

# ABCColombia

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

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

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# Giving It Away: The Consequences of an Unsustainable Mining Policy in Colombia →

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# Contents

<b>Executive Summary</b>	1
<b>Recommendations</b>	3
<b>1.0 Colombian Context</b>	5
1.1 The ongoing conflict	
1.2 The mining panorama	
<b>2.0 Conflicting Government Policies</b>	7
2.1 The environment	
2.2 Rainforest areas: Orinoquia, Amazonia and Chocó	
2.3 Páramos, wetlands and underground water supplies	
2.4 Land restitution	
2.5 Land titling	
2.6 Strategic Mining Areas	
2.7 Other forms of mining in Colombia	
<b>3.0 Social Protest</b>	11
<b>4.0 Rights of Indigenous and Afro-Colombian Peoples</b>	15
4.1 Prior consultation and the right to consent	
4.2 Conflict and the right to consent	
<b>5.0 European Mining Investments in Colombia</b>	19
5.1 UK mining investments in Colombia	
<b>6.0 Governance Mechanisms</b>	21
6.1 Taxation	
6.2 Royalties and taxes	
6.3 Unethical practices	
6.4 Trade mispricing	
6.5 Mining and the local economy	
<b>7.0 Holding Corporations to Account: how do we increase accountability in the international arena?</b>	25
7.1 UN Guiding Principles	
7.2 Judicial mechanisms	
7.3 Improving governance and democracy	
7.4 Transparency of information and reporting requirements	
7.5 Ethical reporting on the London Stock Exchange	



# Executive Summary

Mining in Colombia has been singled out to be one of the major drivers of economic growth for the Colombian economy, and yet this report reveals that in the case of coal, the Colombia Government was actually giving it away in 2007 and 2009. The lack of an effective and transparent tax system in Colombia has resulted in some multinational corporations making more from tax exemptions than they pay in corporate income taxes and royalties. With the proposed new Tax Bill, rather than raising income tax for mining corporations, the government plans to cut it from 33 per cent to 25 per cent.<sup>1</sup> With the goal of doubling coal exports<sup>2</sup> and tripling mining generally by 2021, Colombia risks giving its natural resources away at immense social, environmental and human rights costs if it does not revise its tax regime. Furthermore, the findings of this report reveal that government policies aimed at rapidly expanding natural resource extraction through Foreign Direct Investment (FDI) conflict with policies on the **protection of ecologically sensitive areas, the rights of peasant farmers (campesinos), Indigenous and Afro-Colombian Peoples, land restitution and the protection of areas for agricultural use.**

This report is written in the context of a rapidly expanding Colombian mining industry and increasing European investment in mining in Colombia. Furthermore, it is being launched at a time when the United Kingdom (UK) has been promoting the UN Guiding Principles on Business and Human Rights. Given the UK has taken the positive step of piloting the development of a Colombian Strategy on these principles with the Colombian Government, it is hoped that this report and its recommendations can feed into both Colombian and UK strategies.

Colombian economic policy is based on the extractives industry being one of the major locomotives pushing economic growth over the next decade. However, this policy has been promoted in the context of an ongoing internal conflict and human rights abuses, including forced displacement. Despite the ongoing nature of the conflict, the government has passed a transitional justice law to restore approximately 2.2 million hectares of approximately 6.6 million that has been usurped or abandoned during the conflict.<sup>3</sup> The drive to have Colombia known regionally as a 'mining country' is being undertaken before land restitution policies have been implemented, increasing the difficulty of returning stolen lands to those who have been forcibly displaced.

## Fuelling conflict and human rights abuses

The conflict and forced displacement are complexly related to economic interests. A 2011 report by CODHES<sup>4</sup> that maps forced displacement and enforced disappearances with economic activity in Colombia demonstrates how economic interests, including mining, have impacted on the conflict. The report concludes that 'mining areas are militarised and paramilitarised: law enforcement protects the large private investment and paramilitaries suppress social protest and pressurise for displacement.'<sup>5</sup> An unavoidable problem is that land where mining concessions have now been granted has, in many cases, been caught up in Colombia's decades-long internal conflict. The risks to companies of reputational damage by benefiting from human rights abuses are therefore high and the Colombian context presents difficult challenges for companies wanting to invest responsibly, to respect human rights standards and contribute positively to the overall human rights situation. This is particularly the case where investments in land are concerned, as is the case in mineral extraction. In mining regions like those described by CODHES, multinational corporations face the possibility of legalising the possession of land illegally obtained through violent forced displacement. In addition, money that illegal armed groups manage to secure from multinationals, often through extortion, is used alongside other revenue to fuel the conflict. According to a global risk analysis firm, the practice of extortion continues in Colombia.<sup>6</sup> However, in legal proceedings commenced in the United States, allegations have also been made suggesting that corporations made contributions to illegal armed groups voluntarily.<sup>7</sup> In addition, special army units under the government's direction created to protect infrastructure and industrial installations have often been implicated in human rights violations committed directly or in collusion with paramilitary forces.<sup>8</sup>

## Indigenous rights and consultation

Law 685 of 2001 (commonly known as the Mining Code) conflicts with a number of other national policies, including Constitutional protections afforded to Indigenous Peoples and safeguards for the environment. Colombia appears to have moved in the direction of facilitating FDI in mining to the extent of creating 'Strategic Mining Areas' that will be auctioned to Multinational Corporations (MNCs) and could circumvent the right of Indigenous and Afro-Colombian Peoples to prior consultation. Large-scale economic projects in indigenous territories are already major contributors to 64 indigenous groups being at risk of extinction;<sup>9</sup> by the end of 2010, 59 per cent of Colombian territory was either under concession or had mining applications pending.<sup>10</sup>



In 2009 the Colombian government lost **53 percent** (including exemptions on hydrocarbons) of its possible income through tax exemptions to multinational corporations, amounting to approximately **\$3.82 billion Colombian pesos** (COP). This amount far exceeds what the government has budgeted to spend in 2012 on victims of the conflict, which is **\$2.9 billion** (COP).

## Good governance and sustainable development

In addition to the Administration of President Álvaro Uribe Vélez (2002-2010) granting the highest number of mining permits in Colombia's history, more favourable investment conditions for MNCs were also approved.<sup>11</sup> In the rush to become a 'mining country' the government not only overloaded existing institutions,<sup>12</sup> but also failed to put in place robust governance mechanisms for the protection of rights, protection of ecologically sensitive areas and the collection of revenue. Those who point to the benefits of resource extraction often identify economic development and high revenue resources that feed into pro-poor policies as the major gains. However, this is only possible if revenue is effectively collected and redistributed. Strong institutional structures and governance mechanisms are required for this to take place, things unfortunately deficient in Colombia. Concerns regarding the unsustainable development model proposed by the National Development Plan have been raised, not only by communities and Non-Governmental Organisations (NGOs), but also by government ministers and officials.

## The role of multinational corporations and European governments

In Professor John Ruggie's work on business and human rights, the former UN Special Representative on Human Rights and Transnational Corporations emphasises that it is the responsibility of States to protect human rights, and that both State and non-State actors are obligated to respect human rights. However, if the **State is unable or unwilling to protect human rights**, Ruggie says that the responsibilities of corporations increase, and they must ensure that they respect human rights and avoid complicity in violating human rights and rights of communities. Impunity for human rights abuses is a major obstacle to robust mechanisms in Colombia. According to Ruggie 'unless States take appropriate steps to investigate, punish and redress business-related human rights abuses when they do occur, the State duty to protect can be rendered weak or even meaningless.'<sup>13</sup>

The case studies in this report demonstrate that despite well-elaborated Corporate Social Responsibility (CSR) policies, UK-based mining corporations do not always operate in a socially responsible way. Given the potential for human rights violations, environmental degradation and the destruction of ecological capital that mining corporations can cause, it is essential that corporations are held to account for their behaviour overseas. Home countries therefore also require robust governance mechanisms with which to do this. The changes that can be made to strengthen these mechanisms include transparency of information and specific human rights reporting. The United States have moved ahead of the European Union in the area of transparency of information through its Dodd-Franks legislation.

International financing and registration on stock markets should carry with them a requirement from the outset that corporations registering have a good track record on adherence to human rights due diligence.

Although voluntary guidelines serve to raise standards and may help steer companies in the right direction, and as such have a role in pushing incremental improvements, the major negative impact has been to undermine attempts to develop effective legal sanction, both at national and international level, without which it is not possible to prevent companies abusing the rights of local communities.<sup>14</sup> **The UK has recently taken a regressive step in relation to judicial mechanisms** with changes to the Legal Aid, Sentencing and Punishment of Offenders Act 2012, making it financially unviable for victims of UK MNCs to gain access to justice in the UK. If the UK is to uphold the spirit of the UN Guiding Principles, it will need to introduce new legislation to provide access to the UK justice system for communities in Southern countries in order to protect them from corporate abuses by UK Companies.

<sup>5</sup> CODHES, ¿Consolidación de qué? Informe sobre desplazamiento, conflicto armado y derechos humanos en Colombia, March 2011

<sup>6</sup> Colombia: FARC profiting from extortion [http://infosurhoy.com/cocoon/sail/xhtml/en\\_GB/features/sail/features/main/2012/07/03/feature-01](http://infosurhoy.com/cocoon/sail/xhtml/en_GB/features/sail/features/main/2012/07/03/feature-01)

<sup>7</sup> Such allegations have been made by lawyers representing victims at the centre of civil lawsuits in the United States. The lawyers have endeavoured to present the claims under the US Alien Tort Claims Act (ATCA) against some US companies operating in Colombia. The claims are contested by the companies concerned.

There have been cases brought by US prosecutors concerning payments to illegal armed groups. For example, Chiquita Brands was brought before the US District Court in the Southern District of Florida accused amongst other things of voluntarily paying paramilitaries in 2007. Prosecutors alleged that payments totalling \$1.7m were made to paramilitary groups between 1997 and 2004. Representatives for United Fruit's successor, Chiquita Brands International, admitted that the company had made payments to Colombian paramilitary forces, that were designated a terrorist organisation by the US and the EU, but maintained that these payments were obtained by extortion. On this basis an out-of-court settlement of \$25 million was agreed. None of those that approved the payments went to jail. See: Chiquita admits paying fighters', 14 March 2007, available from <http://news.bbc.co.uk/1/hi/world/americas/6452455.stm> & court documents available from: [www.law.du.edu/documents/corporate-governance/international-corporate-governance/in-re-chiquita-third-amended.pdf](http://www.law.du.edu/documents/corporate-governance/international-corporate-governance/in-re-chiquita-third-amended.pdf) & <http://www.ethicalconsumer.org/commentaryanalysis/corporatewatch/chiquita.aspx>

<sup>8</sup> For example see Amnesty International, Colombia a Laboratory of War: Repression and Violence in Arauca, 19 April 2004.

<sup>9</sup> Colombian Constitutional court in decision Auto 004 of 2009 identified 34 groups and the ONIC a further 30 at risk of physical or cultural extinction.

<sup>10</sup> Contraloría General de la Nación: Estado de los Recursos Naturales y del Ambiente 2010-2011, p. 131. <http://justiciaambientalcolombia.org/2011/12/26/contraloria-presenta-informe-sobre-estado-de-los-recursos-naturales-y-el-ambiente-en-colombia/>

<sup>11</sup> Defensa Territorios, Casi la Mitad de Colombia la Piden las Multinacionales Mineras, 3 May 2011 [http://www.defensaterritorios.org/index.php?option=com\\_content&view=article&id=7722:casi-la-mitad-de-colombia-la-piden-las-multinacionales-mineras-&catid=83:middle-east&Itemid=200](http://www.defensaterritorios.org/index.php?option=com_content&view=article&id=7722:casi-la-mitad-de-colombia-la-piden-las-multinacionales-mineras-&catid=83:middle-east&Itemid=200); for further information on Mining see also ABColombia Report, Returning land to Colombia's Victims, May 2011.

<sup>12</sup> World Politics Review, As Mining Sector Takes Off, Colombia Must Take Care, Alexis Arthur, 11 April 2012.

<sup>13</sup> John Ruggie in Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie 21 March 2011, page 22. [http://ec.europa.eu/enterprise/policies/sustainable-business/files/business-human-rights/guiding\\_principles\\_business\\_and\\_hhrr\\_en.pdf](http://ec.europa.eu/enterprise/policies/sustainable-business/files/business-human-rights/guiding_principles_business_and_hhrr_en.pdf)

<sup>14</sup> Adherence to voluntary codes and guidelines does not provide companies from immunity from prosecution in cases where their actions transgress the law.

<sup>15</sup> UN Special Rapporteur in his Report to the Human Rights Council in August 2012, Follow-up report on indigenous peoples and the right to participate in decision-making, with a focus on extractive industries.

<sup>1</sup> Reuters, Colombia unveils tax reform to create jobs, close loopholes, 2 October 2012 <http://www.reuters.com/article/2012/10/02/us-colombia-tax-idUSBR8911B620121002>

<sup>2</sup> 'Colombia is currently the largest exporter of gold in the Latin American region'. Elizabeth Dickinson, Gold Rush, Foreign Policy, 11 August 2011 [http://www.foreignpolicy.com/articles/2011/08/09/gold\\_rush?page=full](http://www.foreignpolicy.com/articles/2011/08/09/gold_rush?page=full)

<sup>3</sup> Internal Displacement Monitoring Centre and Norwegian Refugee Council, Building Momentum for Land Restoration. Towards property restitution for IDPs in Colombia, November 2010, page 10

<sup>4</sup> CODHES, a leading Colombian organisation working for internally displaced persons and victims of the conflict

# Recommendations

## Recommendations to the UK and Irish Governments and European Parliament:

**Ensure companies listed or headquartered in their jurisdiction do not contribute to or cause human rights abuses overseas** as a consequence of their operations or those of their subsidiaries and joint venture partners.

**Ensure that people whose human rights are adversely affected** by the overseas operations of companies headquartered or listed in the UK **can access effective remedy in the UK, including access to the courts.**

**Ensure that their Stock Exchange Listing Authorities require ethical reporting** from companies and require specific disclosures on: any claims that may exist over the land on which exploration or mining activity is being carried out, including any ancestral or native claims; a company's historical experience of dealing with concerns of local governments and communities on the sites of its mines and exploration properties; and any breaches in compliance requirements of the World Bank/International Finance Corporation (IFC) and OECD.

**To improve reporting procedures as part of human rights 'due diligence'** by requiring mining corporations to report annually on:

- **The implementation of 'free, prior and informed consent' (FPIC) processes**, including the provision of certain basic documents – environmental, social and human rights impact studies – to local Indigenous and Tribal Peoples (as recognised under the ILO Convention 169) prior to commencing any activities in their territory; and whenever a major change or expansion to their mining activities is envisaged.
- **Mechanisms and procedures which show respect for Indigenous and Tribal Peoples right to consent.**

Both these elements could be incorporated (for UK companies) in their **annual reporting on human rights and social impacts as a mandatory section under the 2006 Companies Act.**

**To link provision of government procurement opportunities, investment support and export credit guarantees** to businesses to their human rights records overseas.

**To strongly support** the proposed revisions to the EU Transparency and Accounting Directives to require disclosure of payments by corporations **at project level.** In order to achieve a robust outcome, the UK and Irish **Governments should champion the definition of 'project' adopted by the JURI committee in the European Parliament.**

**To urge the Colombian Government to revise laws that conflict with international human rights obligations** and which place companies in a situation of reputational risk: where the protection of ecologically sensitive areas are exposed; and where there is a risk of violations of the rights of Indigenous and Afro-Colombian Peoples and other vulnerable groups, and conflict with land restitution to victims.

**In areas of conflict governments should require corporations** to report on the provision of security for their operations either by the security forces or private security firms.

**Ensure that it becomes mandatory for companies to report on their human rights impacts:** under Section 172 (1) of the UK Companies Act 2006, which requires company directors to give proper consideration to the impact of the company's operations on the community and the environment – **strengthen this provision by making it mandatory.**

## Recommendations to Corporations:

In the case of Indigenous Peoples and Afro-Colombians, it is recommended that they respect the rights granted under the ILO Convention 169, the UN Declaration of Indigenous Peoples and jurisprudence of the Colombian Constitutional Court, including the rights to:

- **An 'informed' consent process** by ensuring that they provide environmental, social and human rights impact studies to the State prior to beginning any activities and prior to any consultation process to Indigenous and Afro-Colombian Peoples.
- **'Free' Consent Process**, recognising that where communities are placed under pressure by any group, armed or otherwise, this is not a free process.
- **A consent process** that respects their decision-making processes, customs and traditions.
- **Participate in all of the planning and implementation stages of extractive activities** that might impact on their interests, and in joint meetings with the State, whilst maintaining their right not to consent to the project.

**Avoid investments in regions where there are land disputes:** the lack of a national land registry means that corporations undertake a reputational risk when investing in land. The current Land Restitution and Victims Law does not guarantee that lands stolen through human rights abuses and violations will not be provided with de facto legal status.

- Additional and detailed checks from independent sources regarding the status of the land should be undertaken by corporations when applying for mining concessions in Colombia.
- In addition to the legal requirements, it is recommended that additional consultations are undertaken with local human rights groups before embarking on a project.

**Companies should be proactive in calling for a better human rights regime in Colombia through:**

- The full implementation of UN human rights recommendations to the Colombian Government to end human rights violations and impunity and to guerrilla forces to fully respect human rights law and end human rights abuses.

**Demonstrate a commitment to tax transparency by supporting** the adoption of project-by-project reporting.

## Recommend that the Colombian Government:

- Publically recognise the **right of Indigenous and Afro-Colombian Peoples to veto projects** to extract natural resources in their territory as an exercise of their sovereignty in line with the ILO Convention 169, the UN Declaration on the Rights of Indigenous Peoples, and recent Constitutional Court decisions as set out in the international legal and policy framework in the report of the UN Special Representative on Indigenous and Tribal Peoples.<sup>15</sup>
- **Take action to end impunity in cases of human rights abuses and violations** as a means to avoid repetition and as a further step in ensuring the conditions for a 'free, prior and informed consent' process.
- **Review current legislative frameworks to align with the UN Declaration on Indigenous Peoples, Constitutional Court and international jurisprudence.** Making clear provisions for obtaining 'free, prior and informed consent' in all projects and plans affecting afro-Colombian collective territories, and Indigenous Peoples resguardos and ancestral territories. Regulations to make this happen should be produced by working groups which include indigenous and afro-Colombian leaders, and their appointed experts.
- **Conduct a thorough review of tax incentives provided to the mining sector**, abolish overly generous provisions and ensure that all incentives are fully costed and reflected in the annual budget. Consider incorporating windfall taxes or a variable profit tax to ensure that Colombia gets a fair deal from its natural resources.
- **Improve transparency on what companies pay** and the net revenue generated by the sector.
- **Introduce 'no go areas' for mining** which responds to concerns expressed by the Comptroller General to protect ecologically sensitive areas and by the Agricultural Minister to protect agricultural land.



# 1.0 Colombian Context

## 1.1 The ongoing conflict

There has been an ongoing internal conflict for nearly five decades in Colombia with all armed actors targeting the civilian population. At the heart of this conflict has been the struggle for land, with the dispossession of land being a strategic objective not only for military gains but also for economic and political purposes.<sup>16</sup> These economic purposes range from drug cultivation to mega-projects such as agri-businesses, infrastructure and mining. The accumulation of land is intimately related to the phenomenon of forced displacement<sup>17</sup> and resource exploitation plays a prominent role in causing this displacement. UN Rapporteur Francis Deng identified displacement as a tool for acquiring land to benefit, amongst other interests, large-scale projects to exploit natural resources as part of a 'counter-agrarian reform'.<sup>18</sup> The exploitation of natural resources and large-scale projects involves both domestic economic interests and multinational corporations; including UK listed and headquartered companies. At particular risk of forced displacement are communities, predominately indigenous, afro-Colombian and peasant farmers (campesinos), living in areas of strategic importance and rich biodiversity. Colombia currently has the highest number of internally displaced people in the world, higher than Southern Sudan, Iraq or Afghanistan.<sup>19</sup> Both the conflict and the forced displacement continue with 286,000 people newly displaced in 2011.

The economic model driving forced displacement includes money from mining, obtained by illegal armed groups exploiting illegal mining<sup>20</sup> to fund their activities (see Case Study 1 for example) and by extorting money from multinational companies.<sup>21</sup> This is despite a pronouncement by President Juan Manuel Santos that he would throw out of the country companies that pay armed groups. Attacks by the Revolutionary Armed Forces of Colombia (Fuerzas Armadas Revolucionarias de Colombia – FARC) on multinational extractive projects and infrastructure have increased in the last couple of years: in January 2012 FARC guerrillas carried out bomb attacks against Emerald Energy;<sup>22</sup> a UK-based oil company, reportedly because the owners failed to pay protection money. An analyst for Maplecroft, a global risk analysis firm, points out that '[t]he main problem now is not kidnapping, but extortion' and as a result 'we are in an uncomfortable position'.<sup>23</sup> Allegations have also been made in civil law claims in the United States that corporations have made contributions to illegal armed groups voluntarily.<sup>24</sup>

The Colombian State appears concerned its plans for mining and infrastructure projects will need added protection. Recognising

that multinational mining corporations are experiencing increased numbers of attacks, kidnappings and extortion,<sup>25</sup> it announced that as of February 2013 the government will increase the number of special army units for the protection of extractives and infrastructure projects. According to Defence Minister Juan Carlos Pinzón, special army units will increase from 11 to 18 units, resulting in a 40 per cent capacity increase.<sup>26</sup> However, special units have often been implicated in human rights violations committed directly or in collusion with paramilitary forces.<sup>27</sup>

## 1.2 The mining panorama

Three documents draw together Colombia's mining policies: the Mining and Energy Vision 2019 (Minero Energético Visión 2019), the National Development Plan 2011-2014 (Plan Nacional de Desarrollo) and the Mining Code.<sup>28</sup> Colombia's goals for 2021 are to double coal exports, quadruple gold exports<sup>29</sup> and triple the mining area.

The plan to use the energy and mining sector as a major driver of the economy was pushed forward during the previous Administration of President Álvaro Uribe Vélez (2002-2010) with the introduction of the Mining and Energy Vision 2019 (Minero Energético Visión 2019).<sup>30</sup> This plan was designed to promote Colombia as a 'mining country' with the aim of being considered one of the most important in Latin America by 2019. This vision has continued under President Santos and is incorporated in the National Development Plan (NDP) 2010-2014, under the theme 'Prosperity for All: more jobs, less poverty and more security'. The NDP specifies that the mining and energy sector 'will be ...one of the backbones of the Colombian economy'.<sup>31</sup> With the extraction of natural resources as a major driver of economic growth, Colombia's objective is to achieve an annual growth rate of around 5 per cent.

Increasing FDI<sup>32</sup> was a major economic goal during the second period of the Uribe Administration. Combined with his focus on mining, this led to granting the highest number of mining permits in the history of Colombia, alongside creating even more favourable investment conditions for MNCs.<sup>33</sup> According to the Comptroller General, by the end of 2010 almost 60 per cent of Colombian territory was either under concession or had applications pending.<sup>34</sup>

Law 685 of 2001 (Mining Code) introduced reforms that threatened to reduce safeguards for the environment and constitutional protections afforded to Indigenous Peoples. Furthermore, in 2012 the government passed Resolution 18, 0241 of 2012 and Resolution

“

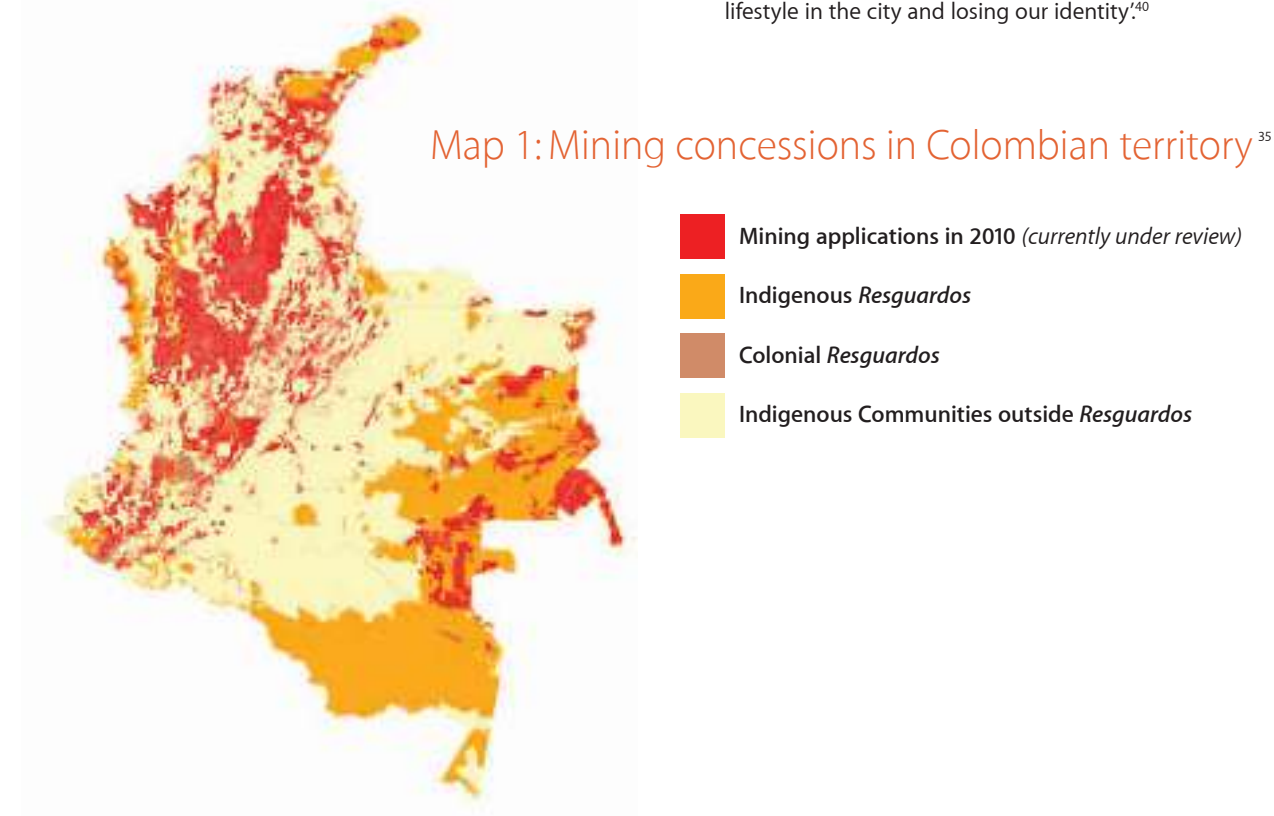
Colombia's 2010-2014 National Development Plan specifies that the mining and energy sector 'will be...one of the backbones of the Colombian economy'.

0045 of June 2012 which declared millions of hectares as 'Strategic Mining Areas' (see section 2.2 on Rainforest areas). Of particular concern was that both Resolutions quoted a decision of 20 February 2012 made by the Directorate for Prior Consultations of the Ministry of Interior (Dirección de Consulta Previa del Ministerio del Interior). The language used by the Directorate suggests that the winner of the concession would be charged with the process of consultation; however, this would be carried out only after they had won the contract.

The National Indigenous Organisation of Colombia (Organización Nacional Indígena de Colombia - ONIC) reports that 80 per cent of concessions for the implementation of economic projects in their territories were granted without prior consultation. This

demonstrates the lack of State protection of their legal rights<sup>36</sup> and poses a grave threat to their cultural survival.<sup>37</sup> In 2010 the Colombian Constitutional Court declared 34 groups of Indigenous Peoples at risk of cultural or physical extinction; a further 30 have been identified by the ONIC. Poverty is much higher among Indigenous Peoples (63 per cent) than the rest of the population (44.3 per cent), and 30 mining licences<sup>39</sup> have been granted in territories of groups at risk of extinction.

For Afro-Colombian and Indigenous Peoples, land is essential for their cultural identity, their spiritual practices and for maintaining the social fabric of their community. As one afro-Colombian explains: 'Our land is our life, if we have to leave our land and our collective territory we will disappear as a group and end up living a western lifestyle in the city and losing our identity'.<sup>40</sup>



Map 1: Mining concessions in Colombian territory<sup>35</sup>

<sup>16</sup> ABColombia Report, Returning Land to Colombia's Victims, May 2011, page 3.

<sup>17</sup> ICTJ and Brookings-LSE Project on Internal Displacement, Criminal Justice and Forced Displacement in Colombia, Federico Andreu-Guzmán, July 2012.

<sup>18</sup> Report of the Representative of the Secretary General on internally displaced persons submitted in accordance with Commission resolution 1999/47, Addendum. Profiles in displacement: follow-up mission to Colombia, E/CN.4/2000/83/Add.1, 11 January 2000, para 23.

<sup>19</sup> CODHES, ¿Consolidación de qué? Informe sobre desplazamiento, conflicto armado y derechos humanos en Colombia, March 2011, page 86.

<sup>20</sup> See section 'Other forms of mining' to understand the difference between illegal mining and informal, ancestral, small-scale and artisanal mining that has become characterised as illegal by the 2001 Mining Code

<sup>21</sup> CItax Colombia and Observatorio Internacional, Armed Illegal Actors and the Extractives Sector in Colombia (Actores Armados Ilegales y Sector Extractivo en Colombia), 2012

<sup>22</sup> El Espectador, FARC attack oil company vehicles in Caqueta, 31 Jan 2012: Emerald Energy is a UK subsidiary of Sinochem. www.elespectador.com/noticias/judicial/articulo-323967-farc-atacan-vehiculos-de-petrolera-caqueta

<sup>23</sup> Infosurhoy Colombia: FARC profiting from extortion, 3 July 2012 http://infosurhoy.com/cocon/sail/xhtml/en\_GB/features/sail/features/main/2012/07/03/feature-01

<sup>24</sup> Refer to footnote 7.

<sup>25</sup> Semana, Seguridad para las 'locomotoras' 18 June 2011 www.semana.com/nacion/seguridad-para-locomotoras/158751-3.aspx

<sup>26</sup> UPI Español, Colombia prepara nuevos siete batallones del Ejército, 10 August 2012 http://espanol.upi.com/Politica/2012/08/10/Colombia-prepara-nuevos-siete-batallones-del-Ej%C3%A9rcito/UPI-19541344621049/

<sup>27</sup> For example see Amnesty International, Colombia a Laboratory of War: Repression and Violence in Arauca, 19 April 2004.

<sup>28</sup> Law 685 of 2001 (commonly known as the Mining Code) was subsequently reformed by Law 1382 of 2010, however in 2011 the Constitutional Court declared the Ley 1382 of 2010 which reformed the 2001 Mining Code law unconstitutional on the basis that the law had not been adequately consulted with Indigenous and Afro-descendant communities, but it gave the government two years to undertake the consultation of the law and so suspended the application of its sentence for two years.<sup>28</sup>

<sup>29</sup> Colombia is currently the largest exporter of gold in the Latin American region - Elizabeth Dickinson, 'Gold Rush', Foreign Policy, August 11, 2011 http://www.foreignpolicy.com/articles/2011/08/09/gold\_rush?page=full

<sup>30</sup> Government of Colombia, Plan Minero Energetico Vision 2019, point 2.

<sup>31</sup> Government of Colombia, National Development Plan 2010-2014.

<sup>32</sup> For more information on the growth of mining see ABColombia Report, Returning Land to Colombia's Victims, May 2011.

<sup>33</sup> Defensa Territorios, 'Casi la Mitad de Colombia la Piden las Multinacionales Mineras' http://www.defensaterritorios.org/index.php?option=com\_content&view=article&id=7722:casi-la-mitad-de-colombia-la-piden-las-multinacionales-mineras-&catid=83:middle-east&Itemid=200; for further information on Mining see also ABColombia Report, Returning land to Colombia's Victims, May 2011.

<sup>34</sup> Contraloría General de la Nación: Estado de los Recursos Naturales y del Ambiente 2010-2011, p. 131. http://justiciaambientalcolombia.org/2011/12/26/contraloria-presenta-informe-sobre-estado-de-los-recursos-naturales-y-el-ambiente-en-colombia/

<sup>35</sup> Human Rights Everywhere (HREV), Map of mining concessions in Colombia as of 2010, Fidel Mingorance, 2011-2012

<sup>36</sup> Programa de las Naciones Unidas para el Desarrollo - PNUD, Pueblos Indígenas: Dialogo entre culturas, Cuaderno del informe de Desarrollo Humano, Colombia 2011.

<sup>37</sup> Programa de las Naciones Unidas para el Desarrollo - PNUD, Pueblos Indígenas: Dialogo entre culturas, Cuaderno del informe de Desarrollo Humano, Colombia 2011. Spanish only.

<sup>38</sup> Programa de las Naciones Unidas para el Desarrollo cited in http://feeds.univision.com/feeds/article/2012-08-26/mas-de-la-mitad-de-refPath=/noticias/america-latina/colombia/

<sup>39</sup> Correct as of 2010. HREV, Desecrated Land 2: Impact of megaprojects on Indigenous Territories in Colombia, 2011 http://www.hrev.org

## 2.0 Conflicting Government Policies

**Concerns around the rapid growth of mining and energy, combined with a lack of appropriate controls to protect human and environmental rights, have been expressed by NGOs, academics and a variety of government ministers and officials. There is also a concerning lack of coherence across government policy in these areas. This section reveals some of these contradictions in relation to the environment and human rights.**

### 2.1 The environment

*'I have no doubts; Colombia is on the verge of an environmental collapse without precedence in our history'*  
Comptroller General Sandra Morelli<sup>42</sup>

Colombia has laws to protect ecologically fragile ecosystems via a system of forest reserves, national parks and special protection of the páramos<sup>43</sup> (high altitude watershed areas). However, the introduction of the Mining Code poses a direct threat to this system of protection. The Mining Code (Article 34) makes provision for authorities to remove the environmental protection awarded to national forest reserves for the purpose of mining. Meanwhile Article 37 prevents municipal authorities from prohibiting mining, even if it is in competition with other interests in their jurisdiction; mining has been declared a 'public interest' and therefore takes precedence over any other activity.

### 2.2 Rainforest areas: Orinoquia, Amazonia and Chocó

At the United Nations Conference on Sustainable Development (UNCSD) in 2012, President Santos announced that Colombia would prioritise policies on sustainable development and the protection of the environment. At the same time, the Minister for Mines and Energy announced that Colombia would set aside 17.6 million hectares (Resolution 45 0045 of June 2012) as 'Strategic Mining Areas'.<sup>44</sup> The areas identified as 'Strategic Mining Areas' are to be sold at 'auction' in large blocks to MNC. These mining blocks include the richly bio-diverse regions of Orinoquia, Amazonia and Chocó.<sup>45</sup> In these departments there are a considerable number of indigenous and afro-Colombian communities, including indigenous groups at risk of extinction.<sup>46</sup> Due to immense pressure from environmental groups, and in recognition of the potential damage that could be caused by multinational companies in the rainforest and jungle areas, in July 2012 former Environment Minister Frank Pearl put forward a counter Resolution.

Whist Minister Pearl's resolution has the effect of partially blocking Resolution 0045 (2012), it is not definitive, only blocking mining

in the forest reserve of the Colombian Amazon for approximately two years.<sup>47</sup> The Resolution is not retrospective which means that Amazonia is not free of all mining. Concessions requested before the resolution was tabled on 31 August 2012 will continue to be processed. As the environmental rights expert Gustavo Wilches<sup>48</sup> explains, 'it is not about rejecting mining, but there are some places like the Amazon where environmental services are the priority'.<sup>49</sup>

### 2.3 Páramos, wetlands and underground water supplies

The Comptroller General Sandra Morelli has declared the development model proposed for mining as unsustainable; the government's plans for the rapid expansion of mining threaten the drinking water of more than 40 per cent of the population (including ten departmental capital cities). Similar concerns were reflected in a report of the Ombudsman's Office (Defensoría del Pueblo) which found that 22 páramos were at extreme risk of disappearing due to the impacts of mining.<sup>50</sup> The páramos supply approximately 70 per cent of the population's drinking water.<sup>51</sup>

Morelli also expressed concerns regarding the inadequate management of the country's wetlands subsequent to the introduction of the 2001 Mining Code. At the end of the 1990s Colombia's wetlands covered an estimated 20 million hectares; however, by 2009 they had been reduced to 3 million.<sup>52</sup>

The Comptroller General raised grave concerns that La Colosa mine in Tolima, owned by UK listed MNC AngloGold Ashanti (AGA), could jeopardise the water basin, potentially reducing supply for agriculture and consumption.<sup>53</sup> Despite these concerns, environmental protection procedures have been further reduced with the introduction of Article 134 in the 2010-2014 NDP which seeks to speed up the process for the issuing of environmental licenses. Rather than placing the emphasis on environmental investigation, Article 134 focuses on the time taken to issue a licence. If the Autoridad de Licencias Ambientales (ANLA), which is responsible for granting the licence, takes longer than 90 working days to respond to a request for a licence then the decision will automatically pass to a committee that is made up of the National Director of planning,

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The Comptroller General has declared the development model proposed for mining as unsustainable.<sup>41</sup>

the Secretary General of the Presidency, the Environment Minister as well as the companies' representative for the sector. They then have 60 working days to respond. It is unclear why companies are represented in this group rather than the communities that will be impacted by the mine, particularly when the decision should be made by the government.

A further loosening of environmental protections can be seen in the change of requirements for environmental impact studies. Prior to the introduction of the 2001 Mining Code, an environmental impact study was required before the exploratory phase of a project; now it is only required after the exploratory stage and before the exploitation phase. However, both the environment and local communities can suffer unwanted and irreversible damages from the exploration stage of any project.<sup>54</sup> Concerns regarding the removal of environmental safeguards have been expressed by the Colombian Constitutional Court in a series of decisions. These decisions establish important precedents regarding the protection of ecologically sensitive areas, including the importance of the Precautionary Principle (Sentence C-443, 2009), and the need for the authorities responsible for the environment and for granting environmental licenses to be independent of the Ministry of Mines and Energy.<sup>55</sup> In addition to the potential environmental damage caused by granting concessions in protected areas, there is also extensive concessioning within indigenous resguardos and collectively owned afro-Colombian territory.



Páramos supply approximately 70 per cent of the population's drinking water in Colombia.

### 2.4 Land restitution

Despite the ongoing internal conflict, President Santos in 2011 introduced the Victims and Land Restitution Law 1448 (Ley de Víctimas y Restitución de Tierra 1448) – a transitional justice policy that provides a framework for land restitution and reparation for the victims of the conflict. Between 5 and 15 per cent of victims wish to return,<sup>56</sup> the majority of whom are organised indigenous, afro-Colombian and campesino communities.<sup>57</sup> There appears to be a conflict between the drive to make Colombia a mining country and land restitution; given it is the same communities that wish to return that are the most vulnerable to a second wave of displacement due to the exploitation of natural resources, agri-business and large-scale infrastructure projects on their land.<sup>58</sup> There also exists a strong possibility that instead of facilitating the return of victims to their land, the Victims Law could create legal security for stolen lands on which some of the mega-projects may be located.<sup>59</sup>



Local woman in COCOMOPOCA territory.

### 2.5 Land titling

As well as returning land to those who have been violently dispossessed, the Colombian State is also in the process of delimiting and granting land titles to Indigenous and Afro-Colombian Peoples. This process has taken many years for communities like COCOMOPOCA, who struggled for 12 years to obtain their land title to 172,000 hectares. When they finally received it the land title was only for 73,000 hectares, of which 50,000 hectares had been granted in a mining concession to UK listed AGA (see Case Study 1). This illustrates the dangers for multinational corporations investing in land in Colombia, including the risk of finding that it is land from which victims have been forcibly displaced or other serious human rights abuses have taken place, and thus knowingly or unknowingly benefiting from the prior human rights abuses.

<sup>40</sup> Mario Angulo, cited by UNHCR in Longing for Home: The bond between Afro-Colombians and their land, 16 June 2011. <http://www.unhcr.org/4df9f75d6.html> Mario Angulo is from Proceso de Comunidades Negras, an umbrella organization that fights for the rights of Afro-Colombians.

<sup>41</sup> Comptroller General, Report on the State of Natural Resources and the Environment (Informe del estado de los recursos naturales y del ambiente), 30 November 2011.

<sup>42</sup> ("No tenga dudas: Colombia está al borde de un colapso ambiental sin antecedentes en nuestra historia") in El Tiempo, 'Colombia está al borde de un desastre ambiental' Sandra Morelli, 13 October 2012. [http://www.eltiempo.com/vida-de-hoy/ecologia/ARTICULO-WEB-NEW\\_NOTA\\_INTERIOR-12303681.html](http://www.eltiempo.com/vida-de-hoy/ecologia/ARTICULO-WEB-NEW_NOTA_INTERIOR-12303681.html)

<sup>43</sup> Páramos are fragile ecosystems that supply about 75% of Colombia's freshwater, including the drinking water of millions of people, and play a key role in mitigating and adaptation to climate change.

<sup>44</sup> El Espectador, Reservan 17.6 millones de hectáreas para minería, 22 June 2012.

<sup>45</sup> Ibid

<sup>46</sup> For example in Amazonia and Orinoquia alone there are 32 pueblos at risk of extinction PNUD, Pueblos Indígenas. Diálogo entre Culturas, Tercer Cuaderno del Informe Sobre de Desarrollo Humano, 2011

<sup>47</sup> El Espectador, Freno a la minería en el Amazonas, 5 September 2012.

<sup>48</sup> Ibid

<sup>49</sup> Original in Spanish unofficial translation: "No se trata de negar la minería, pero hay sitios como el Amazonas donde la prioridad son los servicios ambientales"

<sup>50</sup> El Espectador, Defensoría del Pueblo presenta un crudo diagnóstico de explotación minera: Minería amenaza páramos, 22 January 2011. <http://www.elespectador.com/impreso/politica/articulo-247071-mineria-amenaza-paramos>

<sup>51</sup> Pulitzer Center, Gold or Water? Anna-Katarina Gravgaard, May 13, 2011.

<sup>52</sup> Comptroller General's Report, Estado de Los Recursos Naturales y del Ambiente, 2010-2011, page 217.

<sup>53</sup> Reuters, Colombia's comptroller warns about AngloGold project, 27 July 2011.

<sup>54</sup> CINEP, Conflictividad en el Sector Minero Energético Colombiano, December 2011.

<sup>55</sup> Interamerican Association for Environmental Defence, "Protecting Andean Ecosystems and Communities from Mining's Impact," April 2011.



Case Study 1: COCOMOPOCA, Chocó  
“(T)he president’s engine is going to crush us”<sup>60</sup>

COCOMOPOCA is made up of 43 afro-Colombian communities in the Chocó region (western Colombia) whose control of their ancestral lands has been threatened during decades of conflict. In 1999 the communities applied for a collective land title under Law 70 (1993) in order to obtain the title to their land. Following their application, they suffered forced displacement, threats and killings. As a COCOMOPOCA community leader explains, “It’s awful to live with so much fear, guerrillas and paramilitaries killed people in my family. People watch and follow me. It’s hard to explain how bad the situation is”.

When they received land title to 73,000 hectares, less than half of the full 172,000 hectares of ancestral land in the application, they discovered that AngloGold Ashanti (AGA) had been granted a mining concession on 50,000 hectares of the 73,000 hectares title. This directly contravenes their right to ‘free, prior and informed consent’ under ILO Convention 169 for activities on their land. As a result of this contravention of their rights, the communities have been left in a state of uncertainty about how much control they can maintain of the land to which they were granted the title.

The communities of COCOMOPOCA, in addition to finding the majority of their territory in the land title they secured concessioned to AGA, also found illegal armed groups protecting illegal mines in their territories. This mining was polluting the river on which the communities had to depend, and brought with it even more violence as the illegal mines paid protection money to the armed groups. These communities receive no support from the legitimate authorities in the area to deal with this problem. They have denounced the illegal mining, as has the Diocese of Quibdó, to authorities at both a local and a national level, but to no avail.

2.6 Strategic Mining Areas

The Colombian State’s current model of development and public policies orientated towards the intense industrial exploitation of natural resources conflict with the Indigenous Peoples’ cosmovisión<sup>61</sup> of development.<sup>62</sup> This conflict regarding the vision of development has intensified social protest not only on the part of indigenous but also afro-Colombian and campesino communities.

Despite increasing protest relating to the decision to include mining as a locomotive of the Colombian economy, the government introduced Law 1450 of 2011 which approved the National Development Plan 2010-14 which contained within it Article 108.<sup>63</sup> Article 108 promotes the concept of ‘Strategic Mining Areas’ (Reservas Mineras Estratégicas). Several ‘Strategic Mining Areas’ have been defined via Resolution 18,0241 and Resolution 0045 (see 2.2 on Rainforest areas). These ‘Strategic Mining Areas’ include Orinoquia, Chocó and Amazonas; all of these departments have indigenous resguardos and afro-Colombian territories. The ‘Strategic Mining



Illegal mining in COCOMOPOCA territory.

The lack of rule of law in rural areas is revealed in San Marino: on a hill overlooking the community of San Marino and river Andágueda is the local police station, meanwhile right next to the community, and also in full view of the police station, is an illegal mining operation that has no title concession and is washing toxic chemicals into the river. The police are well within their powers to stop this illegal operation; however, no action at a national or local level has been taken.

Other afro-Colombian communities report a similarly long struggle to get their titles recognised. They point out that corporations, many of them multinationals, have their requests for land concessions expedited quickly, ahead of, and often in the same territory as afro-Colombians have applied for land title years before. This has also occurred with indigenous communities and ancestral territories which they have requested be incorporated into their resguardos.

Areas’ are divided into large concessions and auctioned to MNCs. The winner then signs a contract with the Colombian Government. Once the contract has been obtained the prior consultation process is carried out. Language in this Article could effectively undermine the right to ‘free, prior, and informed consent’ (FPIC) with Indigenous and Afro-Colombian Peoples. It is unclear how, once the MNC has a contract with the State, it will be possible for these groups to exercise their right to withhold consent or veto a project. When civil society organisations have questioned the Ministry of the Interior about these resolutions and FPIC, the reply that they have received is: when a ‘Strategic Mining Area’ is declared it is only ‘aspirational’ that mining will be undertaken. Once the contract is signed it becomes ‘a concrete project’ and there is no need for prior consultation before the project is delimited. However, in reality this circumvents the right to prior consent. These areas are also in ecologically sensitive areas and yet no environmental impact study is required prior to declaring them ‘Strategic Mining Areas’. It appears that these will only be required after the contract has been signed.

<sup>60</sup> César Rodríguez Garavito, Más allá del desplazamiento: Políticas, derechos y superación del desplazamiento forzado en Colombia, Universidad de Los Andes, 2009 <http://terranova.uniandes.edu.co/pdfs/%20novedades/masalladeldesplazamiento.pdf>  
<sup>61</sup> Its proposals include the restoration over a 10 year period of approximately 2.2 million of the estimated 6.6 million hectares of land stolen, abandoned or usurped. For full discussion of the law see ABColombia Reports: Returning Land to Colombia's Victims, May 2011 and The Current Panorama: Victims and Land Restitution Law 1448, June 2012.  
<sup>62</sup> Colombia: The Victims and Land Restitution Law: An Amnesty International analysis, 17 April 2012.  
<sup>63</sup> Colombia: The Victims and Land Restitution Law: An Amnesty International analysis, 17 April 2012.

2.7 Other forms of mining in Colombia

In addition to large-scale mining by multinational corporations, there is informal mining as well as illegal mining in Colombia. Whilst it is not the remit of this report to discuss small-scale informal and artisanal mining, it is important to mention that these exist in Colombia. The terms have become difficult to understand with the introduction of the 2001 Mining Code, which dramatically changed the status of informal small-scale mining in Colombia. The change in legal requirements for these enterprises resulted in them being re-categorised over night as ‘illegal mining’. According to the Defensoría (Ombudsman), the legalisation of mining activities by informal small-scale miners is a torturous process which is extremely costly in terms of money and time and often beyond the capacity of the miners to complete without the support of a lawyer or other similar organisation. This is because legislative changes mean they are expected to meet similar requirements as MNCs.<sup>64</sup> The Defensoría has also stated that ‘(t)he government has in many cases chosen not to recognise the activities of small-scale miners, to the point of persecuting them and applying prohibitions’.<sup>65</sup> Small-scale miners are characterised by a long history of mining

in the region. The miners frequently live locally with their families and it is often used as a means of supplementing other incomes. This mining still causes some pollution and the chemicals used for mining damage the health of miners. However, the various groups of small-scale miners that ABColombia spoke to all expressed a desire for the government to provide them with training in better mining practices that would help to protect the environment and their health.<sup>66</sup> Artisanal mining, such as panning for gold, is practiced by many riverine communities (including COCOMOPOCA<sup>67</sup>), and does not normally use harmful chemicals. These communities use this type of mining to supplement subsistence agriculture and fishing.

However, it is important not to mix this mining with the small and medium-scale miners who carry out illegal mining in complicity with armed groups. The latter pays no attention to whose land the mining is on, whose rights are violated, or what damage is done to the environment. This type of illegal mining is destroying the environment and generating violence and conflict in many regions, including indigenous and afro-Colombian territories.

Case Study 2: Awá Indigenous Peoples

The Awá – meaning ‘people’ – were originally hunter-gatherers who moved around large areas of south-western Colombia with a population of about 21,000. The situation of the Awá people in Nariño and Putumayo is particularly concerning since ‘they continue to be exposed to actions by illegal armed groups, including enforced displacement, threats of recruitment, intimidation, disappearances, killings and retaliation after security forces enter into contact with the population.’<sup>68</sup>

During the last three years the Awá have faced the problem of illegal miners in their territory. Early in 2009 the mining company La Esperanza set up an illegal gold mining operation inside Hojal La Turbia indigenous resguardo. The mining operation was split between Awá land in Colombia and across the border in Ecuadorian territory. The Awá had been calling for the removal of the illegal mine since its establishment in 2009. The Ecuadorian authorities responded promptly by removing the illegal miners from their side of the border, which remains free of illegal mining.

However, the Colombian authorities took no action to remove the miners at that time or after a report by the Ombudsman<sup>69</sup> recommending urgent action be taken. La Esperanza gold mine caused serious environmental damage by polluting local rivers, San Juan de Mayasquer and the river Mira with toxic chemicals, and threatened food security. In addition, the mine was causing internal conflict between Awá living in the resguardo who were employed in the mine, and the rest of the community.

In August 2011, they finally obtained confirmation in writing from the head of La Esperanza José Didier Cadavid Salgado that



Territory of Indigenous Awá People is under threat from illegal and legal mining

his company would leave the site within two months; however, the mine continued to function until July 2012 when, due to the continued lack of action to implement the law, the Awa were forced to act in order to protect their community and their territory and they evicted all operatives of the mining company La Esperanza from an illegal gold mine inside the Hojal la Turbia indigenous resguardo.

Communities like the Awá are not alone in finding a lack of State protection and political willingness to implement the rule of law in their favour; other indigenous groups in Colombia have also started to remove illegal mining from their territories.<sup>70</sup>

<sup>64</sup> Américo Mosquera, legal representative of COCOMOPOCA, is referring to the engine of growth on mining in the NDP.  
<sup>65</sup> Cosmovision is: Indigenous peoples experience nature in a holistic modality imbued with a sacred quality. Nature is revered as the primary source of life; it nourishes, supports and teaches humanity. Nature is the centre of the universe.  
<sup>66</sup> PNUD, Pueblos indígenas: diálogo entre culturas Cuaderno del Informe de Desarrollo Humano, Colombia 2011, page 22.  
<sup>67</sup> Ley 1450 de 2011, “Por la cual se expide el Plan Nacional de Desarrollo 2010-2014” ARTÍCULO 108°. RESERVAS MINERAS ESTRATÉGICAS. La autoridad minera determinará los minerales de interés estratégico para el país, respecto de los cuales podrá delimitar áreas especiales en áreas que se encuentren libres, sobre las cuales no se recibirán nuevas propuestas ni se suscribirán contratos de concesión minera. Lo anterior con el fin de que estas áreas sean otorgadas en contrato de concesión especial a través de un proceso de selección objetiva, en el cual la autoridad minera establecerá en los términos de referencia, las contraprestaciones económicas mínimas distintas de las regalías, que los interesados deben ofrecer.”



# 3.0 Social Protest

**There has been a substantial increase in both the number and intensity of social conflicts associated with natural resource exploitation. CINEP found that between January 2001 and December 2011, 274 collective social actions associated with the extraction of petroleum, coal and gold took place in Colombia, with social protest against mineral extraction rising consistently from 2005.**<sup>71</sup>

2011 alone saw more than 50 anti-mining protests.<sup>72</sup> These social conflicts arise due to different visions of development and are provoked when projects are undertaken without adequate consultation or respect for the rights of communities. Community concerns include severe damage to the environment and water resources; negative health impacts on surrounding communities; forced displacement of communities and the destruction of ancestral land which has spiritual and livelihood significance for Indigenous People.<sup>73</sup> Large-scale economic projects in indigenous territories are major contributing factors to 64 groups being at risk of extinction.<sup>74</sup>

Concerns around the impact of mining on water resources have united groups from very different perspectives – students, NGOs, communities, local businesses, local authorities, governors, mayors and politicians – to protest against mining in sensitive ecological areas and areas where agriculture has been the main source of income. This is the case in the páramos of Santurbán with the multinational mining corporation Eco-Oro Minerals Corps<sup>75</sup> (see Case Study 3), and with Gran Colombia Gold operating in Nariño (see Case Study 4).

According to research, some 80 per cent of human rights and International Humanitarian Law (IHL) violations in the last 10 years have been carried out in mining and energy regions in Colombia.<sup>76</sup> These have been committed by paramilitaries, the security forces and guerrilla groups. The UN Representative Francis Deng’s findings highlight this: ‘It is...not a coincidence that the areas where guerrilla and paramilitary activity is most intense tend to be rich in natural resources.’<sup>77</sup>

Community leaders and human rights defenders in Colombia who support communities opposing mining face stigmatisation, as well as physical and psychological intimidation and violence. Seeking to uphold rights is a dangerous business in Colombia. Negative campaigns stigmatising human rights defenders continue,

particularly those directly, or indirectly linked to land restitution processes and in zones of economic interest.<sup>78</sup> Death threats have been sent to various human rights defenders and community leaders who have contested the rights of mining companies in their territories, ‘You are the ones that will not allow development in this country ... therefore you are on our death list.’<sup>79</sup> On 1 September 2011, Father José Reinel Restrepo Idárraga was murdered. Father Restrepo was an outspoken critic of the Canadian multinational Gran Colombia Gold’s open-pit gold mining venture in Marmato, Antioquia. Communities calling for different development policies or human rights defenders working on land restitution and victims’ rights do so at the risk of being attacked and killed for this work.<sup>80</sup> There was more than one defender killed each week in the first 6 months of 2011, the majority of whom worked on land and victims issues.<sup>81</sup>



“Colombia’s water for Colombia not foreigners.”

“

Large-scale economic projects in indigenous territories are major contributing factors to 64 groups being at risk of extinction.

## Case Study 3: Angostura mining project, Eco-Oro Minerals Corps



“Water and Life are not negotiable.”

Santurbán is a páramo located in the central northern part of the country between the departments of Santander and Norte de Santander. It has a geographical extension of 438,800 hectares and is an area of great importance in Colombia due to its vast biodiversity. Santurbán has approximately 441 hectares of drainage basin, providing the water for 2.5 million people and a potential for 10 million people.<sup>82</sup> Additionally, the páramo has 28,050 hectares of forest and 12,685 hectares of moorland vegetation.<sup>83</sup>

During the last decade, Santurbán páramo has been the subject of legal battles over the granting of mining licenses in the region. According to the Colombian Institute of Geology and Mining – INGEOMINAS, as of 17 February 2010, 40 mining titles had been granted in Santurbán’s surroundings, of which 23 were specifically in Santurbán páramo, covering around 22,971 hectares. A further 39 mining titles have been requested, of which 29 are located in páramo zones – threatening 148,296 hectares.<sup>84</sup>

Canadian multinational Greystar Resources Ltd<sup>85</sup> (which was previously listed on the London Stock Exchange and changed its name to Eco-Oro Minerals Corps during the peak of social conflict over mining in the area) owns the Angostura mining project, which is a proposed large-scale gold mine project in the Santurbán páramo. In May 2011, following controversial hearings, the town and surrounding areas united in protests numbering tens of thousands. These protests were supported by local businesses, local authorities, social and student organisations and individuals.

“It is outrageous that such a damaging mining initiative has the backing of the World Bank... There could be some 20 counties whose water will be affected by this project” said attorney Miguel Ramos of the Committee for the Defence of Water and the Santurbán Páramo, a coalition of nearly 40 local groups.<sup>86</sup>

Colombian law and jurisprudence provide specific protection for páramos. Law 99 of 1993 contains language defining páramos as areas of special protection, and the Council of State (Consejo de Estado) C-339 of 2002 established that mining should be prohibited in several ecosystems including páramos.<sup>87</sup> Despite the 1993 legislation, the 2001 Mining Code did not exclude páramos from mining operations. The Council of State ruled that Article 36 of the 2001 Mining Code was partially unconstitutional because it contradicted standing laws excluding mining activities from areas other than national parks.<sup>88</sup>

Article 34 of Law 1382 of 2010<sup>89</sup> which modified the 2001 Mining Code established the exclusion of páramos from any kind of mining projects. However, before the Mining Code was signed into law, there was a rush on the part of the government to grant mining licences in páramo areas. According to an article in La Silla Vacía, during the eight years of President Uribe’s government (2002-2010) the growth in the number of mining titles conceded in páramos was dramatic; by October 2010 over 6 per cent of the 122,000 hectares covered by these ecosystems were subject to mining titles. The vast majority of these titles had been conceded when Law 1382 of 2010 was approved but had yet to be signed into law by the Uribe Administration. It took around eight months to do this. In this period a large number of mining titles in the páramos were authorised; between July and October 2009 alone 1,900 mining contracts were signed and some mining corporations were able to renew interests they already held arguing that they secured their mining titles before the 1382 Law was promulgated and were therefore entitled to continue exploiting their mining interest.<sup>90</sup> The 1382 Law also contains an Achilles heel in the form of a sentence in Article 34 determining that páramos require formal geographical definition by environmental authorities before they are recognised as such: ‘(t)o produce these effects, these zones must be defined geographically by an environmental authority based on social and environmental technical studies.’<sup>91</sup>

Interbolsa, a company providing advice to investors, recommended investment in Greystar Resources Ltd on the basis that Law 1382

<sup>64</sup> Whilst the State has on three occasions created opportunities for small-scale miners to legalise their activities with the introduction of Law 141 of 1994, Law 685 of 2001 and law 1382 of 2010 they have not been very effective, less than 1% (3,631 applications made and 23 legalised) of those who applied were granted legalisation. The main reasons attributed by the Defensoría were lack of technical and legal help and extremely high requirements. Cited in Defensoría del Pueblo, Minería de Hecho en Colombia, December 2010.

<sup>65</sup> Defensoría del Pueblo, Minería de Hecho en Colombia Delegated Ombudsman for Collective rights and the Environment, December 2010.

<sup>66</sup> ABColumbia interviews with small-scale mining communities carried out in Colombia in June 2012.

<sup>67</sup> COCOMOPOCA is an autonomous ethnic-territorial organisation that represents the Afro-Colombian population in the municipalities of Atrato, Bagadó, Cértegui and Lloró in the Pacific Coastal region of Colombia.

<sup>68</sup> Annual report of the United Nations High Commissioner for Human Rights, Addendum, Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Colombia, January 2012, para 99.

<sup>69</sup> 19th Report of the Ombudsman (defensoría del pueblo) to the Colombian Congress January to December 2011. Decimonoveno Informe del Defensor del Pueblo al Congreso de La República de Colombia Segunda Parte Gestión Defensorial Enero - Diciembre 2011, page 96. [http://www.defensoria.org.co/red/anexos/publicaciones/19\\_informe\\_congreso\\_II.pdf](http://www.defensoria.org.co/red/anexos/publicaciones/19_informe_congreso_II.pdf)

<sup>70</sup> The indigenous guard along with the Association of Indigenous Cabildos from the North of Cauca (ACIN), in an act of self-determination and defence of their territory some 300 indigenous people shutdown a gold mine, stating they would not permit activities that damaged their territory, and that neither small-scale miners nor multinationals would be permitted on their land. <http://www.nasaacn.org/nuestra-palabra-kueta-susuza/4725-montanas-del-cauca-colombia-comunidades-indigenas-cierran-mineras-de-oro>

<sup>71</sup> CINEP, Informe Especial sobre Minería, conflictos sociales y violación de Derechos Humanos en Colombia - Segundo Informe Especial CINEP/ Programa por la Paz, October 2011. [http://issuu.com/cinepppp/docs/ie\\_cinepppp\\_octubre\\_2012](http://issuu.com/cinepppp/docs/ie_cinepppp_octubre_2012)

<sup>72</sup> El Espectador, La locomotora minera puja, pero el Gobierno perdió el año, Álvaro Pardo, December 2011.

<sup>73</sup> CINEP, Informe Especial sobre Minería, conflictos sociales y violación de Derechos Humanos en Colombia - Segundo Informe Especial CINEP/ Programa por la Paz, October 2011. [http://issuu.com/cinepppp/docs/ie\\_cinepppp\\_octubre\\_2012](http://issuu.com/cinepppp/docs/ie_cinepppp_octubre_2012)



would not be able to be applied retrospectively,<sup>92</sup> thus enabling the Angostura project to continue, since Law 1382 did not exclude mining from páramos. When Law 1382 was approved, the Ministry of Housing and Environment (MAVDT) called on Greystar Resources Ltd (now Eco-Oro Minerals Corp) to modify the Environmental Impact Study (EIS) it had submitted in December 2009. Greystar lodged an appeal against the retrospective application of Law 1382 and the MAVDT reinstated the EIS in May 2010 allowing Greystar to continue the process and present the EIS publically. The company was unable to complete the second hearing on 4 March 2011 due to disruption and further social protests against the mine. It had failed to calm the fears of the community and local authorities. Despite this the company stated that it would not withdraw from the project.<sup>93</sup>

Santurbán is geologically a páramo; however, it has not been legally declared as such due to regional authorities failing to delimit the páramo.<sup>94</sup> The Eco-Oro Angostura project has 56 per cent of its project above 3000 metres, which is the height determined by the Humboldt Institute as the limit line where páramos begin.<sup>95</sup> Therefore, until the páramo areas defined by local environmental authorities are recognised, mining projects will continue to exist in protected zones with the potential of enormous damage to water resources and the environment.

A complaint was accepted by the World Bank Group to evaluate its investment in Eco-Oro Minerals’ Angostura mining project. The Compliance Advisor Ombudsman (CAO) will review the allegation that the World Bank failed to evaluate the project’s potentially severe and irreversible social and environmental impacts.<sup>96</sup>

In May 2011 due to immense social protest against the mine, the Colombian Ministry of the Environment rejected Eco-Oro Minerals’ initial request for an environmental licence, citing environmental, constitutional and international law prohibiting mining activity in páramos.<sup>97</sup> However, Eco-Oro has not given up its intention of extracting gold and silver. It appears likely that it will resubmit its plans for a deep-pit mine, rather than the original open-pit mine proposed; potentially causing severe damage to underground water channels and water supplies. Despite lodging an appeal when it operated under the name of Greystar Resources Ltd to block the retrospective application of the Law 1382, and its insistence of exploiting a páramo area, the company’s published policies emphasise its environmental credentials: ‘Eco Oro ... develop(s) best practices in environmental management... (and) are committed to preservation and conservation of Páramo ecosystem’.<sup>98</sup>

Resistance and protest regarding mining and the damage it may cause to the livelihoods of small-scale farmers is increasing in Colombia. The Agricultural and Rural Development Minister Juan Camilo Restrepo Salazar raised concerns about the immense risk the proliferation of mining licenses posed for the agricultural sector.<sup>99</sup> The frantic approval of mining titles under the Uribe Administration could prevent campesinos being granted land titles in nearly 25 million hectares that are in 79.6 per cent of rural territory.<sup>100</sup> The danger is not only the loss of land to mining concessions, but also water consumption and pollution by mines, all of which will impact on food production. The rapid spread of mining concessions therefore poses a threat to food security, especially when combined with the widespread use of land for mono-crops or bio-fuels. The Agriculture Minister stressed that it was essential to exclude mining from some rural areas and to protect some regions for agricultural production.<sup>101</sup>

In some areas farmers have worked for years to develop sustainable agriculture and obtain certification for their products.<sup>102</sup> Mining has never existed in many traditionally agricultural regions of Colombia, and local communities do not know what to expect when a mining company arrives in the area. The only information available to them is often from the mining corporations themselves, who promise to provide new jobs, healthcare, and improved infrastructure. However, they are often not informed about the impacts that mining would have on the environment, local economy and social fabric of the community. An example of this is the case of the Gran Colombia Gold mining project in Nariño (see Case Study 4).



Santurbán Páramo.

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<sup>94</sup> Colombian Constitutional Court in decision Auto 004 of January 2009 identified 34 groups and the ONIC a further 30 at risk of physical or cultural extinction.

<sup>95</sup> Greystar Resources Ltd changed its name to Eco Oro Mineral Corps on 16 August 2011 see: <http://www.eco-oro.com/default.aspx?SectionId=5cc5ecae-6c48-4521-a1ad-480e593e4835&LanguageId=1&PresReleaseId=a588921e-e5eb-42a8-9dff-e2b7bbfd7280>

<sup>96</sup> Sintramínacol, quoted by PBI Colombia, Mining in Colombia: at what cost, Colombia Newsletter 18, Bogotá, 2011.

<sup>97</sup> Report of the Representative of the Secretary General on internally displaced persons submitted in accordance with Commission resolution 1999/47/Addendum. Profiles in displacement: follow-up mission to Colombia; E/CN.4/2000/83/Add.1, 11 January 2000, para 23.

<sup>98</sup> For examples see the defamation campaigns against the Comisión Intereclesial de Justicia y Paz (CIJP) related to their work in the Curvaradó and Jiguamiandó river basins and against Father Javier Giraldo (ex member of CIJP who accompanies the Comunidad de Paz de San José in Apartadó.) See <http://www.pbi-colombia.org/field-projects/pbi-colombia/publications/accompanied-organizations/inter-church-justice-and-peace-commission/> and <http://www.fidh.org/Amenazas-de-muerte-contra-el>

<sup>99</sup> This threat was signed by the Black Eagles followed a series of threats to women defenders including Berenice Celyeta on her return from the UK where she talked about the violation of human rights by mining corporations. See ABColombia Letter to Jeremy Browne FCO Minister of State at [www.abcolombia.org.uk/downloads/8FB\\_110113\\_ABColombia\\_HRDs\\_concerns.pdf](http://www.abcolombia.org.uk/downloads/8FB_110113_ABColombia_HRDs_concerns.pdf)

<sup>100</sup> On average one defender or community leader has been killed every week since the beginning of the Santos Administration (August 2010). Whilst there have been some advances in high-profile court cases following international pressure, impunity for these crimes remains the norm in Colombia.

<sup>101</sup> Somos Defensores, Informe enero - junio 2011 del Sistema de Información de Agresiones contra defensores y defensoras de Jueves, 08 de Septiembre de 2011

<sup>102</sup> For more detailed examples see the negative campaigns conducted against the Comisión Intereclesial de Justicia y Paz (CIJP) related to their work in the Curvaradó and Jiguamiandó river basins reported by PBI and the International Federation of Human Rights, see <http://www.pbi-colombia.org/field-projects/pbi-colombia/publications/accompanied-organizations/inter-church-justice-and-peace-commission/> and <http://www.fidh.org/Amenazas-de-muerte-contra-el>

<sup>103</sup> Document ‘Acción ciudadana para proteger el agua y la vida en el Páramo Santurbán. Encuentro Acción Colectiva y Megaproyectos Mineros 18 y 19 de Mayo 2011’

<sup>104</sup> Rodríguez, Tatiana and Danilo Urrea. Agua o Minería. Un debate nacional. in CENSAT Agua Viva, Bogotá, Colombia, April 2011, page 28.

<sup>105</sup> Greystar was a Canadian Mining Company registered on the London Stock Exchange but has since withdrawn.

<sup>106</sup> *ibid*

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### Case Study 4: Mazamorra Gold, Nariño

The Canadian multinational Gran Colombia Gold established its project ‘Mazamorra Gold’ in 2011 in the municipalities of Arboleda and San Lorenzo, located in the department of Nariño. According to the government of Nariño, there are more than 221 mining titles and 992 mining applications in the department, covering 52 of 64 municipalities.

The Mazamorra Gold project occupies 5,993 acres in Nariño and has its drilling platforms located in San Lorenzo and Arboleda, two municipalities separated by the Mazamorra ravine. Many of the municipalities in Nariño are purely agricultural and mining did not exist in these two municipalities prior to 2009. Only limited information was given to the local communities regarding the proposed Mazamorra Gold project prior to its arrival, and they have said that they were unaware of the negative impacts that mining might have on agriculture in the region.

The region has plenty of water sources which are protected by local communities because of their importance for local farmers. Some of the farmers interviewed by ABColombia had improved product prices through sustainable development and obtaining the Rainforest Alliance Sustainable Development Certification, both of which depend on clean water supplies.

In addition to concerns expressed over agricultural production are those regarding the serious impacts on the social fabric of the community. As one community member expressed: ‘[the mining company] have robbed us of our peace and confidence’. For instance, according to community members<sup>103</sup>, insecurity had grown due to the mining company hiring ‘reinsertados’ as security guards. It is not unlawful to hire Reinsertados, they are paramilitary and guerrillas who have supposedly demobilised and returned to civilian life. The community however, recognise many of these people as having committed terrible crimes. As members of private security firms can be armed, there have always been serious concerns that paramilitaries and demobilised guerrillas could be ‘recycled’ into the conflict.

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<sup>97</sup> Fierro Morales, Julio, Minería en los páramos: el agua vale más que el oro, 28 March 2011, <http://www.razonpublica.com/index.php/econom-y-sociedad-temas-29/1917-mineria-en-los-paramos-el-agua-vale-mas-que-el-oro.html>

<sup>98</sup> *Ibid*

<sup>99</sup> In 2011 the Constitutional Court declared Law 1382 of 2010 unconstitutional on the basis that the law had not been adequately consulted with Indigenous and Afro-descendant communities. The Court declared the lack of consultation unconstitutional, rather than the law itself, and gave the government two years to undertake the consultation of the law and suspended the application of its sentence for two years.

<sup>100</sup> Osorio Avendaño, Camila, El legado minero de Uribe, 14 October 2010, <http://www.lasillavacia.com/historia/18648>

<sup>101</sup> In its Spanish version Article 34 of the Mining Code establishes that: ‘estas zonas para producir estos efectos, deberán ser delimitadas geográficamente por la autoridad ambiental con base en estudios técnicos, sociales y ambientales’

<sup>102</sup> Interbolsa. Comisionista de Bolsa, Greystar Resources, 17 June 2010, <http://www.interbolsa.com/documents/10714/57278/GREYSTAR+RESOURCES++INICIACION+DE+COBERTURA+JUNIO++DE+2010.pdf>

<sup>103</sup> World Gold Analyst Colombia 2011, The Colombian Gold Mining Industry, World Gold Analyst Special Report. p46-47

<sup>104</sup> According to the Inter-American Association for Environmental Defence, to date there are in the country 122,000 páramo hectares titled which remain without an environmental license. Further information see: Protección jurídica de páramos frente a actividades mineras: caso de los complejos de páramos almorzadero y Santurbán. Available at: [www.censat.org/component/attachments/download/914](http://www.censat.org/component/attachments/download/914)

<sup>105</sup> These zones are delimited by the Alexander von Humboldt Research Institute. Yet there is room for future controversy as long as they are not defined by local environmental authorities based on technical, social and environmental studies.

<sup>106</sup> The Compliance Advisor Ombudsman (CAO) is the independent recourse mechanism for the International Finance Corporation and Multilateral Investment Guarantee Agency. The CAO responds to complaints from project-affected communities with the goal of enhancing social and environmental outcomes on the ground.

<sup>107</sup> AIDA, World Bank Group Opens Case on Eco Oro Minerals Gold Mine in Fragile Colombian Wetlands, July 2012 <http://www.aida-america.org/en/release/world-bank-group-opens-case-eco-oro-minerals-gold-mine-fragile-colombian-wetlands>

<sup>108</sup> <http://www.eco-oro.com/Corporate-Responsibility/Environment/default.aspx>

<sup>109</sup> Ministerio de Agricultura y Desarrollo Rural, Licencias mineras comprometen el mapa agrícola de Colombia: Minagricultura, May 2012 <http://www.minagricultura.gov.co/inicio/noticias.aspx?idNoticia=1490>

<sup>110</sup> Habría 5 millones de campesinos en riesgo de conflicto con la minería [www.elspectador.com/economia/articulo-351250-habria-5-millones-de-campesinos-riesgo-de-conflicto-mineria](http://www.elspectador.com/economia/articulo-351250-habria-5-millones-de-campesinos-riesgo-de-conflicto-mineria)

<sup>111</sup> *ibid*

<sup>112</sup> ABColombia interviews conducted in Pasto in June 2012.

<sup>113</sup> Stated in an interview with ABColombia in Pasto in June 2012.

## 4.0 Rights of Indigenous and Afro-Colombian Peoples

**It is noticeable that a worrying pattern has emerged when there is social protest and resistance to mining. Similar to that identified in other countries,<sup>104</sup> corporations often seek to divide communities. The UN Rapporteur on the situation of human rights and fundamental freedoms of Indigenous Peoples, James Anaya, identified this pattern as one repeated globally: ‘(Corporations have) fuelled conflicts between Indigenous Peoples and the State and extractive industry corporations, as well as causing divisions within the Indigenous communities themselves.’<sup>105</sup>**

The UK listed MNC Rio Tinto has an 80 per cent option for a joint venture with Muriel Mining Corporation (MMC) and has been an essential partner in bankrolling the exploration stage of the Mandé Norte Project, in the departments of Chocó and Antioquia.<sup>106</sup> The Indigenous authorities of Urada allege that the prior consultation was characterised by deceit, misinformation and manipulation.<sup>107</sup> However, MMC denied this allegation.<sup>108</sup> They were taken to court for lack of proper consultation; the claim was upheld by the Colombian Constitutional Court.<sup>109</sup> This pattern of accusations has also been made against other companies. For example, in La Guajira, afro-Colombian and indigenous communities state that pressure is being exerted by the companies and state authorities<sup>110</sup> for expansion of the Cerrejón mine: ‘Cerrejón... through their staff, hiring our Indigenous brothers, and in an arbitrary fashion enter(ing) our indigenous and afro-descendant communities (have) divided families; ignored our customs, traditions, community authorities, ways of living and the autonomy of the owners of the territory...’.<sup>111</sup>

The level of concern amongst Indigenous Peoples regarding the lack of accurate information given to communities, along with their experiences of bribery and falsification of signatures on land title deeds, has led to communities carrying out their own internal consultations (Consulta Interétnica de los Pueblos). For example, in February 2009 indigenous and afro-Colombian communities of Jiguamiandó organised an internal consultation. The consultation involved 77 per cent of the communities directly affected by the Mandé Norte Mining Project (1,183 persons). The outcome was a 100 per cent rejection, by participating communities, of the mine in their ancestral territories. Wayúu Indigenous in La Guajira have taken a similar route with the Cerrejón case.

### 4.1 Prior consultation and the right to consent

The Colombian Constitution of 1991 grants the right of prior consultation to Indigenous Peoples; this right is also contained in

the International Labour Organisation (ILO) Convention 169, signed by Colombia. The UN Declaration on the Rights of Indigenous People, endorsed by Colombia, has further developed the right to prior consent contained in the ILO Convention 169 as one of its key elements. In Colombia, the ILO Convention 169 applies to both Indigenous and Afro-Colombian Peoples.

Various mechanisms have been set up in Colombia in order to foster dialogue between the State and Indigenous and Afro-Colombian Peoples, including the Prior Consultation Group of the Ministry of Interior and Justice, the Permanent Roundtable for Consensus with Indigenous Peoples and Organisations, and the Amazonic Indigenous Regional Roundtable.<sup>113</sup> However, the sheer number of cases being presented to the Constitutional Court relating to megaprojects impacting on Indigenous Peoples points to the persistent failure on the part of the State to carry out consultation processes which are truly free, prior and informed. According to James Anaya, from 1993 to 2006 the Colombian Constitutional Court ruled in favour of Indigenous Peoples in about 18 cases due to the violation of the right to territory and prior consultation by megaprojects.<sup>114</sup> Anaya described the development of an effective consultation process to be one of the ‘main challenges confronting Colombia.’<sup>115</sup>

‘Free, prior and informed consent’ (FPIC) is currently the only mechanism that officially gives people a voice and protects the rights of Indigenous and Afro-Colombians Peoples to self-determination in development. Meanwhile the Colombian Government considers that the norms governing FPIC give the right to consultation but ‘explicitly provide that communities have no right to veto the decisions made by the authorities’.<sup>116</sup> However, a consultation process lacks validity unless the real objective is to obtain consent. International covenants and law, as well as recent judgements by the Colombian Constitutional Court’s that create precedence, determine that free, prior and informed consent of Indigenous Peoples should be obtained prior to the approval of the use by private industries of



Permanent sovereignty over natural resources is an integral part of the rights of self-determination of Indigenous Peoples.

UN Special Rapporteur James Anaya<sup>112</sup>

Indigenous Peoples’ land, territories and resources where economic projects are considered to have a considerable impact on the economic, social and cultural rights of these communities.

ONIC reported that there had been 83 prior consultation processes carried out between 1994 and 2009, but none of these were considered to be examples of good practice. In fact, they report the opposite being true – that the consultation process has been converted into a mechanism used to generate internal disputes and divisions.<sup>117</sup> Frequently, Indigenous Peoples find multinational corporations arrive in their territories with government granted concession and with no prior notice or consultation having taken place. The lack of concrete information about the project, its social and environmental impacts, and lack of familiarity with legal mechanisms, often prevents Indigenous People engaging from an early stage in decision-making processes affecting their territory.<sup>118</sup> In addition, Indigenous Peoples have experienced longstanding delays in the legal recognition, titling, and demarcation of their lands, leaving them in a very vulnerable situation.

This premise of consent, and therefore **the right to veto a project**, is supported by Court decisions at regional (Inter-American Court of Human Rights-IACHR) and national level (Colombian Constitutional Court). The IACHR, in the Saramaka People vs Surinam judgement of 2007, made a groundbreaking ruling that the state had a duty ‘not only to consult but also to obtain their FPIC, according to their customs and traditions’ in cases where ‘large-scale development or investment projects ...would have a major impact ...on territory’. The Colombian Constitutional Court decisions on the Mandé Norte case<sup>119</sup> strengthened the framework for the right to veto. It recognised the threat to the cultural survival of the Indigenous People when large-scale projects are developed on their territory, and that in such cases consent should be obtained.

Judgements by the Colombian Constitutional Court and the Inter-American Court, together with the UN Declaration on the Rights of Indigenous People, expand and consolidate the principles contained in ILO Convention 169 in a number of ways. These include expressing Indigenous Peoples’ right to self-determination, and explicitly referring to FPIC prior to the approval of any large-scale projects affecting their culture, lands or territories,<sup>120</sup> with specific reference to the development, utilisation or exploitation of minerals, water or other resources.<sup>121</sup>

A later decision by the Constitutional Court in the Chidima<sup>122</sup> case (T-129 of 2011) of March 2011 expanded this right to consent and to exercise their autonomy with respect to their ‘life plans’ (indigenous development plans) rather than conforming to market models of development; in other words the right to development in conformity with indigenous cosmovisión. This is supported by the UN Special Rapporteur, James Anaya, when he states that ‘permanent sovereignty over natural resources is an integral part of the rights of self-determination of Indigenous Peoples’.<sup>123</sup>

The ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) stated in 2010 that indigenous and afro-Colombian communities still suffer the brunt of the violence, intimidation, dispossession of lands and imposition of projects on their territory without consultation or participation, and continue to suffer violations of the rights laid down in ILO Convention 169.<sup>124</sup> The Committee urged the Colombian Government to immediately suspend the implementation of projects affecting indigenous and afro-Colombian communities until an end has been put to all intimidation of the affected communities and their members, and until the participation and consultation of the peoples concerned has been ensured through their representative institutions in an appropriate climate of full respect and trust, pursuant to Articles 6, 7 and 15 of the Convention.<sup>125</sup>

In order to ensure that intimidation and dispossession of land does not occur it is essential that Colombia improves its prior consultation process. The consultation process should, if in line with UN Conventions signed by Colombia and the recent Constitutional Court decisions, ensure communities have the right to veto. It is essential to recognise that Indigenous Peoples are the rights-holders of their territories whose ‘self-determination, autonomy, cultural identity and responsibilities to future generations are inextricably linked to their right to give — or withhold — their free, prior and informed consent to all projects and plans affecting their lands.’<sup>126</sup> In a context of grave human rights violations, abuses and structural impunity, the right to FPIC cannot be guaranteed.

<sup>104</sup> UN Report to the Human Rights Council Twenty-first session, Human rights bodies and mechanisms, August 2012, Follow-up report on indigenous peoples and the right to participate in decision-making, with a focus on extractive industries page 7. The Rapporteur is discussing environmental degradation and impacts on culture and unfulfilled promises of ‘development’ by corporations.

<sup>105</sup> UN Special Rapporteur James Anya, Report to the Human Rights Council 21st session, August 2012, Follow-up report on indigenous peoples and the right to participate in decision-making, with a focus on extractive industries, page 7.

<sup>106</sup> For more information: ABColombia website <http://www.abcolombia.org.uk/subpage.asp?subid=410&mainid=23>

<sup>107</sup> Sistema e Investigación Indígena, ONIC, Embaras del Chocó resisten a la minería y la militarización (Embera of Choco resist mining and militarisation), see: <http://www.onic.org.co/actualidad.shtml?x=35985> and Colombia Solidarity Campaign, Submission to the UK Joint Committee on Human Rights on 23 April 2009

<sup>108</sup> Muriel Mining Response, 16 May 2009 at <http://www.business-humanrights.org/Documents/MandeNorte>

<sup>109</sup> Decision of the Constitutional Court 2009, Sentencia T-769/09 <http://www.corteconstitucional.gov.co/relatoria/2009/T-769-09.htm>

<sup>110</sup> See: <http://www.youtube.com/watch?v=5AmUl18pejI> & <http://www.moir.org.co/Con-chivos-y-alambre-aceitan-falsa.html>

<sup>111</sup> Federación de Comunidades Afectadas y Desplazadas por la Explotación Minera en La Guajira (FECODEMIGUA). From a statement dated 3 September 2011 ‘Comunidades del Area de Influencia de La Explotacion Minera del Complejo Carbonifero Cerrejon Exigen Respeto A Sus Derechos’

<sup>112</sup> UN Special Rapporteur James Anya, Report to the Human Rights Council 21st session, August 2012, Follow-up report on indigenous peoples and the right to participate in decision-making, with a focus on extractive industries, page 5.

<sup>113</sup> DPLF and OXFAM report The Right of Indigenous Peoples to Prior Consultation: The Situation in Bolivia, Colombia, Ecuador, and Peru, May 2011.

<sup>114</sup> UN Special Rapporteur James Anya, Report to the Human Rights Council 21st session, August 2012, Follow-up report on indigenous peoples and the right to participate in decision-making, with a focus on extractive industries.

<sup>115</sup> Ibid

<sup>116</sup> DPLF and OXFAM report The Right of Indigenous Peoples to Prior Consultation: The Situation in Bolivia, Colombia, Ecuador, and Peru May 2011.

<sup>117</sup> PNUD report Pueblos indígenas: diálogo entre culturas Cuaderno del Informe de Desarrollo Humano, Colombia 2011, citing ONIC Report, 2010-2011: 19

<sup>118</sup> DPLF and OXFAM report The Right of Indigenous Peoples to Prior Consultation: The Situation in Bolivia, Colombia, Ecuador, and Peru May 2011.



4.2 Conflict and the right to consent

In the last twenty years paramilitary groups, repeatedly operating with the support and collusion of the armed and security forces, have carried out serious human rights violations, including sexual violence, torture, forced disappearances, killings, forced displacement or confinement, repression and control of local communities across Colombia.<sup>127</sup> These communities have also been victims of guerrilla attacks, designed to either confine or displace communities. In recent years, all armed actors have provided security for national and international mining, gas and oil corporations.<sup>128</sup>

Case Study 5: Cerrejón, La Guajira

The Cerrejón coal mine in La Guajira, northern Colombia, is one of the largest open-cast coal mines in the world. Since beginning operations, it has been accused of infringing the rights of local people including indigenous groups.<sup>130</sup> It is now under the shared ownership of UK registered multinationals, BHP Billiton, Xstrata<sup>131</sup> and Anglo American, who claim to be mitigating the social and environmental effects of the mine.<sup>132</sup>

Cerrejón is planning to expand its operations to open new pits and increase production from 30 million tons to 60 million tons annually in the next couple of years. In order to do so, the company has to extract 500 million of tons located beneath the largest river of the department – the Ranchería River – and proposes to divert the course of 26km of the Ranchería River. The Ranchería basin is 4000kmsq and the river is 248 kilometres long. The diversion and mining project will, by the company’s own estimates, lead to a loss of natural aquifer water in the area of about 40 per cent, or about 32 million cubic meters of ground storage capacity, which will have ‘a potential impact on downstream water users, and in ecosystems and coastal water.’<sup>133</sup> The company says it will attempt to mitigate the impact of the diversion but the consequences of such large-scale engineering on ecosystems are unpredictable and the mitigation can only be partial. Martha Ligia Castellanos, an environmental scientist at the University of La Guajira, points out that “whatever you do, the river cannot be replaced by any artificial habitat or ecosystem. The consequences would be devastating and irreversible.”<sup>134</sup> Furthermore, Indigenous Wayúu people and other Indigenous Peoples in the area regard the river as sacred and therefore essential to their cultural lives.<sup>135</sup>

The local communities, many of them indigenous and afro-Colombian, report that they had not been properly consulted on the project and they strongly oppose it. Community members stated that divisions were caused by the company offering incentives to people to support the project.<sup>136</sup> “They are dividing

This has made the process of ‘free’ consultation processes almost impossible to achieve as a result of the pressures that the presence of armed actors, whether legal or illegal, can have on communities’ perception of their freedom to decide. The question of communities’ insecurity in the presence of the army was raised by the Colombian Constitutional Court as important for the State to examine in the Mandé Norte case when ‘it ordered the Ministry of Defence to analyse objectively why the indigenous communities perceived its presence and activities as a support to the Mandé Norte project’.<sup>129</sup>



El Cerrejón mine in the department of La Guajira.

us and buying peoples support for the project... the river is the only good thing we have, it is our life and we are not going to allow them to take it from us.”<sup>137</sup> An open letter to President Santos, signed by local indigenous organisations of La Guajira and the ONIC, called for the suspension of all activity on the expansion project due to the ‘manifest ecological, social and cultural non-viability of the diversion of the Ranchería River.’<sup>138</sup>

“(W)e do not want the course of the Ranchería River to be diverted, nor the continued expansion of the mining project. For as we have noted in these 35 years of exploitation, if the expansion takes place the living conditions of the majority of the inhabitants of Guajira will worsen even further.”

The Cerrejón Mining Consortium denied these allegations stating that they had not attempted to buy the support of the communities with money or goods in exchange for approval for the mine expansion. Legal actions have been started against the mine in order to protect the communities’ fundamental rights.<sup>139</sup>

Cerrejón claims to adhere to the United Nations principles of FPIC before using the lands of Indigenous People. However, it appears questionable whether they can both fulfil these principles and go ahead with the expansion project and the diversion of the Ranchería River considering the communities’ objections.<sup>140</sup>



‘Rehabilitamos la Tierra’ A sign at El Cerrejón mine in La Guajira explains how land will be returned to mature forests (bosques maduros) after mining is complete.

Impacts of mining on women

Large-scale mining has led to the breakdown of the social fabric in many communities, with negative impacts particularly for women. This has implications for their personal safety,<sup>141</sup> as does the militarisation of mining areas and the consequences of worsening conflict due to mining activity. Increased sexual violence is reported in areas where mining extraction is taking place<sup>142</sup> and between 2001 and 2009, in 407 municipalities where armed actors were present nearly 18 per cent of women had been victims of sexual violence.<sup>143</sup> Also reported to ABColombia during interviews in June 2012, was the increase in child prostitution and youth pregnancy in mining regions.

The contamination of rivers particularly impact on women’s health in poor riverine communities, as they spend a long time immersed in the river carrying out everyday tasks such as washing clothes and panning for gold. As a result, they experience skin problems and other complications from contaminated water.<sup>144</sup>

<sup>129</sup> Decision (T-769 of 2009)

<sup>130</sup> Decision (T-769 of 2009)

<sup>131</sup> UN Declaration on the Rights of Indigenous People, Article 32.

<sup>132</sup> This related to three projects: the construction of a road, the electrical inter-connection bi-national Colombia Panama and a mining concession.

<sup>133</sup> UN Report to the Human Rights Council Twenty-first session, Human rights bodies and mechanisms, August 2012, Follow-up report on indigenous peoples and the right to participate in decision-making, with a focus on extractive industries, page 5.

<sup>134</sup> ILO, 2010, CEACR: Individual observation concerning Indigenous and Tribal Peoples Convention, 1989 (No. 169) Colombia, Doc. 062010COL 169, International Labour Office, Geneva, 2010, page 1.

<sup>135</sup> Ibid page 2

<sup>136</sup> The North-South Institute, Tipping the Power Balance: Making Free, Prior and Informed Consent Work, 2011

<sup>137</sup> Amnesty International has documented many cases of human rights violations committed by paramilitaries operating in coordination with the armed forces. It has made clear that the use of paramilitary forces has been integral to the armed forces’ counter-insurgency strategies. Despite the supposed demobilisation of paramilitary forces under the governments of President Uribe, Amnesty International continues to document the continued operation of paramilitary forces often in collusion with the security and armed forces. See reports referenced in footnote above. For more information see other Amnesty International reports and documents on the organisation’s website: www.amnesty.org

<sup>138</sup> For example see BP pays out millions to Colombian Farmers’ the Independent, 22nd July 2006: British Petroleum (BP) Exploration Company (Colombia) was accused of causing severe environmental damage to land and of profiting from paramilitaries who were employed to protect a 450 mile oil pipeline. Some of the alleged victims filed a claim in the English High Court in 2005 against the company alleging that it benefited directly from the activities of the paramilitaries, which included the intimidation of the local population and suppression of legitimate opposition to the pipeline. Although BP never admitted culpability, it has been reported that the parties agreed an out-of-court settlement in 2006.

<sup>139</sup> Decision (T-769 of 2009)

<sup>140</sup> Written statement by CETIM and AAJ to Human Rights Council 2007, Human Rights Violations Committed by Transnational Corporations in Colombia [http://www.cetim.ch/en/interventions\\_details\\_print.php?iid=288](http://www.cetim.ch/en/interventions_details_print.php?iid=288)

<sup>141</sup> Xstrata recently merged with the Swiss company Glencore.

<sup>142</sup> Detailed on the Cerrejón company website <http://www.Cerrejón.com/site/english/sustainable-development--social-responsibility.aspx>

<sup>143</sup> Cerrejón, Resumen del Proyecto de expansión liwo’uyaa, 2011

<sup>144</sup> El Heraldo “;Vale la pena la desviación del Ranchería por los beneficios ofrecidos?” Sandra Guerrero Barriga, 1 July 2012 <http://www.elheraldo.co/region/vale-la-pena-la-desviacion-del-rancheria-por-los-beneficios-ofrecidos-73178>

<sup>145</sup> See for example a letter from a Wayuu writer to President Santos <http://www.elespectador.com/impresso/vivir/articulo-338238-carta-de-una-escritora-wayuu-santos>

<sup>146</sup> Semana, Con chivos y vacas buscan que demos el sí al proyecto minero de El Cerrejón, 2012 <http://www.mantomineral.com.co/index.php/nuestras-noticias/88-noticias-positivas/385-con-chivos-y-vacas-buscan-que-demos-el-si-al-proyecto-minero-de-el-cerrejon-noticia-de-la-semana>

<sup>147</sup> Ibid. Statement made in an interview with Semana.com: “Nos están dividiendo, están comprando a la gente para que apoyen el proyecto, pero no todos lo vamos a aceptar porque el río es lo único bueno que tenemos, es nuestra vida y no vamos a permitir que nos lo quiten” unofficial translation.

<sup>148</sup> Letter dated 4 May 2012.

<sup>149</sup> Polo Democratic Alternativa (MOIR), Con chivos y alambre ‘aceitan’ falsa consulta sobre el río Ranchería, ficina de Prensa Senador Jorge Enrique Robledo, Bogotá, 10 October 2012, [www.moir.org.co/Con-chivos-y-alambre-aceitan-falsa.html](http://www.moir.org.co/Con-chivos-y-alambre-aceitan-falsa.html) and <http://www.youtube.com/watch?v=5AmUl18pejl>

<sup>150</sup> <http://www.moir.org.co/Con-chivos-y-alambre-aceitan-falsa.html>

<sup>151</sup> Bermúdez Rico, Rodríguez Maldonado and Roa Avendaño ,Mujer y Minería: Ámbitos de análisis e impactos de la minería en la vida de las mujeres - Enfoque de derechos y perspectiva de género, February 2012, CENSAT <http://www.censat.org/publicaciones?task=view&catid=10043&id=62>

<sup>152</sup> Comunicado de organizaciones colombianas de defensa y promoción de los derechos de las mujeres con ocasión de la visita de la Sra. Wallstrom, En el marco del conflicto en Colombia: “La violencia sexual en el marco del conflicto no es algo inevitable, es y debe ser evitable”, 26 de mayo de 2012

<sup>153</sup> Oxfam Intermon, First Survey of Sexual Violence against Women within the Context of the Colombian Armed Conflict, 2010.

<sup>154</sup> Bermúdez Rico, Rodríguez Maldonado and Roa Avendaño ,Mujer y Minería: Ámbitos de análisis e impactos de la minería en la vida de las mujeres - Enfoque de derechos y perspectiva de género, February 2012, CENSAT <http://www.censat.org/publicaciones?task=view&catid=10043&id=62>

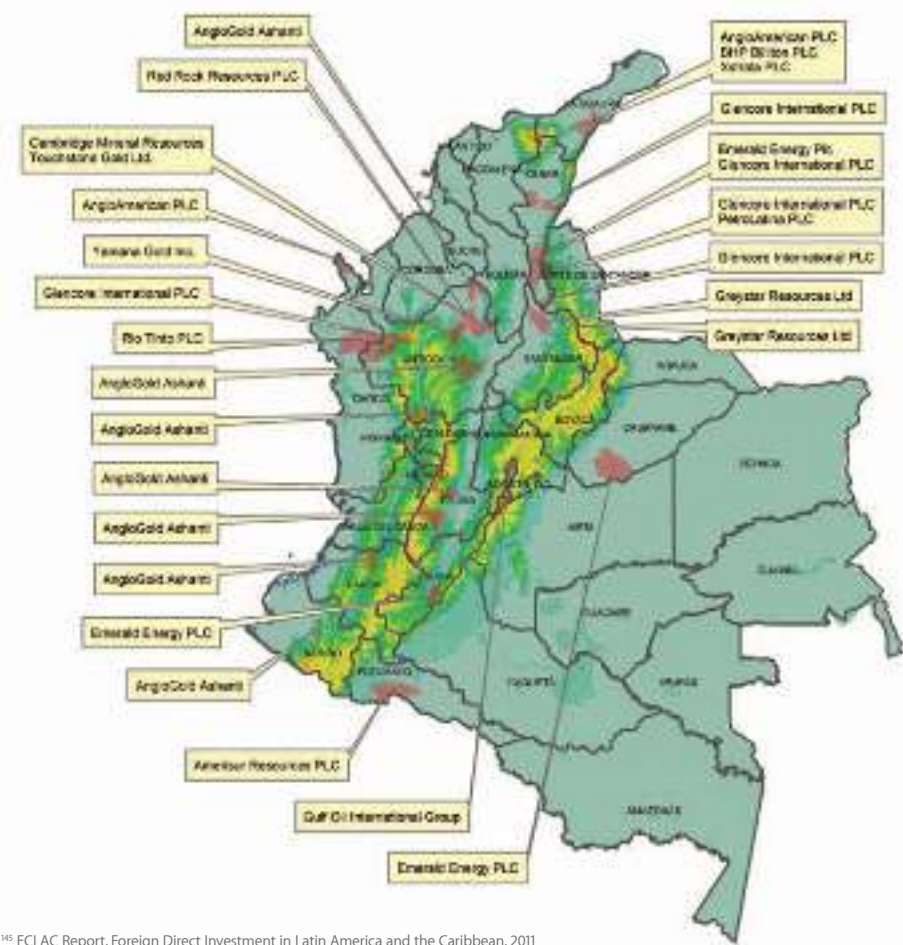
# 5.0 European Mining Investments in Colombia

Since 2003, the European Union has been ranked as the highest investor in the Latin America and Caribbean region, and a key player in the mining and hydrocarbons sectors. European investments are mainly concentrated in South America, with Colombia receiving the third largest share of this investment.<sup>145</sup> UK companies accounted for the largest share of increased European investment in the natural resource sector in Latin America.<sup>146</sup> In 2011, Foreign Direct Investment (FDI) in Colombia reached a record high of US \$13.234 billion, an increase of 92 per cent on the previous year.<sup>147</sup> According to the UK Embassy,<sup>148</sup> the UK is the second largest investor in Colombia with exports totalling £622 million in 2010.<sup>149</sup> Major UK investors are: Anglo American and BHP Billiton (coal and nickel), SAB Miller (beer) and British Petroleum (Oil).<sup>150</sup> The Colombian Trade Minister, Sergio Diaz-Granados, announced that

FDI in the mining sector had reached US \$2 billion in the first eight months of 2012, a 42 per cent year-on-year increase.<sup>151</sup>

With major investments in the mining and hydrocarbons sectors, European corporations have seen their investments yield high incomes and commodity price rises have boosted FDI dividends for European countries of origin. Whilst the exploitation of Colombia's natural resources has brought huge benefits for European corporations, this has come at immense cost to Colombia in terms of unsustainable impacts and violation of human and environmental rights, as shown in the earlier section of this report. With Colombia's National Development Plan (NDP) intending to rapidly scale up the exploitation of natural resources, it is necessary to consider the economic benefits accrued through taxes and royalties, and what impact these have made on poverty and inequality.

## 5.1 UK mining investments in Colombia



Map 2: Concessions belonging to UK headquartered and listed companies operating in Colombia

Zones of influence

<sup>145</sup> ECLAC Report, Foreign Direct Investment in Latin America and the Caribbean, 2011  
<sup>146</sup> *ibid* pages 30-31  
<sup>147</sup> *ibid* page 5  
<sup>148</sup> UK in Colombia: British Embassy website , Colombia - UK Bilateral relations, 28 June 2012 <http://ukincolombia.fc.gov.uk/en/news/?view=News&id=815913482>  
<sup>149</sup> The United Kingdom, Spain, the United States and Chile are the largest investors in Colombia.  
<sup>150</sup> 24 January 2011 BP sold its oil and gas exploration, production and transportation business but retained the Castrol lubricants business. BP Annual Report and Form 20-F 2011 page 57 [www.bp.com/assets/bp\\_internet/globalbp/globalbp\\_uk\\_english/set\\_branch/STAGING/common\\_assets/bpin2011/downloads/BP\\_Annual\\_Report\\_and\\_Form\\_20F\\_2011.pdf](http://www.bp.com/assets/bp_internet/globalbp/globalbp_uk_english/set_branch/STAGING/common_assets/bpin2011/downloads/BP_Annual_Report_and_Form_20F_2011.pdf)  
<sup>151</sup> El Espectador, Inversión extranjera diferente a la minera se duplicó hasta agosto, 4 September 2012.

Table 1: Extractive projects of UK headquartered and listed companies operating in Colombia

Company Name	London Stock Exchange registered	British Company	British HQ	Subsidiaries	Contract	Type of Exploitation	Project Location	Municipalities where known to be located
Amerisur Resources PLC	Yes	Yes	Yes		100% of both projects	Oil and Gas	Platanillo/Alea and Fenix Block	Puerto Asis, Sabana de Torres
AngloAmerican PLC	Yes	Yes	Yes	Cerrejon Coal Company	33.3% joint venture with Xstrata and BHP Billiton	Thermal Coal	Cerrejón Deposits, La Guajira	Albania, Barrancas, Hatonuevo
				AngloAmerican Exploracion Colombiana S.A.		Copper, zinc and molibdeno pre-feasability	Acandí, Chocó	Acandí
AngloGold Ashanti	Yes	No	No	AngloGold Ashanti Colombia S.A. (also known as Kedhada)	100% ownership	Gold	La Colosa, Cajamarca, Tolima	Cajamarca
					51% joint venture with B2 Gold	Gold	Gramalote, North of Santander	San Roque, Yolombo, Santo Domingo, Cisneros, Maceo, San Rafael
					49% or 51% Joint Venture with B2 Gold	Exploration, Gold	Quebradona, Antioquia	Jerico, Jardin, Tamesis, Andes, Pueblorrico
					Joint Venture	Drilling, Gold	Chaparral, Tolima	Chaparral, Rovira, Valle de San Jan
					Joint Venture	Drilling	Western Cordillera	
					100% ownership	Drilling	Rio Dulce	Nechi
					100% ownership	Drilling	Salvajina, Valle del Cauca	Suarez, Buenos Aires, Morales
BHP Billiton PLC	Yes	No	No	Cerrejon Coal Company	33.3% joint venture with Anglo American and Xstrata	Thermal Coal	Cerrejón Deposits, La Guajira	Albania, Barrancas, Hatonuevo
				Cerro Matoso	100% ownership	Nickel and others	Cerro Matoso, Córdoba	Montelibano
Cambridge Mineral Resources	Yes	Yes	Yes			Gold	El Cinco and Quintana, Frontino Gold District, Antioquia	Segovia
Emerald Energy PLC	No	Yes	Yes	Of China's Sinochem Resources UK Limited	wholly owned subsidiary of Sinochem Group	Oil	Matambo, Campo Rico, Fortuna; Ombú field Caquetá	Gigante, Garzon, Mani, Aguachicha
Glencore PLC	Yes	No	No	Prodeco Group		Coal	La Jagua, Cesar	La Jagua de Iberico
				Carboloma S.A. or Carbones de La Loma S.A.		Copper and Molibdeno	Pantanos-Pegadorcitos Project, Antioquia	Frontino, Dabeiba
				C.I. Prodeco S.A.	Joint Venture between Prodeco and Galway Resources Ltd.	Drilling, Coal	Galca Coal Project, Cesar	Pelaya, La Gloria, Gamarra, Aguachicha, San Alberto
Greystar Resources Ltd* (now Eco-Oro Ltd)	Yes	No	No		100% ownership	Feasibility Study, Gold and Silver	Santurban, Angostura, Santander and North of Santander	Vetas, California
Gulf Oil International Group	No	Yes	Yes	Prolub Productora de Lubricantes S.A.		Oil and derivatives	Bogota	
PetroLatina PLC	Yes	Yes	Yes	Petroleus del Norte S.A	Between 25 and 100% ownership in different fields	Oil	Middle Magdalena Valley Basin and Putumayo	San Alberto
Red Rock Resources PLC	Yes	Yes	Yes	Mineras Four Points S.A.	50.5% ownership of Mineras Four Points S.A. (retains option of further 1%)	Gold	El Limon, Antioquia (near El Frontino)	Zaragoza
					50.5% ownership of Mineras Four Points S.A. (retains option of further 1%)	Gold	El Mango, Antioquia (near El Frontino)	
Rio Tinto PLC	Yes	Yes	Yes	Associates of Rio Tinto: Sunward Investments (previously owned by La Muriel Mining Corporation)	80% option for joint venture	Gold, copper, molybdenum and others	Mandé Norte Project, Cerro Cara de Perro, Murindó and Carmen del Darien, Antioquia and Chocó	Murindo, Carmen del Darien
Royal Dutch Shell PLC	Yes	No	No	Shell E & P Colombia	85% Shell E & P Col., 15% Petro Latina PLC	Oil	La Paloma, Colon	Sabana de Torres
Touchstone Gold Ltd.	Yes	Yes (B.Virgin Islands)	Yes		100% ownership	Gold	Rio Pescado Project, Antioquia	Segovia
					Option to aquire	Gold	Santa Rosa Project, Bolivar	
Xstrata PLC	Yes	No	No	Cerrejon Coal Company	33.3% joint venture with AngloAmerican and BHP Billiton	Thermal Coal	Cerrejon Deposits, La Guajira	Albania, Barrancas, Hatonuevo
Yamana Gold Inc.	Yes	No	No		100% ownership	Exploration, Gold	Solferino Project, Northeastern Antioquia	

Source: Information in this table was compiled by ABColombia from publicly available sources in October 2012. It doesn't purport to be an exhaustive list. The list of companies may not be comprehensive due to difficulties in identifying operators not publicly listed.

\* Greystar Resources changed its name to Eco-Oro in August 2011 and is now listed on the Toronto Stock Exchange.



# 6.0 Governance Mechanisms

## 6.1 Taxation

The correlation between abundant natural resources and non-equitable growth in the Global South has been discussed for some years.<sup>152</sup> Disputed hypotheses for this correlation include a decline in competitiveness of other sectors, poor governance, and the volatility of revenues from primary resources. It has also been suggested that increasing inequality, a major factor if revenues are not collected and distributed well, is the channel through which poor development outcomes are transmitted.<sup>153</sup> Most commentators<sup>154</sup> agree that the role of institutions is crucial in order to avoid the ‘resource curse’. Good governance is crucial for the protection of

human rights, the good management of natural resources, and the use of accumulated revenues. Those who argue in favour of the exploitation of natural resources for national growth point to the potential income benefits and their role in addressing areas of poverty, employment, improvements in health, and investment in infrastructure and development. However, this is only possible if revenue is effectively collected and redistributed.

In Colombia, economic benefits to the State from mineral extraction are realised through revenue collection on surface rights fees, taxes and royalties. In addition to taxes and royalties, mining companies

Table 2: Taxes and Exemptions

Mining and hydrocarbons. Value of royalties, income tax and exemptions on income. In billions of pesos and percentages of net income 2007 and 2009										
	Petrol & Gas		Coal		Rest of mining*		Total with hydrocarbons		Total without hydrocarbons	
	2007	2009	2007	2009	2007	2009	2007	2009	2007	2009
Income (net income before taxes)**	11.57	15.20	2.14	2.71	3.67	4.92	17.38	22.83	5.81	7.63
Royalties (direct and indirect)	4.85	4.59	0.72	1.61	0.39	0.32	5.96	6.53	1.11	1.93
Royalties on net income	42%	30%	33%	60%	11%	7%	34%	29%	19%	25%
Income Tax Paid	3.43	2.95	0.28	0.53	1.11	0.23	4.82	3.71	1.39	0.76
Percentage of Income Tax on net income	30%	19%	13%	20%	30%	5%	28%	16%	24%	10%
Nominal rate of tax on net taxable income***	34%	33%	34%	33%	34%	33%	34%	33%	34%	33%
Total nominal tax payable (without exemptions)	3.93	5.02	0.73	0.89	1.25	1.62	5.91	7.53	1.98	2.52
Tax Exemptions on Income Tax****	0.51	2.07	0.45	0.36	0.14	1.39	1.10	3.82	0.59	1.75
Exemptions on Income Tax payable (nominal)	13%	41%	62%	41%	11%	86%	19%	51%	53%	90%

\* This is for the rest of mineral mining excluding coal, gas and oil  
\*\* Calculated from value added (GDP) of each sector, by applying the share of capital income (GDP) in sector  
\*\*\* Nominal rate of tax on net taxable income (Tax Code, Art. 240)  
\*\*\*\* Value to pay on the nominal tariff, less the value actually paid

Source: Guillermo Rudas (2010) calculated on the basis of figures taken from the Banrepública, Home Office (Ministerio de Hacienda). National Planning Department, Regla Fiscal for Colombia, 2010

“  
In the years 2007 and 2009 the Colombian Government appears to have paid corporations to take its coal.

operating in Colombia pay an annual licence fee for exploration and exploitation licences (surface canon).

With encouragement from the World Bank (WB), a series of tax reforms were initiated in order to lower Corporate Income Tax rates in Colombia from 35.5 to 33 per cent. This has reduced the total tax revenue as a percentage of Gross Domestic Product (GDP): a figure already low in comparison to other countries in the region such as Argentina and Costa Rica.<sup>155</sup> In addition, the extractives sector has a complicated system of tax exemptions awarded to multinational corporations which, according to expert economist Guillermo Rudas,<sup>156</sup> has resulted in Colombia gaining relatively very little in the way of income from the extractives sector. In fact, in the years 2007 and 2009 the government appears to have paid corporations to take its coal.

## 6.2 Royalties and taxes

Guillermo Rudas was employed in 2010 by the Colombian National Planning Council to research information related to royalty and tax payments in the mining sector. From this research he compiled Table 2.<sup>157</sup> As you will see from the final columns in this table, in 2007 tax exemptions for coal and minerals amounted to 53 per cent of the revenue due. By 2009 that figure increased dramatically to 90 per cent, signifying that after exemptions Colombia only receives 10 per cent of the published rate.

Using Rudas’ initial calculations, Fierro Morales points out that in addition to these tax exemptions, multinational coal companies were receiving tax rebates on fuel amounting to 0.16 billion pesos in 2007 and 0.24 billion pesos in 2009.<sup>158</sup> Once these are deducted from the tax bill, the real take on revenue for coal falls to -0.07 billion pesos in 2009 and -0.33 billion pesos in 2007. This table confirms concerns expressed by the National Comptroller General that one of the most worrying cases was that of coal, where tax deductions in 2007 were higher than the value of taxes paid by coal mining companies.<sup>159</sup>

One of the major difficulties in understanding what corporations are paying in terms of taxes and royalties is the complexity of the

system of exemptions. The information above reveals the lack of robust and accountable governance mechanisms. Along with the lack of transparency of information, this makes it impossible for communities or analysts to obtain the information needed for democratic oversight and to hold governments and corporations to account.<sup>160</sup> This lack of transparency in taxation can only benefit corporations whilst also facilitating mass revenue loss to Colombia.

Countries with greater public access to information are more likely to have better fiscal discipline and less corruption.<sup>161</sup> International accounting standards exacerbate this lack of transparency by only requiring multinational companies to report accounts on a global consolidated basis. As a result, money that Colombia could obtain from taxes and use on social spending to meet its obligations to the poor is being returned to companies via tax exemptions. According to Table 2, in 2009 the Colombian Government lost 53 per cent (including exemptions on hydrocarbons) of its possible income in tax exemptions to multinational corporations, amounting to approximately 3.82 billion Colombian pesos (COP). This amount far exceeds what the government has budgeted to spend in 2012 for example on victims of the conflict, which is 2.9 billion (COP).<sup>162</sup> This loss of revenue is likely to rapidly increase as Colombia moves towards doubling its coal exports by 2019. Colombia has one of the worst inequality rates in the region (only Honduras rates worse), and is the third most unequal country in the world.<sup>163</sup> Its rural poverty rate is 62.7 per cent and urban rate is 43 per cent.<sup>164</sup> Although there has been a small improvement in national poverty rates, in 2011 abject poverty actually worsened by 2.9 per cent.<sup>165</sup>

Colombia has thus far failed to take advantage of using possible revenue from the exploitation of its natural resources for social spending. Instead, it has returned much of this income to MNCs. In 2011 President Santos took a step in the right direction when he announced the decision to halt new requests for concessions, initiate a review of all pending requests and revoke the licences of firms that had not paid required fees. However, these steps do not address the current exemptions that companies are legally entitled to, and the subsequent loss to Colombia of its natural mineral resources without proper compensation in terms of corporate income tax and royalty revenues.<sup>166</sup> Whilst the Santos administration

<sup>152</sup> Sachs and Warner 1995, ‘Natural Resource Abundance and Economic Growth’ <http://ideas.repec.org/p/nbr/nberwo/5398.html>  
<sup>153</sup> Sachs and Warner 1995 ‘Development outcomes, resource abundance, and the transmission through inequality’ <http://ideas.repec.org/p/qld/uqmrgr6/36.html>  
<sup>154</sup> *ibid*  
<sup>155</sup> OECD, Latin American Economic Outlook 2009  
<sup>156</sup> CINEP, Conflictividad en el Sector Minero Energético en Colombia, Bogotá, 4 December 2011  
<sup>157</sup> The table has been edited removing the columns listing gas and oil revenues as the report is on mineral extraction. The final 2 columns ‘total’ have been calculated without hydrocarbons they are all Rudas’ calculations.  
<sup>158</sup> Fierro Morales, Julio Políticas Mineras en Colombia Bogotá, February 2012 pages 69-70.  
<sup>159</sup> Espectador, La locomotora minera puja, pero el Gobierno perdió el año, Álvaro Pardo, 23 December 2011 <http://www.elespectador.com/economia/articulo-318360-locomotora-minera-puja-el-gobierno-perdio-el-ano>  
<sup>160</sup> Analysts ABColombia spoke to in 2011 and 2012 highlighted this issue pointing out they frequently had to resort to asking politicians to exercise the right to information (derecho de petition) in order to obtain information.  
<sup>161</sup> Rosenblum, Peter and Susan Maples, Contracts Confidential: Ending Secret Deals in the Extractives Industries, Revenue Watch, 2009  
<sup>162</sup> Home Office (Ministerio de Hacienda) COMUNICADO DE PRENSA 031, Presupuesto General de la Nación 2012: más empleo, menos pobreza y más seguridad con solidez fiscal: “En el Presupuesto de 2012, a través de diferentes sectores y programas, se destinan \$2,9 billones para la población víctima de la violencia.” Which is divided as follows: aid for displaced population: \$1.88 billones COP (\$1.88 billion); reparation of the victims of the armed conflict \$850 mil millones COP (0.85 billion); other specific programmes for victims \$176 mil millones COP (0.17 billion).

has improved tax collection generally, it has also announced a **new bill to cut income tax paid by corporations from 33 to 25 per cent**, and introduced a new “equity tax” of 8 per cent that would be charged on profits.<sup>167</sup> This suggests that Colombia will continue to give away its natural resources with the generation of little or no revenue, therefore ignoring one of the essential elements of good governance: a well regulated and transparent system of taxation, accompanied by effective pro-poor policies. Tax policies should provide a tool for correcting the excesses of unequal income distribution by enabling the State to generate essential revenue for expenditure on the delivery of developmental goals and social policies.



Miners at Serranía de San Lucas.

6.3 Unethical practices

Legal but unethical practices have been uncovered with respect to some UK listed MNCs operating in Colombia. This has meant that they have been paying the same tax rate as small-scale mines. This tax avoidance is achieved by purchasing concessions of 2,000 hectares or less. UK listed corporation AGA owns the largest number of concessions in Colombia. In the Medio Atrato and Quibdó regions in the department of Chocó, the company owns 136,000 hectares of concessions, 70 per cent of these were applied for in concessions of less than 2,000 hectares. Similarly in Tadó, AGA applied for 13 concessions of 2,000 hectares, rather than one concession of 26,000 hectares.<sup>168</sup> According to the Comptroller General, as of 29 September 2011, the Colombian Institute of Geology and Mining (Ingeominas) reported that of 341 mining titles listed to AngloGold Ashanti, there is only a record of them paying the annual licence fee (Canon Superficial) for 267 titles. Ingeominas reports that this amounts to a debt of 2,661 million Colombian pesos. AngloGold contested this allegation saying that some aspects of the Comptroller General's

information were incorrect, in that the figures were not current regarding the number of titles they owned.<sup>169</sup>

6.4 Trade mispricing

In addition to the massive tax exemptions that corporations are benefiting from, Christian Aid has also documented ‘trade mispricing’ by corporations in Colombia.<sup>170</sup> This is when multinational companies overprice their imports (inflating costs and lowering profit taxes due) and/or underprice their exports, ensuring a transfer of revenue out of the country to reduce their final tax bill. Christian Aid estimates that between 2005 and 2007 Colombia's tax loss due to capital being moved illicitly out of Colombia was US \$150.8 million on oil and coal, ‘(g)enerous allowances can mean that companies have declared losses for accounting purposes when in fact they are making high profits.’<sup>171</sup>

6.5 Mining and the local economy

Reducing poverty either directly (through employment) or indirectly (through state revenues) are some of the principal arguments for promoting mining in Colombia. However, MNCs appear to have generated little in the way of stimulating local economies (see Case Study 5). Whilst mines can provide much needed employment, modern mining is technologically advanced and once the construction stage is over, relatively little employment is generated in comparison to the size of revenues.

Whilst mining can generate employment locally, and these jobs have the potential to contribute to the local economy, in La Guajira for example, Cerrejón – one of the largest open-pit coal mines in the world – contributes 14.2 per cent to the department's GDP. However, on closer examination it becomes clear that the mine is not integrated into or benefiting the local economy. In La Guajira the Cerrejón mine has generated no major economic development in the department, or supported major industries or sectors such as commerce and transport. The World Bank recommends in their Poverty Reduction Strategy Paper framework<sup>172</sup> that large mining companies be encouraged to make further contributions to local development. Cerrejón claims to contribute to local indigenous development through its foundations and advertises a full program of CSR initiatives. However, with no independent monitoring it is difficult to know how this money is being spent, particularly when one takes into account that after 30 years of coal mining from the largest open-pit mine in the country, 64 per cent of the population of La Guajira still live in poverty and 37.4 per cent in extreme poverty; one of the highest levels of extreme poverty in the country.<sup>173</sup> While Cerrejón has a CSR policy, at the same time it plans to expand into environmentally and culturally sensitive areas with open-pit mining. Those already displaced say they have been provided with poor facilities and insufficient land.<sup>174</sup> According

to research by CENSAT, the ‘excessive number of security guards has generated fear in the local population, resulting in them preferring to pass the whole day without eating rather than risk their lives hunting small animals for food’.<sup>175</sup> This has led to further economic impoverishment for those engaged in traditional practices. This was a reoccurring theme in interviews conducted by ABColombia in Colombia in June 2012. For example, in Nariño communities pointed out that the agriculture they engaged in would be damaged by the water pollution caused by mining, and as a result rob them of their livelihoods.



La Toma, Cauca.

Case Study 6: Cerro Matoso, Córdoba

Cerro Matoso in the department of Córdoba is the biggest open-pit nickel mine in Latin America, which for 30 years has been contracted to the Anglo-Australian mining company BHP Billiton. It has an annual production of 50,000 tons and it aims to double capacity within ten years.<sup>176</sup> Cerro Matoso ‘is the world's second-largest producer of ferronickel and boasts some of the lowest costs’;<sup>177</sup> however, it currently under investigation for tax evasion. In August 2012, the Comptroller General Sandra Morelli issued an official warning to the Mines Minister and the president of the National Mining Agency regarding Cerro Matoso.<sup>178</sup> In her statement, Morelli refers to two previous warnings, one of which was in response to a disparity in the official figures that BHP Billiton had filed with the Colombian tax authorities. These showed that BHP Billiton had officially declared total exports of 9 billion Colombian pesos to the Colombian Government, whilst the company also filed returns that were more than double this at 23 billion Colombian pesos.<sup>179</sup> The Company, when asked, did not respond directly to this point by the comptroller but stated that ‘Cerro Matoso has paid substantial taxes and royalties under BHP Billiton's ownership totalling in excess of US \$2.5 billion’.<sup>180</sup>

Cerro Matoso S.A. also claims to have directly invested 69,000 million Colombian pesos in the local community;<sup>181</sup> it is therefore alarming to find no evidence of these economic benefits locally. Within sight of the mine, the village of La Unión Matoso is paved with saprolite, a waste material from the mine full of sharp shards and high in nickel content. There is no medical centre and no

sewage installations for the 520 inhabitants who report dust clouds blown from the mine which infiltrate the drinking water and irritate the eyes and skin, causing rashes and respiratory problems. The nearest town, Montelíbano – a 90 minute drive from Cerro Matoso – is dilapidated and remains without sewerage or drinking water installations.<sup>182</sup>

BHP Billiton has stated that employment is one of its largest contributions to the local economy; however, the worker's union Sintracerrromatoso has complained of outsourcing workers. This has resulted in the deterioration of workers' rights and minimum or sub-minimum wages.<sup>183</sup> In addition, ex-employees retired for medical reasons report cases of cancer, respiratory diseases, skin conditions and injuries resulting from accidents at work, saying that they were never made aware of the dangers of contact with nickel and other hazardous substances in the mine.<sup>184</sup> At BHP Billiton's AGM in October 2012 in London the company reportedly stated that not everything is perfect in the poor community nearby and there are health issues, but disputed that this was because of the mine.<sup>185</sup> In November 2012 BHP Billiton, in a response to ABColombia, stated that ‘(t)hroughout its history Cerro Matoso has operated to the highest international standards of occupational health, industrial safety and industrial hygiene’. They went on to state ‘that position is supported by solid medical and scientific evidence that demonstrates there is no cause-effect relationship between having worked in CMSA and health issues as has been alleged.’<sup>186</sup>

<sup>163</sup> World Bank Indicators 2009, not all country indicators are recorded e.g. regionally Guatemala is missing. [http://data.worldbank.org/indicator/SI.POV.GINI?order=wbapi\\_data\\_value\\_2009+wbapi\\_data\\_value&sort=desc](http://data.worldbank.org/indicator/SI.POV.GINI?order=wbapi_data_value_2009+wbapi_data_value&sort=desc)  
<sup>164</sup> CEPAL Statistical Year Book 2011.  
<sup>165</sup> *ibid*  
<sup>166</sup> In addition to corporate income tax and royalties the government receives payroll taxes however payroll costs at modern mineral mines represent a relatively small part of the total value from the mine.  
<sup>167</sup> Reuters, Colombia unveils tax reform to create jobs, close loopholes, 2 October 2012  
<sup>168</sup> Las maniobras del rey Midas' 1 March 2012, <http://www.dinero.com/edicion-impresa/investigacion/articulo/las-maniobras-del-rey-midas/145595>  
<sup>169</sup> Semana, Las cuentas cruzadas del sector minero, 7 March 2012 <http://www.semana.com/nacion/cuentas-cruzadas-del-sector-minero/173357-3.aspx>  
<sup>170</sup> Christian Aid Report, Robbing the Poor to Keep the Rich Tax Free, March 2009  
<sup>171</sup> *Ibid* Christian Aid Database <http://www.christianaid.org.uk/Images/false-profits.pdf>

<sup>172</sup> Poverty Reduction Strategy Paper framework [http://siteresources.worldbank.org/INTPRS1/Resources/383606-1205334112622/4251\\_chap25.pdf](http://siteresources.worldbank.org/INTPRS1/Resources/383606-1205334112622/4251_chap25.pdf)  
<sup>173</sup> Data from CEPAL and others, published by Portafolio.co, 6 March 2012 [www.portafolio.co/economia/paises-pobres-del-pais](http://www.portafolio.co/economia/paises-pobres-del-pais)  
<sup>174</sup> Federación de Comunidades Afectadas y Desplazadas por la Explotación Minera en La Guajira (FECODEMIGUA). From a statement dated 3 September 2011 "Comunidades del Area de Influencia de La Explotacion Minera del Complejo Carbonifero Cerrejon Exigen Respeto A Sus Derechos" <http://reclameguajira.blogspot.co.uk/2011/03/comunidades-del-area-de-influencia-de.html>  
<sup>175</sup> Cited in Fierro pages 91-92: "La desmesurada cantidad de guardias de seguridad generan temor entre la población, que prefiere pasar días enteros sin comer antes que arriesgar sus vidas tratando de cazar algún animal para su alimento"  
<sup>176</sup> Cerro Matoso Nickel Mine, Colombia <http://www.mining-technology.com/projects/cerro-matoso/>  
<sup>177</sup> *ibid*  
<sup>178</sup> Semana, Farc atacan vehículos de petrolera en Caquetá, 31 January 2012 <http://www.semana.com/nacion/contraloria-hace-nueva-advertencia-sobre-cerro-matoso/182086-3.aspx>  
<sup>179</sup> Between 2007 and 2010 the company paid the Colombian government 870,000 million pesos (US \$470 million) in royalties calculated from total exports of 9 billion pesos. However, the company filed returns of more than double this at 23 billion pesos (US \$12,500 million) for the same period. As a result, in 2011, Cerro Matoso S.A. was ordered to pay 35,317 million pesos (US \$20 million) to the Colombian state.  
<sup>180</sup> Statement given to ABColombia by BHP Billiton on 1 November 2012  
<sup>181</sup> <http://portal.semana.com/Especiales/cerro-matoso/respuesta-cerro-matoso.pdf> page 1  
<sup>182</sup> Semana, Cerro Matoso: Mina Rica Pueblo Pobre, 4 August 2012 <http://www.semana.com/nacion/cerro-matoso-mina-rica-pueblo-pobre/182119-3.aspx>  
<sup>183</sup> ENS, Intensive Outsourcing of Labour and Violations of Treaty Rights, Compelling Reasons to Consider the Extension of the Contract at Cerro Matoso Inappropriate. (Intensa tercerización laboral y violación de derechos convencionales, razones de más para considerar inconveniente prórroga del contrato a Cerro Matoso) page 2 <http://www.ens.org.co/index.shtml?apc=Na-;1;-;&x=20167299>  
<sup>184</sup> *Ibid*  
<sup>185</sup> London Mining Network, notes taken during the BHP Billiton AGM October 2012 and posted on their website: Killing Me Softly with his Song Inside Another BHP Billiton AGM at <http://londonminingnetwork.org/2012/10/killing-me-softly-with-his-song-inside-another-bhp-billiton-agm/>  
<sup>186</sup> Statement given to ABColombia by BHP Billiton on 1 November 2012



## 7.0 Holding Corporations to Account: how do we increase accountability in the international arena?

*“(W)hile (guidance and voluntary initiatives) are undoubtedly worthwhile ... they do not on their own meet the spirit of the UN Guiding Principles on Business and Human Rights, which envisage that states will take “appropriate steps to prevent, investigate, punish and redress abuse through effective policies, legislation, regulations and adjudication.”*”<sup>187</sup>

This section will focus on changes that the UK and Ireland can support at European and international level, as well as changes that can be made nationally in order to improve corporate accountability.

The recognition that worldwide corporations were violating the rights of local communities led to the UN Human Rights Council in 2007 asking Professor John Ruggie<sup>188</sup> to develop recommendations to strengthen the international human rights regime in order to provide greater protections against corporate-related human rights harm. This led to the production of the UN Guiding Principles on Business and Human Rights which, in an unprecedented step, was endorsed unanimously by the Human Rights Council in June 2011.

### 7.1 UN Guiding Principles

The UN Guiding Principles on Business and Human Rights were adopted by the UN Human Rights Council (UN HRC) in June 2011. These principles are elaborated in the ‘Protect, Respect and Remedy’ Framework which is based on three principles. The first is the State’s duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation, and adjudication. Second is corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing the rights of others and to address their adverse impacts. The third principle is remedy; Ruggie identifies there is a need for greater access by victims to effective remedy, both judicial and non-judicial. Each State now has to develop a strategy, and introduce appropriate policies and laws in order to implement these principles.

Whilst voluntary measures and principles such as Corporate Social Responsibility (CSR) are essential for guiding companies, and have served to raise standards due to their role in pushing incremental improvements, a major negative impact has been that they have undermined attempts to develop effective legal sanction, both at national and international level, without which it is not possible to prevent companies abusing the rights of local communities. Ruggie highlighted that ‘unless States take appropriate steps to investigate,

punish and redress business-related human rights abuses when they do occur, the State duty to protect can be rendered weak or even meaningless.’<sup>190</sup>



Mining in Santurbán.

### 7.2 Judicial mechanisms

Ruggie has raised concerns regarding ‘evidence of an expanding web of potential corporate liability for international crimes’. In the conclusion of his report he stresses that the most consequential legal development in business and human rights is ‘the gradual extension of liability to companies for international crimes, under domestic jurisdiction but reflecting international standards.’<sup>191</sup> The UK has recently taken a regressive step in relation to this by making changes to the Legal Aid, Sentencing and Punishment of Offenders Act 2012,<sup>192</sup> which is the legislation that communities have been using to bring cases against UK MNCs for their abuses overseas. Changes made in 2012 will require success fees and insurance costs to come out of the damages awarded to the victims, instead of being paid by the transnational company that has lost the case. Damages awarded in the UK for human rights abuses are typically much lower because they occur in developing countries, meanwhile fees and insurance premiums reflect the costs of bringing a court case in the UK. As a result, many victims of transnational corporations will find access to justice restricted due to lack of financial viability.

The UK has been vocal in its support for the UN Guiding Principles on Business and Human Rights. However, if it is to uphold the spirit of these principles, the UK will need to look at bringing in new legislation to provide access to the UK Justice system for poor communities in Southern countries, and to enable corporations to

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Unless States take appropriate steps to investigate, punish and redress business-related human rights abuses when they do occur, the State duty to protect can be rendered weak or even meaningless.<sup>181</sup>

be held to account for their behaviour abroad, especially in situations where States are unable or unwilling to take action to protect their citizens from corporate abuses.

In some circumstances, companies can already be held liable for offences overseas; for example, the UK has recently expanded its extraterritorial jurisdiction to include holding companies liable for bribery offences (Bribery Act 2010) committed outside the UK. The criteria available for extraterritorial jurisdiction include ‘where it appears to be in the interest of the standing and reputation of the UK in the international community’;<sup>193</sup> a criterion engaged in relation to the arms trade. The standing and reputation of the UK is undoubtedly affected by unprosecuted violations of human rights by its companies overseas. The Foreign and Commonwealth Office (FCO) and the Foreign Affairs Committee appear to have taken this position when recommending that, due to international human rights obligations, the UK Government should consider ‘the extension of extra-territorial jurisdiction to cover actions overseas by businesses based in the UK, or by firms operating under contract to the UK Government, **which have an impact on human rights**’. They also recognise that ‘(r)elying on local administration of justice may not be enough to preserve the international reputation of the UK for upholding high standards of human rights’ and recommended ‘linking provision of Government procurement opportunities, investment support and export credit guarantees to UK businesses’ human rights records overseas’.

### 7.3 Improving governance and democracy

According to Ruggie, ‘States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations’.<sup>194</sup> Reporting mechanisms that will allow monitoring bodies to ensure that corporations respect human rights is an essential part of this process. Particular provision within human rights reporting should be given to Indigenous and Tribal Peoples’ territory<sup>195</sup> due to the serious potential consequences of resource extraction on their culture and way of life. One of the major instruments for guaranteeing Indigenous and Tribal Peoples’ rights is the prior consultation and consent process. It is therefore crucial that corporations are required to provide detailed reporting on how they have complied with this process. In the UK, companies could be **required** to provide detailed annual reporting on human rights, social impacts and prior consultation and consent processes through small changes to reporting requirements under the Companies Act (2006). One would expect that responsible companies would also push both home governments and the Colombian State to ensure that FPIC

processes are carried out appropriately and for an end to impunity for human rights violations.



A large mining truck transports coal at the El Cerrejón mine.

### 7.4 Transparency of information and reporting requirements

Lack of transparency of information is a major obstacle for public scrutiny of corporations. If due diligence and respect for human rights are to be ensured then it is essential that reporting procedures are improved, both locally in the countries where the corporations are operating, and in the countries where corporations are headquartered or listed. Without access to information citizens cannot hold governments or companies to account.

The European Union is currently processing a new law which, if passed, will require corporations to ‘report all payments in excess of €80,000 (£64,300) to governments and local authorities in the countries where they operate, and also break down how much they pay with respect to individual projects, such as a mine or an oil field’.<sup>196</sup> This will be achieved through proposed revisions to the EU Transparency and Accounting Directives. These revisions have already been elaborated by the European Commission (October 2011) and passed to the European Council of Ministers who will issue a final version of the directive to the European Parliament to be voted on in late 2012.

For these directives to complement the standard set by the United States (US) Securities and Exchange Commission, it is essential that

<sup>187</sup> House of Commons Foreign Affairs Committee, The FCO’s human rights work in 2011, Third Report of Session 2012–13, 11 September 2012

<sup>188</sup> Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts, Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises, UN Document A/HRC/4/035 (19 February 2007)

<sup>189</sup> ibid

<sup>190</sup> ibid

<sup>191</sup> Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts, Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises, UN Document A/HRC/4/035 (19 February 2007), paragraphs 41, 44, 22 and 84.

<sup>192</sup> Legal Aid, Sentencing and Punishment of Offenders Act 2012

<sup>193</sup> House of Commons Foreign Affairs Committee, The FCO’s human rights work in 2011, Third Report of Session 2012–13, 11 September 2012

<sup>194</sup> UN Human Rights Council, Expert Mechanism on the Rights of Indigenous Peoples Comment on the Human Rights Council’s Guiding Principles on Business and Human Rights as related to Indigenous Peoples and the Right to Participate in Decision-Making with a Focus on Extractive Industries, 4 July 2012 p4

<sup>195</sup> In the case of Colombia Afro-Colombians are included under the ILO Convention 169.

<sup>196</sup> The Telegraph, Mining and oil firms could be forced to disclose government payments, 28 September 2012 <http://www.telegraph.co.uk/finance/newsbysector/industry/mining/9551477/Mining-and-oil-firms-could-be-forced-to-disclose-government-payments.html>

the final directives require disclosure of payments at project level as well as country level. However, there is considerable resistance to project-by-project reporting from mining corporations who claim that the administration of this would be expensive, and that revealing what they pay per project could give rise to tensions due to the differences in payment between companies in the region and differences in what regional authorities retain. Yet project-by-project reporting is the only way that the information can help communities affected by natural resource extraction to hold their governments to account. US corporations are expected to report project-by-project and in order to ‘level-up the playing field’ European Corporations should be expected to do the same. Country-by-country reporting, whilst a step forward, will not provide the information necessary to ensure that citizens can hold their governments democratically accountable, nor allow communities to hold corporations to account.

The US has set precedence in this area, for the moment striding ahead of the EU in ensuring greater transparency of reporting with the approval in August 2012 of regulations to implement Section 1504, the Dodd-Frank Financial Reform and Consumer Protection Act. Section 1504 requires oil, gas or mining companies to report on an annual basis to the US Securities and Exchange Commission on payments at both country and project-level made to host governments.<sup>197</sup> This enables citizens and communities in resource-rich economies to ensure that corporations are paying enough to extract their country’s natural resources.

Transparency initiatives should also consider including, particularly in countries in conflict, that MNCs report on their security arrangements, including both private and state security.

### 7.5 Ethical reporting on the London Stock Exchange

There is a heavy weighting of “dedicated” mining companies on the London Stock Exchange (LSE). However, the Financial Services Authority (FSA)<sup>198</sup> has done little to address the unique capacity of mining companies to “do harm”.<sup>199</sup> A recent draft bill proposing to abolish the existing FSA and transfer its role as UK Listing Authority to a new body called the Financial Conduct Authority (FCA) provides an important opportunity to address this gap. The FCA will have responsibility for overseeing new listings on the London Stock Exchange, Alternative Investment Market and PLUS Market, and for ensuring that listed companies keep to the appropriate rules. This presents an opportunity to tighten up regulations that will hold companies to account for their behaviour abroad, and bring the UK

in line with the higher reporting requirements for the environment and human rights currently found on other stock exchanges, such as the Hong Kong Stock Exchange. It could also help to ensure that the UN Guiding Principles, especially aspects of ‘due diligence’ and the observance of human rights, are adequately taken account of before mining corporations are able to list on stock exchanges in the UK. As the London Mining Network have found, ‘(t)he compliance requirements set by other bodies such as the World Bank/International Finance Corporation (IFC) and OECD are often breached by UK-based mining outfits, but they are not required to announce such breaches under existing rules’.<sup>200</sup> This is where improvements in line with the Hong Kong Stock Exchange requirements would be of benefit to the UK, as it requires that minerals companies comply with specific listing requirements that as yet have no counterpart in those imposed by the UK Listing Authority.<sup>201</sup> These include disclosure of any claims that may exist over the land on which exploration or mining activity is being carried out, including any ancestral or native claims, and a company’s historical experience of dealing with concerns of local governments and communities on the sites of its mines in respect of environmental, social, health and safety issues.<sup>202</sup>

Worldwide, it is Indigenous and Tribal Peoples (including afro-Colombians) whose rights are most often impacted on by mining corporations; which is certainly the case in Colombia. It is therefore essential that UK listed companies recognise agreements to which the UK is a signatory, including the UN Declaration on Human Rights and the UN Declaration on the Rights of Indigenous Peoples, and should have to comply with these and report accordingly.<sup>203</sup>

For the FCA to exercise its function as UK Listing Authority in a competent and acceptable manner it should include people with expertise in human rights and environmental protection – not only financial matters – in its governing body.

However, the amendment that was tabled to the Financial Services Bill in 2012, which would have placed responsibility on UK regulators to ‘foster ethical corporate behaviour, including respect for internationally-recognised human rights’<sup>204</sup> was blocked by the government in October 2012. Despite the UK Government’s support for the UN Guiding Principles, they appear not to be translating this rhetoric into actions that would penalise companies when they violate human rights abroad.

<sup>197</sup> Publish what you Pay <http://www.publishwhatyoupay.org/resources/eu-politicians-vote-tough-oil-gas>

<sup>198</sup> The Financial Services Authority (FSA) is a quasi-judicial body responsible for the regulation of the financial services industry in the United Kingdom. When acting as the competent authority for listing of shares on a stock exchange, it is referred to as the UK Listing Authority (UKLA)

<sup>199</sup> London Mining Network, UK-Listed Mining Companies & the Case for Stricter Oversight, February 2012

<sup>200</sup> *ibid*

<sup>201</sup> See: A Guide to listing on the London Stock Exchange, published by the, London Stock Exchange; accessed 10 April 2011: <http://www.londonstockexchange.com/home/guide-to-listing.pdf>.

<sup>202</sup> Even the basic reporting of company carbon emissions is not yet mandatory in the UK. In May 2011, a study by the UK Environment Agency of 500 FTSE All-share companies showed that only a minority of UK publicly-listed companies currently provides environmental statistics in line with government guidance. The majority disclose some quantitative environmental information in their annual reports but, said the Agency, its quality is highly varied and in some cases quite basic. See [www.environment-agency.gov.uk/static/documents/Business/Environmental\\_Disclosures\\_summary\\_report.pdf](http://www.environment-agency.gov.uk/static/documents/Business/Environmental_Disclosures_summary_report.pdf)

<sup>203</sup> London Mining Network’s submission to the Treasury Consultation, September 2011

<sup>204</sup> London Mining Network, Press Release, In the shadow of the scandals surrounding Bumi plc, proposed ethics and human rights amendment to Financial Services Bill ‘blocked’, 16 October 2012 <http://londonminingnetwork.org/2012/10/in-the-shadow-of-the-scandals-surrounding-bumi-plc-proposed-ethics-and-human-rights-amendment-to-financial-services-bill-blocked/>