

**NON-COMPLIANCE WITH THE OECD GUIDELINES
FOR MULTINATIONAL ENTERPRISES**

CMC



Mientras nosotros les damos vida a través del carbón allá en Europa, nosotras y nosotros estamos muriendo.

As we give you life in Europe through coal, we are dying.

— Tabaco community

Estamos sacrificando nuestras propias vidas, las vidas de nuestros mayores y nuestros hijos, para la comodidad de la empresa, de ellos y ellas que viven en Europa.

We are sacrificing our lives, the lives of our elderly and of our children for the commodity of the company and for those who live in Europe.

— Provincial community

Vale más nuestras vidas, que las toneladas de carbón que saca Cerrejón.

Our lives are worth more than the tonnes of coal that Cerrejón removes.

— Varios community

Subject: Non-compliance with the OECD Guidelines for Multinational Enterprises by the Coal Marketing Company (CMC) Ltd.

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GLOSSARY

Organisations:

AIDA	The Interamerican Association for Environmental Defense
ask!	Arbeitsgruppe Schweiz Kolumbien
BHP	BHP Group Limited and BHP Group Plc
CAJAR	Colectivo de Abogados 'José Alvear Restrepo'
Cerrejón	Carbones del Cerrejón Limited and Cerrejón Zona Norte S.A.
CINEP	Centro de Investigación y Educación Popular
CMC	CMC-Coal Marketing DAC
The enterprise / the MNE	Carbones del Cerrejón Limited, Cerrejón Zona Norte S.A, Anglo American plc, BHP Group Limited, BHP Group Plc, and Glencore Plc
ESB	Electricity Supply Board
GLAN	Global Legal Action Network
The parent companies	Anglo American, BHP, and Glencore

International bodies:

CESCR	The UN Committee on Economic, Social and Cultural Rights
IACHR	Inter-American Commission on Human Rights
ICtHR	Inter-American Court of Human Rights
NCP	OECD National Contact Point
OECD	Organisation for Economic Co-operation and Development
UN	United Nations
UN Human Rights Committee	The United Nations Human Rights Committee
WHO	World Health Organization

Treaties and instruments:

CMC	Convention on the Rights of the Child
Due Diligence Guidance	The OECD Due Diligence Guidance for Responsible Business Conduct
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights

ILO Indigenous and Tribal Peoples Convention

International Labor Organization Indigenous and Tribal Peoples Convention

MNE Guidelines

The OECD Guidelines for Multinational Enterprises

Other:

MNE

Multinational enterprise

FPIC

Free, Prior and Informed Consent

I. EXECUTIVE SUMMARY

GLAN is submitting a complaint in accordance with the OECD MNE Guidelines. The complaint is supported by Christian Aid, the Centro de Investigación y Educación Popular (CINEP), the Colectivo de Abogados ‘José Alvear Restrepo’ (CAJAR), the Interamerican Association for Environmental Defense (AIDA), Arbeitsgruppe Schweiz Kolumbien (ask!), and ABColombia. The complaint relates to the activities of a multinational enterprise (MNE) which owns and operates the Cerrejón mine in Colombia.

The Cerrejón mine is one of the largest open pit coal mines in the world, covering approximately **69,000 hectares** of land in the administrative region of La Guajira in Colombia. The persistent expansion of the mine over the past four decades has led to ruinous environmental degradation with serious human rights impacts. The air in La Guajira contains particulate matter in excess of the limits recommended by the WHO and imposed on Cerrejón by the Colombian courts. Annually there are **over 400 emergency room visits** and **over 336,000 respiratory symptom cases** in La Guajira **directly attributable to the mine**. Studies have shown that air pollution is driving elevated levels of cellular damage, in turn raising the risk of **cancer, DNA damage, and chromosomal instability** for those living in the region.

As well as contaminating the air in La Guajira, the mine consumes and contaminates significant quantities of water. It uses approximately **24 million litres of water per day**. In 2019, it **dumped 578 million litres of liquid waste** into natural bodies of water. Studies on the Ranchería River have found **unsafe levels of harmful metals** in the water, including mercury and lead. Cerrejón’s diversion, consumption, and contamination of water has led to water scarcity, food scarcity, and health impacts for those who live in La Guajira.

These harms have been expedited because of the mine’s various **structural interventions into the hydrological system** in La Guajira. The Ranchería River is the principal waterway in the region, and many communities once relied upon it for their domestic and farming activities. The River’s flow was previously fed by 23 main tributaries, among them the Palomino River¹ and a large number of streams. Many of these tributaries have been destroyed or diverted to allow for the expansion of the mine. It is estimated that Cerrejón has carried out interventions into more than seventeen *Arroyos* (waterways) and has affected a further thirty streams in the

¹ The Palomino River is in Barrancas.

region.² The recent diversion of a tributary called the Arroyo Bruno was carried out despite a court judgment finding that it could violate fundamental rights. The Arroyo Bruno supports the ecosystem of a tropical dry forest, which is in critical danger of extinction.

La Guajira is the **ancestral homeland of the indigenous Wayúu people**, and many Wayúu communities have been displaced to make way for the mine. **Afro-Colombian** and campesinos (subsistence farmer) communities, who also live in the region, have faced similar forced displacement. At times, **evictions have been carried out with armed guards, tear gas, and metal projectiles**. In 2016, **bulldozers** were again used to destroy an Afro-Colombian village. Even when Cerrejón claims to have consulted with displaced communities, it has not offered a genuinely free choice as to relocation. According to local communities and civil society organisations, consultation is premised on the assumption that expansion will continue.

In 2020, Cerrejón's activities were denounced by a number of United Nations (UN) Special Rapporteurs, independent experts who assist the UN Human Rights Council in promoting and monitoring human rights worldwide.. David Boyd – the UN Special Rapporteur on human rights and the environment – remarked that ‘the situation that was brought to my attention recently regarding the El Cerrejón mine and the Wayúu indigenous people is one of the most disturbing situations that I have learned about in my two and half years as Special Rapporteur on human rights and the environment.’³

CMC-Coal Marketing (CMC), a private limited company registered in Ireland, is the exclusive marketer of Cerrejón coal. It negotiates and concludes all contracts for the sale of Cerrejón coal. As explained below, CMC is an entity within multinational enterprise (MNE). The MNE Guidelines set certain minimum standards for multinational enterprises. These Guidelines apply to enterprises which contribute to adverse impacts through their operations. **CMC has contributed to human rights and environmental impacts in La Guajira by promoting and coordinating the sale of Cerrejón coal**. It has also failed to carry out adequate due diligence to identify, prevent, and mitigate adverse impacts to which it is contributing; and has failed to disclose material information about the impacts of its operations.

² CAJAR, “Diez Verdades sobre Carbones Cerrejón – Report”, (2019) <<https://perma.cc/529Z-GBG2>>; Mauricio Ramírez, ‘La red hídrica afectada por la explotación minera de la Guajira’(30 January 2018) <<https://perma.cc/RXH7-YG33>>.

³ ABColombia, ‘Digging Deeper: UN Special Rapporteur David Boyd’s video statement – El Cerrejón and the need for TNC Treaty’ <<https://www.youtube.com/watch?v=ffWTT9Q69g8>> at 1:30.

Pursuant to the MNE Guidelines, CMC must stop contributing to adverse impacts in La Guajira. This means that CMC must **stop marketing and selling Cerrejón coal**. CMC must also cooperate in **remediating the adverse human rights impacts to which it has contributed**. Human rights remediation will require environmental rehabilitation, and cooperation should include the provision of funding for remediation. Finally, CMC must issue a **public statement committing to the above actions** and acknowledging and **apologising** for its contributions to adverse impacts.

<i>Category</i>	<i>Provisions</i>	<i>Failures to comply</i>	<i>Actions</i>
<i>Human rights</i>	Ch II article A.11 Ch IV articles 2, 4 and 6	<ul style="list-style-type: none"> • Contributing to adverse human rights impacts and failing to address these impacts when they have occurred • Failing to remedy adverse human rights impacts which to which it has contributed • Failing to have a policy commitment to respect human rights 	<ul style="list-style-type: none"> • Acting as the sole marketer of Cerrejón coal in full knowledge of the human rights impacts caused by its production • Presenting a misleading impression of the impacts of Cerrejón’s operations • Failing to have a human rights policy
<i>The environment</i>	Ch II article A.11	<ul style="list-style-type: none"> • Contributing to adverse impacts to the environment and failing to address these impacts when they have occurred 	<ul style="list-style-type: none"> • Acting as the sole marketer of Cerrejón coal in full knowledge of the environmental impacts caused by its production • Presenting a misleading impression of Cerrejón’s environmental impacts

			to both coal purchasers and the public
<i>Due diligence</i>	Ch II article 10 Ch IV article 5 Ch VI article 3	<ul style="list-style-type: none"> • Failing to identify, prevent, and mitigate adverse impacts on human rights and the environment • Failing to account for how adverse impacts have been addressed 	<ul style="list-style-type: none"> • Apparently failing to assess at any point the human rights and environmental impacts of its operations
<i>Disclosure</i>	Ch II articles 1, 3 and 4 Ch VI articles 1 and 2	<ul style="list-style-type: none"> • Failing to disclose timely and accurate information on all matters regarding its activities • Failing to adopt, and report on, performance in relation to value statements, statements of business conduct, policies and other codes of conduct • Failing to report on environmental and social performance • Failure to provide the public with adequate, measurable, verifiable and timely information on the potential environmental impacts of its activities 	<ul style="list-style-type: none"> • Failing to disclose the human rights and environmental abuses caused by Cerrejón to both purchasers and the public at large

II. THE COMPLAINT

A. The entity: CMC

CMC is the **exclusive marketer of Cerrejón coal**. Cerrejón owns and operates one of the largest open-pit coal-export mining operations in the world.⁴ CMC and Cerrejón are both fully and equally owned by the same parent companies, namely BHP (formerly BHP Billiton), Anglo American, and Glencore.⁵ CMC is thus part of an MNE comprised of the following entities:

- CMC-Coal Marketing DAC, which is registered in Ireland.⁶
- Anglo American plc, which is registered and headquartered in England.⁷
- BHP Group Limited, which is registered in Australia,⁸ and BHP Group Plc, which is registered in England.⁹ The two companies (collectively BHP) have identical Boards of Directors and are run by a unified management team; their global headquarters is located in Australia.¹⁰
- Glencore Plc, which is registered in Jersey¹¹ and headquartered in Switzerland.¹²
- Two holding companies, Carbones del Cerrejón Limited, which is incorporated in Anguilla (a British overseas territory); and Cerrejón Zona Norte S.A., which is incorporated in Colombia (referred to collectively as ‘Cerrejón’).¹³

The MNE Guidelines do not provide a definition of ‘multinational enterprises’.¹⁴ However, the Guidelines do state that MNEs ‘usually comprise of companies or other entities established in

⁴ Cerrejón, ‘Who we are?’ <<https://perma.cc/663V-NHQA>>.

⁵ *ibid.*

⁶ Company registration no. 359984. Registered office: Fumbally Square, New Street, Dublin 8, Ireland.

⁷ Registration number 03564138. Registered office: 20 Carlton House Terrace, London SW1Y 5AN England.

⁸ ABN 49 004 028 077. Registered office: 171 Collins Street, Melbourne, Victoria 3000, Australia.

⁹ Registration number 3196209. Registered office: Nova South, 160 Victoria Street London SW1E 5LB United Kingdom.

¹⁰ BHP Group Limited, ‘BHP Annual Report 2019’ <<https://perma.cc/MJQ8-NLZH>> internal cover.

¹¹ Registration number: 107710. Registered office: 13 Castle Street St Helier Jersey JE1 1ES.

¹² Headquarters: Baarermattstrasse 3, P.O. Box 1363, CH-6341 Baar, Switzerland.

¹³ Cerrejón, ‘Cerrejón Sustainability Report 2018’ (2018) <<https://perma.cc/LQB4-WXE8>> p. 5; BHP Group Limited, ‘BHP Annual Report 2019’ <<https://perma.cc/MJQ8-NLZH>> p. 236; AngloAmerican, ‘Integrated Annual Report 2019: Re-Imagining Mining to Improve People’s Lives’ <<https://perma.cc/AE5Q-M8SM>> pp. 196 and 198.

¹⁴ OECD, *OECD Guidelines for Multinational Enterprises* (OECD Publishing, 2011) (hereinafter MNE Guidelines) p. 17, para 4: ‘A precise definition of multinational enterprises is not required for the purposes of the Guidelines...’

more than one country and so linked that they may coordinate their operations in various ways'.¹⁵

CMC's website states that:

*Coal Marketing DAC (CMC) and Carbones del Cerrejón Ltd (Cerrejón) work together to meet contractual commitments in terms of quality, quantity and timely delivery... To date, we have co-ordinated the sale and delivery of over 450 million tonnes of Cerrejón coal. Sales, service and technical support are managed from our office in Dublin.*¹⁶

*We work closely with the Cerrejón operations team to react swiftly to customers' needs and changing schedules. Through teamwork across all departments and geographical locations, we provide full and seamless customer support.*¹⁷

The entities, which are established in more than one country, thus coordinate their operations in various ways. Moreover, even if the Parent Companies afford CMC a high level of autonomy, they are still a single MNE: the MNE Guidelines are clear that the 'degree of autonomy' of each entity within an enterprise 'may vary widely',¹⁸ and the Guidelines apply to the activities of both parent companies *and* local subsidiaries, even when the subsidiary is responsible for the day-to-day oversight of those activities .¹⁹

The entities connected to Cerrejón are thus a single enterprise. This complaint relates to a single entity within that enterprise, namely CMC.

B. The notifier: GLAN

GLAN is a registered charity which was established in August 2015.²⁰ Its members include legal practitioners, investigative journalists, and academics. GLAN's charitable objects are 'to protect and promote human rights... throughout the world by... monitoring and reporting cases of human rights... [and] contributing to the sound administration of international legal standards and human rights law through litigation, advocacy, training and information

¹⁵ *ibid.*

¹⁶ CMC, 'CMC Coal Marketing Company' <<https://perma.cc/H5BG-A9D8>>.

¹⁷ CMC, 'Reliability: About CMC' <<https://perma.cc/28VC-RUGH>>.

¹⁸ MNE Guidelines p. 17, para 4.

¹⁹ *ibid.*

²⁰ GLAN is a registered charitable organisation in England and Wales (registered charity number 1167733).

sharing...²¹ GLAN's work focuses on the accountability of actors, particularly those based in developed countries, involved in violations of human rights, especially those committed in developing countries.

Since 21 June 1976, Ireland has maintained a commitment to the OECD Declaration and Decisions on International Investment and Multinational Enterprises,²² the most recent of which are the MNE Guidelines. When the MNE Guidelines are believed to have been violated, any 'interested party' may submit a complaint to the relevant NCP.²³ The MNE Guidelines do not provide a definition of 'interested party', but the Irish Department for Business, Enterprise and Innovation (DEBI) recognises that the interested party 'may be, for example... an NGO'.²⁴ GLAN is an NGO and is an interested party for the purposes of this complaint.

This submission is supported by:

- 1) **Christian Aid**, an international aid and development agency of the Protestant Churches of Ireland and Great Britain.²⁵ Christian Aid recently issued a report entitled *Undermining Human Rights: Ireland, ESB and Cerrejón coal*, which describes the human rights and environmental abuses occurring at Cerrejón.²⁶
- 2) **ABColumbia**, the joint advocacy project on Colombia of British and Irish Agencies.²⁷
- 3) **Arbeitsgruppe Schweiz Kolumbien (ask!)**, an independent human rights organisation based in Switzerland, which gives voice to the concerns of Colombian civilians.²⁸

²¹ Charity Commission, 'Data for financial year ending 30 June 2019: Global Legal Action Network (Glan), Charity no. 1167733, Charitable objects' <<https://perma.cc/8BUZ-FGLE>>.

²² OECD, *OECD Declaration and Decisions on International Investment and Multinational Enterprises* (latest version 2012) <<https://perma.cc/PF5B-FNHH>>.

²³ Cristina Tebar Less and Tihana Bule (Investment Division of the OECD Directorate for Financial and Enterprise Affairs), 'Global Forum on Responsible Business Conduct, National Contact Points: An Overview' (OECD Conference, 18-19 June 2015, Paris) p. 9; Department for Business, Enterprise and Innovation, 'National Contact Points for Ireland – Procedures for Dealing with Complaints Brought Under the OECD Guidelines for Multinational Enterprises' (December 2018) (hereinafter DBEI NCP Procedures) p. 2.

²⁴ DBEI NCP Procedures, *ibid* p. 2.

²⁵ See Christian Aid, 'Our Aims' <<https://perma.cc/DB9T-R4PE>>.

²⁶ Christian Aid, *Undermining Human Rights: Ireland, the ESB and Cerrejón coal* (February 2020) <<https://perma.cc/5MBX-YB5N>>.

²⁷ ABColumbia, 'About Us: British and Irish Agencies working in Colombia' <<https://perma.cc/4XZZ-NAMU>>.

²⁸ ask!, 'Über uns: Die ask! ist eine Menschenrechtsorganisation' <<https://perma.cc/A2SQ-KNH3>>

- 4) **AIDA** (the Interamerican Association for Environmental Defense), an environmental law organisation which seeks to protect the environment and communities suffering from environmental harm, particularly in Latin America.²⁹
- 5) **CINEP** (Centro de Investigación y Educación Popular), a non-profit foundation based in Colombia.³⁰ CINEP has long been an advocate for those affected by the operation of the Cerrejón mine.³¹
- 6) **CAJAR** (Colectivo de Abogados ‘José Alvear Restrepo’), a non-governmental Colombian legal organisation which has led numerous litigation and advocacy efforts on behalf of those affected by Cerrejón’s operations.³²

C. NCP jurisdiction

The MNE Guidelines state that ‘generally, issues will be dealt with by the NCP of the country in which the issues have arisen.’³³ The OECD has explained that the word ‘issues’ is not synonymous with the word ‘impacts’.³⁴ To illustrate this point, the OECD’s Coordination Guide for NCPs provides an example of ‘the issue of trade in minerals used to finance local conflict and human rights abuse. The impact... gives rise to several issues related to responsibilities of commercial actors along mineral supply chains... In this respect the underlying impact may give rise to multiple issues (or allegations) which implicate enterprises across various jurisdictions, and potentially, various NCPs.’³⁵

In this case, the impact of Cerrejón’s activities is felt in Colombia, and the issue of CMC’s failure to comply with the MNE Guidelines arises in Ireland. CMC is headquartered and registered in Ireland. This complaint therefore falls squarely within the remit of the Irish NCP.

²⁹ AIDA, ‘About Us’ <<https://perma.cc/H778-VSRD>>.

³⁰ See <<https://perma.cc/8VA7-8AKS>>.

³¹ See, for example, Cerrejón statement on lawsuit filed against comprehensive environmental management plan, 22nd August 2019 <<https://perma.cc/8QS6-RXAH>>.

³² See <<https://perma.cc/8NPS-XBTS>>.

³³ MNE Guidelines, Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, p. 82, para 23.

³⁴ OECD, *Guide for National Contact points on Coordination when handling Specific Instances*, *OECD Guidelines for Multinational Enterprises* (OECD 2019) (hereinafter NCP Coordination Guide) p. 6.

³⁵ *ibid.*

GLAN is simultaneously submitting a complaint to the Irish NCP about the Electricity Supply Board (ESB), an Irish state-owned MNE which is in a business relationship with Cerrejón. These complaints should be read together as they are based on the same factual background.

Complaints related to the impact of Cerrejón's activities are also being submitted to the Australian, UK, and Swiss NCPs, against BHP, Anglo American, and Glencore respectively (collectively the parent companies). These are the companies that form the consortium that owns Cerrejón and CMC. The MNE Guidelines state that:

*When issues arise from an enterprise's activity that takes place in several adhering countries or from the activity of a group of enterprises organised as consortium, joint venture or other similar form, based in different adhering countries, the NCPs involved should consult with a view to agreeing on which NCP will take the lead in assisting the parties.*³⁶

The OECD's Coordination Guide explains that this language 'covers situations where the activities of only one corporate entity are at issue... for example, a specific instance related to the conduct of a subsidiary operating in one jurisdiction, with a holding company in a second jurisdiction and a parent company in third could potentially implicate three NCPs. In these situations it will be necessary to appoint a lead NCP.'³⁷ The complaint submitted to the Australian, Swiss, and UK NCPs is about the Parent Companies' collective failure to comply with the MNE Guidelines with respect to the activities of their subsidiary Cerrejón. That issue arises in all three jurisdictions; as such, a lead NCP will have to be appointed with respect to that complaint.

The Guide further explains that:³⁸

The provision on appointment of a lead NCP does not cover situations where the conduct of various corporate entities, related to the same impact, is at issue. In these cases appointment of a lead NCP may not be necessary and the separate (but related) specific instances may be considered by several NCPs in parallel in order to correctly address the different issues raised.

³⁶ MNE Guidelines, Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, p. 82, para 24.

³⁷ NCP Coordination Guide (n 34) p. 8.

³⁸ *ibid*, emphasis added.

This complaint relates to the conduct of CMC as a single entity within the enterprise. The issue of CMC's failure to comply with the MNE Guidelines arises in Ireland. As such, unlike the complaint against the Parent Companies, **the complaint against CMC does not require identification of a 'lead NCP' and can be dealt with by the Irish NCP independently.** However, **coordination with the other NCPs will certainly be necessary**, as these NCPs will be dealing with the same underlying facts about the impacts of Cerrejón's activities. NCPs are required to co-operate 'if such a need arises, on any matter related to the Guidelines relevant to their activities'.³⁹ The OECD Coordination Guide further highlights the importance of consistent interpretation of the MNE Guidelines where multiple NCPs are dealing with related complaints,⁴⁰ and notes that 'the Guidelines broadly encourage cooperation amongst the NCPs on substantive matters related to them.'⁴¹

GLAN therefore requests that the Irish NCP issue its own decision in relation to CMC, but that it coordinate with the other relevant NCPs in assessing this complaint. GLAN submits that the Irish NCP must coordinate with the Australian, Swiss, and UK NCPs in seeking remediation of the adverse impacts caused by Cerrejón, to which CMC has contributed. GLAN is forwarding a copy of this complaint to the Australian, Swiss and UK NCPs companies.

³⁹ Amendment of the Decision of the Council on the OECD Guidelines for Multinational Enterprises OECD/LEGAL/0307 para I.2.

⁴⁰ NCP Coordination Guide (n 34) p. 9.

⁴¹ *ibid.*

III. CERREJÓN'S IMPACTS ON THE ENVIRONMENT AND LOCAL COMMUNITIES

A. Introduction

The Cerrejón mine is one of the largest open pit coal mines in the world and the largest in Latin America, covering an area of approximately 69,000 hectares of land in the middle of the ancestral land of the Wayúu.⁴² The Wayúu are indigenous peoples scattered across more than 15,000 km² of the department (i.e. administrative district) of La Guajira.⁴³ Their language is Wayúunaiki. La Guajira has also been home to Afro-descendant communities for around 500 years, since the *cimarronaje* process saw groups escape from enslavement and settle in the middle basin of the Ranchería river.⁴⁴ Although La Guajira is predominantly desert, the Wayúu and Afro-Colombian communities have historically had sufficient access to waterways.⁴⁵ As will be explained in detail below, the operation of the Cerrejón mine has changed this.

La Guajira is divided into three zones: High Guajira, Middle Guajira, and Low Guajira. El Cerrejón concentrates its mining operation in the Middle and Low Guajira zones. However, Cerrejón has built a railway to transport the coal, which runs through the entire Wayúu territory (see Figure 1 below). The railway stretches from the mine in Low Guajira to the Bolivar port, from where the coal is shipped globally.⁴⁶

The Ranchería River flows right beside the mine. Low Guajira used to be fertile, as it was where water resources were concentrated. It was once the *despensa agrícola* of La Guajira: the place that provided agricultural products to the rest of La Guajira.⁴⁷

⁴² Inter-American Commission on Human Rights, Resolution 60/2015 (Provisional Measures No 51/15), *Asunto niñas, niños y adolescentes de las comunidades de Uribí, Manaure, Riohacha y Maicao del pueblo Wayúu, asentados en el departamento de la Guajira, respecto de Colombia*, (11 December 2015) p. 2. <<https://perma.cc/3DUZ-RMPL>>.

⁴³ *ibid* p. 1.

⁴⁴ CINEP, *Bárbaros hoscós: historia de la (des)territorialización de los negros de la comunidad de Roche* (Bogotá, 2015).

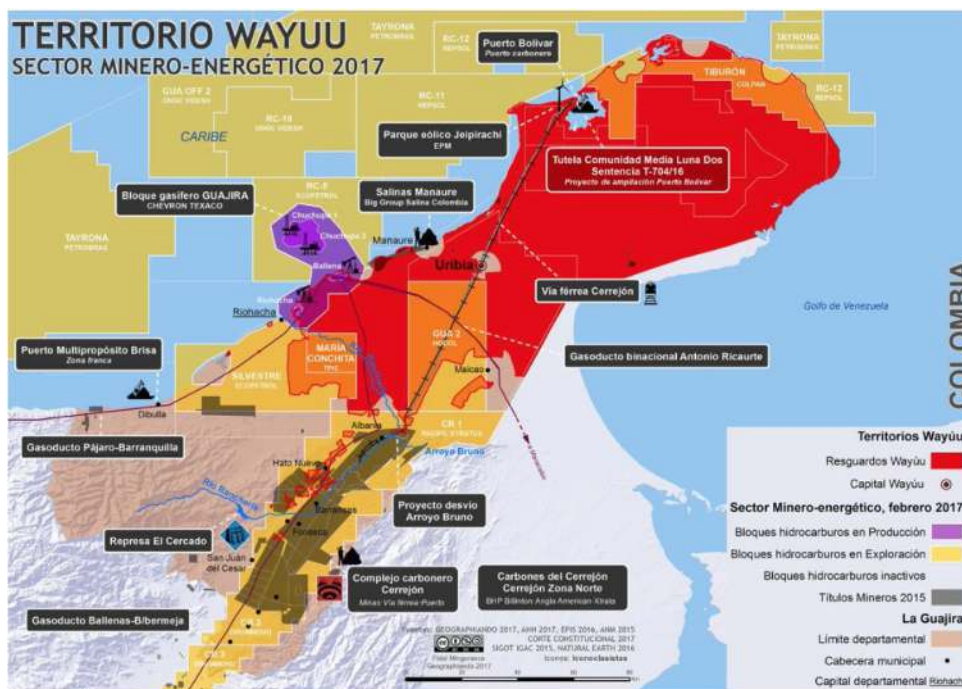
⁴⁵ CINEP, 'Minería a gran escala y derechos humanos: lo que el des-arroyo trajo a la Guajira' (2020) 61 Noche Niebla pp. 59-102, at p. 67. <<https://perma.cc/JXH7-GJ4T>>.

⁴⁶ Cerrejón, 'Cerrejón's Sustainability Report 2019' (hereinafter 'Cerrejón Report 2019') <<https://perma.cc/U84D-NYGR>> p. 70: in 2019, Cerrejón transported 27% of its coal to Europe, 42% to the Mediterranean, 25% to America and 6% to Asia.

⁴⁷ CINEP (n 45) p. 67.

The most productive lands in Low Guajira and Middle Guajira are precisely those that have been appropriated for the extraction of coal. The Wayúu explain:⁴⁸

Cerrejón has the most fertile, the most productive lands that we had here in Guajira, and today they have turned [these lands] into pure hills of sterile material, which even they themselves call sterile material, I hear, that woman is sterile, when... she cannot give birth to children. And if the land is barren, what can it give us?... How is it going to grow a Guáimaro tree there? Never.



Territorio Wayúu Wayúu Land

Fuente: Geogrphiano 2017, ANH 2017, EPIS 2016, ANM 2015, Corte Constitucional 2017, SIGOT IGAC 2015, Natural Earth, 2016.

Figure 1 The Cerrejón mine is located in the area shaded in brown. The remaining Wayúu territory can be seen in red.

The Wayúu and Afro-Colombian communities have for years been struggling against forced relocation, health issues, environmental degradation and the destruction of their rivers, all of which have been linked to the Cerrejón mine.

According to rulings of the Riohacha Administrative Court, the State Council and the Constitutional Court of Colombia, Cerrejón's mining operations directly impact a population of more than 300,000 people, across an area of 200 km².⁴⁹ As a result of Cerrejón's activities, 35 communities have been displaced from their lands and 17 waterways have dried up.⁵⁰ The

⁴⁸ Colombian Constitutional Court, SU-698 of 2017 relating to the Arroyo Bruno (hereinafter Colombian Constitutional Court, SU698/17) <<https://perma.cc/SPN3-V3KE>>.

⁴⁹ CAJAR, 'Diez Verdades sobre Carbones Cerrejón' (n 2) p. 7. This includes the municipalities of Fonseca, Barrancas, Hato Nuevo, Albania, Uribí and Maicao in the department of La Guajira.

⁵⁰ *ibid* p. 6.

operation of the Cerrejón mine has had major consequences for the health of the communities living near the mine. In 2019, the Colombian Constitutional Court found that harm to human health ‘will be caused or continue to be caused’ by pollution from Cerrejón’s mining activities, and that ‘this would imply serious and irreparable harm to the community’.⁵¹

This 2019 judgment is the latest in a series of judicial findings denouncing Cerrejón’s activities. Indeed, the Constitutional Court identified the risks linked to mining in La Guajira as early as 1992,⁵² and the mine has been the subject of litigation many times since then.⁵³

In 2015, for example, the Constitutional Court highlighted that fundamental rights impacts were no longer a merely hypothetical risk, and that mining had caused ‘severe environmental damage, such as the... diversion of important water sources... waste dumps... damage caused to the soil, large-scale tree felling... the impact on the health of inhabitants in the mining area and the loss of biodiversity’.⁵⁴ In 2016, the Court again found that ‘mining activity is bringing harmful effects’ in La Guajira, including water pollution, air pollution, and ecosystem destruction.⁵⁵ It ordered that consultation take place with affected communities, with a view to modifying, suspending, or cancelling Cerrejón’s environmental licence as necessary.⁵⁶ Cerrejón continues to operate under a licence granted in 1983,⁵⁷ arguing that this licence exempts it from complying with current Colombian environmental law – an interpretation which is currently being challenged in the courts.⁵⁸

In 2017, the Court reviewed a vast body of academic literature on the effects of the Cerrejón mine and summarised its effects on the fundamental rights to health, water, and food

⁵¹ Colombian Constitutional Court, T-614 of 2019 (hereinafter Colombian Constitutional Court, T-614) <<https://perma.cc/W7MS-8LDK>> para 9.8.

⁵² Colombian Constitutional Court T-528 of 1992. The Court relied on resolution 02122, issued by the Ministry of Health (12 February 1992), which had identified the area surrounding the Cerrejón mine as ‘uninhabitable’ and dangerous to human and animal life, and plant agriculture. The Court ordered the authorities to ‘ensure the preservation of the quality of life and a health environment’.

⁵³ Judgments against Cerrejón include the following: Colombian Supreme Court (Corte Suprema de Justicia) 13/0912, 0014-01 of 7 May 2002; Criminal Cassation Chamber of the Supreme Court, sentence of 13 September 2012; Colombian Constitutional Court T-256 of 2015; Colombian Constitutional Court, T-704 of 2016; Barrancas Court (Juzgado Promiscuo de Barrancas) 2015-00473 of 26 February 2016; Administrative Supreme Court of Colombia (Consejo de Estado) 2016-00079-01 of 13 October 2016; Colombian Constitutional Court, SU-698 of 2017; Colombian Constitutional Court, T-329 of 2017 <<https://perma.cc/AX8V-BEQY>> (hereinafter Colombian Constitutional Court, T-329/17).

⁵⁴ Colombian Constitutional Court, T-256 of 2015, para 118.

⁵⁵ Colombian Constitutional Court, T-704 of 2016, para 5.29

⁵⁶ *ibid*, Resolution.

⁵⁷ Richard Solly, ‘Legal action against Cerrejón Coal’s environmental licence’ (London Mining Network, 27 February 2019) <<https://perma.cc/UC4Q-ZSQP>>.

⁵⁸ See CAJAR, ‘Consejo de Estado estudiará demanda contra la licencia ambiental de Carbones del Cerrejón’ (6 August 2019) <<https://perma.cc/2WMP-FJE7>>.

sovereignty.⁵⁹ It held that Cerrejón had given insufficient consideration to social and environmental impacts when deciding to expand the mine.⁶⁰

Referencing this body of precedent its 2019 ruling, the Constitutional Court stated that ‘[this] is not the first time that a case has been resolved against Cerrejón [for] endangering and/or causing damage to the environment and the health of nearby populations’.⁶¹ It went on to highlight that the broader context – namely the vulnerability of local indigenous communities to the impacts of large-scale mining – means that Cerrejón ‘must carry out its operations with a special degree of care and diligence in the face of the magnitude of the damage that it may cause’.⁶²

The local population in La Guajira is indeed vulnerable. The maternal mortality rate in the region is 180.9 per 100,000; among local indigenous populations, the rate is 242 per 100,000.⁶³ The national rate in Colombia is 51.27 per 100,000.⁶⁴ Similarly, infant mortality in La Guajira stands at 18.6 per 100,000 live births - 7.45 percentage points above the national average.⁶⁵ Between 2016 and 2018, an average of one indigenous child under five died every week in La Guajira due to malnutrition.⁶⁶ The high level of infant mortality amongst the Wayúu people was highlighted by the Inter-American Commission on Human Rights (IACHR) in 2015, when it directed the Colombian government to take immediate precautionary measures to safeguard the lives and personal safety of the Wayúu people in La Guajira.⁶⁷ The IACHR decision was prompted by the documented deaths of 4,770 Wayúu children during the preceding 8 years, as a result of thirst, malnutrition and preventable disease.⁶⁸

⁵⁹ Colombian Constitutional Court, SU698/17 (n 48).

⁶⁰ *ibid.*

⁶¹ Colombian Constitutional Court, T-614 (n 51) para 9.10.

⁶² *ibid.*

⁶³ Alfonso Fernández Reza, ‘The Wayúu village that beat malnutrition’ (Unicef, 8 August 2019) <<https://perma.cc/L6YY-AQSR>>.

⁶⁴ *ibid.*

⁶⁵ *ibid.*

⁶⁶ William Avilés ‘The Wayúu tragedy: death, water and the imperatives of global capitalism (2019) 40 (9) Third World Quarterly 1750, 1750.

⁶⁷ Inter-American Commission on Human Rights, Resolution 60/2015 (n 42).

⁶⁸ *ibid.* para. 1. See also CAJAR, ‘Diez Verdades sobre Carbones Cerrejón’ (n 2) p. 15; Defensoría del Pueblo de Colombia (Ombudsman's Office of Colombia), ‘Crisis humanitaria en La Guajira 2014’ (June 2014) <<https://perma.cc/JWH9-46AJ>>; Constitutional Court, Sentence T-302 of 2017 <<https://perma.cc/BNN3-Q9NL>>; Colombian Constitutional Court, Sentence T-359 of 2018 <<https://perma.cc/V6CS-SUPY>>; and Colombian Constitutional Court, Sentence T-216 of 2019 <<https://perma.cc/AJV8-XJBF>>.

B. Recent statement of UN Special Rapporteurs

The impacts caused by the Cerrejón mine were recently highlighted by the UN Special Rapporteur on human rights and the environment, David Boyd. Professor Boyd is an associate professor of law, policy, and sustainability at the University of British Columbia, and has advised various governments on environmental, constitutional, and human rights policy.⁶⁹ The UN released the following statement on the 28th September 2020, relaying the Special Rapporteur's concerns:⁷⁰

Colombia should suspend some operations at one of the world's largest coal mines because it has seriously damaged the environment and health of the country's largest indigenous community, and is making them more vulnerable to COVID-19, a UN human rights expert said today.

"I call on Colombia to implement the directives of its own Constitutional Court and to do more to protect the very vulnerable Wayúu community on the Provincial indigenous reserve against pollution from the huge El Cerrejón mine and from COVID-19," said David Boyd, UN Special Rapporteur on human rights and the environment. "At least during the pandemic, operations at the Tajo Patilla site close to the Provincial reserve should be suspended until it can be shown to be safe."

Breathing polluted air and not having enough clean water puts people at greater risk of becoming sick, Boyd said, adding that during the coronavirus pandemic, this can be a deadly threat. "The science is clear; people living in areas that have experienced higher levels of air pollution – such as that around the El Cerrejón mine – face increased risk of premature death from COVID-19," he said.

Despite a court order last December that directed Colombian authorities and the owners of El Cerrejón mine to improve air quality and reduce the mine's harm to the residents, not enough has been done to protect members of the Wayúu community in the Provincial reserve. The Court found the company had damaged the health of

⁶⁹ UN, 'David R. Boyd, Special Rapporteur on human rights and the environment' <<https://perma.cc/959U-F926>>.

⁷⁰ UN, 'UN expert calls for halt to mining at controversial Colombia site' (28 September 2020) <<https://perma.cc/5UT9-JKBG>>.

residents in the Provincial reserve by contaminating the air, water and vegetation, and through noise and vibration from mining.

El Cerrejón, the largest open-pit mine in Latin America, borders protected communal lands of the Wayúu community, in La Guajira Department in the northeast of the country. The mining company, Cerrejón, is independently operated and belongs in equal parts to subsidiaries of the international mining companies BHP, Anglo American and Glencore.

Residents living near the mine, particularly in Provincial, suffer from headaches, nasal and respiratory discomfort, dry cough, burning eyes and blurred vision as a result of open-pit mining carried out 24 hours a day, seven days a week, using heavy machinery and explosives. Explosions cause houses to shake and propel coal dust into the air, water and soil.

Mining and transportation along railroads also owned by the company emit fine particles called PM 2.5, invisible to the human eye. This pollutant can cause asthma, respiratory illnesses, heart disease, hypertension and cancer, skin and eye damage, miscarriages and premature births, but only began to be measured in 2018, after the mine had already been operating for 35 years.

The Cerrejón mine is also the largest water polluter in the region. The company not only diverts and uses a huge number of streams and tributaries, but also pours back water contaminated with heavy metals and chemicals. In response to this the company has helped to truck water to residents, but Boyd said that the water pollution had denied the communities of access to clean water in the first place. “This has made the Wayúu community more dependent on the alternative source of water and leaves them more exposed to the risk of COVID-19,” he said

“It is absolutely vital that Colombia protect the indigenous peoples’ rights to life, health, water, sanitation, and a safe, clean, healthy and sustainable environment by halting mining close to the Provincial reserve until it can be made safe.” “I further call on the mining company to increase its effort to prevent further harm to people and also to ensure that those who have been negatively impacted have access to effective remedy.”

This statement was also endorsed by six additional UN Special Rapporteurs and by the UN Working Group on Business and Human Rights. The signatories were:⁷¹

- Michael Fakhri, Special Rapporteur on the right to food. Professor Fakhri teaches courses on human rights, food law, development, and commercial law at the University of Oregon School of Law.⁷²
- Tlaleng Mofokeng, Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. Dr Mofokeng is a medical doctor with expertise advocating for universal health access.⁷³
- Anita Ramasastry, Chair of the Working Group on the issue of human rights and transnational corporations and other business enterprises. Professor Ramasastry is the Director of the Graduate Program in Sustainable International Development at the University of Washington School of Law.⁷⁴
- Dante Pesce, Vice-Chair of the Working Group on the issue of human rights and transnational corporations and other business enterprises. Mr Pesce is the Founder and Executive Director of the VINCULAR Center for Social Responsibility and Sustainable Development at the Catholic University of Valparaíso, Chile, which works on sustainability and responsible business practices in fourteen Latin American countries.⁷⁵
- Surya Deva, member of the Working Group on the issue of human rights and transnational corporations and other business enterprises. Professor Deva is based at the School of Law of City University in Hong Kong, where he specialises in business and human rights and corporate social responsibility, among other areas.⁷⁶
- Elżbieta Karska member of the Working Group on the issue of human rights and transnational corporations and other business enterprises. Professor Karska is the Head of the Department of Protection of Human Rights and International Humanitarian Law at the Faculty of Law and Administration, Cardinal Stefan Wyszyński University in Warsaw, Poland.⁷⁷

⁷¹ *ibid.*

⁷² UN, ‘Mr. Michael Fakhri - Special Rapporteur on Right to Food’ <<https://perma.cc/9L6V-Z5KD>>.

⁷³ UN, ‘Ms. Tlaleng Mofokeng: Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of health’ <<https://perma.cc/D23Y-NLBT>>.

⁷⁴ UN, ‘Members of the Working Group on the issue of human rights and transnational corporations and other business enterprises’ <<https://perma.cc/78QS-V7ST>>.

⁷⁵ *ibid.*

⁷⁶ *ibid.*

⁷⁷ *ibid.*

- Githu Muigai, member of the Working Group on the issue of human rights and transnational corporations and other business enterprises. Professor Muigai is an Associate Professor of Law at the University of Nairobi.⁷⁸
- Leo Heller, Special Rapporteur on the rights to water and sanitation. Professor Heller is a researcher in the Oswaldo Cruz Foundation in Brazil, which seeks to disseminate knowledge and technologies to promote health and quality of life.⁷⁹
- Olivier De Schutter, Special Rapporteur on extreme poverty and human rights. Professor De Schutter is a Professor at the University of Louvain (UCL) and at the College of Europe (Natolin).⁸⁰
- Marcos A. Orellana, Special Rapporteur on hazardous substances and wastes. Dr Marcus has worked with United Nations agencies, governments and non-governmental organizations, including on wastes and chemicals issues.⁸¹
- Francisco Cali Tzay, Special Rapporteur on the rights of indigenous peoples. Mr Cali Tzay is Maya Kaqchikel and has founded various indigenous organisations in Guatemala.⁸²

This section outlines some of the ways in which Cerrejón’s activities have impacted on the environment and on local communities.

C. Air and noise pollution and related health impacts

The extraction and transportation of coal causes the emission of particulate matter pollutants into the air known as **PM 2.5** and **PM 10**.⁸³ Both pollutants are dangerous to human health.⁸⁴ According to the WHO, ‘[t]he range of health effects [caused by particulate matter] is broad, but [the effects] are predominantly to the **respiratory and cardiovascular** systems... The risk for various outcomes has been shown to increase with exposure... the numerical guideline and interim target values given [by the WHO] reflect the concentrations at which **increased**

⁷⁸ *ibid.*

⁷⁹ UN, ‘Mr. Léo Heller, Special Rapporteur on the human rights to safe drinking water and sanitation’ <<https://perma.cc/6TGK-WETF>>.

⁸⁰ UN, ‘Olivier De Schutter’ <<https://perma.cc/7Z9H-73Q6>>.

⁸¹ UN, ‘Dr. Marcos A. Orellana, Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes’ <<https://perma.cc/DJ8K-6MEM>>.

⁸² UN, ‘Francisco Cali Tzay, Special Rapporteur on the rights of indigenous peoples’ <<https://perma.cc/298M-9A9D>>.

⁸³ ‘PM’ refers to ‘particulate matter’. The numbers 2.5 and 10 refer to the diameters of the respective types of pollutants in micrometres.

⁸⁴ On the relative dangers of PM₁₀ and PM_{2.5} in causing lung cancer, see Ole Raaschou-Nielsen et al, ‘Air pollution and lung cancer incidence in 17 European cohorts: prospective analyses from the European Study of Cohorts for Air Pollution Effects (ESCAPE)’ 14(9) *The Lancet* (2013) 813.

mortality responses due to [particulate matter] air pollution are expected based on current scientific findings.’⁸⁵ PM 2.5 is the deadliest and smallest form of particulate matter, and is capable of causing diseases such as asthma, pneumonia, hypertension, cancer, damage to the skin and eyes, miscarriages, premature births and pre-eclampsia.⁸⁶ Measurement of its concentration in the air around Cerrejón only began in 2018, by which time the mine had been operating for 35 years.⁸⁷

A research project in 2018, which assessed almost half of the population living within 23km of the mine, concluded that **annually there are 442 emergency room visits and 336,832 respiratory symptom cases directly attributable to the Cerrejón mining operations.**⁸⁸ A study carried out from 2011 to 2018 also found evidence indicating that **pollution from the Cerrejón mine is driving elevated levels of cellular damage, in turn raising the risk of cancer, DNA damage, and chromosomal instability** among employees and those living around the mine.⁸⁹

Cerrejón claims to have a ‘solid air-quality management system that combines best practices for emission controls with long-term and hourly forecasts, and the continuous analysis of data for timely decision-making’.⁹⁰ Cerrejón states that the concentration of particulate matter in the air around the mine falls below the maximum limits set by Colombian regulations of general application.⁹¹ However, earlier this year **the Colombian Constitutional Court expressed concern about Cerrejón’s emission levels and ordered the mine to reduce air pollution as an ‘urgent transitional measure’.**⁹² Air quality analysis had previously found that particulate

⁸⁵ World Health Organization, ‘WHO Air quality guidelines for particulate matter, ozone, nitrogen dioxide and sulfur dioxide: Global update 2005’ p. 9 <<https://perma.cc/EY54-RZB4>>.

⁸⁶ CAJAR, ‘Diez Verdades sobre Carbones Cerrejón’ (n 2) p. 18.

⁸⁷ Monitoring of PM_{2.5} at Cerrejón only began after a Colombian domestic regulation mandated it in 2018. See Resolution No. 2254 by which the ambient air quality standard is adopted and other provisions are dictated, available at <<https://perma.cc/2PEM-NR6N>>; see also Gabriel Bustos, ‘New Air-Quality Regulation’ (Cerrejón, 1st March 2018) <<https://perma.cc/DC6S-BHDB>>.

⁸⁸ Heli A Arregocés, Roberto Rojano, Luis Angulo and Gloria Restrepo, ‘Intake Fraction of PM10 from Coal Mine Emissions in the North of Colombia’ *Journal of Environmental and Public Health* (2018) Article ID 8532463 <<https://perma.cc/S2VE-UKXM>> p. 5: ‘We appraised that annually there are 22 hospital respiratory disease admissions, 442 emergency room visits, 105835 restricted activity days, and 336832 respiratory symptom cases attributable to the direct impact of the mining.’

⁸⁹ Vega Vargas, M., *Carbón Tóxico: Daños y riesgos a la salud de trabajadores mineros y población expuesta al carbon - evidencias científicas para Colombia*. Fundación Rosa Luxembourg, 2018 <<https://perma.cc/VBA3-3ZQK>>. Main findings summarised at pp. 8-11.

⁹⁰ Cerrejón Report 2019 (n 46) p. 50.

⁹¹ *ibid* p. 51.

⁹²The Colombian Constitutional Court ruled that as an urgent transitional measure, Cerrejón must control its mean emissions (calculated by month) to a maximum of 20 µg/m³ for PM10 and 10 µg/m³ for PM2.5. The measure is to remain in force until agreement on particulate matter limits is reached between Cerrejón and the affected communities. Constitutional Court of Colombia, T-614 (n 51) Order 3.

matter in the air around the Cerrejón mine **exceeds the limits recommended by the WHO.**⁹³ Cerrejón bears full responsibility for these high levels of particulate emissions. Researchers have concluded that **‘[t]he main source of [air particulate] emissions in the region is the opencast coal mine’.**⁹⁴

In 2019, a group of indigenous women from Provincial (a Wayúu settlement of 679 inhabitants) filed an action of protection (*Acción de Tutela*) with the Constitutional Court of Colombia. The action demanded ‘the urgent protection of the fundamental rights to life, personal integrity, health, a healthy environment and the privacy of the inhabitants of their community’, which they argued were in ‘serious danger due to the proximity of the [Provincial] reservation to the mining operation carried out by the company Carbones del Cerrejón Limited’.⁹⁵ They argued that the **rights to life and health of the Wayúu children of Provincial were particularly affected.**⁹⁶ Due to their greater vulnerability (as a result of living close to the mine), these children have suffered serious and recurring respiratory and skin diseases, fevers, headaches, and diarrhea, among other conditions.⁹⁷ The health effects for children in Provincial were covered in a 2017 documentary by DW, the German state broadcaster.⁹⁸ The documentary showed how the environmental impacts of the mine, particularly from air pollution, have severely impacted the health of children within Wayúu communities.

The brief described the various ailments and illnesses suffered due to particulate matter emitted by the mining operations and Cerrejón’s use of heavy machinery and explosions.⁹⁹ The most frequent symptoms in the community are **headaches, nasal and breathing discomfort, dry cough, burning eyes and blurred vision**; these ailments appear to become more acute with

⁹³ Golda Amanda Fuentes, Jesús Olivero Verbel, Juan Carlos Valdelamar Villegas, Daniel Armando Campos and Alan Phillippe, *Si el río suena, piedras lleva: Sobre los derechos al agua y a un ambiente sano en la zona minera de La Guajira* (Indepaz 2018) pp. 111-117 <<https://perma.cc/PHX9-C2J3>>. Recent reports from Cerrejón also show that emissions exceed the limits set out in the WHO guidelines: Cerrejón reports annual emissions of 45 µg/m³ for PM10 and 10 µg/m³ for PM2.5, Cerrejón Report 2019 (n 46) p. 51. WHO Guidelines state that annual mean admissions should not exceed 20 µg/m³ for PM10 and 10 µg/m³ for PM 2.5, so even on Cerrejón’s own reporting it is failing to comply with the standard for PM10. See World Health Organization, Air quality guidelines (n 85) p. 9.

⁹⁴ Arregocés et al (n 88) p. 3. See also R Rojano, H Arregocés, L Angulo and G Restrepo, ‘PM₁₀ emissions due to storage in coal mines in a mining industrial area’ 207 WIT Transactions on Ecology and the Environment (2016) 87 <<https://perma.cc/4DDN-XLVH>>.

⁹⁵ Constitutional Court of Colombia, T-614 (n 51) para 1.2.

⁹⁶ *ibid.* See for example paras 1.6 and 4.2.

⁹⁷ *ibid.*, See 7.1 f., 7.2 b

⁹⁸ DW, ‘Colombia – The Curse of Coal’ (2017), available at <https://www.youtube.com/watch?v=t1xLZWp2eBc&ab_channel=DWDocumentary> (last accessed 28 October 2020).

⁹⁹ *ibid* paras 1.3, 1.4, 1.5, 1.6, and 1.8. The explosions cause tremors which result in the dispersion of coal dust: *ibid* paras 1.4, 1.5, and 1.6.

the presence of strong and prolonged bad odours, which are described as ‘sulphur’ or ‘burned coal’.¹⁰⁰

In December 2019, after reviewing all the available evidence, the Colombian Constitutional Court (in its judgment T-614) made the following findings with respect to Provincial:¹⁰¹

- *Complex mixtures of chemical substances associated with coal burning, such as polycyclic aromatic hydrocarbons, sulphur, chromium, copper and zinc, were identified in air samples obtained near the Cerrejón mining complex. In particular, concentrations of sulphur and chromium significantly higher than those found in other areas of La Guajira were found.*
- *It was evident that the fires in the mine's coal blankets generated sulphur oxides, nitrogen oxides, carbon dioxide, among other gases, which were even noticeable by smell.*
- *It was concluded that there was a progressive increase in PM 10 particle material in the Provincial air and its accumulation was registered on the roofs and vegetation of the area. In addition, it was specified that independent monitoring of the PM 2.5 material had not been carried out.*
- *It was documented that the dispersion of particles emitted by the mine reached the community and that the concentrations of the PM 10 material exceeded WHO levels and even doubled those allowed by Colombian regulations.*
- *It was confirmed that the coal dust is constant inside the ranches of the community, as well as the smell of sulphur. The presence of dust curtains moving from the company's dumps was also documented.*
- *It was found that the noise generated by the explosions and the activity of the machinery in the area was continuous and noticeable, in addition, noise measurements higher than what is permissible by Colombian regulations were recorded.*

¹⁰⁰ *ibid* paras 1.4, 1.6, 3.1, and 4.3.

¹⁰¹ *ibid* para. 9.7. Emphasis added.

- *High concentrations of various metals were found in the blood of the inhabitants near the mine, especially sulphur, chromium and bromine, which can cause DNA damage and diseases such as cancer.*
- *The existence of damage in the cells of residents of the area was verified, which can be related to respiratory, cardiac, dermatological and cancer diseases, among others.*
- *It was registered that 10% of the members of the Wayúu in Provincial have affections in their lung function and various cases of respiratory diseases and acute respiratory tract infections were found in this population.*

Having observed the above, the Court ordered Cerrejón to ‘carry out exhaustive cleaning of coal dust in the houses of the reservation, the water wells used by its inhabitants and the surrounding vegetation’,¹⁰² and to ‘reduce the noise level generated by its activities [to a maximum] of 65 decibels during the day and 55 decibels at night’.¹⁰³ It further instructed Cerrejón to ‘control its emissions of particulate matter’ PM 2.5 and PM 10 as an ‘urgent transitory measure’ until an agreement on limits could be reached with the Ministry of the Environment and Sustainable Development and the affected communities.¹⁰⁴

Rather than accepting the need to comply with this order, Cerrejón applied for it to be nullified. It also criticised the judgment in its most recent Sustainability Report:

*Ruling T-614, notified by the Constitutional Court in January of 2020, has imposed certain measures (e.g. regarding air-quality levels in an area near the mine) that are more restrictive for Cerrejón than those in effect for the rest of Colombia and Latin America. These measures reveal a lack of awareness concerning the normal conditions in nature in the region as well as the impact that activities other than mining can have on air-quality measurements.*¹⁰⁵

¹⁰²*ibid* Order 4.

¹⁰³*ibid*.

¹⁰⁴ *ibid* Order 3.

¹⁰⁵ Cerrejón Report 2019 (n 46) p. 51.

D. Contamination of the Ranchería River and other waterways

According to Corpoguajira, the most senior environmental body in La Guajira,¹⁰⁶ the Ranchería River is the most important source of water in the department of La Guajira, playing a key role in the maintenance of ecosystems in its basin and providing water for domestic, recreational, cultural, spiritual, farming and industrial activities.¹⁰⁷ Previously, an estimated 450,000 people depended directly and indirectly on the water of the Ranchería River.¹⁰⁸ Many people in La Guajira relied on the river for cleaning, bathing, and cooking.¹⁰⁹ Some communities also relied on the river for their drinking water.¹¹⁰ However, the operation of the Cerrejón mine has damaged the Ranchería River.¹¹¹ It can no longer provide the population with drinking water.¹¹²

As recently noted by the UN Special Rapporteur on human rights and the environment, **the Cerrejón mine is ‘the largest water polluter in the region’**,¹¹³ and it ‘not only diverts and uses an enormous number of streams and tributaries, but also returns them contaminated with heavy metals, chemicals and sediments’.¹¹⁴

A 2017 analysis found that, as a result of the mine, various metals known to cause serious health effects were present in the waters in and around the Ranchería River.¹¹⁵ Specifically, it found that the **levels of lead, cadmium, barium, manganese, iron and zinc surpassed permissible levels under World Health Organization (WHO) guidelines**. A subsequent study published in July 2019 also found dangerously high levels of **mercury** in the water.¹¹⁶ Long-term overexposure to these metals, particularly in drinking water, causes **nausea and**

¹⁰⁶ Corpoguajira, ‘Historical Review’ (11 September 2014) <<https://perma.cc/E2D9-KHM8>>.

¹⁰⁷ Corpoguajira, ‘Plan de acción 2016-2019 prosperidad, paz y sostenibilidad# (Action Plan 2016-2019) p. 13 <<https://perma.cc/Z743-TAF2>>.

¹⁰⁸ *ibid.*

¹⁰⁹ Lydia James, ‘Dangerous levels of mercury found in river in Colombian region of La Guajira’ (London Mining Network, 25th November 2019) <<https://perma.cc/VXG8-676M>>.

¹¹⁰ *ibid.*

¹¹¹ CENSAT Agua Viva, ‘La desviación del arroyo Bruno: entre el desarrollo minero y la sequía’ (2015) p. 9 <<https://perma.cc/QYB7-LLL7>>.

¹¹² See Johana Rodriguez, ‘Indigenas wayúu en la Guajira denuncian que no tienen agua por culpa de Cerrejón’ (AFM News, 2 September 2019) <<https://perma.cc/K5DX-36XE>>.

¹¹³ UN, ‘UN expert calls for halt to mining at controversial Colombia site’ (n 70).

¹¹⁴ *ibid.* See also CAJAR, ‘Diez Verdades sobre Carbones Cerrejón’ (n 2).

¹¹⁵ Daniel Armando Campos and Allan Philippe, ‘Monitoring and assessment of polluting metals in the southeastern mining-impacted region of La Guajira, Colombia’ (University of Koblenz Landau, 2017).

¹¹⁶ Informe de Resultados de Laboratorio, 9 July 2019 <<https://perma.cc/53N6-BX2F>>. See also Lydia James, ‘Dangerous levels of mercury found in river in Colombian region of La Guajira’ (n 109). The lab results show that the mercury presence was 0.0749 mg/L. The World Health Organization recommend a maximum mercury limit of 0.006 mg/L, while the Colombian Government’s Resolution 2115 (22nd June 2007) sets the recommended limit at 0.001 mg/L, <<https://perma.cc/K5GX-H7EQ>>.

vomiting,¹¹⁷ impaired kidney function,¹¹⁸ constriction of blood vessels,¹¹⁹ muscle pain and muscle weakness,¹²⁰ neurological disorders, and – in cases of particularly high or long-term exposure – **death.**¹²¹ Mercury, which appears in the WHO’s top ten chemicals of major public health concern, can have **toxic effects on the nervous, digestive, and immune systems, and on the lungs, kidneys, skin and eyes,** even in small quantities.¹²²

In its own reporting, Cerrejón claims that it has ‘progressed enormously’ in its ‘capacity to improve water and air quality’.¹²³ Dumped water waste, it states, is ‘treated using different mechanisms to comply with the maximum allowable concentrations’ of contaminants under Colombian law.¹²⁴ **Cerrejón dumped 578 million litres of liquid waste (primarily runoff from dump sites and pits) into bodies of water in 2019.**¹²⁵ Research has shown that manganese, selenium, barium and strontium are all present in higher concentrations close to where Cerrejón dumps its waste materials.¹²⁶ **Cerrejón’s 2019 Sustainability Report does not contain any information about the presence of contaminants in this waste or at the dumping sites,** despite stating that water quality along the Ranchería River is monitored.¹²⁷

¹¹⁷ World Health Organization, ‘Zinc in Drinking-water’ WHO/SDE/WSH/03.04/17 (2003) p. 3.

¹¹⁸ World Health Organization, ‘Cadmium in Drinking-water’ WHO/SDE/WSH/03.04/80/Rev/1 (2011) p. 5.

¹¹⁹ World Health Organization, ‘Barium in Drinking-water’ WHO/FWC/WSH/16.48 (2016) p. 9.

¹²⁰ World Health Organization, ‘Manganese in Drinking-Water’ WHO/SDE/WSH/03.04/104/Rev/1 (2011) p. 11.

¹²¹ World Health Organization, ‘Lead poisoning and health’ (23 August 2019) <<https://perma.cc/8JQT-HMHM>>; World Health Organization, ‘Iron in Drinking-water’ WHO/SDE/WSH/03.04/08 (2003) p. 3.

¹²² World Health Organization, ‘Mercury and health’ (21st March 2017) <<https://perma.cc/YJ2H-PZEJ>>.

¹²³ Cerrejón Report 2019 (n 46) p. 13.

¹²⁴ *ibid* p. 49. Cerrejón reports that it dumped 578 million litres of waste in 2019, primarily runoff water from dump sites and pits; this represented a 31% reduction in discharges as compared with 2018.

¹²⁵ *ibid*.

¹²⁶ Campos and Philippe (n 115) p. 35.

¹²⁷ The Report states that: ‘At Cerrejón, we steward the water catchments of the various streams that supply the Ranchería River and we also measure water quality with 45 different parameters. Those data tell us that the water meets all the indices established by Colombian regulations for water for household use and human consumption.’ Cerrejón Report 2019 (n 46) p. 13. It further states that: ‘We have a system of 29 sensors for the real-time monitoring of the quality and amount of surface water. These sensors measure diverse variables at key points, which lets us ensure our activities are carried out in compliance with regulations and do not affect either the quality or usage of water downstream of our operations.’ *ibid* p. 49. Cerrejón has also stated that it ‘annually take[s] more than 4,000 samples [of water from the River] to make physical, chemical and bacteriological analyses.’ Cerrejón, ‘How we use water from the Ranchería River in our operation’ (February 2020) <<https://perma.cc/XB9B-4P4H>>.

In December 2019, the Constitutional Court of Colombia found that:¹²⁸

... the surface and underground water sources of [the Provincial] community were being affected by the Cerrejón operations, due to the contribution of contaminating sediments and the disappearance and alteration of channels and aquifers.

*Non-compliance with the discharge regulations [was identified] and the presence of oily liquid residues from the company, as well as coal-like material were found in the Ranchería River. In addition, discharges that were carried out without the corresponding permission were evidenced.*¹²⁹

The Constitutional Court ordered Cerrejón to ‘prevent contamination of nearby water sources’ as an urgent matter.¹³⁰ To date, the order has not been complied with. Instead, Cerrejón criticised the Court’s ruling in its most recent Sustainability Report.¹³¹ The Sustainability Report also makes repeated references to the fact that Cerrejón provides drinking water to affected communities.¹³² However, as a network of NGOs has pointed out, potable water has been provided only to *some* of the affected communities and this measure fails to address the fact that Cerrejón has impeded access to water for 450,000 people.¹³³

E. Structural interferences with the hydrological system in La Guajira

The Cerrejón mine is one of the largest consumers of water in La Guajira. The mine uses 24 million litres of water a day, enough to supply 150,000 people in regions without shortage problems.¹³⁴ In La Guajira, where the local population has adapted to the aridity of the region, this figure would be significantly lower. **In 2019, Cerrejón extracted 10,733 million litres of surface water**, including water from wetlands, rivers, lakes, and oceans.¹³⁵ 11 percent of its

¹²⁸ Constitutional Court of Colombia, T-614 (n 51) p. 123, para 9.7.

¹²⁹ *ibid.*

¹³⁰ *ibid* para 11.14.

¹³¹ Cerrejón Report 2019 (n 46) p. 51.

¹³² *ibid* pp. 11-13, 25, 40, 43, and 45.

¹³³ See letters from ABColombia to the Corporación Autónoma Regional de la Guajira and to Cerrejón, 31st July 2018 <<https://perma.cc/8FHB-ELSR>>.

¹³⁴ DW (n 98); CAJAR, ‘Diez Verdades sobre Carbones Cerrejón’ (n 2).

¹³⁵ Cerrejón Report 2019 (n 46) p. 49.

total water extraction – 1,241 million litres of freshwater – was drawn directly from the Ranchería River.¹³⁶

Cerrejón has also carried out various structural changes to the river's waterways. As part of its operations, **Cerrejón has diverted more than 17 streams¹³⁷ and damaged another 30.**¹³⁸ In 2016, Cerrejón decided to divert the Arroyo Bruno, a Ranchería tributary.¹³⁹ This decision was taken with the objective of increasing production from 32 to 40 million tonnes of coal per year.¹⁴⁰ The following year, a group of NGOs and community representatives challenged the diversion in court, adducing evidence of consequent damage to the ecosystem. These proceedings culminated in the Colombian Constitutional Court upholding an injunction suspending the diversion and expansion of the La Puente mining pit until an inter-institutional group could carry out a technical study on the uncertainties of the environmental and social impacts of the diversion, in order to assess its environmental viability.¹⁴¹ Although the judgment required that 'the inter-institutional roundtable... must open sufficient participation spaces to the representatives of the acting communities',¹⁴² according to civil society groups their views have not been taken into account.¹⁴³ The diversion of the Arroyo Bruno remains in place.¹⁴⁴

In June 2020, the lack of compliance with the Constitutional Court's judgment relating the Arroyo Bruno was the subject of a pronouncement by the Colombian Contraloría (i.e. Controller General),¹⁴⁵ which published an 89-page report criticising this inaction.¹⁴⁶ The Contraloría highlighted the failure to properly comply with the eighth order in the *Arroyo*

¹³⁶ *ibid*: 'Rainwater runoff and coal seam water provide 89% of the water used in our processes, primarily for reducing particulate matter emissions. The remaining 11% is freshwater withdrawn from the mid-valley of the Ranchería River and its alluvial aquifer...' Freshwater extraction is shown to total 1,241 megalitres.

¹³⁷ Colombia, Ministerio de Ambiente, Resolución 2097 de 2005 <<https://perma.cc/Q6SL-XAWG>>.

¹³⁸ Ramírez (n 2).

¹³⁹ Lydia James, 'British multinational disobeys Colombia court by diverting water source' (London Mining Network, 8 July 2019) <<https://perma.cc/LZE9-J8JT>>.

¹⁴⁰ Discussion with CINEP.

¹⁴¹ Colombian Constitutional Court, SU698/17 (n 48), Orders 3, 4, 8 and 9.

¹⁴² *ibid* Orders 3 and 4.

¹⁴³ Discussion with CAJAR.

¹⁴⁴ Richard Solly, 'Saving the river: the struggle for Colombia's Arroyo Bruno' (London Mining Network, 20 July 2019) <<https://perma.cc/CSX7-8G4B>>; Colectivo de Abogados José Alvear Restrepo (CAJAR), 'Carbones de Cerrejón mantendrá taponado el Arroyo Bruno desconociendo fallo de la Corte Constitucional' (12 June 2019) <<https://perma.cc/BD9F-L963>>.

¹⁴⁵ The Contraloría General de la República de Colombia (Officer of the Comptroller General of Colombia) is the Colombian independent governmental institution responsible for fiscal control and monitoring of public expenditure.

¹⁴⁶ Contraloría General de la República, Informe de Auditoría de Cumplimiento, 'Aspectos Ambientales de la Sentencia SU-698/17 en relación con el proyecto de desvío de cauce del Arroyo Bruno' (June 2020) <<https://perma.cc/6SCN-ZFYG>>.

Bruno judgment, which had required that the tributary be returned to its natural course while an inter-institutional round-table could decide on the long-term implications of its diversion.¹⁴⁷ It also highlighted a number of deficiencies in the round-table's decision-making, and concluded that since the group had failed to make a final and substantive decision on the future of the Arroyo Bruno, the judgment had not been properly complied with.¹⁴⁸

The Contraloría also explained that:

*Despite the El Cerrejón mining operation and its subsequent modifications having been authorized since 1983... the expansion of the exploitation area, which [resulted in] interventions such as the diversion of the Arroyo Bruno channel, [and other] modifications are not in accordance with the current environmental legal regime.*¹⁴⁹

Cerrejón has carried out activities which would ordinarily contravene domestic environmental law, such as expanding the mine without completion of an adequate environmental impact assessment. Cerrejón contends that such actions are lawful because its environmental licence was issued in 1983, and as such it need only comply with environmental law as it stood in 1983.¹⁵⁰ The legality of Cerrejón relying on its old licence in this way is currently the subject of litigation in Colombia.¹⁵¹

The Contraloría further observed that the negative impacts resulting from Cerrejón's diversion of the Arroyo Bruno were exacerbated by its subsequent **failure to take corrective steps**. It noted that:

To affect the maintenance of habitats and biodiversity without implementing corrective measures ... could generate a possible drought due to the loss of the Tropical dry forest, which would lead to a decrease in the functions of ecological regulation, related to climate change, due to the loss of hydrological control and its relationship with the forests, which help to control evapotranspiration processes and greenhouse gas

¹⁴⁷ Colombian Constitutional Court, SU698/17 (n 48), Eighth Order.

¹⁴⁸ Contraloría General de la República (n 146).

¹⁴⁹ *ibid* p. 4.

¹⁵⁰ On Cerrejón's use of its original licence, which has been subject to sixty modifications, see Richard Solly, 'Legal action against Cerrejón Coal's environmental licence' (n 57).

¹⁵¹ The case will be determined by El Consejo de Estado, the High Court of Administrative Affairs in Colombia.

*capture processes, a situation that would lead to possible supply costs due to the low availability of water resources and consequent desertification of the area.*¹⁵²

It also noted the possible consequences that this failure could have for fires in the region.¹⁵³

Cerrejón's activities have thus caused irreparable damage both to the hydrographic basin of the Ranchería River¹⁵⁴ and beyond. Experts have further noted that '[t]he Ranchería River [was] a natural retainer of the biodiversity of Sierra Nevada. Without the river, the Sierra will gradually become desertified.'¹⁵⁵ Cerrejón's structural interventions also affect underground water: experts have noted that 'the underground water is the most affected by the mining'.¹⁵⁶

F. Impact of Cerrejón's activities on the food security of local communities

Cerrejón's activities, which have caused deforestation and a decline in the agricultural productivity of the surrounding lands, have had major consequences for the food security of local communities. The expansion of the mine has put an end to the self-sufficiency of the Wayúu and Afro-descendant people and has greatly harmed the trees and plants on which they have relied for nutrition and medicinal purposes for generations.

A 2019 report from the Colombian Ombudsman on the state of human rights in Colombia found that:

*...there is a particularly critical situation of [food and water] shortages in the territories of the Wayúu communities of La Guajira... In this same region, the communities have been denouncing the **impacts caused by coal extraction**, such as loss of territories, loss of bodies of water, adverse effects on health, adverse effects on traditional culture, and **threats to food security**... In this process, the communities have resorted to court actions...*¹⁵⁷

¹⁵² Contraloría General de la República (n 146) pp. 83-84.

¹⁵³ *ibid* p. 84.

¹⁵⁴ Tathiana Montaña, 'La desviación del Río Ranchería: algunos elementos a consideración' (Notas visita Riohacha 16-18 October 2012, Indepaz) <<https://perma.cc/U8KA-QQJ7>>.

¹⁵⁵ *ibid*.

¹⁵⁶ *ibid*. See also Constitutional Court of Colombia, T-614 (n 51) p. 123, para 9.7: 'the surface and underground water sources of [the Provincial] community were being affected by the Cerrejón operations, due to... the disappearance and alteration of channels and aquifers.'

¹⁵⁷ Defensoría del Pueblo, *XXVI Informe del Defensor del Pueblo al Congreso de la República, Parte I - Informe Analítico: Situación de los Derechos Humanos y Derecho Internacional Humanitario en Colombia – 2018* (July 2019) pp. 151-152 <<https://perma.cc/QNF5-GT7P>>.

One example of a court action is the above-mentioned judgment concerning the diversion of the Arroyo Bruno. In that case, the Colombian Constitutional Court concluded that **the reduction in access to water for use in agriculture, the reduction in access to drinking water, and uncertainty about the ecological effects of the diversion, constituted a ‘concrete, certain and direct threat to the rights of water, health, and food security and sovereignty of the communities dependent upon the Arroyo Bruno.’**¹⁵⁸ The Contraloría subsequently noted that ‘the threat to the rights to health, water and food security of the indigenous communities affected by the project to divert the channel of the Arroyo Bruno by the company Carbones del Cerrejón Limited, a threat that was recognized by the Constitutional Court’ had not been addressed.¹⁵⁹

Water scarcity, and the food scarcity to which it gives rise, has particularly affected children in La Guajira.¹⁶⁰ In 2015, the Wayúu communities from High Guajira submitted a complaint to the Inter-American Commission on Human Rights about the shortage of water associated with the operations of the Cerrejón mine. The communities requested urgent measures of protection against the risk to their lives and personal integrity caused by the ‘lack of access to drinking water and the state of malnutrition that this causes to members of the community, especially girls and boys’.¹⁶¹ The Inter-American Commission on Human Rights granted the interim measures requested, but the situation has not improved.¹⁶²

G. Context of climate change

The impacts described above take place in a context of significant vulnerability to climate change. The Colombian governmental agency IDEAM (the Institute of Hydrology, Meteorology and Environmental Studies), in collaboration with the UN Development Program, has predicted that in La Guajira the main effects of global climate change will be felt on the **agricultural and livestock** sectors, with particular impacts on food crops.¹⁶³ The report notes that **decreased water** in the ecosystem ‘could continue to be one of the main effects [of global

¹⁵⁸ Colombian Constitutional Court, SU698/17 (n 48) Consideration 5.7.4.

¹⁵⁹ Contraloría General de la República (n 146) p. 13.

¹⁶⁰ Carolina Mila, ‘La sed de los niños Wayuu’ (Semana Sostenible, 13 July 2018) <<https://perma.cc/4ZMP-U5HH>>.

¹⁶¹ Inter-American Commission on Human Rights, Resolution 60/2015 (n 42) p. 1. These relevant communities were from the municipalities of Uribía, Manaure, Riohacha y Maicao.

¹⁶² See, for example, Colombian Constitutional Court, T-302/17 (n 68).

¹⁶³ Institute of Hydrology, Meteorology and Environmental Studies and United Nations Development Program, *Nuevos escenarios de Cambio climático para Colombia 2011-2100* (2015) <<https://perma.cc/7JB8-8LAT>> p. 40.

climate change] in the [region], affecting health due to nutritional factors related to food security. Diseases... could be accentuated.’¹⁶⁴

Cerrejón’s activities have already contributed to water shortages on a local level in La Guajira,¹⁶⁵ and global climate change is also inextricably linked to the enterprise’s activities. Cerrejón operates the largest open cast coal mine in Latin America, and sells much of its coal to energy companies. The energy sector is responsible for some 40 *percent* of global carbon dioxide emissions,¹⁶⁶ and almost two-thirds of these emissions come from coal.¹⁶⁷ Coal is a particularly dirty fuel: its combustion emits more carbon dioxide per thermal unit than any other fossil fuel.¹⁶⁸ Water shortages in La Guajira, which have been caused by Cerrejón’s coal mining, are now being exacerbated by global climate change which is in part caused by coal combustion. Cerrejón’s activities thus combine to heighten the severity of the adverse impacts felt in La Guajira.

H. Displacement of local and indigenous communities and other activities without their consent

Over the past forty years, Cerrejón has forcibly displaced thousands of individuals from Wayúu, Afro-Colombian, and campesino (rural subsistence farmer) communities in La Guajira.¹⁶⁹ The first example of this was in 1981, when 750 residents from the Wayúu village of Media Luna were displaced to make way for the construction of Puerto Bolívar.¹⁷⁰ Cerrejón entered into collective relocation negotiations with the residents, but these broke down after a number of residents were threatened by company employees.¹⁷¹ The inhabitants were subsequently forcibly relocated.¹⁷² When the initial relocation site turned out to be unsuitable,

¹⁶⁴ *ibid.*

¹⁶⁵ See Section III E.

¹⁶⁶ UN News, ‘Is the world ready to end the coal era and embrace clean energy?’ (29 November 2019) <<https://perma.cc/RNS9-59CA>>.

¹⁶⁷ The World Bank, *Understanding CO2 Emissions from the Global Energy Sector* (2014/15) <<https://perma.cc/RS42-HKJR>>.

¹⁶⁸ See U.S. Energy Information Administration, ‘How much carbon dioxide is produced when different fuels are burned?’ <<https://perma.cc/HU8S-354A>>.

¹⁶⁹ Noel Healy, Jennie C Stephens and Stephanie A Malin, ‘Embodied energy injustices: Unveiling and politicizing the transboundary harms of fossil fuel extractivism and fossil fuel supply chains’ 48 (2019) *Energy & Social Science* 219, 224.

¹⁷⁰ Remedios Fajardo Gómez, ‘The Systematic Violation of the Human Rights of the Indigenous People, Black people and Campesinos by the Coal Mining Multinationals in the Department of La Guajira, Colombia’ in Chomsky, Leech and Striffler (eds), *The People Behind Colombian Coal* (Casa Editorial Pisando Callos, 2007) pp. 19-20.

¹⁷¹ Dennis Rømer Adamsen, Anne Sofie Poulsen and Maren Urban Swart, ‘The Curse of Coal: Our consumption causes diseases, pollution, and poverty in Colombia’ (Danwatch, 2010) <<https://perma.cc/3SSQ-T5BK>> p. 9.

¹⁷² Christian Aid, *Undermining Human Rights* (n 26) p. 20.

the inhabitants were told to move again.¹⁷³ Seven families refused to do so, and Cerrejón subsequently built a fence around their homes and stationed armed guards in the area.¹⁷⁴

Another example of community displacement by Cerrejón is the eviction of 1,200 Afro-Colombian residents of the community of Tabaco in 2001.¹⁷⁵ The eviction was carried out by police, armed guards, and the military.¹⁷⁶ Bulldozers were used to demolish the village.¹⁷⁷ The Colombian Supreme Court ordered that the village be reconstructed,¹⁷⁸ but this order was not followed.¹⁷⁹ Complaints were subsequently lodged with the Australian and Swiss NCPs in respect of two of Cerrejón's parent companies.¹⁸⁰ These NCPs, as well as the UK NCP, facilitated negotiations between the complainants and Cerrejón's parent companies. In 2008, a settlement agreement was concluded.¹⁸¹

However, this agreement was concluded by a small number of arbitrarily selected leaders, and was never democratically ratified by the Tabaco community as a whole.¹⁸² Moreover, the enterprise's responsibilities focused on compensation, as opposed to substantive remediation of the harms caused.¹⁸³ In 2017, the Colombian Constitutional Court pointed out that the displacement of the Tabaco community **'cannot be treated exclusively as a problem of compensation'**.¹⁸⁴ The more substantive obligations – such as the requirement to provide housing and infrastructure to replace that which was destroyed – were passed on to the local

¹⁷³ *ibid.*

¹⁷⁴ *ibid.*

¹⁷⁵ Rømer Adamsen et al (n 171) p. 7.

¹⁷⁶ Karin Gregow, *As Black as Coal: Business and human rights with a focus on coal mining in Colombia* (Forum Syd 2016) <<https://perma.cc/4LLP-EK5N>> p. 17.

¹⁷⁷ *ibid.*

¹⁷⁸ Colombian Supreme Court, Chamber for Civil Cases, Decision No. 0014-01 of 7 May 2002.

¹⁷⁹ Gregow (n 176) pp. 16-17

¹⁸⁰ See Patrick Colmer, *Statement by the Australian National Contact Point: BHP Billiton – Cerrejon Coal Specific Instance*, 12 June 2009 <<https://perma.cc/78TQ-6HHG>>; National Contact Point of Switzerland, *Specific Instance Cerrejon Coal Mine, Columbia: Closing Statement*, 15 July 2009 <<https://perma.cc/C2P7-5HJZ>>. The UK NCP was involved in the mediation process but did not issue a public statement as it had not received a complaint.

¹⁸¹ *ibid.*

¹⁸² Tabaco representatives (Luis Carlos Romero Daza, Samuel Arregoces, Rogelio Manuel Ustate Arregoces, Kendris Deluquez, Ines Estela Perez Arregoces, Juana Díaz de Medina, Yenis Cecilia Zambrano, Édgar Enrique Arregoces Arregoces, Argemiro Pérez, and Antonio Manuel Solano Arregoces), 'Manifiesto Istanica Coordinadora Comunidad de Tabaco' (February 2020). The leaders also note that the displacement of the community has led to a breakdown in social cohesion and collective identity.

¹⁸³ *ibid.*

¹⁸⁴ Colombian Constitutional Court, T-329/17 (n 53) para 4.7.

authority, which failed to comply with the agreement.¹⁸⁵ As a result, the Tabaco community remains dispossessed to this day.¹⁸⁶

In 2019, Paul Warner – the BHP representative who negotiated the 2008 agreement and who previously had direct responsibility for its implementation – noted that an enterprise cannot, ‘having handed [the requirement to provide housing to displaced communities] off to local government... leave the issue of adequate housing unaddressed when that local government ultimately proves unwilling or unable [to provide it]’.¹⁸⁷ On this basis, he accepted that **‘the time has come for Cerrejón to assume responsibility for providing Tabaco with the housing and infrastructure that is part of a socially responsible resettlement process.’**¹⁸⁸ The enterprise nonetheless still to fail to act.

In October 2020, a group of community representatives issued a statement setting out the continuing inadequacy of ostensible remediation efforts, and made the following requests:¹⁸⁹

- i. That a consultation process be initiated with the Tabaco community in order to reach agreements with those who have received no reparations for the violations of their rights;
- ii. That future meetings between the enterprise and the community be observed by a supervising committee comprised of, *inter alia*, members from the Office of the Attorney General, the Office of the Ombudsman, and the Office of the Contraloría, as stipulated by the Colombian Court’s 2017 judgment;¹⁹⁰
- iii. That future meetings be attended by individuals from both the enterprise and the local government who have the power to make decisions;
- iv. That the continuing impacts on the Tabaco community be identified, acknowledged and reflected in the reparations;
- v. That this process begin with the allocation of a budget, the development of an action plan, and an initial schedule for work lasting no longer than three months;

¹⁸⁵ Letter from Paul Warner to Aviva Chomsky, 8 July 2019.

¹⁸⁶ Eliana Mejía, ‘El drama de un pueblo que lleva casi 20 años esperando su reubicación’, (*El Tiempo*, 28th May 2020) <<https://perma.cc/VE56-K8NG>>. See also Richard Solly, ‘Ten years on from the independent evaluation of Cerrejón Coal’ (London Mining Network, 17 September 2018) <<https://perma.cc/ZC3Q-V5ZS>>; and Lydia James, ‘Tabaco, Colombia: still no justice after 18 years’ (London Mining Network, 9 August 2019) <<https://perma.cc/5PFQ-CKLH>>.

¹⁸⁷ Letter from Paul Warner to Aviva Chomsky, 8 July 2019.

¹⁸⁸ *ibid.*

¹⁸⁹ Tabaco representatives (n 182).

¹⁹⁰ Colombian Constitutional Court, T-329/17 (n 53) para 10.2.

- vi. That this process be conducted with the participation, oversight, and agreement of the community representatives and the open participation of the entire community.

Cerrejón has not responded to this statement.

The Tabaco community is not alone in its experience of displacement. In 2016, eight Afro-Colombian families refused to be resettled when Cerrejón failed to provide guarantees on the conditions of their relocation.¹⁹¹ Tear gas and metal projectiles were used to force the families out, and several individuals were seriously injured.¹⁹² By way of other examples, the communities of Manantial, Las Mulas, Oreganal, El Descanso, and Sarahíta have all been displaced, have not been reaccommodated, and have not received any reparation.¹⁹³

Even when Cerrejón claims to have sought the consent of local communities in relation to displacement, the process has been shown to be fundamentally flawed.¹⁹⁴ In 2012, for example, Cerrejón proposed to divert the Ranchería River.¹⁹⁵ Widespread protests broke out, with local groups arguing that the compensation offered by Cerrejón was insufficient to offset the damage which would be caused to the ecosystem in La Guajira.¹⁹⁶ Jackeline Romero, a member of the Wayúu Women's Force Movement, described the 'consultation' process as follows:

*The Ministry of Interior and the company held a meeting... in which they told the community: 'here's a project', and described its benefits. Sometimes money was given out, but never information about the project's pros and cons. The process would end up being a buy-sell agreement with the communities, which is illegitimate because the process had not provided all the tools for proper community participation.*¹⁹⁷

Similarly, the president of the labour union at Cerrejón reported that the company's CEO had confidentially told the union that Cerrejón's sustainability relied on production growth, and

¹⁹¹ Richard Solly, 'Cerrejón Coal: brutal evictions of villagers resisting relocation' (London Mining Network, 26 February 2016) <<https://perma.cc/M8KE-WRPW>>.

¹⁹² *ibid.* Cerrejón has stated that it 'laments what occurred on that day', Cerrejón Statement on the Christian Aid Report (21 February 2020) (on file with authors) p. 4.

¹⁹³ CINEP (n 45) pp. 59-102, p. 77.

¹⁹⁴ U.S. Office on Colombia, 'Large-scale mining in Colombia: Human rights violations past, present and future' (May 2013) <<https://perma.cc/JM5T-UL4Q>> p. 28

¹⁹⁵ *ibid.* p. 26.

¹⁹⁶ *ibid.* p. 28.

¹⁹⁷ U.S. Office on Colombia (n 194) p. 29.

that production growth required the extraction of 500 million tons of coal from under the Ranchería River.¹⁹⁸

Cerrejón was ultimately taken to court, and in September 2012 the Criminal Cassation Chamber of the Supreme Court found that there had been a violation of the right to prior consultation for indigenous and Afro-descendant communities.¹⁹⁹ The diversion was subsequently suspended, with Cerrejón citing changes in the coal market.²⁰⁰

The International Council on Mining and Metals (ICMM), a group of extraction companies to which all the parent companies belong,²⁰¹ references the above series of events as a case study for *good practice* in relation to indigenous peoples and mining.²⁰² The Council reports that the process of securing the free prior and informed consent of the local communities was ‘carried out according to best practice’ and that ‘[d]uring the whole process, Cerrejón... reconfirmed that it would not carry out the expansion project without the communities’ approval’.²⁰³ This directly conflicts with the Supreme Court ruling.

As explained above, Cerrejón diverted another waterway in 2016: the Arroyo Bruno tributary. Within months, the Council of State had ordered that this diversion be suspended and that prior consultation take place with more than 25 communities.²⁰⁴ The following year, the Colombian Constitutional Court ordered that the diversion be suspended for a full assessment of its foreseeable environmental and social impacts to be carried out (as explained above).²⁰⁵ Applying the precautionary principle, the court highlighted that the following uncertainties, among others, would have to be considered:²⁰⁶

- the characteristics and state of the ecosystem around the Arroyo Bruno, taking into account the fact that the waterway runs through a tropical dry forest;
- the impact of climate change and global warming in La Guajira, considering in particular the reduction in rainfall levels;

¹⁹⁸ *ibid* p. 26.

¹⁹⁹ Judgment of the Criminal Cassation Chamber of the Supreme Court of Justice of 13 September 2012.

²⁰⁰ Cerrejón, ‘Cerrejón Postpones Studies on the Possible Diversion of the Ranchería River’ <<https://perma.cc/7QAA-HD54>>.

²⁰¹ Anglo American and BHP are founding members of ICMM. See ICMM, ‘Company members’ <<https://perma.cc/E49W-58EN>>.

²⁰² International Council on Mining & Metals, ‘FPIC and Expansion Project’ <<https://perma.cc/J783-DUC5>>.

²⁰³ *ibid*.

²⁰⁴ See Indepaz, ‘Una consulta previa sin garantías: El caso del arroyo Bruno’ <<https://perma.cc/4KKD-R2WM>>.

²⁰⁵ Colombian Constitutional Court, SU698/17 (n 48).

²⁰⁶ *ibid* para 5.1.

- the impacts caused by Cerrejón’s previous activities, particularly past interventions that had been carried out in the bodies of water in La Guajira, and the cumulative and residual impacts of these activities;
- the functions that the Arroyo Bruno fulfils with respect to cultural practices, water supply, regulation and maintenance, and the impact that the deviation could have on each of these functions;
- the upstream impact that the diversion could have;
- the loss of groundwaters through the removal of aquifers, and the realignment of surface waters elsewhere in the region; and
- the biological value of the Arroyo Bruno basin in the context of the broader management of the Ranchería River.

This evaluation has still not been completed, and legally Cerrejón remains under an obligation to return the stream to its natural channel as a precautionary measure until the study is carried out.²⁰⁷ In 2019, Cerrejón representatives stated that restoration of the tributary was no longer feasible.²⁰⁸ In June 2020, the Contraloría found that there had been a failure to properly consider the evidence and reach a determinative conclusion about the future of the tributary.²⁰⁹

The El Rocío community, which lives close to the Arroyo Bruno, is now also facing eviction.²¹⁰ The land on which the communities live may technically be owned by private individuals, although this legal title appears to have been granted in contravention of laws against sale of indigenous property.²¹¹ Cerrejón recently expressed interest in purchasing these lands, and the private landowners began to explore eviction options.²¹² In October 2019, Cerrejón stated that it had commenced ‘consultation... with the communities of El Rocío’, as well as other communities living close to the Arroyo Bruno, **‘to identify, and compensate for, possible**

²⁰⁷ Discussion with CAJAR, November 2020.

²⁰⁸ Richard Solly, ‘Saving the river’ (n 144).

²⁰⁹ Contraloría General de la República (n 146).

²¹⁰ ABColombia, Letter of Concern to Colombian Government: Forced Eviction of El Rocío (27 August 2019) <<https://perma.cc/5VMM-FD3D>>; Cerrejón newsletter October 2019: ‘Prior consultation process begins with Tigre Pozo and El Rocío communities’ <<https://perma.cc/KL9F-UELC>>.

²¹¹ El Tiempo, ‘La disputa por un predio clave para el agua de La Guajira’ (26 November 2019) <<https://perma.cc/8K8N-2DAM>>. In 1989, the State granted ownership of this 18-hectare plot to private landowners. This award was apparently in contravention of the law against such awards for any purpose other than the establishment of an indigenous reservation.

²¹² *ibid.* The community has also faced forcible displacement by armed groups apparently linked to the private landowners at various points since 1998.

effects caused by... [the] diversion' of the stream.²¹³ In other words, the consultations appear to be premised on the assumption that the tributary will not be returned to its natural course, and that the communities of El Rocío and Tigre Pozo will therefore be displaced.²¹⁴ According to the ICMC case study, one of the 'lessons learned' by Cerrejón following its previous attempt to divert the Ranchería was that 'communities have the expectation of resolving all of their needs through a *prior* consultation process', rather than 'receiving compensations according to the impacts of a project'.²¹⁵

I. Destruction of cultural heritage

The Wayúu normative system, which includes a set of principles, procedures and rites that govern the social and spiritual conduct of the community, has been inscribed in the List of Intangible Cultural Heritage of Humanity of UNESCO.²¹⁶ Yet the environmental devastation of La Guajira, and the forcible displacement of its people by the mine, has led to irreparable cultural harm. The cultural heritage of the Wayúu is inextricably linked to their ancestral lands.²¹⁷ As one member of the displaced Tabaco community explains:

*We ethnic communities, Afro-descendant and Wayúu, have always lived off of agriculture, fishing, hunting, and from herding our animals. We have a spiritual anchor to our land... Because we have been displaced, we have lost our sacred places, our meeting places, we have lost our ancestral medicine.*²¹⁸

Wayúu individuals' testimonies, recorded in a recent CINEP report, indicate the severity of the cultural damage caused by Cerrejón:

With the arrival of mining, they stripped us of our beliefs, since the sacred sites were taken away; they wiped out vegetation, animals, and waters. There was also an

²¹³ Cerrejón newsletter (n 210).

²¹⁴ As previously noted, the diversion of the Arroyo Bruno remains in place contrary to the decision of the Constitutional Court: Richard Solly, 'Saving the river' (n 144).

²¹⁵ International Council on Mining & Metals (n 202). Emphasis added.

²¹⁶ See UNESCO, Intangible Cultural Heritage, 'Wayuu normative system, applied by the Pütchipü'üi (palabrero)' (2010) <<https://perma.cc/X66V-QTEP>>.

²¹⁷ Katrin Blanta, 'Interdependency and Interference: The Wayuu's Normative System and State-based Conflict Resolution in Colombia (Berghof Foundation, 2016) p. 12 <<https://perma.cc/CYV7-ANTU>>.

²¹⁸ Statement by Rogelio Ustate Arrogoes, see Hilda Lloréns and Ruth Santiago, 'Coal's Open Wounds / Las Heridas Abiertas del Carbón' (NACLA, 28 September 2018) <<https://perma.cc/6XYB-WT2V>>.

*intrusion into our culture and fragmented our communities, families and friendships forged over 400 years ago.*²¹⁹

...

*The soil was fertile, it allowed the grazing of goats, sheep and cows; yucca, ahuyama, bananas, corn, millet, melon... were cultivated, there was also a great variety of wild fruits. In the mornings the melodious songs of the birds could be heard, and throughout the day, the springs ran from the source to the mouth, along with the rain watering the green grass and the immense trees of caracolí, oak, trupillo, jobo, ceiba, guáimaro, cotoprix, mamoncillo and the algarrobillos that refreshed us and produced fruits and food for domestic and wild animals. We felt privileged with the water sources that gave us the precious liquid for our families, such as the Ranchería River, the streams, jagüeyes and springs of crystalline waters.*²²⁰

The Guáimaro tree provides an example of how environmental destruction caused by the mine has led to both the food insecurity detailed above, and to a loss of cultural heritage. The Guáimaro tree is a sacred tree for the Wayúus. It bears fruits and nuts, with food properties that are even superior to those of avocado.²²¹ It has as much protein as milk, four times more potassium than bananas, as much iron as spinach, and four times the magnesium of red beans.²²² Thanks to its roots that extend up to 50 metres deep into the earth, it is resistant to droughts and hurricanes.²²³ It can live 100 years and is productive until its death.²²⁴ The tree was revered by the Wayúu for its medicinal properties capable of treating respiratory diseases and rheumatism.²²⁵ The Guáimaro tree is now on the brink of extinction, in part because of water shortages and structural changes to the hydrological system caused by Cerrejón's

²¹⁹ CINEP (n 45) p. 65

²²⁰ *ibid* p. 67.

²²¹ *El País*, 'Guáimaro, guardián ambiental nacido de la entraña de la Tierra' (22 March 2018) <<https://perma.cc/7YMM-H5GC>>.

²²² *El Nuevo Siglo*, 'Guáimaro, guardián ambiental nacido de la entraña de la Tierra' (19 March 2018) <<https://perma.cc/K3G7-C493>>.

²²³ CAJAR, 'Diez Verdades sobre Carbones Cerrejón' (n 2) p. 17

²²⁴ *ibid*.

²²⁵ *ibid*.

activities.²²⁶ As a result, the Wayúu and Afro-Colombian communities can no longer engage in the cultural and commercial practices associated with this tree.²²⁷

Other surviving flora of cultural significance have also been harmed by pollution generated by Cerrejón's operations: in its December 2019 judgment, the Constitutional Court found that 'the flora of the region [has been] affected by its proximity to the mining complex, causing constant exposure to pollution and the accumulation of particle material.'²²⁸ The loss of indigenous plants has impaired the practice of customary traditional medicine by the people of La Guajira.²²⁹

As well as devastation of the natural environment, Cerrejón's expansion has led to the destruction of indigenous communities' churches and cemeteries.²³⁰ The bulldozing of sacred sites is a direct incursion into the cultural heritage of the Wayúu people. On a spiritual level, community members have also explained how the train which runs between the Cerrejón mine and Puerto Bolívar disrupts their dreams.²³¹ Dreams hold spiritual significance for the Wayúu people. One member of the Wayúu community of Paradero explains:

*My mother is a dreamer and the train interrupts her dreams and she is unable to continue dreaming once she is awake. And this is upsetting because her dreams are a source of important information for us.*²³²

²²⁶ CINEP, *Noche y Niebla 61* (June 2020) <<https://perma.cc/95UE-9W5D>> pp. 84-85; AIDA, CAJAR, and the Global Initiative for Economic, Social and Cultural Rights, *Parallel Report on Colombia for the Committee on the Elimination of Racial Discrimination (CERD): Climate Change and Ethnic Communities in La Guajira* p. 8 <<https://perma.cc/5T5M-BGH2>>. See Sections II D and E on Cerrejón's impacts on water in La Guajira. In its submission for the *Arroyo Bruno* case, Cerrejón tacitly accepted that its structural interventions into La Guajira's hydrological system have contributed to the loss of the tree. See Colombian Constitutional Court, SU698/17 (n 48) para 6.3.2.5: 'Of course... it will take a while for the riparian forest conditions to return to [their natural state]. You cannot have that forest overnight, but we are... even planting... the Guáimaro as recommended by the communities themselves.'

²²⁷ *El Espectador*, Ambiente 'Guáimaro, el árbol que renace para luchar contra la desnutrición en Colombia' (20 March 2018) <<https://perma.cc/XK9M-RA7V>>.

²²⁸ Constitutional Court of Colombia, T-614 (n 51) p. 123, paragraph 9.7.

²²⁹ The Wayúu, Afro-Colombian and campesinos communities have traditionally used over 170 types of plants in their medicines. The growth of these plants has been impeded by the operation of the mine. CINEP (n 45) p. 84.

²³⁰ CINEP (n 45) p. 75. In particular, the communities of Palmarito, Caracolí, Espinal, and Tabaco have been affected.

²³¹ ABColombia webinar, 'How Mining Companies Silence and Nullify the Actions of Indigenous Peoples to Protect their Rights: Case Study Carbones de Cerrejón' (11th September 2020); Lloréns and Santiago (n 218).

²³² Lloréns and Santiago (n 218).

The damage caused to the cultural property and identity of indigenous people in La Guajira – a region where almost half of the population is indigenous²³³ – is both immeasurable and irremediable.

J. Inadequate response to threats against activists

Harassment and violence towards human rights and environmental defenders is a significant problem in Colombia.²³⁴ Since January 2016, at least 734 environmental and human rights activists have been murdered.²³⁵ In La Guajira, community leaders routinely receive death threats and intimidation from right-wing paramilitary organisations such as Las Aguilas Negras (The Black Eagles).²³⁶ In March 2020, Las Aguilas Negras circulated pamphlets identifying various human rights defenders, including several members of the Fuerza de Mujeres Wayúu (Wayúu Women’s Force), as targets for violence.²³⁷ In June 2020, the president of Nación Wayúu, an NGO which defends the human rights of the Wayúu people, received a floral wreath at the entrance to his home with a note reading: ‘your funeral is approaching’.²³⁸

The activists who face threats of violence are often those who speak out against Cerrejón.²³⁹ Moreover, threatening incidents often take place before or after hearings and judicial actions presented by indigenous peoples opposing Cerrejón’s operations.²⁴⁰ Indeed, one convicted paramilitary leader has stated that he met with a mine official to discuss the assassination of Cerrejón union members;²⁴¹ and other paramilitaries have stated that they ‘watched over El Cerrejón’.²⁴² As a result, some leaders of groups opposing Cerrejón’s projects have had to

²³³ Christian Cwik, ‘Displaced Minorities: The Wayuu and Miskito People’ in Steven Ratuva (ed), *The Palgrave Handbook of Ethnicity* (Palgrave, 2019) <<https://perma.cc/LWN3-F93K>>.

²³⁴ UN News, Colombia: “Terrible trend” of rights defenders killed, harassed; UN calls for “significant effort” to tackle impunity’, 10 May 2019 <<https://perma.cc/ZQ79-9D2Z>>. See also letter from ABColombia to Irish Minister Simon Coveney, 2 August 2019 <<https://perma.cc/ZDB4-CVLH>>.

²³⁵ Luis Jaime Acosta, ‘Miles de personas marchan en Colombia para exigir cese de violencia contra líderes sociales’ (Reuters, 27 July 2019) <<https://perma.cc/5AXL-2GBB>>.

²³⁶ Sandra Guerrero, ‘Ola de amenazas contra líderes, funcionarios y víctimas en La Guajira’ (El Heraldo, 10 June 2019) <<https://perma.cc/6P8K-DUE3>>.

²³⁷ Fuerza de Mujeres Wayúu (Wayúu Women’s Force), ‘Comunicado a la Opinión Pública y a la Comunidad Nacional e Internacional Sobre Las Recientes Amenazas por Medio de Panfletos de las Aguilas Negras – Comando Central Bloque Capital D.C.’ (12 March 2020) <<https://perma.cc/F7U3-ZFYQ>>.

²³⁸ See formal complaint, 17 June 2020 <<https://perma.cc/KY3L-L7RP>>.

²³⁹ Consultation with CINEP, CAJAR and AIDA, 5th October 2020; ABColombia webinar (n 231); CINEP (n 45) p. 100.

²⁴⁰ Consultation with CINEP, CAJAR and AIDA, 5th October 2020.

²⁴¹ Victoria McKenzie & Steven Cohen, ‘Death and Displacement: A USAID Export’ (2018) 50(2) NACLA Report on the Americas 128, 131.

²⁴² *ibid.*

request special protection under the National Protection Unit schemes, which involves wearing a bulletproof vest and carrying a panic button.²⁴³

In December 2019, CINEP filed a brief before the Judge overseeing the execution of the court decision (Sentence SU-698) relating to the deviation of the Arroyo Bruno and the violation of the rights of the indigenous communities of La Gran Parada, Paradero and La Horqueta. In the brief, CINEP denounced threats against indigenous leaders who spoke out against the deviation of Arroyo Bruno:

Days prior to the verification visit and the public hearing held on July 8 and 9, 2019, threatening pamphlets of paramilitary groups appeared in the municipalities of Albania, Hatonuevo and Barrancas against three defenders of ethnic-territorial rights who participate actively in the defense of the Bruno stream, who were to attend the public hearing. This same pamphlet was again released in November, prior to the participation space of the Inter-institutional Roundtable held in Paradero (Albania).

The pamphlet is signed by paramilitaries calling themselves “Águilas Negras - Bloque Capital D.C.” and designates social leaders as “disguised guerrillas” and “snoops seeking to destroy companies” The leaders mentioned are: Inés Pérez, leader of the Afro-descendant community of Tabaco, violently displaced by Cerrejón in 2001 and, currently, leader of the municipality of Albania; José Gil, the authority of the community of Charito and Blas Sierra, the authority of the community of El Rocío, indigenous settlements located on the banks of the Bruno stream that are affected by the project for the diversion of the Bruno stream and expansion of the La Puente pit.

It is worth mentioning that Misael Socarrás, leader of the activist community of La Gran Parada and member of the Fuerza de Mujeres Wayyu organization, has been constantly threatened and has suffered various security incidents, so today he has a collective security scheme implemented by the National Protection Unit.

Added to this is a series of statements and messages made by Guillermo Fonseca, president of the multinational Carbones de Cerrejón Limited, who has insisted

²⁴³ Letter to Director of the National Protection Unit Re: Urgent action required to guarantee the rights and safety of defenders, social leaders, and communities in the context of COVID-19 pandemic and obligatory social isolation measures (Bogotá, May 2020) <<https://perma.cc/EW8W-VSD6>>; letter to Colombia Vice-president concerning the security risks by indigenous leader Samuel Arregoces and the insufficient response by the National Protection Unit, dated 11 September 2019.

*throughout 2019 that there are three issues hindering the exploitation and export of coal [namely, inter alia]: i) "greater social, judicial and media activism against them, which has made it difficult to advance mining projects such as La Puente" [...]*²⁴⁴

CINEP's brief further remarked that:

*This aggressive situation of pointing out [people opposing Cerrejón's projects] and [their] stigmatization was multiplied by social networks condemning the ethnic communities that defend the territory and the human rights organizations as "obstacles to development" or a "threat to the economy of the department and the country", which has had the effect of discouraging and intimidating participation in actions taken in defence of the territory, in addition to increasing the risk situation and the vulnerability of the plaintiffs and the Wayúu communities who disagree with the expansion of the La Puente pit which require the diversion of its most important water source.*²⁴⁵

Although Cerrejón has publicly condemned violence and intimidation against human rights defenders and union leaders,²⁴⁶ community leaders report that Cerrejón's media efforts have fuelled hostility against them.²⁴⁷ For example, Cerrejón's former president recently stated in a media interview that 'the attitude of the communities has to change... 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... profiting from these processes against our companies.'²⁴⁸

In February 2020, Cerrejón issued a response to Christian Aid's report, which had highlighted concerns about the effects of such statements.²⁴⁹ The response stated that:

Cerrejón has heard the complaints from specific communities regarding the effect of some public messages about the company's future and the impact these have had on the safety of

²⁴⁴ CINEP, Brief before Juzgado 20 de Ejecución de Penas y Medidas de Seguridad de Bogotá, 26 December 2019, p. 9.

²⁴⁵ *ibid* p. 10.

²⁴⁶ See, for example, Cerrejón, 'Cerrejón condemns threats against fuerza de mujeres Wayúu leaders and sintracarbón's Igor Díaz and requests prompt investigations from authorities' (16 May 2019) <<https://perma.cc/F35E-TFLT>>.

²⁴⁷ Christian Aid, *Undermining Human Rights* (n 26) p. 28. See also PAX communication with Bettercoal, email of 18th December 2017, FOI doc 264 (on file with authors): 'it's one thing to make statements to European actors that you condemn violence and threats, it's something else to actually contribute to addressing these threats.'

²⁴⁸ Jorge Hernán Peláez, Interview with Cerrejón President Guillermo Fonseca, 'La dinámica de las comunidades tiene a Cerrejón parado y a otras industrias' (La República, 9 February 2019) <<https://perma.cc/44HV-CGWC>>.

²⁴⁹ Christian Aid, *Undermining Human Rights* (n 26) p. 28

*community leaders. We take these comments seriously and have revised our messages to ensure that the company is transparent about current economic challenges without placing anyone at risk.*²⁵⁰

In the very same document, Cerrejón also stated that:

*...we comply with laws, ruling and treaties, standards, and commitments agreed with the community, not calls by activists which appear to only give voice to the views of critical stakeholders...*²⁵¹

This latter statement is an example of precisely the anti-activist sentiment which affected communities believe is fuelling hostility against them.

²⁵⁰ Cerrejón Statement on the Christian Aid Report (n 192) point 28.

²⁵¹ *ibid* point 20.

IV. CMC's NON-COMPLIANCE WITH THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES

A. CMC has contributed to adverse impacts on human rights and the environment

Under the MNE Guidelines, enterprises should:

CHAPTER II – General Policies

11. Avoid... contributing to adverse impacts on matters covered by the Guidelines, through their own activities, and address such impacts when they occur.

CHAPTER IV – Human Rights

2. Within the context of their own activities, avoid... contributing to adverse human rights impacts and address such impacts when they occur.

6. Provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have... contributed to these impacts.

i. Adverse impacts caused by the Cerrejón mine

On the basis of the foregoing facts, the operation of the Cerrejón mine has caused, and continues to cause, severe adverse human rights impacts. The Commentary to the MNE Guidelines states that enterprises must respect, 'at a minimum...the internationally recognised human rights expressed in the International Bill of Human Rights, consisting of the Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights...'²⁵²

The UN Human Rights Committee, the organ that monitors implementation of the International Covenant on Civil and Political Rights (ICCPR), has stated that the right to life under Article 6 ICCPR 'is not to be interpreted narrowly' and that it includes 'the right to **be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death**', as well as the right 'to **enjoy a life with dignity**'.²⁵³ The Committee has

²⁵² MNE Guidelines, Commentary to Chapter IV, para 39. Emphasis added. The Commentary further notes that '[e]nterprises can have an impact on virtually the entire spectrum of internationally recognised human rights.' See MNE Guidelines, Commentary to Chapter IV, para 40.

²⁵³ CCPR/C/GC/36. General Comment 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the Right to Life, 30 October 2018, para 3.

acknowledged that in this sense, **degradation of the environment can give rise to a violation of the right to life with dignity.**²⁵⁴ This approach to the right to life has been applied in a recent case raising an environmental issue, the *Portillo case*, in which the Committee found a violation of the right to life of individuals exposed to toxic substances in their surrounding environment.²⁵⁵ The Committee reaffirmed the principle that a violation of article 6 of the Covenant can take place ‘even if such threats and situations do not result in loss of life.’²⁵⁶

The notion of the right to life with dignity has also been understood in the context of other binding instruments in Colombia,²⁵⁷ as protecting indigenous peoples’ rights to enjoy their ancestral lands, ‘acceding to their traditional means of subsistence, as well as of the use and enjoyment of the natural resources needed to obtain clean water and for the practice of traditional medicine to prevent and cure illnesses,’ and ‘living conditions compatible with their dignity.’²⁵⁸ In short, the right to life guarantees indigenous peoples’ basic economic, social and cultural rights which include being able to exercise traditional activities for subsistence and access to natural resources (like water, trees, land) deeply connected with the cultural identity of aboriginal communities.²⁵⁹

Also of note in this context is the Inter-American Court of Human Rights’ Advisory Opinion on the Environment and Human Rights (requested by Colombia) which held that the right to a healthy environment is a fundamental right under the American Convention on Human Rights.²⁶⁰ For its part, the International Covenant on Economic, Social and Cultural Rights (ICESCR) enshrines ‘**the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.**’²⁶¹ The right to health is also recognised in various other human rights instruments.²⁶² For example, Article 24 of the Convention on the Rights of

²⁵⁴ *ibid* para 26.

²⁵⁵ Human Rights Committee, *Portillo Cáceres and Others v. Paraguay* CCPR/C/126/D/2751/2016, Communication 2751/2016 (‘*Portillo case*’).

²⁵⁶ *ibid* para 7.3.

²⁵⁷ Colombia ratified the American Convention on Human Rights on 28 May 1973.

²⁵⁸ Int-Am Ct H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment 17 June 2005 §§ 158(d) and 158(e) (‘*Yakye Axa Case*’).

²⁵⁹ Indigenous peoples enjoy similar protection via the right to take part in cultural life contained in Article 15(1)(a) of the International Covenant on Economic, Social and Cultural Rights. See Committee on Economic, Social and Cultural Rights, General Comment No. 21: Right of everyone to take part in cultural life (art. 15, para 1(a), of the International Covenant on Economic, Social and Cultural Rights) (E/C.12/GC/21) paras. 36 and 37.

²⁶⁰ Int-Am Ct H. R, Advisory Opinion 23 on Environment and Human Rights, OC-23/17 of November 15, 2017, Requested by the Republic of Colombia §59.

²⁶¹ Art 12(1).

²⁶² See the International Convention on the Elimination of All Forms of Racial Discrimination art 5(e)(iv); the Convention on the Elimination of All Forms of Discrimination against Women arts 11(1)(f), 12, and 14(2)(b); the

the Child recognises ‘the right of the child to the enjoyment of the highest attainable standard of health’ and requires States to ‘pursue full implementation of this right’ through *inter alia* ‘the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution.’ Similarly, the Committee on Economic, Social and Cultural Rights (CESCR), has stated the right to health is dependent on the ‘underlying determinants of health’, including **access to safe drinking water and adequate sanitation, safe food, and healthy environmental conditions.**²⁶³ In relation to the right to water, the CESCR has further stated that states must ensure that ‘**[i]ndigenous peoples’ access to water resources on their ancestral land is protected from encroachment and unlawful pollution**’.²⁶⁴ The UN High Commissioner for Human Rights and the WHO have recognised that extractive industries can ‘indirectly infringe upon the right to health by polluting water [and] air.’²⁶⁵

The ICESCR also guarantees the **right to adequate housing.**²⁶⁶ It therefore protects individuals against ‘forced evictions,’ defined as ‘the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.’²⁶⁷

The Commentary to the MNE Guidelines notes that ‘[i]n practice, some human rights may be at greater risk than others in particular industries or contexts, and therefore will be the focus of heightened attention.’²⁶⁸ Attention should therefore be paid to the specific risks associated with mining generally and with mining in lands occupied by indigenous communities. In this respect, the MNE Guidelines recognise that ‘enterprises should respect the human rights of

Convention on the Rights of the Child art 24; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families arts 28, 43(e) and 45(c); and the Convention on the Rights of Persons with Disabilities art 25.

²⁶³ CESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12) (E/C.12/2000/4) para 4. The rights to food and water are both independently protected by Article 11 of the ICESCR. See further CESCR, General Comment No. 12: The right to adequate food (Art.11) (E/C.12/1999/5) and CESCR General Comment No. 15: The right to water (Arts. 11 and 12) (E/C.12/2002/11).

²⁶⁴ CESCR General Comment No. 15: The right to water (Arts. 11 and 12) (E/C.12/2002/11), para 16 (d).

²⁶⁵ Office of the United Nations High Commissioner for Human Rights and the World Health Organization, ‘The Right to Health’ (Fact Sheet No. 31) p. 30.

²⁶⁶ Art 11(1).

²⁶⁷ CESCR, General Comment No. 7: The Right to Adequate Housing (Art 11(1)): Forced Evictions (E/1998/22), para 3.

²⁶⁸ MNE Guidelines, Commentary to Chapter IV, para 40.

individuals belonging to specific groups or populations’, and note that ‘the United Nations instruments have elaborated further on the **rights of indigenous peoples...**’²⁶⁹

Article 10 of the UN Declaration on the Rights of Indigenous Peoples, endorsed by Colombia in 2009, stipulates that:

*Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the **free, prior and informed consent** of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.*

The requirement for free, prior and informed consent (FPIC) is also recognised in Article 16 of the ILO Indigenous and Tribal Peoples Convention,²⁷⁰ ratified by Colombia in 1991:

*... the peoples concerned shall not be removed from the lands which they occupy... Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their **free and informed consent**. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned...*

The principle of FPIC is also binding on Colombia under the American Convention on Human Rights²⁷¹ and, more generally, under the right to self-determination which is a fundamental principle of international law.²⁷² The CESCR has stated that ‘States parties and businesses should respect the principle of free, prior and informed consent of indigenous peoples in relation to all matters that could affect their rights, including their lands, territories and resources that they have traditionally owned, occupied or otherwise used or acquired.’²⁷³

The importance of FPIC in the mining context is reflected in the OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector, which states that

²⁶⁹ *ibid.*

²⁷⁰ ILO C169 – Indigenous and Tribal Peoples Convention, Convention, 1989 (No. 169) art 16.

²⁷¹ Colombia ratified the American Convention on Human Rights on 28 May 1973.

²⁷² As recognised in the Charter of the United Nations (art 1(2)), the International Covenant on Civil and Political Rights (art 1(1)) and the International Covenant on Economic, Social and Cultural Rights (art 1 (1)).

²⁷³ General comment No. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities (E/C.12/GC/24), para. 12.

mining companies should ‘[e]ngage in the process of seeking consent as soon as possible during project planning, before activities for which consent should be sought commence or are authorised, including in the context of exploration activities’.²⁷⁴

On the basis of the facts outlined in section III, and contrary to Chapters II and IV of the MNE Guidelines, Cerrejón has caused and continues to cause severe adverse impacts to the **human rights to enjoy a life with dignity (in its interrelation to the right to culture of indigenous communities), to health, water, food and to a healthy environment** of those living within the vicinity of the Cerrejón mine through its widespread, persistent and extreme polluting of the environment surrounding the mine.

ii. CMC’s contributions to Cerrejón’s adverse impacts

The Commentary to the MNE Guidelines explains that ‘contribution’ is to be interpreted as ‘a substantial contribution, meaning **an activity that causes, facilitates or incentivises another entity to cause an adverse impact and does not include minor or trivial contributions.**’²⁷⁵ The OECD Due Diligence Guidance further explains that an enterprise ‘contributes to’ an impact ‘if its activities, in combination with the activities of other entities cause the impact’.²⁷⁶ The Commentary notes that a ‘contribution’ to an adverse impact may consist of ‘activities in the supply chain’.²⁷⁷ CMC is effectively Cerrejón’s sales and marketing arm: it creates and manages all of Cerrejón’s supply chains.²⁷⁸

The OECD Guidance lists three factors as instructive in determining whether an enterprise has contributed to an impact.²⁷⁹ Applying these in turn demonstrates the magnitude of CMC’s contribution:

- *the extent to which an enterprise may encourage or motivate an adverse impact by another entity, i.e. **the degree to which the activity increased the risk of the impact occurring.***

²⁷⁴ OECD, *OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector* (OECD 2017) p. 97. See also UN Declaration on the Rights of Indigenous Peoples art 10.

²⁷⁵ MNE Guidelines Ch II Commentary para 14. Emphasis added.

²⁷⁶ Due Diligence Guidance Q29. Emphasis added.

²⁷⁷ *ibid* para 17.

²⁷⁸ CMC, ‘CMC Coal Marketing Company’ <<https://perma.cc/GML2-PYAG>>.

²⁷⁹ Due Diligence Guidance Q 29.

As above, CMC enters into contractual agreements for the sale of Cerrejón coal.²⁸⁰ In order to meet the contractual obligations agreed by CMC, Cerrejón's activities proceed and have resulted in the displacement of communities, diversion of waterways, and result in unsafe levels of pollution. CMC therefore **increases the risk** that Cerrejón will cause adverse impacts in the course of its activities.

- *the extent to which an enterprise could or should have known about the adverse impact or potential for adverse impact, i.e. the degree of **foreseeability**.*

There is a plethora of publicly available evidence on the adverse impacts consequent upon Cerrejón's activities.²⁸¹ This evidence alone means that it has long been highly foreseeable that further adverse impacts will result from the mining of more coal by Cerrejón.

Moreover, since CMC is effectively Cerrejón's sales and marketing arm, it has an intimate knowledge of Cerrejón's activities and the effects of those activities. CMC is expected to deal with concerns about Cerrejón's behaviour and reputation when these are raised by power companies,²⁸² and the entity provides updates on Cerrejón's activities to its clients.²⁸³ CMC therefore has **full knowledge** of the adverse impacts effected by the performance of contracts it negotiates.

- *the degree to which any of enterprise's activities actually **mitigated the adverse impact** or **decreased the risk** of the impact occurring.*

Based on CMC's statements on its website and documents obtained through freedom of information requests, it is alleged that CMC has taken **no steps** to mitigate, prevent, or cease the adverse impacts of Cerrejón's activities.²⁸⁴ Instead, its focus seems to have been on

²⁸⁰ See, for example, Coal and Sale Purchase Contract LTD17-028 between CMC – COAL MARKETING DAC and ELECTRICITY SUPPLY BOARD, FOI doc 402 (on file with authors), which specifies tonnage and delivery at clause 2.02 and base price and adjustment at article 4.

²⁸¹ See Section II.

²⁸² See emails of 25 July 2018, FOI doc 021 (on file with authors): 'it's a judgement call for you as to whether you feel you need it is necessary for you to separately / additionally raise the allegations with CMC...' 'As regards the allegations made by Deputy Crowe, I will forward the Dáil transcript to CMC for their comment and also to seek the assurances regarding the allegations. I would welcome some wording to put to CMC or would a general email seeking assurances around the allegations made suffice.' See also emails of 26 July 2018, FOI doc 141 (on file with authors); email of 1st August 2018, FOI doc 142 (on file with authors).

²⁸³ See invitation to the Cerrejón CSR Roundtable, sent by CMC to ESB, FOI doc 105 (on file with authors).

²⁸⁴ See CMC, 'Reliability: Our coal operation' <<https://perma.cc/F8ZF-JXLK>>; CMC, 'Accountability: Our integrated coal handling infrastructure – mine-rail-port' <<https://perma.cc/VL5P-48DY>>; CMC, 'Sustainability: Cerrejón's commitment to mining responsibly' <<https://perma.cc/8826-A8ZW>>; email from CMC representative to ESB representative, 16th November 2018, FOI doc 119 (on file with authors); email from CMC to ESB, FOI doc 129 (on file with authors); emails of 26 July 2018, FOI doc 141 (on file with authors); email of 1st August

dismissing the gravity of these impacts and limiting the consequential reputational harm for Cerrejón.²⁸⁵

In sum, CMC has contributed to adverse impacts caused by Cerrejón by motivating Cerrejón to engage in activities which necessarily cause adverse impacts, and managing relationships with coal purchasers in order to minimise the commercial effect of such impacts when they occur.

iii. CMC's obligations

If an enterprise identifies a risk of contributing to an adverse impact, then it should first take the necessary steps to '**cease or prevent its contribution**'.²⁸⁶ This means 'stop[ping] activities that are... contributing to adverse impacts'.²⁸⁷ **CMC must therefore stop selling Cerrejón coal.**

The Commentary to the MNE Guidelines further explains that 'if an enterprise identifies a risk of contributing to an adverse impact, then it should take the necessary steps to... use its leverage to mitigate any remaining impacts to the greatest extent possible'.²⁸⁸ Leverage is considered to exist 'where the enterprise has the ability to effect change in the wrongful practices of the entity that causes the harm'.²⁸⁹ CMC is the sole marketing agent for Cerrejón, and manages all relationships between Cerrejón and its customers. As such, CMC should utilise its ability to effect change in Cerrejón's behaviour by presenting a true portrayal of Cerrejón's activities to coal purchasers. CMC is obligated under the Guidelines to use its leverage as Cerrejón's exclusive marketer to mitigate the impacts of Cerrejón's activities 'to the greatest extent possible'.²⁹⁰

Moreover, enterprises should 'provide for or co-operate through legitimate processes in the **remediation of adverse human rights impacts** where they identify that they have... contributed to these impacts.'²⁹¹

2018, FOI doc 142 (on file with authors). For more information on CMC's failures to disclose relevant information, see Section IV. B.

²⁸⁵ *ibid.*

²⁸⁶ MNE Guidelines Ch II para 19.

²⁸⁷ Due Diligence Guidance p. 29, para 3.1.

²⁸⁸ MNE Guidelines, Commentary to Ch II, para 19.

²⁸⁹ *ibid.*

²⁹⁰ MNE Guidelines, Commentary to Ch II, para 19.

²⁹¹ MNE Guidelines, Ch IV, Article 6. On the routes through which remediation decisions might be facilitated, see MNE Guidelines, Commentary to Ch IV, para 46. The Due Diligence Guidance further explains that when an

The Due Diligence Guidance explains that remediation entails, *inter alia*, the following practical actions:

- a. *Seek to restore the affected person or persons to the situation they would be in had the adverse impact not occurred (where possible) and enable remediation that is proportionate to the significance and scale of the adverse impact.*
- b. *Comply with the law and seek out international guidelines on remediation where available... The type of remedy or combination of remedies that is appropriate will depend on the nature and extent of the adverse impact and may include... restitution or rehabilitation... **financial or non-financial compensation (for example, establishing compensation funds for victims, or for future outreach and educational programmes)**...*
- c. *In relation to human rights impacts, **consult and engage with impacted rightsholders and their representatives in the determination of the remedy.***
- d. *Seek to assess the level of satisfaction of those who have raised complaints with the process provided and its outcome(s).²⁹²*

CMC must now engage with rights-holders to identify appropriate remedies.²⁹³ Human rights violations to which CMC has contributed, and which it must now remedy in cooperation with Cerrejón and its parent companies, include:

- The displacement of indigenous communities without their free, prior and informed consent;²⁹⁴
- Contamination of air, water and noise pollution;
- Incursions into the right to health and right to live in a healthy environment, caused by Cerrejón's environmental abuses;²⁹⁵ and

enterprise has contributed to actual adverse impacts, it must 'address such impacts by providing for or cooperating in their remediation', Due Diligence Guidance p. 34, para 6.1.

²⁹² Due Diligence Guidance, p. 34, para 6.1.

²⁹³ The perspective of those affected is an important consideration in determining the appropriate remedy for human rights impacts: Due Diligence Guidance Q50.

²⁹⁴ See Section III G.

²⁹⁵ See Section III C and D.

- Incursions into the rights to water and to food security, caused by Cerrejón’s structural interventions in the hydrological system in La Guajira.²⁹⁶

GLAN requests that the Irish NCP engage with the affected groups, CMC, its parent companies, and other relevant NCPs²⁹⁷ in order to identify appropriate remedies, **including environmental restoration measures**. Throughout this process, consideration should be given to the impacts for affected individuals in La Guajira, and the scale of CMC’s annual profits.²⁹⁸

B. CMC has failed to disclose information about its activities

The MNE Guidelines stipulate that:

CHAPTER III – Disclosure

1. Enterprises should ensure that timely and accurate information is disclosed on all material matters regarding their activities... This information should be disclosed for the enterprise as a whole, and, where appropriate, along business lines or geographic areas...

3. Enterprises are encouraged to communicate additional information that could include:

- a) value statements or statements of business conduct intended for public disclosure including, depending on its relevance for the enterprise’s activities, information on the enterprise’s policies relating to matters covered by the Guidelines;
- b) policies and other codes of conduct to which the enterprise subscribes, their date of adoption and the countries and entities to which such statements apply;
- c) its performance in relation to these statements and codes;
- d) information on internal audit, risk management and legal compliance systems;
- e) information on relationships with workers and other stakeholders.

4. Enterprises should apply high quality standards for... non-financial disclosure, including environmental and social reporting where they exist. The standards or policies under which information is compiled and published should be reported...

²⁹⁶ See Section III E.

²⁹⁷ See Section II C.

²⁹⁸ In 2019, CMC posted an \$89 million (€82.5 million) profit before tax on revenues of \$2.7 billion. Peter Hamilton, ‘ESB called out for “contributing to human rights violations”’, *The Irish Times* (Dublin, 20th February 2020) <<https://perma.cc/3RZE-7ZWX>>. In 2018, CMC made €70 million in profit, and as of December 2018 the enterprise held \$57 million in cash and cash equivalents. Its recorded sales in that year totalled \$2.7 billion, most of which was cancelled out by its ‘costs of sale’. Other outgoings included \$5.3 million in staff costs for its 26 employees. Paul O’Donoghue, ‘Colombia mine firm’s €70m profit’, *The Times* (London, 20 May 2019) <<https://perma.cc/HXR2-UXE6>>.

The Guidelines further state that MNEs should:

CHAPTER VI – Environment

1. Establish and maintain a system of environmental management appropriate to the enterprise, including:

- a) collection and evaluation of adequate and timely information regarding the environmental, health, and safety impacts of their activities;
- b) establishment of measurable objectives and, where appropriate, targets for improved environmental performance...
- c) regular monitoring and verification of progress toward environmental, health, and safety objectives or targets.

2. Taking into account concerns about cost, business confidentiality, and the protection of intellectual property rights:

- a) provide the public... with adequate, measurable and verifiable (where applicable) and timely information on the potential environment, health and safety impacts of the activities of the enterprise, which could include reporting on progress in improving environmental performance...

As the Due Diligence Guidance notes, the MNE Guidelines' **disclosure obligations are particularly important for sales and marketing departments.**²⁹⁹

With respect to particulate matter, CMC's website states that:

*One of the main impacts of mining activity is the generation of particulate matter, or dust: we implement an array of control strategies throughout the coal chain and operate an early warning detection system for forecasting climatic conditions which may affect dust levels.*³⁰⁰

As explained above, particulate matter generated by Cerrejón exceeds the limits recommended by the WHO and has been linked to increased incidences of respiratory conditions in the region.³⁰¹

Similarly, the CMC website states that:

Cerrejón has developed social responsibility programmes focused on sustainable development in areas such as education, health, culture, sports, productive projects, the

²⁹⁹ OECD Due Diligence Guidance Q16, Table 5.

³⁰⁰ CMC, 'Accountability: Our integrated coal handling infrastructure – mine-rail-port' p.2 <<http://www.cmc-coal.ie/cerrejon1.html>>.

³⁰¹ See Section III. C.

*environment, infrastructure enhancement, training, employment and basic sanitation for our neighbouring communities, including the native Wayuu people.*³⁰²

As detailed above, Cerrejón has in fact displaced Wayúu communities and polluted the environment, such that the right to live in a healthy environment, access to water, food security and access to basic sanitation have been compromised for these communities.³⁰³

CMC summarises Cerrejón’s approach to human rights and environmental responsibility thus:

*As expectations of companies change, the sustainability of our business depends on Cerrejón’s ability to uphold the highest standards in environmental management and human rights. This is achieved by implementing strategies and policies consistent with the (Ten Principles of the) Global Compact, the UN Guiding Principles and being at the vanguard of social responsibility.*³⁰⁴

This claim is at odds with Cerrejón’s repeated failures to respect human rights and the environment.³⁰⁵

CMC’s failure to recognise the adverse impacts of Cerrejón’s activities extends to situations where allegations are directly put to the entity. For example, when the *Irish Examiner* ran an article on CMC’s complicity in abuses caused by Cerrejón in January 2019, the entity ‘declined to put forward a spokesperson’.³⁰⁶

CMC has taken a similar approach when coal purchasers have themselves have raised concerns about Cerrejón’s activities. Documents obtained from ESB, an Irish state-owned energy company, show that in November 2018 a meeting was arranged between CMC and ESB to discuss the adverse impacts caused by Cerrejón’s operations.³⁰⁷ At the meeting, CMC sought to rebut the allegations levied against Cerrejón. For example, it told ESB that ‘[t]he communities are not required to be part of the roundtable’ which had been ordered by the Colombian courts in order to determine whether the Arroyo Bruno should be returned to its

³⁰² CMC, ‘Sustainability: Cerrejón’s commitment to mining responsibly’ <<https://perma.cc/DP98-WPJK>>.

³⁰³ See Sections III (A) and III (B).

³⁰⁴ CMC, ‘Sustainability: Cerrejón’s commitment to mining responsibly’ p. 2 <<https://perma.cc/QJ4J-VYQC>>.

³⁰⁵ See Section III. See also the Ten Principles of the UN Global Compact, princ 1, 2, 7, 8 and 9; and UN Guiding Principles on Business and Human Rights (HR/PUB/11/04) ch II.

³⁰⁶ Caroline O’Doherty, ‘€2.3bn coal importer rejects abuse claim’, *Irish Examiner* (Dublin, 4th January 2019) <<https://perma.cc/KJ3S-ABJU>>.

³⁰⁷ Email from CMC representative to ESB representative, 16th November 2018, FOI doc 119 (on file with authors). See also email from CMC to ESB rebutting criticisms about Cerrejón’s diversion of the Arroyo Bruno, FOI doc 129 (on file with authors).

natural course.³⁰⁸ This directly conflicts with the court judgment, which states that ‘the inter-institutional roundtable made up of [various ministries and enterprises, including Cerrejón]... must open sufficient participation spaces to the representatives of the acting communities’.³⁰⁹

Another example of CMC portraying Cerrejón’s activities in an artificially positive light is its statement of July 2019, which appears to have been sent to all Cerrejón coal purchasers.³¹⁰ The statement was about a court case relating to violations of human rights and abuses to the environment caused by Cerrejón. The case had reached the highest Constitutional Court in Colombia,³¹¹ and CMC stated that ‘Cerrejón... presented solid arguments against the allegations’.³¹² The Colombian Constitutional Court subsequently found in favour of the claimants and ordered Cerrejón to remedy its various breaches.³¹³ Based on documents available to GLAN it does not appear that CMC disclosed the Constitutional Court’s clear findings against Cerrejón to its customers.

Further, the Commentary to the Guidelines has emphasised the need for developing ‘reporting standards for greenhouse gas emissions... that cover direct and indirect, current and future, corporate and product emissions’.³¹⁴ A recent decision by the Dutch NCP demonstrates that this includes *indirect* contributions to greenhouse gas emissions.³¹⁵ As such, CMC should also be measuring and reporting on the greenhouse gas emissions caused by the combustion of the coal it sells. It has never indicated an intention to do this.

CMC has thus failed to meet its obligations under the Guidelines. CMC has not only failed to disclose information about the impacts of its contractual agreements to coal purchasers and the public; it has also dismissed or downplayed the myriad adverse impacts directly caused by Cerrejón.³¹⁶

³⁰⁸ *ibid.*

³⁰⁹ Colombian Constitutional Court, SU698/17, Orders 3 and 4.

³¹⁰ Howard Gatiss, ‘*Tutela* action concerning Cerrejón’ (19th July 2019), FOI doc 104 (on file with authors).

³¹¹ *ibid.*

³¹² *ibid.*

³¹³ Colombian Constitutional Court, T-614 (n 51).

³¹⁴ MNE Guidelines, Commentary to Ch III para 33.

³¹⁵ Dutch National Contact Point, ‘Final Statement: Oxfam Novib, Greenpeace Netherlands, BankTrack and Friends of the Earth Netherlands (Milieudefensie) versus ING’ (19 April 2019) <<https://perma.cc/JS3R-F2K2>>.

³¹⁶ See CMC, ‘Reliability: Our coal operation’ <<https://perma.cc/F8ZF-JXLK>>; CMC, ‘Accountability: Our integrated coal handling infrastructure – mine-rail-port’ <<https://perma.cc/VL5P-48DY>>; CMC, ‘Sustainability: Cerrejón’s commitment to mining responsibly’ <<https://perma.cc/8826-A8ZW>>.

C. CMC has not carried out due diligence

Under the MNE Guidelines, enterprises should:

CHAPTER II – General Policies

10. Carry out risk-based due diligence... to identify, prevent and mitigate actual and potential adverse impacts... and account for how these impacts are addressed.

CHAPTER IV – Human Rights

5. Carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts.

CHAPTER VI – Environment

3. Assess, and address in decision-making, the foreseeable environmental, health, and safety-related impacts associated with the processes, goods and services of the enterprise over their full life cycle with a view to avoiding or, when unavoidable, mitigating them...

The Commentary to the MNE Guidelines explains that ‘addressing actual and potential human rights impacts consists of taking adequate measures for their identification...’³¹⁷ Assessments should cover ‘actual adverse impacts or risks of impacts caused or contributed to by the business’ and ‘the measures that the enterprise or its business relationship is implementing to prevent and mitigate adverse impacts’.³¹⁸ Relevant adverse impacts include those on human rights and the environment.³¹⁹

With respect to the environment, **adequate due diligence should involve *ex ante* assessment of potential environmental impacts associated with the enterprise’s activities.**³²⁰ These assessments may contain a ‘broad and forward-looking view of the potential impacts of an enterprise’s activities’,³²¹ and should assess the environmental impacts associated with the enterprise’s goods ‘over their full life cycle’.³²² The Commentary further notes that MNEs have responsibilities for environmental impacts beyond their own operations,³²³ and that ‘sound environmental management’ is to be ‘interpreted in its broadest sense, embodying activities

³¹⁷ MNE Guidelines, Commentary to Chapter IV, para 41.

³¹⁸ Due Diligence Guidance, Annex, Q26.

³¹⁹ Due Diligence Guidance p. 15.

³²⁰ MNE Guidelines, Commentary to Chapter VI, para 67.

³²¹ *ibid.*

³²² MNE Guidelines Ch VI principle 3.

³²³ MNE Guidelines, Commentary to Chapter VI, para 67.

aimed at controlling both direct and indirect environmental impacts of enterprise activities over the long-term, and involving both pollution control and resource management elements.’³²⁴ CMC’s environmental impact assessments should therefore have considered both the impacts caused by the mining and the combustion of the coal that it sells, particularly with respect to greenhouse gas emissions.³²⁵

Furthermore, with respect to human rights, the Commentary explains that ‘addressing actual and potential adverse human rights impacts consists of **taking adequate measures for the identification, prevention, where possible, and mitigation of potential human rights impacts, remediation of actual impacts, and accounting for how the adverse human rights impacts are addressed.**’³²⁶

Despite these provisions, **CMC does not appear to have assessed the environmental or human rights impacts of its operations at any point.** When challenged on its due diligence failures, CMC has passed queries on to Cerrejón, which has in turn relied on an initiative called Bettercoal.³²⁷ Bettercoal is an assessment body set up by major coal buyers to ensure that coal is being sourced via responsible supply chains. Bettercoal’s most recent assessment of Cerrejón found numerous ‘findings against’ the Code, including six ‘findings against’ Principle 1 of the Bettercoal Code, which requires companies to:

*comply with national applicable laws and regulations, and widely accepted international laws and strive to meet generally accepted international standards for ethical, social, and environmental performance where those exceed national standards.*³²⁸

Given CMC’s close relationship with Cerrejón and its necessarily intimate knowledge of the reality on the ground, its reliance on an external assessment to identify adverse

³²⁴ *ibid* para 63.

³²⁵ See, for example, U.S. Energy Information Administration, ‘Coal explained; Coal and the environment’ (21 January 2020) <<https://perma.cc/4WRT-Q7FT>>, listing the principal emissions which result from coal combustion, and also highlighting the need to vent out coalbed methane, which results in further greenhouse gas emissions during the mining process itself.

³²⁶ MNE Guidelines, Commentary to Chapter IV, para 41.

³²⁷ See, for example, Caroline O’Doherty (n 306): ‘CMC was asked a number of questions but the company declined to put forward a spokesperson. It passed the questions on to the mine which provided a statement of its co-operation with Bettercoal and other independent assessments.’ For more information on the flaws in the Bettercoal initiative, see GLAN’s complaint against ESB Section IV B ii a.

³²⁸ Bettercoal, ‘Bettercoal Assessment Public Report: Cerrejón Coal Company’ (9th January 2019) <<https://perma.cc/7XZU-3BKR>> p. 7.

impacts does not conform with the ‘nature and context’ of its operations.³²⁹ Moreover, CMC does not appear to have prevented or mitigated adverse impacts, and has never accounted for this failure.³³⁰

D. CMC has not adopted or implemented a human rights policy

Under the MNE Guidelines, enterprises should:

CHAPTER IV – General Policies

4. Have a policy commitment to respect human rights.

The Commentary recommends that this policy: ‘(i) is approved at the most senior level of the enterprise; (ii) is informed by relevant internal and/or external expertise; (iii) stipulates the enterprise’s human rights expectations of... parties directly linked to its operations, products or services; (iv) is publicly available... (v) is reflected in operational policies and procedures necessary to embed it throughout the enterprise.’³³¹

CMC does not appear to have a policy commitment to respecting human rights. Its website contains a page entitled ‘responsible mining’, which briefly argues that Cerrejón acts in a sustainable way and contains links to the main Cerrejón website.³³² The Cerrejón website has itself been described by local individuals as ‘presenting a world directly opposite to the lived experiences of marginalised communities’.³³³ Nowhere on CMC’s website or in any publicly available statement does CMC commit to acting in accordance with human rights.

³²⁹ See MNE Guidelines Ch IV art 5.

³³⁰ See MNE Guidelines Ch II art 10.

³³¹ MNE Guidelines, Commentary to Chapter IV, para 44.

³³² CMC, ‘Sustainability: Cerrejón’s commitment to mining responsibly’ <<https://perma.cc/DP98-WPJK>>.

³³³ Healy, Stephens, and Malin (n 169) p. 229.

V. CONCLUSIONS AND RECOMMENDATIONS

On the basis of the foregoing analysis, GLAN requests that the Irish NCP call upon CMC to take the following actions:

- i. **Stop selling Cerrejón coal.** Enterprises which identify that they are contributing to an adverse impact must ‘cease or prevent’ such contribution.³³⁴
- ii. **Cooperate in the remediation of adverse human rights impacts caused by Cerrejón’s operations.**³³⁵

Human rights remediation will clearly include fulfilment of previously concluded agreements,³³⁶ and compliance with domestic court orders.³³⁷ Remediation should also include the provision of funding towards the financial compensation of the communities affected by Cerrejón’s operations.³³⁸

However, adequate remediation will require consideration of the totality of the damage caused by the enterprise. The enterprise’s operations have drastically altered the peninsula’s landscape, rendering much of it inhospitable for agriculture.³³⁹ **Human rights remediation will therefore require environmental rehabilitation.**

Furthermore, since engagement with rights-holders will be necessary in order to identify appropriate remedies,³⁴⁰ GLAN submits that the Irish NCP should coordinate with the UK, Swiss and Australian NCPs, which will be assessing remediation options for Cerrejón’s parent companies, regarding the negotiation of a collective remediation effort that meets the needs of the impacted communities.³⁴¹

³³⁴ MNE Guidelines Ch II para 19. This means ‘stop[ping] activities that are... contributing to adverse impacts’: Due Diligence Guidance p. 29, para 3.1. See Section IV A iii.

³³⁵ MNE Guidelines, Ch IV, Article 6. On the routes through which remediation might be facilitated, see MNE Guidelines, Commentary to Ch IV, para 46. The Due Diligence Guidance further explains that when an enterprise has contributed to actual adverse impacts, it must ‘address such impacts by providing for or cooperating in their remediation’: Due Diligence Guidance p. 34, para 6.1.

³³⁶ This includes the agreements with the Tabaco, Las Casitas, Patilla, Roche, and Chancleta communities.

³³⁷ These include Judgment T-614 of 2019 and Sentence SU698 of 2017.

³³⁸ Due Diligence Guidance, p. 34, para 6.1 (b).

³³⁹ Aviva Chomsky, ‘Closing coal mines can further victimise victims of coal mining’ (*The Irish Times*, 21 January 2019) <<https://perma.cc/S93C-NUEF>>.

³⁴⁰ The perspective of those affected is an important consideration in determining the appropriate remedy for human rights impacts: Due Diligence Guidance Q50.

³⁴¹ See Section II. C.

iii. **Issue a public statement.**³⁴² This statement should:

- (1) State that **CMC has stopped selling Cerrejón coal** because it is unable to do so without contributing to adverse impacts;
- (2) Accurately **summarise the human rights and environmental abuses** caused by the operation of the Cerrejón mine;³⁴³
- (3) **Recognise that CMC’s previous accounts of Cerrejón’s operations have been misleading**, and that CMC has therefore failed to meet the disclosure obligations as required by the MNE Guidelines;³⁴⁴
- (4) State that **CMC is seeking to identify and provide for remedies** for the abuses to which it has contributed;³⁴⁵
- (5) **Call on Cerrejón to stop causing adverse impacts** in La Guajira, to **comply with pending court rulings**, and to **join with CMC in the provision of remedies** for past impacts; and
- (6) **Apologise** to the affected communities in La Guajira for its contributions to the adverse impacts caused by the operation of the Cerrejón mine.

GLAN submits that **CMC should comply with these recommendations within three months of the Irish NCP issuing them**. GLAN requests that the Irish NCP specify this deadline in its recommendations, and **follow up on CMC’s compliance** accordingly.³⁴⁶

³⁴² See text to n 288-289. A public statement from CMC about Cerrejón’s behaviour will influence all purchasers of Cerrejón coal and will put significant pressure on the parent companies to mitigate and prevent the effects which are being caused by the operation of the Cerrejón mine.

³⁴³ As required by MNE Guidelines Ch III paras 1, 3, 4; and MNE Guidelines Ch IV paras 1, 2, 3. The Due Diligence Guidance notes that disclosure obligations are particularly important for sales and marketing departments, and CMC is effectively the sales and marketing department for Cerrejón: OECD Due Diligence Guidance Q16, Table 5.

³⁴⁴ See Section IV. B.

³⁴⁵ MNE Guidelines, Ch IV, Article 6.

³⁴⁶ MNE Guidelines, Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, paras 34 and 36: ‘The parties may... agree to seek the assistance of the NCP in following-up on the implementation of the agreement and the NCP may do so on terms agreed between the parties and the NCP... If the NCP makes recommendations to the parties, it may be appropriate under specific circumstances for the NCP to follow up with the parties on their response to these recommendations. If the NCP deems it appropriate to follow up on its recommendations, the timeframe for doing so should be addressed in the statement of the NCP.’

The importance of following up on recommendations was recently highlighted by the OECD:³⁴⁷

Some NCPs have noted that they considered follow up to agreements and recommendations to be instrumental in their role in furthering the effectiveness of the Guidelines... This view is supported by research showing that soft norms or recommendations which are not followed up on or not accompanied by a credible verification mechanism will be less effective and will not likely lead to accountability for non-compliance. In turn, research also shows that, should compliance with such norms and recommendations be closely monitored, they may be able to achieve high levels of effectiveness.

The Irish NCP has also recognised the importance of following up on compliance, stating that ‘the NCP will consider [the issue of follow-up] in reviewing [its] Rules of Procedure as part of an overall action plan (planned for 2020).’³⁴⁸ Although no new Rules of Procedure have yet been published, GLAN submits that the Irish NCP should therefore commit to following up on CMC’s compliance with its recommendations at regular intervals.

³⁴⁷ OECD, *Guide for National Contact Points on Follow Up to Specific Instances* (OECD 2020).

³⁴⁸ OECD Watch, ‘NCP Ireland’ <<https://perma.cc/JT7T-93D5/>>.