constitutional Court and the Land Restitution Tribunal in the Mandé Norte and Alto Andágueda cases. Self-determination for Indigenous and Afro-descendant Peoples is enshrined in the Colombian Constitution and reflects the understanding of Indigenous and Afro-descendant Peoples as distinct, with their own decision-making processes, and collective, territorial and cultural rights.

The Colombian State is responsible for ensuring that Indigenous and Afro-descendant Peoples' fundamental right to FPIC, along with all other human rights, is respected. Colombia has ratified the ILO Convention 169 and has endorsed the UN Declaration on the Rights of Indigenous Peoples<sup>179</sup> which include the rights to FPIC and self-determination. However, some high-level Colombian Government officials have publicly presented FPIC rights as an obstacle to development which promotes a polarising view of this issue.<sup>180</sup>

#### 3.8.2 International law and policy advances in FPIC

The recognition of the fundamental right to self-determination of Indigenous and Tribal Peoples in decisions about development in their territory has seen advances in international policy, as well as in terms of obligations under international law. In 2012, the World Bank's private lending arm, the International Finance Corporation (IFC), updated its Sustainability Framework to require corporate loan recipients to engage in FPIC when their operations affected Indigenous Peoples. In 2013, the Equator Principles, as part of their environmental and social standards, stipulated that '[p]rojects with adverse impacts on indigenous people will require their Free, Prior and Informed Consent (FPIC).'<sup>181</sup> Also in 2013, the International Council on Mining and Metals (ICMM) in its Indigenous Peoples and Mining Position Statement (May 2013), recognised Indigenous Peoples' right to refuse a project '**indigenous peoples can give or withhold their consent to a project** through a process...consistent with their traditional decision-making...based on good faith negotiation.'<sup>182</sup> The UN Guiding Principles on Business and Human Rights (UNGPs) hold that all businesses have a responsibility to **avoid causing or contributing to adverse human rights impacts** through their activities and they should mitigate or address any such impacts when they occur. This also applies within their supply chain.<sup>183</sup> According to the UN Global Compact, there are '[t]wo fundamental elements of indigenous peoples' rights, on which the ability to exercise and enjoy a number of other rights rest, these are the right to self-determination and FPIC, ...[these] require that business fully and meaningfully engage indigenous peoples with the objective to obtain their consent ...'<sup>184</sup>

International norms such as ILO Convention 169 make it clear that, when embarking on large-scale projects such as mining on the land of Indigenous Peoples, their approval must be sought prior to exploration and initiation of operations. UNDRIP (UN Declaration on the Rights of Indigenous Peoples) Article 32 makes it clear this consent should be prior to the 'approval of any project' in territories.

Over the years there has been controversy about at what stage/s FPIC should be carried out – before offering a concession, before exploration or only before exploitation. In Colombia, when the current Mining Code was established in 2001, it was stipulated that it should be ahead of exploitation. However, this is very late in the process for everyone concerned - the company

175 Failure to engage local communities is costing investors big money, according to a new analysis 9th October 2015 Mike Gaworecki <http://news.mongabay.com/2015/10/failure-to-engage-local-communities-is-costing-investors-big-money-according-to-a-new-analysis/>

176 The principle of free, prior and informed consent is linked to treaty norms, including the right to self-determination affirmed in common Article 1 of the International Human Rights Covenants; UN Declaration on the Rights of Indigenous Peoples, art. 32, para. 1.

177 See the section in this report on Mining in Alto Andágueda Resguardo for more information on (*prelación*), including ZMIs and ZMNs.

178 Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, Extractive industries and indigenous peoples, A/HRC/24/41, 1 July 2013.

179 Colombia, had originally abstained in the vote on the Declaration, but subsequently sent a letter to the UN High Commissioner for Human Rights on 20 April 2009 expressing its support for the Declaration and the principles contained therein. Report of the UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, 15 July 2009, page 9.

180 Addendum of the Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Colombia - A/HRC/28/3/Add.3, 23 January 2015.

181 The Equator Principles III, 2013. Principle 5. <http://www.equator-principles.com/index.php/ep3>.

182 International Council of Mining and Metals, Indigenous Peoples and Mining Position Statement, May 2013. Overview. <https://www.icmm.com/document/5433>

183 UN Guiding Principles on Business and Human Rights [http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)

has made an investment, environmental damage may have occurred and there may have been considerable impact on the community. Colombian jurisprudence has moved forward, together with international norms recognising indigenous and Afro-descendant communities' right to consent regarding projects in their territory. For example, in judgments T769 of 2009 (Mandé Norte) and T129 of 2012, the Constitutional Court ruled that, in cases where a large-scale project would impact on the life of the community, consent would have to be obtained before exploration operations took place.<sup>185</sup> The Land Restitution Tribunal in its ruling in the Alto Andágueda Case suspended the mining applications as well as the mining titles because of lack of consultation and consent. The judge also ruled that even when the community was forcibly displaced by the conflict it did not negate its right to FPIC regarding proposed projects in their territory.<sup>186</sup>

In the Mandé Norte Case, Muriel Mining Corporation (MMC) not only contested it but also, together with the State, appealed against the decision of the Court in favour of the communities. However, this decision was upheld and strengthened by the Constitutional Court in its Decision T769 of 2009. Social conflict and unwise investment by companies could be avoided if the Colombian Government ensured it carried out adequate FPIC with Indigenous and Afro-descendant communities prior to offering their territory in concessions to MNCs.



### 3.8.3 Companies must respect Human Rights

The UN Guiding Principles on Business and Human Rights (UNGPs) make it clear that business enterprises also have a responsibility to respect internationally recognised human rights, such as those set forth in UNDRIP. **This responsibility is additional to and independent of State obligations.**<sup>187</sup> According to James Anaya, the former UN Special Rapporteur on the Rights of Indigenous Peoples, '[G]iven their independent responsibility to respect human rights ... **extractive companies, should not assume that compliance with State law equals compliance with the international standards of indigenous rights.** On the contrary, companies should perform due diligence to ensure that their actions will not violate or be complicit in violating indigenous peoples' rights.'<sup>188</sup> Anaya goes on to state that 'extractive companies should employ due diligence to avoid acquiring tainted assets, such as permits previously acquired by other business enterprises in connection with prospecting for or extracting resources in violation of indigenous peoples' rights.'<sup>189</sup>

Companies need to comply with due diligence measures when initially applying for mining titles from the State but also when acquiring a title previously granted to another company. Exercising due diligence in this context means that they ensure that FPIC has been carried out and that Indigenous Peoples and Afro-descendant rights have in no way been violated in the acquisition of these concessions. This brings into question the bidding of companies for Strategic Mining Areas (SMAs).<sup>190</sup> SMAs could circumvent the right to FPIC. They may be created with no consultation with affected Afro-descendant or indigenous communities, so that affected communities are forced to accept that their territories could be used for a particular economic activity. It is only after a company has already obtained the rights at auction and submitted an application to begin activities in the area that a process of FPIC may be initiated. This attempt to circumvent FPIC should also be of concern to companies, as Anaya states that a company's obligations to respect human rights mean that extractive companies should avoid accepting permits or concessions from States when prior consultation and consent requirements have not been met.<sup>191</sup>

184 UN Global Compact, The Business Reference Guide to the UN Declaration on the Rights of Indigenous Peoples, 2013, page 11.

185 Constitutional Court Decisions, Sentencia T-769/09 <http://www.corteconstitucional.gov.co/relatoria/2009/T-769-09.htm> and Sentencia T-129/11 <http://www.corteconstitucional.gov.co/relatoria/2011/t-129-11.htm>

186 Informe Secretarial: solicitud de medida cautelar presentada por la Unidad Administrativa Especial de Gestión de Restitución de Tierras Despojadas – Dirección de Asuntos Etnicos a favor del Resguardo Indígena Embera-Katíos el Alto Andágueda, 30 January 2013

187 Report A/HRC/21/47, Extractive industries and indigenous peoples, Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, 6 July 2012, paras. 55-56.

188 Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, Extractive industries and indigenous peoples, A/HRC/24/41, 1 July 2013, para. 53. Unofficial translation.

189 Ibid, para 54.

190 Previously created SMAs were suspended by the Council of State on the basis that, as part of a public development policy, they could impact on the economic, social and cultural rights of Afro-descendant and Indigenous community. In these circumstances, according to the Colombian Constitution this policy should have been subject to FPIC.

Law 1753 of 2015 which implements the most recent National Development Plan effectively revives the SMA model. This law's constitutionality is being challenged by civil society organisations on several grounds, including the fact that it has not been subject to a process of FPIC.

191 Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, Extractive industries and indigenous peoples, A/HRC/24/41, 1 July 2013, para. 55.

To fulfil the requirements of FPIC, the Government and the company should ensure that consent is given on just and equitable terms. Anaya suggests that companies, in order to demonstrate compliance with due diligence and to create a more equitable playing field, should be consistent and transparent in developing and publishing formal policies, and when dealing with implementation strategy. In particular, they should address the significant power imbalances between the companies and the affected communities in terms of technical capacity and access to information.<sup>192</sup>

Companies need to be proactive in Colombia in seeking to set up from the outset channels of communication with communities. The situation in Chocó when MNCs were submitting their applications for mining concessions from the early 2000s onwards was, and continues to be, one of conflict, violations and abuses of human rights and mass forced displacements. AGA was aware of the level of conflict. They state, 'a number of the areas for which AGAC [AngloGold Ashanti Colombia] had applied for mineral tenements were deemed unsafe and were ultimately declared to be in Force Majeure due to the inability to ensure safe access of its employees to mineral exploration sites.'<sup>193</sup> Continental Gold Buriticá (CGL) stated that they had not entered the area because of the conflict.<sup>194</sup> This conflict and displacement and lack of an accurate land registry were all on public record. NGOs, the UN and others published information on the human rights situation in Chocó. In fact, the situation in Chocó is particularly well documented, including the collusion between the military and paramilitary forces, as well as the operations of the guerrilla groups and the human rights violations and abuses committed by all the armed actors.



Community travelling along the river in Chocó

In addition to this under Colombian law, there are special protections for the territorial rights of Indigenous and Afro-descendant Peoples. Chocó has 96 per cent of its territory under collective ownership suggesting that far greater due diligence should have been undertaken by companies investing there.

### 3.8.4 Voluntary Principles on Security and Human Rights (VPs)

The Voluntary Principles on Security and Human Rights (VPs) were established in 2000 by the UK and the US in order to address human rights violations by Security Forces contracted to protect MNCs' oil and mining operations. Companies were generally facing problems in balancing security with respect for human rights and fundamental freedoms, and in doing so had faced strong criticism for complicity with human rights violations.<sup>195</sup> The VPs aimed to provide guidelines for reducing the negative effects of security measures employed by companies on communities.<sup>196</sup> However, whilst some large MNCs signed up to these, the smaller junior companies are noticeable by their absence. The junior companies normally undertake the early exploratory phases of mining projects and, as such, there is a greater propensity for these companies to be operating in conflict zones and in contexts that the VPs were designed to address. Companies are expected under these guidelines to help ensure that actions of governments and public security providers in relation to the companies' operations are consistent with the protection and promotion of human rights. This includes transparency in terms of security policies.

The environment in Colombia for FDI in the mining and energy sector has always been challenging. A major feature of the dynamics of the conflict in Colombia has been the way in which economic interests and forced displacement have fed into it. The International Council on Mining and Minerals (ICMM) suggests that that companies should establish a Memorandum of Understanding with the Security Forces that they contract, ensuring that there is agreement on a range of issues, which include: 'the joint objective of respecting human rights and humanitarian law and that no-one "credibly implicated" in past human rights abuses provide security to the company'. However, it is questionable whether these clauses are sufficient to promote and protect the rights of communities when companies are entering volatile areas of conflict with an Army that has a well-documented and negative human rights record. The high level of extrajudicial killings on the part of the Colombian Security

<sup>192</sup> Ibid, para 91, inter alia.

<sup>193</sup> Letter to ABColumbia from AngloGold Ashanti, 9 October 2015.

<sup>194</sup> ABColumbia Interview with CGL by phone, 9 October 2015.

<sup>195</sup> Research Center (SFB) 700 Governance in Areas of Limited Statehood: From Compliance to Practice. Mining Companies and the Voluntary Principles on Security and Human Rights in the Democratic Republic of Congo, SFB-Governance Working Paper Series No. 25 October 2011.

<sup>196</sup> Ibid.



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Forces between 2005 and 2010 was described by the UN Special Rapporteur as systematic.<sup>197</sup> Further complicating the situation is US-designed counter-insurgency training that the Colombian Army has received which promotes polarisation with the view that 'you're either for us or against us'. This sees citizens as potential enemies as opposed to neutral individuals or victims.<sup>198</sup>

Counter-insurgency strategies have also included what is referred to as, 'taking the fish out of the water', which is a strategy that firstly sees the civilian population as guerrilla sympathisers and then removes that population to leave a clear battlefield with guerrilla groups. This view of the civilian population promotes human rights violations. Contracting the Army in these circumstances suggests a lack of due diligence on the part of companies. The judge picked up on this in the Mandé Norte case and specifically ordered the Ministry of Defence to examine why it was that the Army was seen in the eyes of the communities as a threat to their security.<sup>199</sup>

Adding secrecy clauses to the security contracts (Collaboration Agreements) that companies enter into with the Ministry of Defence means there is a lack of transparency and democratic civil society oversight of these contracts; it also fosters distrust. For these reasons, VPs encourage companies and governments to make security arrangements transparent and accessible to the public.

In the case of Mandé Norte, in addition to the failure to conduct an adequate FPIC process, there were concerns that the company, Muriel Mining, entered the region with the army for the sole purpose of carrying out exploratory mining operations. This appears to have intensified the conflict in the Emberá Katío's territory in Alto Guayabal (see case study). This is not to say that the company was directly responsible in this case, but its presence and the intensification of the conflict was certainly perceived as being linked by the local communities.

<sup>197</sup> Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, Addendum, Mission to Colombia, A/HRC/14/24/Add.2, 31 March 2010. "Security forces have carried out a significant number of premeditated civilian murders and fraudulently presented the civilians as "killed in combat." Although it appears that these so-called falsos positivos (false positives) were not carried out as a matter of State policy, they were also not isolated occurrences" – Summary to report.

<sup>198</sup> Ibid.

<sup>199</sup> Sentence T-769/09 of the Colombian Constitutional Court, Orden sexta.

### 3.9 Conclusions

Major problems that communities in Chocó face are that the small-scale mechanised mining brings with it violence. It creates internal conflicts within the communities and there is little if any space for them to openly express their ideas and arrive at a consensus because armed groups are seeking to impose their agenda on them. As one community member succinctly put it, speaking up on mining issues is very difficult *'because afterwards they send someone to kill you or silence you.'*<sup>200</sup> If uncontrolled mining continues in Chocó it will also destroy the environment upon which the communities depend for their livelihoods, their cultural and spiritual wellbeing and their survival.

Despite all the violence and conflict in Chocó, ABColombia spoke to many communities that have a vision for the development of their territories. However, they need State support and government policies that stimulate the local economies. They want to participate in local and regional development planning – a constitutional right for Indigenous People; they want the government to tackle corruption and impunity and to support transparency and citizen's oversight at the local level.

The State will need to ensure that the rights of these communities are upheld. Recent decisions by the Land Restitution Tribunal on the Alto Andágueda case and those of the Constitutional Court on consent in the case of large-scale projects should help to achieve this.

Multinational mining corporations will need to ensure that, when seeking to invest in the country, they engage communities in discussion about what development they want and ensure they obtain their consent for projects; otherwise they will generate social conflict.

All of the international frameworks mentioned in this section, with the exception of FPIC, are voluntary frameworks. Whilst they are essential and offer important guiding principles, in situations where there are huge power disparities, there also have to be statutory provisions and access to the legal system in the countries of origin of these MNCs. The UK Solicitor General Robert Buckland points out that safeguards created by the respect of human rights also create fertile conditions for economic growth, whereas the absence of respect for human rights drives political instability, creates conflict, reduces investment and innovation. The Guiding Principles recommend that those affected by human rights abuses have access to effective remedy through judicial, administrative, legislative or other appropriate means. Buckland goes on to state that the intention of the UK Government is to

ensure 'a comprehensive and well-equipped system of remedy ... to eradicate human rights abuses through both judicial and non-judicial processes.'<sup>201</sup>

However, UK legislation identified as positive by UN Representative John Ruggie has been reversed. This threatens to limit victims' access to the UK justice system, in direct contrast to the direction that international norms and legislation are moving, that is, towards greater protections of human rights and the rights of vulnerable communities.

The legislation of the European Union (EU) on conflict minerals was presented by the European Commission to the European Parliament as a voluntary set of principles.<sup>202</sup> But instead of taking a backwards step and approving another set of voluntary principles, the European Parliament decided to accept the proposals of INGOs and voted for an amendment to make the requirements legal and binding. Whilst this proposed mandatory system aligns the EU with global efforts to tackle a minerals trade linked to conflict, corruption, and human rights abuses, it is very limited in that it only covers four minerals - tin, tungsten, tantalum and gold. Consequently, the regulation, as currently drafted, cannot adapt to developments in the resources trade, or to the changing nature of conflict or human rights abuses. The regulation should include a mechanism that allows for other minerals and natural resources to be added at a later date; as in the case of similar legislation in the United States. If the UK government wants to fulfill the commitment made during the previous coalition government to not downgrade human rights to commercial interests, it will have to ensure that the European Parliament proposal on conflict minerals is not only mandated by legal requirements but also ensure that the implementation is vigorous. The UK also has to address backward step taken in national legislation on access to the UK Justice System for the victims of UK registered or headquartered companies.<sup>203</sup>



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200 ABColombia interview in Rio Quito, October 2014.

201 UK Solicitor General Robert Buckland QC MP on business and human rights at the Law Society Conference, 10 December 2014.

202 SOMO paper, There is more than 3TG. The need for the inclusion of all minerals in EU regulation for conflict due diligence, January 2015.

203 For further information on the Legal Aid Law see:

<https://www.thebureauinvestigates.com/2011/10/28/analysis-human-rights-abuse-claims-to-lose-out-if-legal-aid-reform-goes-through/>

## About us

### ABColumbia

The ABColumbia is a group of leading UK and Irish organisations with programmes in Colombia. We work on questions of human rights, development and forced displacement. ABColumbia's members are CAFOD, Christian Aid (UK and Ireland), Oxfam GB, SCIAF, and Trócaire. Amnesty International and Peace Brigades International are observer members.

ABColumbia develops the collective advocacy work of members. Our members work with around 100 partner organisations in Colombia, most of them with little access to decision-making forums nationally or internationally.

[www.abcolombia.org.uk](http://www.abcolombia.org.uk)

### Tierra Digna

The Centre for Social Justice Studies 'Tierra Digna' is a Colombian organisation dedicated to the defense of the territory, life and culture of communities affected by economic policies and extractives projects. The organisation offers comprehensive support to mainly rural communities through legal assistance and research, strengthening and exchanging knowledge, guaranteeing access to justice for affected communities and their rights in order to counteract the impunity that characterises these violations.

[www.tierradigna.org](http://www.tierradigna.org)

### Centro de Investigación y Educación Popular/Programa por la Paz (CINEP/PPP) Colombia

The Centro de Investigación y Educación Popular/Programa por la Paz (Centre for Investigation and Popular Education/Programme for Peace) is a non-profit foundation that seeks social change in Colombia. It aims to construct a society that is just, democratic, peaceful and inclusive of all the men and women that have been excluded from society – including Colombia's victims. CINEP/PPP has been active since 1972. The work carried out by CINEP/PPP is focused on research, education, advocacy, and communication. In addition, CINEP/PPP offers support to social organisations.

[www.cinep.org.co](http://www.cinep.org.co)

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# ABColumbia

CAFOD, Christian Aid, Oxfam GB, SCIAF, Trócaire  
Working for Peace and Human Rights in Colombia

Romero House, 55 Westminster Bridge Road, London SE1 7JB

Tel: +44 (0) 207 870 2216/7

Email: [abcolombia@abcolombia.org.uk](mailto:abcolombia@abcolombia.org.uk)

October 2015

With support from

