

Mr. Luis E. Marulanda
Vice President of Public Affairs and Communications
Cerrejón

11 August 2020

Dear Mr. Marulanda,

Thank you for your letter dated 5 June 2020 and please accept our apologies for the delay in our response. Further to our Press Release of 28 April 2020ⁱ our recommendations remain appropriate and relevant. The issues raised in the press release represent the experiences of communities and are further substantiated by various rulings of the Colombian Constitutional Court, Resolutions by the Ministry of the Environment, other technical and expert reports, which we outline in detail below.

Moreover, we wish to communicate our grave concerns related to Cerrejón's lack of full compliance with, and acknowledgement of, the evidence contained in the various judgements of the Colombian Constitutional Court.

We explicitly reject Cerrejón's assertions against ABColumbia and CINEP of being "biased" and presenting "unsubstantiated" claims. Such statements are inaccurate and irresponsible and can only be understood as an attempt to discredit both organisations and to divert attention from the grave situation affecting communities in La Guajira.

Points raised in ABColumbia and CINEP's Press Release, "Liberate the Bruno Stream" of 28 April 2020:

- 1. "Communities around Cerrejón have struggled in the courts to prevent the destruction of their rivers."**

There are various rulings from both the Constitutional Court and other Courts in relation to Cerrejón's mining activities that refer to the violation of the fundamental rights of the Wayuu and Afro-Colombian peoples by Cerrejón, including the right to water, as well as related rights to health, food, a healthy environment, prior consultation and decent living conditions: **T614/2019** (health, life and personal integrity, healthy environment and privacy); **SU 698/2017** (water in all of its aspects: accessibility, availability and quality; health; food security); **T-704 of 2016** (prior consultation, environmental management, violation of the fundamental rights as a consequence of air pollution, water and health) **T-256/2015** (water).

There are also a range of reports and technical studies showing how mining activities carried out by Cerrejón have affected a large part of the water courses of rivers and streams that are important to the communities.

- 2. ABColumbia and CINEP claimed that there are more and more sentences from the Constitutional Court and local courts in which Cerrejón is sanctioned for the damages caused by open-pit mining but that Cerrejón persistently fails to comply. Protection of the communities' rivers has not been prioritised either by local authorities or by the Cerrejón**

mine. The communities' own sources of water are being cut off. Although Cerrejón is supporting the distribution of water and humanitarian aid, the denial of communities' right to water in the first place makes them more dependent on aid. As COVID-19 hits Colombia the lack of access for these communities to food and clean water in the lockdown becomes a matter of life or death.

The Colombian Constitutional Court in its decision SU 698/2017 of 28th November 2017ⁱⁱ which was rendered in a process initiated against the diversion of Arroyo Bruno, confirmed that Wayúu communities are *'communities highly dependent on the ecosystem services provided by biodiversity'*ⁱⁱⁱ and that this ecosystem suffers a high level of *'fragility, vulnerability and deterioration'*^{iv}. Such deterioration arises not only from the natural conditions of the ecosystem, **as argued by Cerrejón** in its letter of 5 June 2020, but more importantly, it is specifically caused by mining activity. In this context, the Constitutional Court emphasised that, generally, there is interdependency between the right to water, the right to food and the right to health. However, in cases such as Arroyo Bruno, this linkage is particularly intense. According to the Court, this means that such rights are not satisfied only by providing food or water, **i.e. 'it is not enough that businesses provide to the communities the daily portion of drinking water [or food] for the satisfaction of their basic necessities.'**^v **The Court established that the continuity of water supply in the ecosystem must be guaranteed and that this can only be achieved by protecting the environment and controlling natural resource exploitation.**

In the same vein, decision **T 256/2015** of the Constitutional Court of Colombia on 5th of May of 2015^{vi}, established the relevance of the fundamental rights to the environment and water. The decision establishes three normative elements of the right to water: (i) accessibility, 'water and installation and services of water, must be accessible to all without discrimination'^{vii} (ii) availability 'water supply must be continuous and sufficient for personal and domestic use'^{viii}; and (iii) quality, 'water for personal and domestic use must be potable, therefore, it should not contain microorganisms or chemical or radioactive substances that may pose a threat to peoples' health'^{ix}. In line with the above, the Court considered that the **right to water of the population of La Guajira has been breached** insofar the population does not have access to potable water. **The Court affirmed that 'mining projects carried out in the region have an irreversible environmental impact affecting mainly the relationship between quantity and quality of water for consumption in the region'**^x. The decision concludes that in this case the three elements of the right to water have been breached: 'the breach of the right to water is multiple, it affects all of the contents of the right -**availability, quality and accessibility**- and dignity of the afro descendant community of Patilla y Chancleta'^{xi} Such breach of the right to water entails the breach of related rights such as the 'right to adequate housing, health, life, food, an appropriate level of life, cultural identity, free development of the personality, environment, human dignity and equality of indigenous and afro descendant communities of Patilla y Chancleta'.^{xii}

The Constitutional Court's decision **T 614/2019** of 16 December 2019 referred to the right to health, life, personal integrity and healthy environment.[8] The decision was rendered in a process brought by members of *Resguardo* Indígena Wayúu Provincial against Cerrejón. It made several references to other court rulings, including decision SU-123 of 2018 in which the Court established that 'corporations and not only States, have the obligation to act with due diligence in order to identify, prevent mitigate and respond to the negative consequences of their activities.'^{xiii} Hence, according to the Court corporations have the obligation to implement the required measures to prevent, mitigate, correct and reinstate the effects of extractive activity. The Constitutional Court concluded that Colombian law protects the right to health and the environment and **causing harm generates the obligation to 'adopt measures of prevention, mitigation, correction and environmental compensation against extractive activities.'**^{xiv} Despite Cerrejón's argument that pollution was within the acceptable limits, **the Court considered that a situation of risk exists to members of the community due to the extractive activity of *Carbones del Cerrejón*.**^{xv}

The Court reiterated that 'environmental control and the way to analyse whether there are negative impacts of a polluting activity cannot be reduced to a mathematical verification of values; it cannot be affirmed that if those parameters are fulfilled there has been no harm to the environment as if it were

an expert report.^{xvi} The Court reminds Cerrejón that there have been previous cases against this corporation which indicates that there is a ‘general context’ of vulnerability of communities facing mining exploitation. **The Court concludes that in this case Cerrejón had breached international standards of due diligence as required by the Ruggie Principles.**^{xvii}

Additionally, decision **T-704/2016** of 13 December 2016 deals with the ‘tutela’ brought by the Media Luna community against Cerrejón in relation to the expansion of Puerto Bolivar. In this decision the Court considered that this project produced carbon emissions that polluted the air and affected the health and economic activities of bordering populations. The Court commanded Cerrejón to **‘implement an immediate plan of mitigation of the environmental, social and cultural harms caused in the area, and to compensate such damages caused by carbon exploitation.**^{xviii}

Cerrejón has failed to fully comply with all of the above Court rulings.

Cerrejón's mining activity negatively intervenes in the communities’ main water sources to acquire the large amounts of water which it uses throughout its coal operation - from the exploitation to the port. La Guajira is an area with the greatest water deficit in the country,^{xix} where times of drought are becoming more frequent and which lacks adequate aqueduct services.^{xx}

As of 2016, it was estimated that 450,000 people depend directly and indirectly on the water of the Ranchería river. The problem is the monopolization of water in La Guajira, which according to official indicators, only 3 out of 15 municipalities have water fit for human consumption and only 4% of the rural population has access to portable water (Housing Ministry, 2019).

The *TERRAE Geoenvironmental*^{xxi} study^{xxii}, reports that in the northern part of Cerrejón’s exploitation area alone, approximately 40% of the water courses of the Rancheria river, Tabaco and Bruno streams, tributaries and secondary channels have been affected or lost. This is supported by the **Ministry of the Environment’s Resolution 2097 of 2005**, which warns that as a result of the mining activities of Cerrejón, the water from some of the streams are no longer reaching the Ranchería river, affecting its flow and ecosystems, as well as those of the streams feeding it. The Resolution also highlights that mining activity requires the use of large quantities of water, both surface and underground, which affects the waterways and flows of rivers and streams. According to CAJAR, in the information presented in a legal submission to the **Colombian State Council in 2019**^{xxiii}, there are structural interventions in 19 rivers and streams.

In June 2020, the Comptroller General in an audit report on Constitutional Court Sentence SU 698/2017, was damning regarding the failures to implement the Court’s ruling. It listed 14 shortcomings of the state in ensuring its implementation, seven of which may have disciplinary effect, against three entities the *Ministerio de Ambiente y Desarrollo Sostenible* (MADS), the Director General of the *Corporación Autónoma de La Guajira* (Corpoguajira) and the Director General of the *Autoridad Nacional de Licencias Ambientales* (ANLA). **The first, and arguably most important finding is the lack of a roadmap (workplan) ordered by the Constitutional Court for the temporary and provisional return of the Arroyo Bruno to its “natural channel”.**

The *Controlaría* analysed in detail the response of the ‘interinstitutional roundtable’, of which paradoxically Cerrejón is a member, to the order of the provisional re-diversion of the stream. The report of the interinstitutional roundtable, according to the Comptroller, lacked information and structure. Furthermore, it considered that it was **biased** because it was predominantly based on secondary information provided **by Cerrejón** and **disregarded information presented by other entities calling into question Cerrejón’s statements regarding the positive effects of the diversion.** In particular, the report failed to mention the social, cultural, economic and health-related impacts of the diversion on the local population. According to the Comptroller General, the potential negative impacts of releasing the Arroyo Bruno to flow along its natural channel that were stated in the report referred to the impacts of a complete dismantling of the newly built channel. This represented the

most extreme measure and disregarded the fact that the Constitutional Court asked for a temporary and provisional release of the hydraulic tap to allow the Arroyo Bruno to run along its natural course until the environmental and social impacts of the diversion can be established with clarity. Furthermore, the **affected communities did not participate in the drafting of the report of the roundtable**, and the roundtable **had not answered to the issue of water scarcity in the different communities**; especially if the Arroyo Bruno remains diverted.

Reports produced by Carbones del Cerrejón Ltd note that climate variability has exacerbated water scarcity in the department, which is reflected in a decrease in the availability of both surface and groundwater sources in the Ranchería river basin.^{xxiv} Several studies point out that coal mining in general, and Cerrejón specifically, has accelerated climate change and created risks and impacts on groundwater supplies.^{xxv} In 2014, IDEAM characterised the Guajira peninsula as one of the most vulnerable areas to climate variability in the country, and that its high levels of aridity make it one of the regions with the largest water deficit. Cerrejón's monopolisation of water for its mining activities is restricting access to water for local communities, this has made them **dependent during the COVID 19 crisis on water delivery programmes** from Cerrejón and other agencies.

Finally, it is essential to recall that the Colombian Constitution operates the "**Precautionary Principle**" in respect to the environment. The Comptroller General in their report (finding 12) clearly state, that the decision to leave the hydraulic plug in place cutting off the Arroyo Bruno, was based on "insufficient" evidence and failed to take into consideration the impacts. It is essential to apply the precautionary principle to the Bruno stream and maintain its integrity whilst carrying out the study ordered by Sentence SU 698/2017, whereby the Court ordered that seven uncertainties be addressed that were not considered when diverting the Arroyo Bruno.

3. ABColombia and CINEP stated: *Defending rivers, water, territory is a practice that costs lives in Colombia. Indigenous leaders and environmental defenders protesting against the mine have been threatened and killed and this is totally unacceptable*.

An unprecedented number of human rights defenders and community leaders have been killed in recent years in Colombia. This is clearly illustrated by the fact that in the last three years over 100 human rights defenders have been killed annually. Global Witness pointed out in its report on environmental human rights defenders that Colombia was one of the most dangerous countries in the world.^{xxvi} This makes defending rights in the context of mining activities in Colombia very dangerous.

The Business & Human Rights Resource Centre (March 2020) Report, "Defenders in Colombia" states: "*The main economic sectors involved, representing 90% of attacks on business-related HRDs in Colombia between 2015 and 2019, are mining, fossil fuels, agriculture and livestock, and hydroelectric plants and dams. The most commonly documented type of attack were killings, followed by death threats, beatings and violence. Most of the HRDs under attack were leaders and members of affected communities, unionists, and Afro-Colombian and indigenous people ... the companies that were most often the subject of advocacy by HRDs who were attacked were AngloGold Ashanti, Big Group Salinas(BG Salinas), Cerrejón Coal (Non-Operated Joint Venture of Anglo American, BHP and Glencore), Ecopetrol & EPM.*"

- **On 17 June 2020**, José Silva, president of Nación Wayuu, an NGO defending the human rights of the Wayuu people in La Guajira, found a floral wreath at the entrance to his home with a threatening note saying, "Your funeral is approaching." Nación Wayuu had been working in co-operation with various indigenous communities in the area, making public complaints and offering legal advice on violations of human and collective rights.
- **12 March 2020** Death threats issued against *Fuerza de Mujeres Wayuu* the threats were issued by *Aguilas Negras* (Black Eagles a neo-paramilitary group) Comando Central Bloque Capital DC (Central Command, Bogota). Mentioned by name are Jaqueline Romero, Deriz Paz, Miguel Iván Ramírez, Duky Cortes (Dulcy Cotes), Carmen Ramírez and Luis Misael Socarras.

- In **June 2019** Community leaders from Tabaco, Charito and *El Rocío* received pamphlets threatening them just before they were to take part in a Public Hearing regarding the Arroyo Bruno
- **2 May 2019** Wayuu indigenous organisation, *Fuerza de Mujeres Wayuu*, other community leaders and members of mine workers' union Sintracarbon, received death threats.
- **On 29 April 2019**, two defamatory and threatening pamphlets against the social organisation *Fuerza Mujeres Wayuu* from a group identifying itself as Águilas Negras – Bloque Capital D.C. The following leaders were listed as particular targets: Karmen Ramírez, Miguel Iván Ramírez, Jakeline Romero, Deris Paz, Luis Misael Socarra and Dulcy Cotes. The organisation focuses on the alleged negative environmental and human rights impact of the mining company El Cerrejón, in the department of La Guajira. Cerrejón and other coal extraction and export companies in La Guajira and Cesar issued a public statement condemning the threats in May 2019.
- **August 2019:** following public pronouncements by Cerrejón regarding the legal action to nullify its mining operations environmental licence, community leaders and organisations that had submitted this application to the Court were victims of telephone threats and intimidations, they were followed, and harassed by unidentified actors.
- **On 10 October 2018** Threats and intimidation against the *Fuerza de Mujeres Wayuu* persecution deployed by armed paramilitary groups known as “Águilas Negras” [Black Eagles], who scattered leaflets along the Cerrejón railroad, threatening to kill those who defend life in the territory. Just before the October 2018 London AGM of BHP. It is unclear whether the timing was deliberate.

It was therefore positive to see the intervention in May 2019, of Cerrejón along with other coal extraction and export companies in La Guajira and Cesar issue a public statement condemning the threats made on 29 April 2019, against the *Fuerza Mujeres Wayuu* allegedly from Águilas Negras – Bloque Capital D.C.

Nevertheless, one of the allegations that communities make is that Cerrejón's media statements allegedly fuel hostilities towards them and puts their lives at risk. This is seen clearly on 23 August 2019, in reference to the legal challenge made by local communities against Cerrejón's environmental license, in a media interview **Cerrejón's president Guillermo Fonseca declared:**

*“...We also feel the impact that this could have in the event that there is **a ruling in favour of the plaintiffs, the impacts on the generation of employment for the twelve thousand families that depend on Cerrejón, in the royalty income for the nation and for the Department**”...and went on to say “the dynamic of the communities not only has Cerrejón at a standstill, but also other extractive industries. The attitude of the communities has to change.... The communities are focused on protests in a very selfish way... the wellbeing of the country has to come before that of a few communities. These communities are sometimes the only beneficiaries, with lawyers and some NGOs who are profiting from these processes against our companies.”^{xxvii}*

A public statement suggesting that those **criticising the company will be responsible for the loss of employment in the region and income for the department which inevitably would effect services**, in the dangerous and risky context of killings and threats against community leaders **is very dangerous and irresponsible**. The UN Special Rapporteur in his 2019 report highlighted that such statements undermine human rights defenders and **expose them to greater risks and violations**. He went on to recommend that companies **refrain from stigmatising rights defenders** and instead publicly recognise the **important role that they play**^{xxviii}

Finally, we would recommend that Cerrejón **complies fully with all the Court Orders and respects the serious criticisms in the Comptroller General's report**. We would specifically highlight that in order to do this Cerrejón should **immediately removes the hydraulic plug and allow the Arroyo Bruno to return to its natural course** before any further damage is done. Comply with the Court's orders to

ensure full participation of the communities affected and take a decision based on sufficient, rigorous and complete information.

We would also recommend that Cerrejón makes positive statements about the role of human rights defenders, community leaders including trade union leaders in accordance with the recommendations of the UN Special Rapporteur Michel Forst's report (December 2019).

As the end of the current licence approaches and the life of the mine comes to an end it is imperative that Cerrejón has an adequate mine closure plan that it has consulted, with the indigenous and afro-Colombian communities and workers affected, from an early stage in order that there can be real participation and they can evaluate critique *and contribute to it*.

Yours sincerely,



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ABColumbia Programme and Advocacy Manager

Signature



Luis Guillermo Guerrero Guevara
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ⁱ [ABColumbia Press Release](#): Liberate the Bruno Stream, 28 April 2020

ⁱⁱ [Sentencia SU 698/2017](#) de 28 de noviembre de 2017

ⁱⁱⁱ Sentencia SU 698/2017 Considerando 4.1 'comunidades altamente dependientes de los servicios ecosistémicos que provee la biodiversidad'

^{iv} Sentencia SU 698/2017 Considerando 4.1 'fragilidad, vulnerabilidad y deterioro'

^v Sentencia SU 698/2017 Considerando 4.4 'Primero, los mencionados derechos no se agotan en su faceta prestacional, por lo que, por ejemplo, no basta con que el Estado o los particulares ofrezcan a las comunidades raciones diarias de agua potable para la satisfacción de sus necesidades básicas, o que les provean de alimentos necesarios para garantizar su nutrición.'

^{vi} [Sentencia T 256/2015](#) de 5 de mayo de 2015

^{vii} Sentencia T256/2015 Paragraph 73 'el agua y las instalaciones y servicios de agua deben ser accesibles para todos, sin discriminación alguna'

^{viii} Sentencia T256/2015 Paragraph 73 'el abastecimiento de agua de cada persona debe ser continuo y suficiente para usos personales y domésticos'

^{ix} Sentencia T256/2015 Paragraph 73 'el agua necesaria para cada uso personal o doméstico debe ser salubre, y por lo tanto, no ha de contener microorganismos o sustancias químicas o radiactivas que puedan constituir una amenaza para la salud de las personas'.

x Sentencia T256/2015 Paragraph 84 ‘los proyectos minero-energéticos que se llevan a cabo en la Guajira tienen un impacto ambiental irrecuperable afectando principalmente en relación a la cantidad y calidad de agua para el consumo en la región’.

xi Sentencia T256/2015 Paragraph 167 ‘la vulneración al derecho fundamental al agua es múltiple, por cuanto afecta todos los contenidos del derecho -disponibilidad, calidad y accesibilidad- y la dignidad inherente a la comunidad afrodescendiente de Patilla y Chancleta’.

xii Sentencia T256/2015 Paragraph 168 ‘así, se constatan las siguientes conculcaciones sobre los derechos a la vivienda digna, a la salud, a la vida, a la alimentación, al nivel de vida adecuado, a la identidad cultural, al libre desarrollo de la personalidad, al ambiente, a la dignidad humana y a la igualdad, de las comunidades indígenas y afrodescendientes de Patilla y Chancleta’.

xiii [Sentencia T 614/2019](#) de 16 de diciembre de 2019: Considerando 8.1 ‘las empresas, y no solo los Estados, tienen la obligación de actuar con una debida diligencia a fin de identificar, prevenir, mitigar y responder a las consecuencias negativas de sus actividades’.

xiv **Sentencia T 614/2019 de 16 de diciembre de 2019** Considerando 8.10 ‘adoptar medidas de prevención, mitigación, corrección y compensación ambiental frente a las labores extractivas’.

xv **Sentencia T 614/2019 de 16 de diciembre de 2019** Considerando 9.3 ‘existe una clara situación de riesgo para quienes habitan el resguardo indígena Provincial’.

xvi **Sentencia T 614/2019 de 16 de diciembre de 2019** Considerando 9.9 ‘control ambiental y la forma de analizar si hay impactos nocivos de una actividad contaminante, no puede reducirse a la verificación matemática del cumplimiento de unos valores límite; menos aún, puede afirmarse que, si se acreditan estos parámetros, no se han ocasionado daños ambientales, como si se tratase de una especie de “dictamen pericial anticipado” al respecto’

xvii Considerando 9.10 ‘incumplió el estándar internacional de *debida diligencia* exigido por la *Declaración de Principios Rectores sobre las Empresas y los Derechos Humanos*, también denominados “*Principios Ruggie*” para no vulnerar derechos humanos de poblaciones susceptibles de ser afectadas’.

xviii [Sentencia T-704/2016](#) de 13 de diciembre de 2016: Punto Resolutivo Quinto ‘implementar un plan inmediato de mitigación de daños ambientales, sociales, culturales, en la zona, para lo cual, deberá compensar los daños causados por la explotación de carbón al ambiente y a los derechos de las comunidades afectadas’.

xix Análisis multitemporal de afectación de cuerpos de agua en el área intervenida por la extracción minera del área norte de Cerrejón y en la cuenca del Arroyo Bruno (La Guajira, Colombia) realizado por la Corporación Geoambiental TERRAE en septiembre de 2019.

xx Análisis multitemporal de afectación de cuerpos de agua en el área intervenida por la extracción minera del área norte de Cerrejón y en la cuenca del Arroyo Bruno (La Guajira, Colombia) realizado por la Corporación Geoambiental TERRAE en septiembre de 2019.

xxi *TERRAE Geoenvironmental is a non-profit organization of geo-environmental professionals*

xxii Análisis multitemporal de afectación de cuerpos de agua en el área intervenida por la extracción minera del área norte de Cerrejón y en la cuenca del Arroyo Bruno (La Guajira, Colombia) realizado por la Corporación Geoambiental TERRAE en septiembre de 2019.

xxiii Cajar submission to the Council of State, *Demanda de Nulidad Simple contra la Licencia Ambiental LAM 1094 del megaproyecto minero energético “Carbones del Cerrejón”, 2019*

xxiv Informe sostenibilidad Cerrejón 2016, p.26: ‘La variabilidad climática de los últimos años, con tendencia a extremar las sequías, ha acentuado la escasez del agua en La Guajira. Entre otros, este hecho se ha reflejado en una menor disponibilidad de este recurso en las fuentes superficiales y subterráneas. Esta es precisamente la situación en la cuenca del río Ranchería, principal cuerpo de agua de La Guajira ...’

xxv [Censat \(2016\)](#): Informe de verificación arroyo Bruno. Posibles impactos de su desviación: and [TERRAE Geoenvironmental \(2016\)](#): Consideraciones ambientales acerca del proyecto carbonífero de El Cerrejón

xxvi [Global Witness Report Defending Tomorrow](#), 29 July 2020

xxvii [El Pilon](#), “Quieren hacer ver a Cerrejón culpable de la crisis en La Guajira”: Guillermo Fonseca, presidente, 23 August 2019

xxviii Report of the [UN Special Rapporteur](#) on the situation of human rights defenders, 26 December 2019 para 77