

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

BHP, Anglo American, and Glencore



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 enterprise which owns and operates the Cerrejón mine.

To: **Australia National Contact Point**

Ms Kate Lynch
Australian National Contact Point
c/- Markets Conduct Division
Department of the Treasury
Langston Crescent
Canberra ACT 2600
Australia
secretariat@ausncp.gov.au

United Kingdom National Contact Point

Department for International Trade
3 Whitehall Place
London SW1A 2AW
United Kingdom
UK.NCP@trade.gov.uk

Switzerland National Contact Point

State Secretariat for Economic Affairs SECO
National Contact Point of Switzerland
Holzikofenweg 36
3003 Bern
Switzerland
afin@seco.admin.ch

Notifier: **Global Legal Action Network (GLAN)**

Irish Centre for Human Rights
University Road
Galway
Ireland
gocuinn@glanlaw.org

Instructed by GLAN:

Monica Feria-Tinta, barrister
Twenty Essex
20 Essex Street
London WC2R 3AL
MFeria-Tinta@twentyessex.com

Entities:

Anglo American plc
20 Carlton House Terrace
London SW1Y 5AN
United Kingdom

BHP Group Limited

171 Collins Street
Melbourne Victoria 3000
Australia

Glencore International AG

Baarermattstrasse 3
CH-6340 Baar
Switzerland

CC:

Ireland National Contact Point
National Contact Point for OECD MNE
Guidelines
Trade Policy Unit
Department of Business, Enterprise and
Innovation
26 Kildare Street
Dublin 2
Ireland
oeclnclp@dbei.gov.ie

CMC Coal Marketing Company
Coal Marketing DAC
Fumbally Square
New Street
Dublin
D08 XYAS

Electricity Supply Board
ESB Head Office
Two Gateway
East Wall Road
Dublin 3
D03 A995
Ireland
esbnetworks@esb.ie

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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 the diversion 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 communities (subsistence farmers), 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 enabled 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.

Community groups have been advocating for an end to these harms since the Cerrejón mine came into existence. As noted in a recent judgment of Colombia's Constitutional Court, the impacts caused by the mine arise within 'a general context characterised by indigenous communities that present a high degree of vulnerability, and large-scale mining exploitation puts their environment and health at risk'.³ These impacts have been recognised by various Colombian court decisions, and the mine's failure to comply with domestic court rulings has seriously undermined the rule of law in Colombia.

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.'⁴ This complaint forms part of a broader, decades-long effort to hold the owners of the Cerrejón mine to account.

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 Colombian Constitutional Court, T-614 of 2019 (hereinafter Colombian Constitutional Court, T-614) <<https://perma.cc/W7MS-8LDK>> para 9.10.

⁴ 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.

The MNE Guidelines, which have been developed by the OECD, set certain minimum standards for multinational enterprises. The consortium which owns the mine – Anglo American, BHP and Glencore – has failed to meet these minimum standards. It has caused adverse human rights and environmental impacts; has failed to carry out adequate due diligence; and has failed to disclose material information about the impacts of its operations. Specific failures to comply with the Guidelines are set out below.

Pursuant to the MNE Guidelines, the enterprise must stop causing adverse impacts. Compliance requires the progressive **closure of the Cerrejón mine** and the immediate closure of the pits which are located close to human settlements. According to the MNE Guidelines, the enterprise must also **remedy the human rights impacts caused by its activities**. Such remediation will require **environmental rehabilitation**. Some of the impacts caused by the enterprise are irremediable. The enterprise should acknowledge this reality, and should issue a formal **apology** for the irreversible damage done to La Guajira and to the lives of its people.

<i>Category</i>	<i>Provisions</i>	<i>Failures to comply</i>	<i>Actions</i>
<i>The environment</i>	Ch II articles A.1 and A.11 Ch VI article 6 (a) and (d)	<ul style="list-style-type: none"> • Causing adverse impacts to the environment and failing to address these impacts when they have occurred • Failing to adopt operating procedures to ensure best environmental performance • Failing to explore and assess ways of improving its environmental performance over the longer term 	<ul style="list-style-type: none"> • Polluting the air and water in La Guajira; generating high levels of noise pollution • Carrying out structural interventions into the hydrological system
<i>Human rights</i>	Ch II article A.2 and A.11 Ch IV articles 1, 2 and 6	<ul style="list-style-type: none"> • Causing adverse human rights impacts and failing to address these impacts when they have occurred • Failing to respect the internationally recognised human rights of those affected by its activities • Failing to remedy adverse human rights impacts which it has caused 	<ul style="list-style-type: none"> • Displacing indigenous people without their free, prior and informed consent • Evicting local communities, thus interfering with their right to adequate housing and associated rights • Impacting upon the right to health and associated rights through its environmental abuses
<i>Due diligence</i>	Ch II article 10 Ch II articles 1, 3 and 4	<ul style="list-style-type: none"> • Failing to identify, prevent, and mitigate adverse impacts on human rights and the environment 	<ul style="list-style-type: none"> • Publishing misleading information about its impacts on human rights and the environment

*and
disclosure*

Ch IV article 5	<ul style="list-style-type: none">• Failing to account for how adverse impacts have been addressed	<ul style="list-style-type: none">• Undermining civil society organisations, courts, and others who highlight its impacts on human rights and the environment
Ch VI article 2	<ul style="list-style-type: none">• Failing to engage in adequate and timely consultation with the communities directly affected by environmental policies and implementation• Failing to provide the public with adequate, measurable, verifiable and timely information on the potential environmental impacts of its activities• Failing to publicly communicate its performance in relation to its value statements, statements of business conduct, policies and other codes of conduct to which it subscribes	

II. THE COMPLAINT

A. The multinational enterprise

The MNE Guidelines do not provide a definition of ‘multinational enterprise’.⁵ However, the Guidelines do state that:

*[MNEs] usually comprise companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another... The Guidelines are addressed to all the entities within the multinational enterprise (parent companies and/or local entities). According to the actual distribution of responsibilities among them, the different entities are expected to co-operate and to assist one another to facilitate observance of the Guidelines.*⁶

This complaint sets out the ways in which an MNE is causing adverse impacts in Colombia. The entities which make up this MNE are Carbones del Cerrejón Limited, Cerrejón Zona Norte S.A, Anglo American plc, BHP Group Limited, BHP Group Plc, Glencore Plc, and CMC-Coal Marketing DAC.⁷

These entities are **established in more than one country**:

- Anglo American plc is registered and headquartered in England.⁸
- BHP Group Limited is registered in Australia,⁹ and BHP Group Plc is registered in England.¹⁰ The two companies (collectively BHP) have identical Boards of Directors

⁵ 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...’

⁶ MNE Guidelines p. 17, para 4. Emphasis added.

⁷ 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; Glencore, ‘Annual Report 2019’, pp. 49, 71 <<https://perma.cc/W5Y8-FK7H>>.

⁸ Registration number 03564138. Registered office: 20 Carlton House Terrace, London SW1Y 5AN England.

⁹ ABN 49 004 028 077. Registered office: 171 Collins Street, Melbourne, Victoria 3000, Australia.

¹⁰ Registration number 3196209. Registered office: Nova South, 160 Victoria Street London SW1E 5LB United Kingdom.

and are run by a unified management team; their global headquarters is located in Australia.¹¹

- Glencore Plc is registered in Jersey¹² and headquartered in Switzerland.¹³
- Cerrejón is operated through 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).¹⁴
- CMC-Coal Marketing DAC is registered in Ireland.¹⁵

Cerrejón is a joint venture of Anglo American, BHP and Glencore. Cerrejón is operated through its own management team, and the work of that team is overseen by the parent companies. For example, the parent companies participate in strategic decisions like whether to expand the mine into new locations.¹⁶

Some of the parent companies have sought to distance themselves from the adverse impacts caused by the mine by referencing the independence of Cerrejón's management team.¹⁷ However, the MNE Guidelines clearly state that the 'degree of autonomy' of each entity within an enterprise 'may vary widely'.¹⁸ **The Guidelines apply to the activities of both parent**

¹¹ BHP Annual Report 2019 (n 7), internal cover.

¹² Registration number: 107710. 13 Castle Street St Helier Jersey JE1 1ES.

¹³ Headquarters: Baarermattstrasse 3, P.O. Box 1363, CH-6341 Baar, Switzerland.

¹⁴ Cerrejón Sustainability Report 2018' (n 7) 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.

¹⁵ Company registration no. 359984.

¹⁶ BHP, 'Non-Operated Joint Ventures' <<https://perma.cc/KX2N-KVPB>>. For example, in 2011 the three parent companies approved \$1.3 bn expansion of the mine, which included the diversion of the Arroyo Bruno. See Xsrata Coal, 'News Release: Cerrejón Expansion Project Approved' (18 August 2011) <<https://perma.cc/5AUQ-XE4H>>; Anglo American, 'Anglo American Announces Investment in Cerrejón Expansion Project' (18 August 2011) <<https://perma.cc/DRG8-DEQ3>>; BHP, 'Expansion of Cerrejón Coal' (18 August 2011) <<https://perma.cc/Q3QW-44NE>>.

¹⁷ See, for example, Richard Solly, 'BHP's London AGM, Thursday 17 October 2019: a fight between a tethered donkey and a tiger' (London Mining Network, 6 November 2019) <<https://perma.cc/PQF6-KQ4C>> para 127: in response to concerns about abuses at Cerrejón, BHP Chairman Ken MacKenzie said: 'This is another of those non-operated joint ventures, we only have a 33%, we are shareholders, and the other shareholders are Glencore and Anglo American which also own 33.3% each. So, our involvement here is as a shareholder. This is managed as a joint venture and you have been introduced to Brian Quinn [BHP's President of Non-Operated Joint Ventures] here today, and therefore it is through this team that we seek to influence Cerrejón, but it is important to recognise that Cerrejón is an independent company and is operated through its own management team and it is pursuing its own standards and it is not controlled by BHP...' See also Richard Solly, 'Death, destruction and dividends: the 2019 Anglo American AGM' (London Mining Network, 30 April 2019) <<https://perma.cc/TG8T-GY7V>> para 50: when asked about the diversion of the Arroyo Bruno, the Anglo American Chairman Stuart Chambers stated that Cerrejón's management team were responsible for running the Cerrejón mine and best placed to answer questions, although Anglo would accept questions as well.

¹⁸ MNE Guidelines p. 17 para 4.

companies and local subsidiaries, even when the subsidiary is responsible for the day-to-day oversight of those activities.¹⁹

The relevant entities therefore operate as an enterprise for the purposes of the Guidelines. Accordingly, each of the parent companies is responsible for the adverse impacts caused by Cerrejón in the same way that they would be so responsible under the Guidelines if any one of them were the sole parent company of Cerrejón.

B. The notifier: GLAN

The Global Legal Action Network (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 [abuses]... [and] contributing to the sound administration of international legal standards and human rights law through litigation, advocacy, training and information sharing...'²¹ GLAN's work focuses on the accountability of actors involved in violations of human rights, particularly where the actors are based in developed countries and the violations are committed in developing countries. One of GLAN's four priority areas is environmental and economic justice.

This complaint is submitted by GLAN, which is an interested party as a result of its charitable objects.²² This submission is also supported by:

- 1) **Christian Aid**, an international aid and development agency of the Protestant Churches of Ireland and Great Britain.²³ 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.²⁴
- 2) **ABColumbia**, the joint advocacy project on Colombia of British and Irish Agencies.²⁵

¹⁹ *ibid.*

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

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 Ms Feria-Tinta is instructed by GLAN under GLAN's licence to instruct counsel in England and Wales.

²³ See Christian Aid, 'Our Aims' <<https://perma.cc/M852-TAKD>>.

²⁴ Christian Aid, *Undermining Human Rights: Ireland, the ESB and Cerrejón coal* (February 2020) <<https://perma.cc/5MBX-YB5N>>.

²⁵ ABColumbia, 'About Us: British and Irish Agencies working in Colombia' <<https://perma.cc/4XZZ-NAMU>>.

- 3) **Arbeitsgruppe Schweiz Kolumbien (ask!)**, an independent human rights organisation based in Switzerland, which gives voice to the concerns of Colombian civilians.²⁶
- 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.²⁷
- 5) **CINEP** (Centro de Investigación y Educación Popular), a non-profit foundation based in Colombia.²⁸ CINEP has long been an advocate for those affected by the operation of the Cerrejón mine.²⁹
- 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.³⁰

Australia, Switzerland, the UK and Colombia all adhere to the MNE Guidelines.³¹ When the MNE Guidelines are believed to have been violated, any ‘interested party’ may submit a complaint to the relevant NCP.³² The relevant NCPs describe their expectations of ‘interested parties’ as follows:

- Australia: ‘The notifier may be any interested party. Generally however, they require a close interest in the issue in order to be able to supply the AusNCP with adequate information.’³³
- Switzerland: ‘It is necessary to ascertain who has raised the specific instance and what their motivation was. The party raising the specific instance is required to disclose its identity and its legitimate interest in the issue at hand.’³⁴

²⁶ ask!, ‘Über uns: Die ask! ist eine Menschenrechtsorganisation’ <<https://perma.cc/A2SQ-KNH3>>

²⁷ AIDA, ‘About Us’ <<https://perma.cc/H778-VSRD>>.

²⁸ See <<https://perma.cc/8VA7-8AKS>>.

²⁹ See, for example, Cerrejón statement on lawsuit filed against comprehensive environmental management plan, 22nd August 2019 <<https://perma.cc/8QS6-RXAH>>.

³⁰ See <<https://perma.cc/8NPS-XBTS>>.

³¹ The MNE Guidelines are part of the OECD Declaration and Decisions on International Investment and Multinational Enterprises, first adopted in 1976. All OECD members, as well as thirteen non-OECD countries including Colombia, have subscribed to the Declaration: <<https://perma.cc/7588-L36S>>.

³² MNE Guidelines p. 72; 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.

³³ Australian National Contact Point Complaint Procedures (September 2019) <https://ausncp.gov.au/sites/default/files/2019-09/2019_AusNCP_Complaint_Procedures.pdf> p. 4.

³⁴ OECD Guidelines for Multinational Enterprises: National Contact Point for Switzerland - Information on the Specific Instances Procedure (November 2014) <<https://perma.cc/CB3U-SB9K>> p. 3.

- UK: ‘According to the Guidelines, any “interested party” can file a complaint. The complainant may be, for example, a community affected by a company’s activities... or an NGO... complainants should have a close interest in the case and be in a position to supply information about it. They should also, in accordance with the principles of the Guidelines, have a clear view of the outcome they wish to achieve.’³⁵

GLAN and the supporting organisations have a legitimate interest in remedying the human rights and environmental abuses in La Guajira. They are in a position to supply information to the NCPs as necessary.

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.’³⁶ The OECD has explained that the word ‘issues’ is not synonymous with the word ‘impacts’.³⁷ 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.’³⁸

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.

In this case, the impact of Cerrejón’s activities is felt in Colombia, and the issue of the parent companies’ failure to comply with the MNE Guidelines arises in Australia, Switzerland, and the UK.

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

³⁵ UK National Contact Point Procedures for Dealing with Complaints Brought Under the OECD Guidelines for Multinational Enterprises (September 2019) <<https://perma.cc/7J5U-6Y4H>> p. 5, paras 2.3.1 and 2.3.2.

³⁶ MNE Guidelines, Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, para 23, p. 82.

³⁷ 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.

³⁸ *ibid.*

*should consult with a view to agreeing on which NCP will take the lead in assisting the parties.*³⁹

This case therefore requires the appointment of a lead NCP. GLAN defers to the NCPs to determine which office is best placed to carry out this role.

GLAN has also submitted two complaints to the Irish NCP:

1. A complaint about an Irish state-owned energy company, the Electricity Supply Board (**ESB**), which is in a business relationship with Cerrejón and which has failed to adequately mitigate or prevent adverse impacts directly linked to its operations.
2. A complaint about CMC-Coal Marketing DAC (**CMC**), a private limited company which is incorporated in Ireland. CMC is the exclusive marketer of Cerrejón coal and is contributing to the adverse impacts caused by the MNE which is the subject of this complaint.

NCPs are required to co-operate ‘if such a need arises, on any matter related to the Guidelines relevant to their activities’.⁴⁰ The OECD Coordination Guide further highlights the importance of consistent interpretation of the MNE Guidelines where multiple NCPs are dealing with related complaints,⁴¹ and notes that ‘the Guidelines broadly encourage cooperation amongst the NCPs on substantive matters related to them.’⁴² **GLAN therefore submits that coordination with the Irish NCP will be necessary in this case.**

³⁹ MNE Guidelines, Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, para 24, p. 82. Emphasis added.

⁴⁰ Amendment of the Decision of the Council on the OECD Guidelines for Multinational Enterprises OECD/LEGAL/0307 para I.2.

⁴¹ NCP Coordination Guide (n 37) p. 9.

⁴² *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.⁴³ The Wayúu are indigenous peoples scattered across more than 15,000 km² of the department (i.e. administrative district) of La Guajira.⁴⁴ 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.⁴⁵ Although La Guajira is predominantly desert, the Wayúu and Afro-Colombian communities have historically had sufficient access to waterways.⁴⁶ 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.⁴⁷

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.⁴⁸

⁴³ 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>>.

⁴⁴ *ibid* p. 1.

⁴⁵ CINEP, *Bárbaros hoscós: historia de la (des)territorialización de los negros de la comunidad de Roche* (Bogotá, 2015).

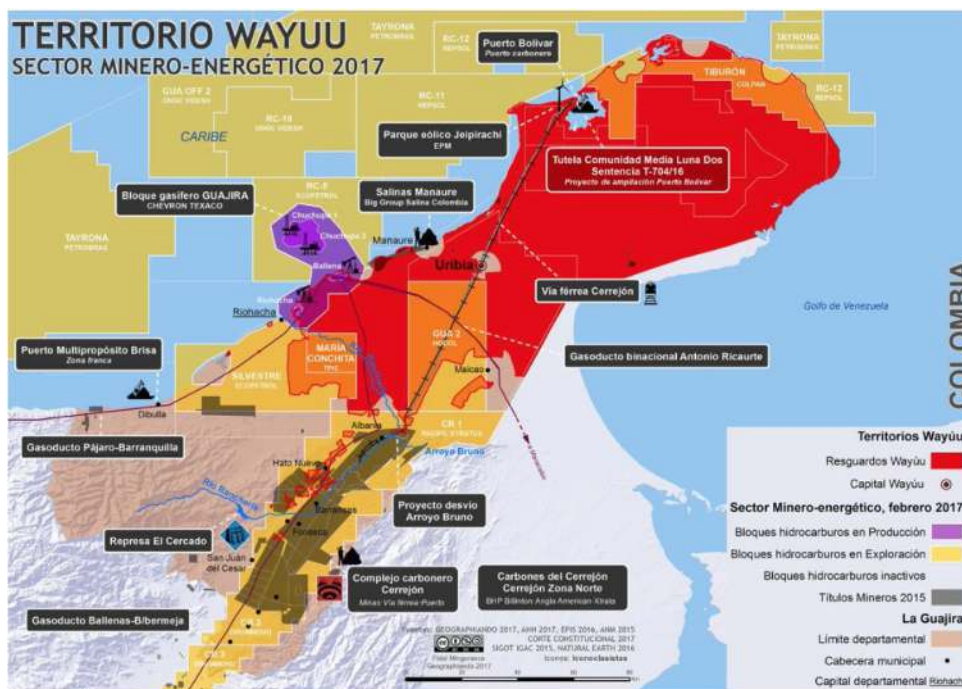
⁴⁶ CINEP, 'Minería a gran escala y derechos humanos: lo que el des-arroyo trajo a la Guajira' (2020) 61 Noche Niebla pp. 59-102, at p. 67. <<https://perma.cc/JXH7-GJ4T>>.

⁴⁷ 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.

⁴⁸ CINEP (n 46) 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:⁴⁹

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 km².⁵⁰ As a result of Cerrejón’s activities,

⁴⁹ Colombian Constitutional Court, SU-698 of 2017 relating to the Arroyo Bruno (hereinafter Colombian Constitutional Court, SU698/17) <<https://perma.cc/SPN3-V3KE>>.

⁵⁰ 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.

35 communities have been displaced from their lands and 17 waterways have dried up.⁵¹ The 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’.⁵²

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 1992,⁵³ and the mine has been the subject of litigation many times since then.⁵⁴

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’.⁵⁵ In 2016, the Court again found that ‘mining activity is bringing harmful effects’ in La Guajira, including water pollution, air pollution, and ecosystem destruction.⁵⁶ It ordered that consultation take place with affected communities, with a view to modifying, suspending, or cancelling Cerrejón’s environmental licence as necessary.⁵⁷ Cerrejón continues to operate under a licence granted in 1983,⁵⁸ arguing that this licence exempts it from complying with current Colombian environmental law – an interpretation which is currently being challenged in the courts.⁵⁹

⁵¹ *ibid* p. 6.

⁵² Colombian Constitutional Court, T-614 (n 3) para 9.8.

⁵³ 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’.

⁵⁴ 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).

⁵⁵ Colombian Constitutional Court, T-256 of 2015, para 118.

⁵⁶ Colombian Constitutional Court, T-704 of 2016, para 5.29

⁵⁷ *ibid*, Resolution.

⁵⁸ Richard Solly, ‘Legal action against Cerrejón Coal’s environmental licence’ (London Mining Network, 27 February 2019) <<https://perma.cc/UC4Q-ZSQP>>.

⁵⁹ See CAJAR, ‘Consejo de Estado estudiará demanda contra la licencia ambiental de Carbones del Cerrejón’ (6 August 2019) <<https://perma.cc/2WMP-FJE7>>.

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 sovereignty.⁶⁰ It held that Cerrejón had given insufficient consideration to social and environmental impacts when deciding to expand the mine.⁶¹

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’.⁶² 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’.⁶³

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 100,000.⁶⁴ The national rate in Colombia is 51.27 per 100,000.⁶⁵ Similarly, infant mortality in La Guajira stands at 18.6 per 100,000 live births - 7.45 percentage points above the national average.⁶⁶ Between 2016 and 2018, an average of one indigenous child under five died every week in La Guajira due to malnutrition.⁶⁷ 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.⁶⁸ 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.⁶⁹

⁶⁰ Colombian Constitutional Court, SU698/17 (n 49).

⁶¹ *ibid.*

⁶² Colombian Constitutional Court, T-614 (n 3) para 9.10.

⁶³ *ibid.*

⁶⁴ Alfonso Fernández Reza, ‘The Wayúu village that beat malnutrition’ (Unicef, 8 August 2019) <<https://perma.cc/L6YY-AQSR>>.

⁶⁵ *ibid.*

⁶⁶ *ibid.*

⁶⁷ William Avilés ‘The Wayúu tragedy: death, water and the imperatives of global capitalism (2019) 40 (9) Third World Quarterly 1750, 1750.

⁶⁸ Inter-American Commission on Human Rights, Resolution 60/2015 (n 43).

⁶⁹ *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.⁷⁰ The UN released the following statement on the 28th September 2020, relaying the Special Rapporteur's concerns:⁷¹

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

⁷⁰ UN, 'David R. Boyd, Special Rapporteur on human rights and the environment' <<https://perma.cc/959U-F926>>.

⁷¹ 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:⁷²

- 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.⁷³
- 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.⁷⁴
- 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.⁷⁵
- 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.⁷⁶
- 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.⁷⁷
- 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.⁷⁸

⁷² *ibid.*

⁷³ UN, 'Mr. Michael Fakhri - Special Rapporteur on Right to Food' <<https://perma.cc/9L6V-Z5KD>>.

⁷⁴ 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>>.

⁷⁵ UN, 'Members of the Working Group on the issue of human rights and transnational corporations and other business enterprises' <<https://perma.cc/78QS-V7ST>>.

⁷⁶ *ibid.*

⁷⁷ *ibid.*

⁷⁸ *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.⁷⁹
- 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.⁸⁰
- 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).⁸¹
- 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.⁸²
- 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.⁸³

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**.⁸⁴ Both pollutants are dangerous to human health.⁸⁵ 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

⁷⁹ *ibid.*

⁸⁰ UN, ‘Mr. Léo Heller, Special Rapporteur on the human rights to safe drinking water and sanitation’ <<https://perma.cc/6TGK-WETF>>.

⁸¹ UN, ‘Olivier De Schutter’ <<https://perma.cc/7Z9H-73Q6>>.

⁸² 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>>.

⁸³ UN, ‘Francisco Cali Tzay, Special Rapporteur on the rights of indigenous peoples’ <<https://perma.cc/298M-9A9D>>.

⁸⁴ ‘PM’ refers to ‘particulate matter’. The numbers 2.5 and 10 refer to the diameters of the respective types of pollutants in micrometres.

⁸⁵ 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.

interim target values given [by the WHO] reflect the concentrations at which **increased mortality responses** due to [particulate matter] air pollution are expected based on current scientific findings.’⁸⁶ 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.⁸⁷ Measurement of its concentration in the air around Cerrejón only began in 2018, by which time the mine had been operating for 35 years.⁸⁸

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.**⁸⁹ 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.⁹⁰

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’.⁹¹ 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.⁹² 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’.**⁹³ Air quality analysis had previously found that particulate

⁸⁶ 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>>.

⁸⁷ CAJAR, ‘Diez Verdades sobre Carbones Cerrejón’ (n 2) p. 18.

⁸⁸ 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>>.

⁸⁹ 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.’

⁹⁰ 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.

⁹¹ Cerrejón Report 2019 (n 47) p. 50.

⁹² *ibid* p. 51.

⁹³ The 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

matter in the air around the Cerrejón mine **exceeds the limits recommended by the WHO**.⁹⁴ 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’**.⁹⁵

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’.⁹⁶ They argued that the **rights to life and health of the Wayúu children of Provincial were particularly affected**.⁹⁷ 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.⁹⁸ The health effects for children in Provincial were covered in a 2017 documentary by DW, the German state broadcaster.⁹⁹ 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.¹⁰⁰ The most frequent symptoms in the community are **headaches, nasal and breathing discomfort, dry**

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 3) Order 3.

⁹⁴ 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 47) 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 86) p. 9.

⁹⁵ Arregocés et al (n 89) 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>>.

⁹⁶ Constitutional Court of Colombia, T-614 (n 3) para 1.2.

⁹⁷ *ibid*. See for example paras 1.6 and 4.2.

⁹⁸ *ibid*, See 7.1 f., 7.2 b

⁹⁹ DW, ‘Colombia – The Curse of Coal’ (2017), available at <https://www.youtube.com/watch?v=t1xLZWp2eBc&ab_channel=DWDocumentary> (last accessed 28 October 2020).

¹⁰⁰ *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.

cough, burning eyes and blurred vision; these ailments appear to become more acute with the presence of strong and prolonged bad odours, which are described as ‘sulphur’ or ‘burned coal’.¹⁰¹

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:¹⁰²

- *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.*

¹⁰¹ *ibid* paras 1.4, 1.6, 3.1, and 4.3.

¹⁰² *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’,¹⁰³ and to ‘reduce the noise level generated by its activities [to a maximum] of 65 decibels during the day and 55 decibels at night’.¹⁰⁴ 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.¹⁰⁵

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.*¹⁰⁶

¹⁰³*ibid* Order 4.

¹⁰⁴*ibid*.

¹⁰⁵ *ibid* Order 3.

¹⁰⁶ Cerrejón Report 2019 (n 47) p. 51.

D. Contamination of the Ranchería River and other waterways

According to Corpoguajira, the most senior environmental body in La Guajira,¹⁰⁷ 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.¹⁰⁸ Previously, an estimated 450,000 people depended directly and indirectly on the water of the Ranchería River.¹⁰⁹ Many people in La Guajira relied on the river for cleaning, bathing, and cooking.¹¹⁰ Some communities also relied on the river for their drinking water.¹¹¹ However, the operation of the Cerrejón mine has damaged the Ranchería River.¹¹² It can no longer provide the population with drinking water.¹¹³

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’**,¹¹⁴ 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’.¹¹⁵

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.¹¹⁶ 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.¹¹⁷ Long-term overexposure to these metals, particularly in drinking water, causes **nausea and**

¹⁰⁷ Corpoguajira, ‘Historical Review’ (11 September 2014) <<https://perma.cc/E2D9-KHM8>>.

¹⁰⁸ Corpoguajira, ‘Plan de acción 2016-2019 prosperidad, paz y sostenibilidad# (Action Plan 2016-2019) p. 13 <<https://perma.cc/Z743-TAF2>>.

¹⁰⁹ *ibid.*

¹¹⁰ 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>>.

¹¹¹ *ibid.*

¹¹² CENSAT Agua Viva, ‘La desviación del arroyo Bruno: entre el desarrollo minero y la sequía’ (2015) p. 9 <<https://perma.cc/QYB7-LLL7>>.

¹¹³ 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>>.

¹¹⁴ UN, ‘UN expert calls for halt to mining at controversial Colombia site’ (n 71).

¹¹⁵ *ibid.* See also CAJAR, ‘Diez Verdades sobre Carbones Cerrejón’ (n 2).

¹¹⁶ 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).

¹¹⁷ 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 110). 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,¹¹⁸ impaired kidney function,¹¹⁹ constriction of blood vessels,¹²⁰ muscle pain and muscle weakness,¹²¹ neurological disorders, and – in cases of particularly high or long-term exposure – **death.**¹²² 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.¹²³

In its own reporting, Cerrejón claims that it has ‘progressed enormously’ in its ‘capacity to improve water and air quality’.¹²⁴ Dumped water waste, it states, is ‘treated using different mechanisms to comply with the maximum allowable concentrations’ of contaminants under Colombian law.¹²⁵ **Cerrejón dumped 578 million litres of liquid waste (primarily runoff from dump sites and pits) into bodies of water in 2019.**¹²⁶ Research has shown that manganese, selenium, barium and strontium are all present in higher concentrations close to where Cerrejón dumps its waste materials.¹²⁷ **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.¹²⁸

¹¹⁸ World Health Organization, ‘Zinc in Drinking-water’ WHO/SDE/WSH/03.04/17 (2003) p. 3.

¹¹⁹ World Health Organization, ‘Cadmium in Drinking-water’ WHO/SDE/WSH/03.04/80/Rev/1 (2011) p. 5.

¹²⁰ World Health Organization, ‘Barium in Drinking-water’ WHO/FWC/WSH/16.48 (2016) p. 9.

¹²¹ World Health Organization, ‘Manganese in Drinking-Water’ WHO/SDE/WSH/03.04/104/Rev/1 (2011) p. 11.

¹²² 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.

¹²³ World Health Organization, ‘Mercury and health’ (21st March 2017) <<https://perma.cc/YJ2H-PZEJ>>.

¹²⁴ Cerrejón Report 2019 (n 47) p. 13.

¹²⁵ *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.

¹²⁶ *ibid*.

¹²⁷ Campos and Philippe (n 116) p. 35.

¹²⁸ 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 47) 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:¹²⁹

... 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.*¹³⁰

The Constitutional Court ordered Cerrejón to ‘prevent contamination of nearby water sources’ as an urgent matter.¹³¹ To date, the order has not been complied with. Instead, Cerrejón criticised the Court’s ruling in its most recent Sustainability Report.¹³² The Sustainability Report also makes repeated references to the fact that Cerrejón provides drinking water to affected communities.¹³³ 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.¹³⁴

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.¹³⁵ 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.¹³⁶ 11 percent of its

¹²⁹ Constitutional Court of Colombia, T-614 (n 3) p. 123, para 9.7.

¹³⁰ *ibid.*

¹³¹ *ibid* para 11.14.

¹³² Cerrejón Report 2019 (n 47) p. 51.

¹³³ *ibid* pp. 11-13, 25, 40, 43, and 45.

¹³⁴ See letters from ABColombia to the Corporación Autónoma Regional de la Guajira and to Cerrejón, 31st July 2018 <<https://perma.cc/8FHB-ELSR>>.

¹³⁵ DW (n 99); CAJAR, ‘Diez Verdades sobre Carbones Cerrejón’ (n 2).

¹³⁶ Cerrejón Report 2019 (n 47) p. 49.

total water extraction – 1,241 million litres of freshwater – was drawn directly from the Ranchería River.¹³⁷

Cerrejón has also carried out various structural changes to the river's waterways. As part of its operations, **Cerrejón has diverted more than 17 streams¹³⁸ and damaged another 30.**¹³⁹ In 2016, Cerrejón decided to divert the Arroyo Bruno, a Ranchería tributary.¹⁴⁰ This decision was taken with the objective of increasing production from 32 to 40 million tonnes of coal per year.¹⁴¹ 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.¹⁴² Although the judgment required that 'the inter-institutional roundtable... must open sufficient participation spaces to the representatives of the acting communities',¹⁴³ according to civil society groups their views have not been taken into account.¹⁴⁴ The diversion of the Arroyo Bruno remains in place.¹⁴⁵

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),¹⁴⁶ which published an 89-page report criticising this inaction.¹⁴⁷ The Contraloría highlighted the failure to properly comply with the eighth order in the *Arroyo*

¹³⁷ *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.

¹³⁸ Colombia, Ministerio de Ambiente, Resolución 2097 de 2005 <<https://perma.cc/Q6SL-XAWG>>.

¹³⁹ Ramírez (n 2).

¹⁴⁰ Lydia James, 'British multinational disobeys Colombia court by diverting water source' (London Mining Network, 8 July 2019) <<https://perma.cc/LZE9-J8JT>>.

¹⁴¹ Discussion with CINEP.

¹⁴² Colombian Constitutional Court, SU698/17 (n 49), Orders 3, 4, 8 and 9.

¹⁴³ *ibid* Orders 3 and 4.

¹⁴⁴ Discussion with CAJAR.

¹⁴⁵ 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>>.

¹⁴⁶ 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.

¹⁴⁷ 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.¹⁴⁸ 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.¹⁴⁹

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.*¹⁵⁰

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 1983.¹⁵¹ The legality of Cerrejón relying on its old licence in this way is currently the subject of litigation in Colombia.¹⁵²

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

¹⁴⁸ Colombian Constitutional Court, SU698/17 (n 49), Eighth Order.

¹⁴⁹ Contraloría General de la República (n 147).

¹⁵⁰ *ibid* p. 4.

¹⁵¹ 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 58).

¹⁵² 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.*¹⁵³

It also noted the possible consequences that this failure could have for fires in the region.¹⁵⁴

Cerrejón's activities have thus caused irreparable damage both to the hydrographic basin of the Ranchería River¹⁵⁵ 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.'¹⁵⁶ Cerrejón's structural interventions also affect underground water: experts have noted that 'the underground water is the most affected by the mining'.¹⁵⁷

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...*¹⁵⁸

¹⁵³ Contraloría General de la República (n 147) pp. 83-84.

¹⁵⁴ *ibid* p. 84.

¹⁵⁵ Tathiana Montaña, 'La desviación del Río Ranchería: algunos elementos a consideración' (Notas visita Riohacha 16-18 October 2012, Indepaz) <<https://perma.cc/U8KA-QQJ7>>.

¹⁵⁶ *ibid*.

¹⁵⁷ *ibid*. See also Constitutional Court of Colombia, T-614 (n 3) 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.'

¹⁵⁸ 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.’**¹⁵⁹ 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.¹⁶⁰

Water scarcity, and the food scarcity to which it gives rise, has particularly affected children in La Guajira.¹⁶¹ 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’.¹⁶² The Inter-American Commission on Human Rights granted the interim measures requested, but the situation has not improved.¹⁶³

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.¹⁶⁴ The report notes that **decreased water** in the ecosystem ‘could continue to be one of the main effects [of global

¹⁵⁹ Colombian Constitutional Court, SU698/17 (n 49) Consideration 5.7.4.

¹⁶⁰ Contraloría General de la República (n 147) p. 13.

¹⁶¹ Carolina Mila, ‘La sed de los niños Wayuu’ (Semana Sostenible, 13 July 2018) <<https://perma.cc/4ZMP-U5HH>>.

¹⁶² Inter-American Commission on Human Rights, Resolution 60/2015 (n 43) p. 1. These relevant communities were from the municipalities of Uribía, Manaure, Riohacha y Maicao.

¹⁶³ See, for example, Colombian Constitutional Court, T-302/17 (n 69).

¹⁶⁴ 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.’¹⁶⁵

Cerrejón’s activities have already contributed to water shortages on a local level in La Guajira,¹⁶⁶ 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,¹⁶⁷ and almost two-thirds of these emissions come from coal.¹⁶⁸ Coal is a particularly dirty fuel: its combustion emits more carbon dioxide per thermal unit than any other fossil fuel.¹⁶⁹ 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.¹⁷⁰ 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.¹⁷¹ Cerrejón entered into collective relocation negotiations with the residents, but these broke down after a number of residents were threatened by company employees.¹⁷² The inhabitants were subsequently forcibly relocated.¹⁷³ When the initial relocation site turned out to be unsuitable,

¹⁶⁵ *ibid.*

¹⁶⁶ See Section III E.

¹⁶⁷ UN News, ‘Is the world ready to end the coal era and embrace clean energy?’ (29 November 2019) <<https://perma.cc/RNS9-59CA>>.

¹⁶⁸ The World Bank, *Understanding CO2 Emissions from the Global Energy Sector* (2014/15) <<https://perma.cc/RS42-HKJR>>.

¹⁶⁹ See U.S. Energy Information Administration, ‘How much carbon dioxide is produced when different fuels are burned?’ <<https://perma.cc/HU8S-354A>>.

¹⁷⁰ 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.

¹⁷¹ 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.

¹⁷² 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.

¹⁷³ Christian Aid (n 24) p. 20.

the inhabitants were told to move again.¹⁷⁴ Seven families refused to do so, and Cerrejón subsequently built a fence around their homes and stationed armed guards in the area.¹⁷⁵

Another example of community displacement by Cerrejón is the eviction of 1,200 Afro-Colombian residents of the community of Tabaco in 2001.¹⁷⁶ The eviction was carried out by police, armed guards, and the military.¹⁷⁷ Bulldozers were used to demolish the village.¹⁷⁸ The Colombian Supreme Court ordered that the village be reconstructed,¹⁷⁹ but this order was not followed.¹⁸⁰ Complaints were subsequently lodged with the Australian and Swiss NCPs in respect of two of Cerrejón's parent companies.¹⁸¹ 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.¹⁸²

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.¹⁸³ Moreover, the enterprise's responsibilities focused on compensation, as opposed to substantive remediation of the harms caused.¹⁸⁴ In 2017, the Colombian Constitutional Court pointed out that the displacement of the Tabaco community **'cannot be treated exclusively as a problem of compensation'**.¹⁸⁵ 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

¹⁷⁴ *ibid.*

¹⁷⁵ *ibid.*

¹⁷⁶ Rømer Adamsen et al (n 172) p. 7.

¹⁷⁷ 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.

¹⁷⁸ *ibid.*

¹⁷⁹ Colombian Supreme Court, Chamber for Civil Cases, Decision No. 0014-01 of 7 May 2002.

¹⁸⁰ Gregow (n 177) pp. 16-17

¹⁸¹ 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.

¹⁸² *ibid.*

¹⁸³ 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 Istanicia 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.

¹⁸⁴ *ibid.*

¹⁸⁵ Colombian Constitutional Court, T-329/17 (n 54) para 4.7.

authority, which failed to comply with the agreement.¹⁸⁶ As a result, the Tabaco community remains dispossessed to this day.¹⁸⁷

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]’.¹⁸⁸ 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.’**¹⁸⁹ 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:¹⁹⁰

- 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;¹⁹¹
- 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;

¹⁸⁶ Letter from Paul Warner to Aviva Chomsky, 8 July 2019.

¹⁸⁷ 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>>.

¹⁸⁸ Letter from Paul Warner to Aviva Chomsky, 8 July 2019.

¹⁸⁹ *ibid.*

¹⁹⁰ Tabaco representatives (n 183).

¹⁹¹ Colombian Constitutional Court, T-329/17 (n 54) 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.¹⁹² Tear gas and metal projectiles were used to force the families out, and several individuals were seriously injured.¹⁹³ 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.¹⁹⁴

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.¹⁹⁵ In 2012, for example, Cerrejón proposed to divert the Ranchería River.¹⁹⁶ 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.¹⁹⁷ 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.*¹⁹⁸

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

¹⁹² Richard Solly, 'Cerrejón Coal: brutal evictions of villagers resisting relocation' (London Mining Network, 26 February 2016) <<https://perma.cc/M8KE-WRPW>>.

¹⁹³ *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.

¹⁹⁴ CINEP (n 46) pp. 59-102, p. 77.

¹⁹⁵ 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

¹⁹⁶ *ibid.* p. 26.

¹⁹⁷ *ibid.* p. 28.

¹⁹⁸ U.S. Office on Colombia (n 195) p. 29.

that production growth required the extraction of 500 million tons of coal from under the Ranchería River.¹⁹⁹

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.²⁰⁰ The diversion was subsequently suspended, with Cerrejón citing changes in the coal market.²⁰¹

The International Council on Mining and Metals (ICMM), a group of extraction companies to which all the parent companies belong,²⁰² references the above series of events as a case study for *good practice* in relation to indigenous peoples and mining.²⁰³ 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’.²⁰⁴ 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.²⁰⁵ 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).²⁰⁶ Applying the precautionary principle, the court highlighted that the following uncertainties, among others, would have to be considered:²⁰⁷

- 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;

¹⁹⁹ *ibid* p. 26.

²⁰⁰ Judgment of the Criminal Cassation Chamber of the Supreme Court of Justice of 13 September 2012.

²⁰¹ Cerrejón, ‘Cerrejón Postpones Studies on the Possible Diversion of the Ranchería River’ <<https://perma.cc/7QAA-HD54>>.

²⁰² Anglo American and BHP are founding members of ICMM. See ICMM, ‘Company members’ <<https://perma.cc/E49W-58EN>>.

²⁰³ International Council on Mining & Metals, ‘FPIC and Expansion Project’ <<https://perma.cc/J783-DUC5>>.

²⁰⁴ *ibid*.

²⁰⁵ See Indepaz, ‘Una consulta previa sin garantías: El caso del arroyo Bruno’ <<https://perma.cc/4KKD-R2WM>>.

²⁰⁶ Colombian Constitutional Court, SU698/17 (n 49).

²⁰⁷ *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.²⁰⁸ In 2019, Cerrejón representatives stated that restoration of the tributary was no longer feasible.²⁰⁹ 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.²¹⁰

The El Rocío community, which lives close to the Arroyo Bruno, is now also facing eviction.²¹¹ 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.²¹² Cerrejón recently expressed interest in purchasing these lands, and the private landowners began to explore eviction options.²¹³ 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**

²⁰⁸ Discussion with CAJAR, November 2020.

²⁰⁹ Richard Solly, ‘Saving the river’ (n 145).

²¹⁰ Contraloría General de la República (n 147).

²¹¹ 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>>.

²¹² 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.

²¹³ *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.²¹⁴ 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.²¹⁵ 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'.²¹⁶

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.²¹⁷ 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.²¹⁸ 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.*²¹⁹

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

²¹⁴ Cerrejón newsletter (n 211).

²¹⁵ 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 145).

²¹⁶ International Council on Mining & Metals (n 203). Emphasis added.

²¹⁷ See UNESCO, Intangible Cultural Heritage, 'Wayuu normative system, applied by the Pütchipü'üi (palabrero)' (2010) <<https://perma.cc/X66V-QTEP>>.

²¹⁸ 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>>.

²¹⁹ 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.*²²⁰

...

*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.*²²¹

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.²²² 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.²²³ Thanks to its roots that extend up to 50 metres deep into the earth, it is resistant to droughts and hurricanes.²²⁴ It can live 100 years and is productive until its death.²²⁵ The tree was revered by the Wayúu for its medicinal properties capable of treating respiratory diseases and rheumatism.²²⁶ 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

²²⁰ CINEP (n 46) p. 65

²²¹ *ibid* p. 67.

²²² *El País*, 'Guáimaro, guardián ambiental nacido de la entraña de la Tierra' (22 March 2018) <<https://perma.cc/7YMM-H5GC>>.

²²³ *El Nuevo Siglo*, 'Guáimaro, guardián ambiental nacido de la entraña de la Tierra' (19 March 2018) <<https://perma.cc/K3G7-C493>>.

²²⁴ CAJAR, 'Diez Verdades sobre Carbones Cerrejón' (n 2) p. 17

²²⁵ *ibid*.

²²⁶ *ibid*.

activities.²²⁷ As a result, the Wayúu and Afro-Colombian communities can no longer engage in the cultural and commercial practices associated with this tree.²²⁸

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.'²²⁹ The loss of indigenous plants has impaired the practice of customary traditional medicine by the people of La Guajira.²³⁰

As well as devastation of the natural environment, Cerrejón's expansion has led to the destruction of indigenous communities' churches and cemeteries.²³¹ 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.²³² 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.*²³³

²²⁷ 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 49) 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.'

²²⁸ *El Espectador*, Ambiente 'Guáimaro, el árbol que renace para luchar contra la desnutrición en Colombia' (20 March 2018) <<https://perma.cc/XK9M-RA7V>>.

²²⁹ Constitutional Court of Colombia, T-614 (n 3) p. 123, paragraph 9.7.

²³⁰ 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 46) p. 84.

²³¹ CINEP (n 46) p. 75. In particular, the communities of Palmarito, Caracolí, Espinal, and Tabaco have been affected.

²³² 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 219).

²³³ Lloréns and Santiago (n 219).

The damage caused to the cultural property and identity of indigenous people in La Guajira – a region where almost half of the population is indigenous²³⁴ – 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.²³⁵ Since January 2016, at least 734 environmental and human rights activists have been murdered.²³⁶ In La Guajira, community leaders routinely receive death threats and intimidation from right-wing paramilitary organisations such as Las Aguilas Negras (The Black Eagles).²³⁷ 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.²³⁸ 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’.²³⁹

The activists who face threats of violence are often those who speak out against Cerrejón.²⁴⁰ Moreover, threatening incidents often take place before or after hearings and judicial actions presented by indigenous peoples opposing Cerrejón’s operations.²⁴¹ Indeed, one convicted paramilitary leader has stated that he met with a mine official to discuss the assassination of Cerrejón union members;²⁴² and other paramilitaries have stated that they ‘watched over El Cerrejón’.²⁴³ As a result, some leaders of groups opposing Cerrejón’s projects have had to

²³⁴ 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>>.

²³⁵ 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>>.

²³⁶ 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>>.

²³⁷ Sandra Guerrero, ‘Ola de amenazas contra líderes, funcionarios y víctimas en La Guajira’ (El Heraldo, 10 June 2019) <<https://perma.cc/6P8K-DUE3>>.

²³⁸ 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>>.

²³⁹ See formal complaint, 17 June 2020 <<https://perma.cc/KY3L-L7RP>>.

²⁴⁰ Consultation with CINEP, CAJAR and AIDA, 5th October 2020; ABColombia webinar (n 232); CINEP (n 46) p. 100.

²⁴¹ Consultation with CINEP, CAJAR and AIDA, 5th October 2020.

²⁴² Victoria McKenzie & Steven Cohen, ‘Death and Displacement: A USAID Export’ (2018) 50(2) NACLA Report on the Americas 128, 131.

²⁴³ *ibid.*

request special protection under the National Protection Unit schemes, which involves wearing a bulletproof vest and carrying a panic button.²⁴⁴

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

²⁴⁴ 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" [...]*²⁴⁵

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.*²⁴⁶

Although Cerrejón has publicly condemned violence and intimidation against human rights defenders and union leaders,²⁴⁷ community leaders report that Cerrejón's media efforts have fuelled hostility against them.²⁴⁸ 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.'²⁴⁹

In February 2020, Cerrejón issued a response to Christian Aid's report, which had highlighted concerns about the effects of such statements.²⁵⁰ 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

²⁴⁵ CINEP, Brief before Juzgado 20 de Ejecución de Penas y Medidas de Seguridad de Bogotá, 26 December 2019, p. 9.

²⁴⁶ *ibid* p. 10.

²⁴⁷ 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>>.

²⁴⁸ Christian Aid, *Undermining Human Rights* (n 24) 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.'

²⁴⁹ 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>>.

²⁵⁰ Christian Aid, *Undermining Human Rights* (n 24) 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.*²⁵¹

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...*²⁵²

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

²⁵¹ Cerrejón Statement on the Christian Aid Report (n 193) point 28.

²⁵² *ibid* point 20.

IV. THE ENTERPRISE'S FAILURE TO COMPLY WITH THE MNE GUIDELINES

The below section sets out the ways in which the foregoing facts constitute a failure to comply with the MNE Guidelines.

A. The enterprise has caused adverse environmental impacts

Under the MNE Guidelines, enterprises should:

CHAPTER II – General Policies

A. 1. Contribute to... environmental... progress with a view to achieving sustainable development.

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

Enterprises should also:

CHAPTER VI – Environment

[...] within the framework of laws... in the countries in which they operate, and in consideration of relevant international agreements... take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development.

6. Continually seek to improve corporate environmental performance... by encouraging such activities as:

a) adoption of technologies and operating procedures in all parts of the enterprise that reflect standards concerning environmental performance in the best performing part of the enterprise;

...

d) exploring and assessing ways of improving the environmental performance of the enterprise over the longer term, for instance by developing strategies for emission reduction, efficient resource utilisation and recycling, substitution or reduction of use of toxic substances, or strategies on biodiversity.

The Commentary explains that '[t]here should not be any contradiction between the activities of multinational enterprises... and sustainable development...' ²⁵³ and that '[m]anagers [of MNEs]... should... give appropriate attention to environmental issues within their business

²⁵³ MNE Guidelines, Commentary to Chapter II, para 3. The Commentary further notes that 'links among economic, social, and environmental progress are a key means for furthering the goal of sustainable development', and cites the definition of 'sustainable development' in the 1987 World Commission on Environment and Development (the Brundtland Commission): 'Development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.

strategies. Improving environmental performance requires a commitment to a systematic approach and to continual improvement of the system.²⁵⁴

On the basis of the facts outlined in section III, Cerrejón has failed to contribute to environmental progress. Instead, it has caused severe adverse environmental impacts.

The MNE has therefore failed to comply with the MNE Guidelines in the following ways:

- It has contaminated air and water in the vicinity of the mine, thereby causing severe adverse impacts to the environment.²⁵⁵
- It has carried out structural interventions into the hydrological system of La Guajira, thereby contributing to water scarcity and deforestation, and causing adverse impacts to the tropical dry forest and to biological diversity.²⁵⁶
- It has failed to address adverse impacts when they have occurred, including by failing to comply with Colombian court orders relating to its environmental performance.²⁵⁷
- It has failed to adhere to internationally recognised environmental standards, such as the WHO emission limits, and has failed to apply the precautionary principle. As such the enterprise has failed to take due account of the need to protect the environment,²⁵⁸ failed to conduct its activities in a manner contributing to the wider goal of sustainable development,²⁵⁹ failed to adopt environmentally appropriate operating procedures,²⁶⁰ and failed to adopt adequate strategies for emission reduction.²⁶¹
- It has enlarged the mine and carried out structural interventions into the hydrological system of La Guajira without properly assessing the cumulative, perpetual and long-term impacts of such actions on the environment of La Guajira.²⁶²

²⁵⁴ MNE Guidelines, Commentary to Chapter VI, para 61.

²⁵⁵ MNE Guidelines, Ch II art 11.

²⁵⁶ *ibid.*

²⁵⁷ *ibid.*

²⁵⁸ MNE Guidelines, Ch VI.

²⁵⁹ *ibid.*

²⁶⁰ MNE Guidelines, Ch VI art 6(a).

²⁶¹ MNE Guidelines, Ch VI art 6(d).

²⁶² MNE Guidelines, Ch VI art 3. See further below, Section IV C.

B. The enterprise has caused adverse human rights impacts

Under the MNE Guidelines, enterprises should:

CHAPTER II – General Policies

A. 2. Respect the internationally recognised human rights of those affected by their activities.

A. 11. Avoid causing or 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

1. Respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.

2. Within the context of their own activities, avoid causing or 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 caused or contributed to these 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...’²⁶³

i. Right to life and a healthy environment

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**’.²⁶⁴ The Committee has

²⁶³ 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.

²⁶⁴ 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.**²⁶⁵ 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.²⁶⁶ 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.’²⁶⁷

The notion of the right to life with dignity has also been understood in the context of other binding instruments in Colombia,²⁶⁸ 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.’²⁶⁹ 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.²⁷⁰

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.**’²⁷¹ The right to health is also recognised in various other human rights instruments.²⁷² For example, Article 24 of the Convention on the Rights of 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

²⁶⁵ *ibid* para 26.

²⁶⁶ Human Rights Committee, *Portillo Cáceres and Others v. Paraguay* CCPR/C/126/D/2751/2016, Communication 2751/2016 (*Portillo case*).

²⁶⁷ *ibid* para 7.3.

²⁶⁸ Colombia ratified the American Convention on Human Rights on 28 May 1973.

²⁶⁹ 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*).

²⁷⁰ 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.

²⁷¹ Art 12(1).

²⁷² 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 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.

of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution.’ The Committee on Economic, Social and Cultural Rights (CESCR), in its General Comment on the rights to health and an adequate standard of living (Articles 11 and 12 ICESCR), explains that 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.**²⁷³ The General Comment further notes the need for states to ensure that ‘[i]ndigenous peoples’ **access to water resources on their ancestral land is protected from encroachment and unlawful pollution**’.²⁷⁴ 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.’²⁷⁵

Environmental degradation can therefore lead to adverse impacts upon human rights as recognised in the ICCPR and the ICESCR. The right to a healthy environment is also a **fundamental right under the American Convention on Human Rights**. This was recently confirmed by the Inter-American Court of Human Rights in its Advisory Opinion on the Environment and Human Rights (requested by Colombia).²⁷⁶

ii. Right to adequate housing

The ICESCR also guarantees the **right to adequate housing**.²⁷⁷ 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.’²⁷⁸

iii. Rights of indigenous peoples

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

²⁷³ 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).

²⁷⁴ CESCR General Comment No. 15: The right to water (Arts. 11 and 12) (E/C.12/2002/11), para 16 (d).

²⁷⁵ 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.

²⁷⁶ 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.

²⁷⁷ Art 11(1).

²⁷⁸ CESCR, General Comment No. 7: The Right to Adequate Housing (Art 11(1)): Forced Evictions (E/1998/22), para 3.

heightened attention.²⁷⁹ 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 individuals belonging to specific groups or populations’, and note that ‘the United Nations instruments have elaborated further on the **rights of indigenous peoples...**’²⁸⁰

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,²⁸¹ 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 Rights²⁸² and, more generally, under the right to self-determination which is a fundamental principle of international law.²⁸³ The CESCR has stated that: ‘States parties and businesses should respect the principle of free, prior and informed consent of indigenous peoples in

²⁷⁹ MNE Guidelines, Commentary to Chapter IV, para 40.

²⁸⁰ *ibid.*

²⁸¹ ILO C169 – Indigenous and Tribal Peoples Convention, Convention, 1989 (No. 169) art 16.

²⁸² Colombia ratified the American Convention on Human Rights on 28 May 1973.

²⁸³ 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)).

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.²⁸⁴

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 **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’.**²⁸⁵

iv. Application of the MNE Guidelines

On the basis of the facts outlined in section III, the enterprise has thus failed to comply with the MNE Guidelines in the following ways:²⁸⁶

- It has caused and continues to cause severe adverse impacts to the human rights to life, 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.
- It has forcibly displaced thousands of people from indigenous, campesinos and Afro-Colombian communities living within the vicinity of the mine, thereby causing severe adverse impacts to the human rights to adequate housing and respect for one’s home. Some of these groups, such as the Afro-Colombian inhabitants of Tabaco displaced in 2001, remain displaced to this day. That displacements associated with the Cerrejón mine have taken place in a manner that is not in accordance with the law is evidenced by the enterprise’s failure to comply with the relevant decisions of the Colombian courts.
- It has caused and continues to cause severe adverse impacts to the right to life with dignity and the interrelated right to culture, in particular through the devastating harm

²⁸⁴ 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.

²⁸⁵ 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.

²⁸⁶ As noted in section II. A, for the purpose of the MNE Guidelines the enterprise is responsible for the conduct of Cerrejón. The listed contraventions all relate to MNE Guidelines Ch II, art A. 2. and A. 11; and Ch IV, arts 1, 2, and 6.

caused by the mine to the lands, sacred sites and revered flora of the indigenous peoples living in La Guajira as well as to their cultural practices.

- It has systematically infringed the principle of FPIC when expanding the mine into the ancestral lands of La Guajira's indigenous communities, severely affecting those lands and their waterways and, ultimately, when forcing these communities from their lands.
- It has failed to address the severe adverse human rights impacts it has caused and to provide for remediation of these impacts, including by failing to comply with the relevant decisions of the Colombian courts.

C. The enterprise has failed to carry out and report on 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

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

- a) provide the public and workers with adequate, measureable 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; and
- b) engage in adequate and timely communication and consultation with the communities directly affected by the environmental, health and safety policies of the enterprise and by their implementation.

3. Assess, and address in decision-making, the foreseeable environmental [and] health... impacts associated the processes... of the enterprise... with a view to avoiding or, when unavoidable, mitigating them. Where these proposed activities may have significant environmental [or] health... impacts, and where they are subject to a decision of a competent authority, prepare an appropriate environmental impact assessment.

The MNE Guidelines further 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...

The MNE Guidelines thus require enterprises to **identify, address, and account for** the prevention and mitigation of adverse impacts caused by their activities.

i. Environmental impact assessments

Adequate due diligence should involve *ex ante* assessment of potential environmental impacts associated with the enterprise’s activities.²⁸⁷ Moreover, where environmental impact assessments are required by law, they are also required under the MNE Guidelines.²⁸⁸ These assessments may contain a ‘broad and forward-looking view of the potential impacts of an enterprise’s activities’, and should address impacts to health and to the environment by examining alternatives and considering mitigation measures.²⁸⁹ Where there is uncertainty about the potential impacts of an activity, enterprises must observe the precautionary principle, such that the uncertainty is not relied upon as an excuse for continuing the activity.²⁹⁰

The enterprise has failed to carry out adequate environmental impact assessments and has instead continued to expand its operations without any certainty as to the consequences.

²⁸⁷ MNE Guidelines, Commentary to Chapter VI, para 67.

²⁸⁸ See MNE Guidelines Ch VI principle 3.

²⁸⁹ MNE Guidelines, Commentary to Chapter VI, para 67

²⁹⁰ MNE Guidelines Ch VI principle 4; Commentary to Chapter VI para 68.

For example, in 2005 Cerrejón expanded its port, extended its rail line, and broadened its area of operation – all without conducting any environmental impact assessments.²⁹¹ Similarly, the Colombian Constitutional Court held in 2017 that Cerrejón had failed to properly assess the impacts of its diversion of the Arroyo Bruno.²⁹² Where impact assessments have ostensibly been conducted, they have failed to consider the cumulative and perpetual impacts of the operation of the mine on La Guajira over the past forty years.

Moreover, Cerrejón and its parent companies have failed to consider the global environmental impacts of coal mining when deciding to continue operating and expanding the mine. The MNE Guidelines require assessment of environmental impacts associated with the enterprise's processes and goods 'over their full life cycle'.²⁹³ The Commentary further notes that MNEs have responsibilities for environmental impacts beyond their own operations,²⁹⁴ and that 'sound environmental management' is to be 'interpreted in its broadest sense, embodying activities 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.'²⁹⁵ **Cerrejón should therefore be assessing both the impacts of coal mining and the impacts of burning coal, particularly with respect to greenhouse gas emissions.**²⁹⁶ There is no evidence to show that it is adequately doing either.

In short, Cerrejón has failed to identify and address the environmental harms caused by its operations. It has also failed to account for its activities.

ii. Monitoring and reporting

The Commentary to the MNE Guidelines recognises that '[c]lear and complete information on enterprises is important to a variety of users... [including] local communities, special interest groups... and society at large.'²⁹⁷ It states that:

²⁹¹ Discussion with representatives from CAJAR (30th October 2020).

²⁹² Colombian Constitutional Court, SU698/17 (n 49), paras 5.1.3 and 5.2.5.

²⁹³ MNE Guidelines Ch VI principle 3.

²⁹⁴ MNE Guidelines, Commentary to Chapter VI, para 67.

²⁹⁵ *ibid* para 63.

²⁹⁶ 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.

²⁹⁷ MNE Guidelines, Commentary to Chapter III, para 28.

*Enterprises are encouraged to provide easy and economical access to published information and to consider making use of information technologies to meet this goal. Information that is made available to users in home markets should also be available to all interested users. Enterprises may take special steps to make information available to communities that do not have access to printed media (for example, poorer communities that are directly affected by the enterprise’s activities).*²⁹⁸

The Commentary further states that:

Information about the activities of enterprises... and associated environmental impacts is an important vehicle for building confidence with the public. This vehicle is most effective when information is provided in a transparent manner and when it encourages active consultation with stakeholders such as employees, customers... local communities and with the public-at-large so as to promote a climate of long-term trust and understanding on environmental issues of mutual interest. Reporting and communication are particularly appropriate where scarce or at risk environmental assets are at stake either in a regional, national or international context...

Communication about efforts to address impacts is also shown as a key step in the due diligence process in an infographic contained in the OECD Due Diligence Guidance for Responsible Business Conduct:

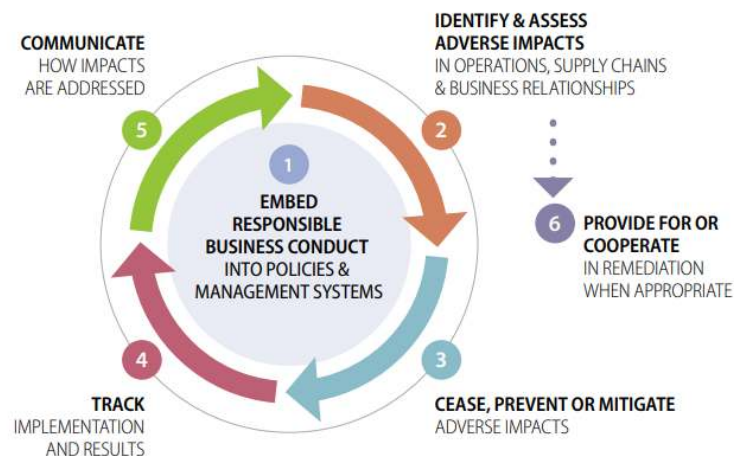


Figure 2, OECD Due Diligence Guidance for Responsible Business Conduct (2018)

²⁹⁸ MNE Guidelines, Commentary to Chapter III, para 35.

Practical steps set out in this Guidance include the following:

- Publicly report relevant information on due diligence processes... e.g. through the enterprise's... sustainability... reports...²⁹⁹
- Publish the above information in a way that is easily accessible and appropriate, e.g. on the enterprise's website, at the enterprise's premises and in local languages.³⁰⁰
- For human rights impacts that the enterprise causes... be prepared to communicate with impacted or potentially impacted rightsholders in a timely, culturally sensitive and accessible manner, the information above that is specifically relevant to them, in particular when relevant concerns are raised by them or on their behalf.³⁰¹

With respect to human rights, the Commentary to the MNE Guidelines 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.'³⁰² Human rights due diligence is described as 'assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses as well as communicating how impacts are addressed.'³⁰³ This is to be an ongoing exercise.³⁰⁴

With respect to the environment, the Commentary specifically emphasises the need for developing 'reporting standards for greenhouse gas emissions... that cover direct and indirect, current and future, corporate and product emissions'.³⁰⁵ The need to monitor the impact of mining on water scarcity in La Guajira has also been highlighted by the Colombian Ombudsman.³⁰⁶

Cerrejón has failed to monitor and report on its environmental and human rights performance in line with the above specifications. For example, Cerrejón does not currently

²⁹⁹ OECD Due Diligence Guidance p. 33, para 5.1 (a).

³⁰⁰ *ibid* (b).

³⁰¹ *ibid* (c).

³⁰² MNE Guidelines, Commentary to Chapter IV, para 41.

³⁰³ *ibid* para 45.

³⁰⁴ *ibid*.

³⁰⁵ MNE Guidelines, Commentary to Ch III para 33. For a recent NCP Final Statement addressing the need to measure and report on indirect contributions to greenhouse gas emissions, see 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>>.

³⁰⁶ Defensoría del Pueblo de Colombia (2014) (n 69) p. 122.

report on greenhouse gas emissions produced as a result of coal mining in La Guajira; nor does it report on the emissions produced through the combustion of that coal.³⁰⁷

Cerrejón does publish annual sustainability reports, which are available on its website in both English and Spanish, and it states that these reports are issued ‘in accordance with the Global Reporting Initiative standard’,³⁰⁸ which is the standard recommended by the MNE Guidelines.³⁰⁹ It also regularly publishes updates about its operations on its website.³¹⁰

However, rather than constituting an adequate step in the due diligence process, Cerrejón’s sustainability reports serve to whitewash its operations by failing to address the reality experienced by communities living in La Guajira. Individuals living close to the mine have said that Cerrejón’s website ‘presents a world directly opposite to the lived experiences of marginalised communities’.³¹¹ Cerrejón’s 2019 Sustainability Report, for example, contains such statements as: ‘Mining and the environment can in fact be compatible, and proof of this statement is how Cerrejón operates responsibly.’³¹²

Similarly, rather than noting the harmful environmental impacts of its operations, Cerrejón states that it is seeking to ‘decrease [its] energy consumption of fuels such as diesel, gasoline, and natural gas’, and that it is ‘capturing carbon by planting millions of trees’.³¹³ It continues:

In the department of La Guajira, forest regeneration is constantly interrupted by fires that lead to slowed growth of woody vegetation. Nevertheless, at Cerrejón we have managed to efficiently control fire... The company’s environmental offset plans cover a total of 16,000 hectares, which will capture at least 600,000 tonnes of CO2 over the next 10 years and prevent 1.4 million tonnes of CO2...³¹⁴

The inadequacy of the enterprise’s due diligence was also explicitly noted by the Colombian Constitutional Court in 2019. The Court found that Cerrejón had failed to comply with

³⁰⁷ See, for example, Cerrejón Report 2019 (n 47) further details on which are provided below. See U.S. Energy Information Administration (n 296).

³⁰⁸ Cerrejón, ‘Sustainability Reports’ <<https://perma.cc/Y6YJ-RZ5T>>.

³⁰⁹ MNE Guidelines Chapter III para 24; Ch VI para 65.

³¹⁰ See Cerrejón, ‘Media’ <<https://perma.cc/WMG6-8R64>>.

³¹¹ Healy, Stephens, and Malin (n 170) p. 229.

³¹² Cerrejón Report 2019 (n 47) p. 13.

³¹³ *ibid* p. 57.

³¹⁴ *Ibid*.

standards set out in the UN Guiding Principles on Business and Human Rights,³¹⁵ holding that:

[Cerrejón's] internal supervision should go beyond verifying numerical compliance with regulations as a way of discrediting the complaints made by neighbouring communities. Instead, it could promote an open, continuous and sincere dialogue that seeks to adopt effective measures to guarantee the protection of the ecosystem and the people who live around it.

*Thus, this company failed to comply with the international standard of due diligence required by the Declaration of Guiding Principles on Business and Human Rights, also known as the "Ruggie Principles" in order not to violate the human rights of populations likely to be affected.*³¹⁶

As well as failing to properly report on its environmental and human rights performance, Cerrejón discredits complaints about its impacts. Recent examples of this approach include the following:

- In July 2020, Global Witness issued its annual report detailing the dangers faced by land and environmental defenders.³¹⁷ In the report, it explained how activists protesting Cerrejón's activities face death threats and violence from local paramilitary groups.³¹⁸ In response, the enterprise stated that '[Global Witness] has limited itself to reproducing information from other sources without verifying and contrasting the information with Cerrejón, in the end delivering a report that is unbalanced and lacks objectivity.'³¹⁹
- In June 2020, a lawyer instructed by CAJAR and representing a group of Wayúu women filed a complaint with the UN about Cerrejón's operations. The enterprise responded by stating that '[w]e regret that this account continues to repeat information without real evidence, apparently supporting interests that do not represent all members of the Provincial indigenous community.'³²⁰ Numerous UN Special Rapporteurs

³¹⁵ Judgment T-614 of 2019 (n 3), para. 9.10.

³¹⁶ *ibid.*

³¹⁷ Global Witness, *Defending Tomorrow: The climate crisis and threats against land and environmental defenders*, July 2020 <<https://perma.cc/DA6X-FXPP>>.

³¹⁸ *ibid* pp. 20-22.

³¹⁹ Cerrejón, 'Cerrejón rejects allegations in global witness report of links to threats on human rights defenders', 30 July 2020 <<https://perma.cc/ZQ4U-VAHM>>.

³²⁰ Cerrejón, 'Cerrejón responds to Twenty Essex press release' (18 June 2020) <<https://perma.cc/6BKY-NQRA>>.

subsequently upheld the complaint and issued a statement criticising Cerrejón's environmental and human rights abuses.³²¹

- In June 2020, a group of NGOs published a report setting out a number of concerns about how several mines, including Cerrejón, were operating during the Covid-19 pandemic.³²² The enterprise issued a statement asserting that: '[t]his report contains a series of accusations against Cerrejón based on inaccurate and biased information, and we reject allegations of promoting forced displacement, failing to recognize court rulings, or benefiting from the COVID-19 pandemic.'³²³

As an absolute minimum, an enterprise must be expected to recognise the impacts of its activities where those impacts are the subject of adverse judicial findings.³²⁴ Yet even in these circumstances, Cerrejón has persisted in denying and minimising the severity of its impacts. Following the Colombian Constitutional Court's 2019 ruling on the environmental and human rights impacts caused by the Cerrejón mine, for example, the entity stated that:

*There is no doubt that, in 2019, we faced challenges that went beyond those deriving from the coal market and [these challenges] have clearly placed us at a disadvantage because of the uncertainty caused in our operations. This has been reflected in **judicial activism against mining** and in certain court rulings that have obviously changed the rules of conduct.*³²⁵

The parent companies have also failed to account for the impacts of the mine and their failure to comply with judicial orders. Glencore's 2019 Sustainability Report does not make reference to any of the impacts set out above.³²⁶ BHP's Report states that 'Cerrejón is implementing a

³²¹ UN, 'UN expert calls for halt to mining at controversial Colombia site' (n 71).

³²² Earthworks (USA), Institute for Policy Studies - Global Economy Program (USA), London Mining Network (UK), MiningWatch Canada, Terra Justa, War on Want (UK) and Yes to Life No to Mining, 'Voices From the Ground: How the Global Mining Industry is Profiting from the COVID-19 Pandemic' (June 2020) <<https://perma.cc/W7U7-NDUR>>.

³²³ Cerrejón, 'Cerrejón's comments on the report *Voices from the Ground: How the Global Mining Industry is Profiting from the COVID-19 Pandemic*' 2 July 2020 <<https://perma.cc/3FGQ-MSSV>>.

³²⁴ MNEs must cooperate, through legitimate processes, in the remediation of adverse human rights impacts which they have caused. See MNE Guidelines Ch IV principle 6. This includes complying with judicial orders, see Commentary to the MNE Guidelines, Ch IV para 46. Moreover, MNEs are clearly subject to the legislation of the countries in which they operate and to the jurisdiction of the competent courts, see Charter of the Organization of American States (A-41) art 36; see also MNE Guidelines p. 17, para 4.

³²⁵ *ibid* p. 14. Emphasis added.

³²⁶ Glencore, 'Our Purpose: responsibly sourcing the commodities that advance everyday life' (Sustainability Report 2019 <<https://perma.cc/GSZ4-BRHT>>.

water management approach',³²⁷ and highlights that there is an active tailings dam at Cerrejón,³²⁸ but fails to mention the high levels of water contamination recorded in La Guajira. Cerrejón is explicitly excluded from Anglo American's Report on the basis that it is independently managed.³²⁹

In short, **the enterprise as a whole has not carried out proper due diligence and has not engaged in genuine disclosure.** Not only has it failed to address the adverse impacts caused by its operations; it has refused to be upfront about these impacts in the first place.

³²⁷ BHP, 'Sustainability Report 2019' p. 52 <https://perma.cc/QAK9-WBLL>.

³²⁸ *ibid* p. 24. Tailings are waste products from mining, and tailings dams are used to store this waste and separate out water.

³²⁹ Anglo American, 'Re-imagining Mining to Improve People's Lives' (Sustainability Report 2019) p. 1.

V. CONCLUSIONS AND REMEDIES

For the foregoing reasons, GLAN requests that the NCPs recognise the adverse impacts which have occurred as a result of the enterprise's activities, and recommend appropriate remedies.

Under the MNE Guidelines, enterprises should:

CHAPTER IV – Human Rights

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

If an enterprise is causing an adverse impact, the MNE Guidelines require that it stop causing that impact.³³⁰ The impacts in this case are serious and widespread in La Guajira. The high level of community distrust of the enterprise, combined with the enterprise's failures to recognise and mitigate the harms caused by its operations, mean that ongoing mining operations will almost certainly result in further adverse impacts. These are likely to include more environmental destruction, leading to further incursions into fundamental human rights, and additional displacement of indigenous communities.

As a starting point, the enterprise must ensure that all previous judicial orders are complied with in full.³³¹ The Arroyo Bruno should be reverted to its original course, in light of the shortage of water resources in La Guajira negatively affecting the Wayúu and local communities. No further hydrological diversions should be carried out for the purpose of expanding the mine. The enterprise should also disclose the orders of the Constitutional Court, the legal significance of these orders, and its compliance failures to relevant stakeholders.

Furthermore, **the closest pit to local communities should be immediately closed.** As recently recommended by several UN Special Rapporteurs,³³² operations at the Patilla pit should be immediately halted because of human rights and environmental adverse impacts due the pit's proximity to a local community.

³³⁰ This is inferable from the basic requirement under the Guidelines that enterprises 'avoid causing or contributing to adverse impacts on matters covered by the Guidelines': MNE Guidelines, Chapter II, art 10. It is also inferable from the Commentary to Chapter II, para 18, and is explicitly stated in relation to human rights in the Commentary to Chapter IV, para 42.

³³¹ In particular, Cerrejón must urgently comply with the following judgments: SU698/17, T-614/19, and T-329/17.

³³² UN, 'UN expert calls for halt to mining at controversial Colombia site' (n 71).

The enterprise must progressively close down its operations at Cerrejón.³³³ The closure strategy must be created in consultation with all stakeholders, including local communities and the Cerrejón labour union.³³⁴ This closure strategy should be recorded in a formal plan, which should be published.

However, it is imperative that the enterprise does not leave La Guajira without first remedying the effects of its activities. The parent companies must remedy the damage they have done, even if they sell their shares in Cerrejón.³³⁵

The OECD Due Diligence Guidance explains that remediation may entail, *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).*³³⁶

³³³ At present, the enterprise has failed to adequately respond to calls to close the mine. For an example of Cerrejón's disregard for the views of the community when deciding on a mine closure plan, see Autoridad Nacional de Licencias Ambientales, Response to filing 2020073016-2-000 (11 May 2020).

³³⁴ The perspective of those affected is an important consideration in determining the appropriate remedy for human rights impacts: OECD Due Diligence Guidance Q50. The name of the union is Sintracarbón.

³³⁵ BHP has recently indicated that it may sell its shares in Cerrejón: Ben Butler, 'BHP commits to selling its thermal coalmines within two years' (*The Guardian*, 18 August 2020).

³³⁶ Due Diligence Guidance, p. 34, para 6.1. Emphasis added.

In this case, human rights remediation will clearly include fulfilment of previously concluded agreements³³⁷ and compliance with domestic court orders.³³⁸ However, adequate remediation will require consideration of the totality of the damage caused by the enterprise. **The enterprise must cooperate with the NCP process to identify the most appropriate means of remedying the human rights impacts caused by its activities, including through the implementation of environmental restoration measures.**³³⁹ The enterprise's operations have drastically altered the peninsula's landscape, rendering much of it inhospitable for agriculture.³⁴⁰ Remedies should also reflect the scale of the enterprise's annual revenue.³⁴¹

Finally, GLAN requests that the enterprise issues a statement in which it:

- undertakes to comply with the court judgments issued in response to cases brought by the affected communities;
- recognises that some of its impacts are irremediable, in particular the impacts to Wayúu cultural heritage caused by the devastation of their ancestral lands;
- accepts responsibility for adverse impacts caused, including the perpetual impacts;
- formally apologises for causing adverse human rights and environmental impacts through the operation of the Cerrejón mine; and
- commits to fulfilling the terms of the NCP recommendations.

This statement should be co-signed by each of the entities that make up the MNE, and should be disclosed to coal purchasers, shareholders, and the public at large.

³³⁷ This includes the agreements with the Tabaco, Las Casitas, Patilla, Roche, and Chancleta communities.

³³⁸ These include Judgment T-614 of 2019 (n 3) and SU698/17 (n 49).

³³⁹ MNE Guidelines Chapter IV art 6; Commentary to Chapter IV para 46.

³⁴⁰ Aviva Chomsky, 'Closing coal mines can further victimise victims of coal mining' (*The Irish Times*, 21 January 2019) <<https://perma.cc/S93C-NUEF>>.

³⁴¹ Glencore is the largest mining company globally, with a 2019 revenue of approximately \$220 bn. BHP is the second largest mining company globally, with a revenue of approximately \$44 bn in 2019. AngloAmerican is the fifth largest mining company globally, with a revenue of approximately \$28 bn in 2019: M Garside, '2020 global list of leading mining companies based on revenue' (Statista, 28 April 2020) <<https://www.statista.com/statistics/272707/ranking-of-top-10-mining-companies-based-on-revenue/>>.Cerrejón's revenue in 2019 was \$1.6 bn. Cerrejón Report 2019 (n 47) p. 60.

GLAN submits that the lead NCP should set a deadline for implementation of its recommendations and follow up on the parent companies' compliance accordingly.³⁴² The importance of following up on recommendations was recently highlighted by the OECD:³⁴³

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 Australian, Swiss and UK NCPs have made commitments in their Rules of Procedure to taking follow-up action where appropriate.³⁴⁴ The lead NCP should therefore take follow-up action in accordance with its published Rules of Procedure.

³⁴² 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.'

³⁴³ OECD, *Guide for National Contact Points on Follow Up to Specific Instances* (OECD 2020).

³⁴⁴ AusNCP, Australian National Contact Point Complaint Procedures (September 2019) Article 7; Swiss State Secretariat for Economic Affairs SECO, *OECD Guidelines for Multinational Enterprises: National Contact Point for Switzerland - Information on the Specific Instances Procedure* (November 2014) p. 5; UK Department for International Trade, *UK National Contact Point Procedures for Dealing with Complaints Brought Under the OECD Guidelines for Multinational Enterprises* (September 2019) paras 6.1 and 6.2