

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

**ESB**



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

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

— Tabaco community

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

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

— Provincial community

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

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

— Varios community

**Subject:** Non-compliance with the OECD Guidelines for Multinational Enterprises of the Electricity Supply Board's supply chain operations in Cerrejón, Colombia.

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## **GLOSSARY**

### **Organisations:**

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

### **International bodies:**

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

### **Treaties and instruments:**

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

ILO Indigenous and Tribal Peoples Convention

International Labor Organization Indigenous and Tribal Peoples Convention

MNE Guidelines

The OECD Guidelines for Multinational Enterprises

**Other:**

MNE

Multinational enterprise

FPIC

Free, Prior and Informed Consent

## I. EXECUTIVE SUMMARY

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

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

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

These harms have been expedited because of the mine’s various **structural interventions into the hydrological system** in La Guajira. The Ranchería River is the principal waterway in the region, and many communities once relied upon it for their domestic and farming activities. The River’s flow was previously fed by 23 main tributaries, among them the Palomino River<sup>1</sup> and a large number of streams. Many of these tributaries have been destroyed or diverted to allow for the expansion of the mine. It is estimated that Cerrejón has carried out interventions into more than seventeen *Arroyos* (waterways) and has affected a further thirty streams in the

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<sup>1</sup> The Palomino River is in Barrancas.

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

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

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

ESB, a company which is 95 *percent* owned by the Irish state, has purchased millions of tonnes of coal from Cerrejón over the past two decades. Two-thirds of the coal burned at ESB's Moneypoint power station in County Clare since 2001 has come from Cerrejón.

In its 2020 Concluding Observations on Ireland, the **UN Committee on the Elimination of Racial Discrimination expressed concern** that ‘the operation of the Cerrejón mine complex in La Guajira, Colombia... from which the State party [through ESB] has purchased coal for one of its power stations in County Clare, has been linked with serious abuses of human rights, in particular affecting people of African descent and indigenous peoples...’<sup>4</sup>

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

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

<sup>4</sup> Committee on the Elimination of Racial Discrimination, ‘Concluding observations on the combined fifth to ninth reports of Ireland’ CERD/C/IRL/CO/5-9 para 47.



Despite a UN body raising concerns about ESB's links to the mine, **ESB has never committed to terminating its relationship with Cerrejón**. Instead, it has relied on a scheme called Bettercoal to defend the relationship. Bettercoal is an initiative set up by major coal purchasers to verify that coal mines meet certain minimum standards. Bettercoal's most recent publicly available report on Cerrejón states that the mine 'meets' or 'substantially meets' the Bettercoal Code, and ESB has relied on this report to defend its relationship with Cerrejón to the media and to the Oireachtas Joint Committee on Communications, Climate Action and the Environment. However, documents obtained from ESB through a freedom of information request appear to show that the full Bettercoal report recorded that Cerrejón had, *inter alia*, failed to adopt any explicit policy against mining in areas granted the highest level of international environmental protection, failed to carry out adequate water monitoring, and failed to properly report on hazardous waste. Bettercoal has stated that it cannot publish this full report without the consent of coal purchasers, such as ESB.

ESB is an MNE for the purposes of the MNE Guidelines. The MNE Guidelines set certain minimum standards for multinational enterprises. In particular, MNEs must identify, and seek to prevent or mitigate, adverse impacts which are directly linked to their operations. They must also satisfy certain disclosure obligations. **By maintaining its relationship with Cerrejón despite the adverse impacts caused by the mine, and by refusing to be transparent about that relationship, ESB has failed to comply with the MNE Guidelines.** Failures to comply with specific provisions within the Guidelines are set out below.

Pursuant to the MNE Guidelines, **ESB must now permanently terminate its relationship with Cerrejón**. It should **issue a public statement** acknowledging the need for this termination and calling on the parent companies of the mine to close down the mine and remedy its impacts. In order to comply with the Guidelines moving forward, ESB must compile and publish a human rights policy; incorporate the provisions of that policy into its contracts with suppliers; and include extraterritorial impacts in its annual reporting. Finally, in light of its status as a state-owned enterprise, **ESB should issue a formal apology to the affected communities for the part it has played in the impacts to their environment and human rights.**

## II. THE COMPLAINT

### A. The multinational enterprise: ESB

ESB was established in 1927 under the Electricity Supply Act 1927. ESB's asset base is approximately €9 billion, and the Irish Government holds a 95 percent stake in the company.<sup>5</sup> ESB owns and operates the Moneypoint power plant in County Clare, and over the past twenty years it has purchased millions of tons of coal from the Cerrejón mine in Colombia for use at Moneypoint.<sup>6</sup>

The MNE Guidelines do not provide a definition of 'multinational enterprises'.<sup>7</sup> However, the Guidelines do state that MNEs 'usually comprise of companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways', recognising that each entity's degree of autonomy within the enterprise 'may vary widely from one multinational enterprise to another'.<sup>8</sup> The legal entities which comprise ESB include:

- ESB International, a global engineering consultancy which is headquartered in Dublin and has worked in over 120 countries.<sup>9</sup> ESB International currently employs over 750 staff across operations in Europe, the Middle East, Africa and South East Asia.<sup>10</sup>
- Generation and Trading, which oversees the generation of electricity and competes on the global wholesale energy trading market.<sup>11</sup> Generation and Trading operates assets such as wind farms and thermal stations across the UK and Ireland.<sup>12</sup> ESB has been an independent electricity generator in the UK for 25 years, and has invested £1.8bn into its UK assets in recent years.<sup>13</sup>

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<sup>5</sup> ESB, 'About ESB' <<https://perma.cc/GPZ4-7Q5Y>>.

<sup>6</sup> Between 2011 and 2016, 7.5 million tons of Cerrejón coal were burned by ESB at the Moneypoint power plant in County Clare: Christian Aid, *Undermining Human Rights: Ireland, the ESB and Cerrejón coal* (February 2020) <<https://perma.cc/5MBX-YB5N>>. ESB purchases from Cerrejón have averaged 0.5 million tonnes over the past five years: Cerrejón, 'Cerrejón Statement on the Christian Aid Report "Undermining Human Rights: ESB and Cerrejón coal"' (21 February 2020) p. 2.

<sup>7</sup> OECD, *OECD Guidelines for Multinational Enterprises* (OECD Publishing, 2011) (hereinafter MNE Guidelines) p. 17, para 4: 'A precise definition of multinational enterprises is not required for the purposes of the Guidelines...'

<sup>8</sup> MNE Guidelines p. 17, para 4.

<sup>9</sup> ESB International, 'Discover ESB International' <<https://perma.cc/J74W-42WE>>.

<sup>10</sup> *ibid.*

<sup>11</sup> See ESB, 'Generation and Trading' <<https://perma.cc/U399-BKTZ>>.

<sup>12</sup> See ESB, 'Generation Asset Map' <<https://perma.cc/PU95-YLDH>>.

<sup>13</sup> ESB, 'ESB in the UK' <<https://perma.cc/QSC8-U544>>.

- ESB Networks, which manages the construction and maintenance of ESB’s transmission system within Ireland.<sup>14</sup>
- Electric Ireland, which is the retail arm of ESB and supplies energy services across the Republic of Ireland and Northern Ireland.<sup>15</sup>
- NIE Networks, which is registered in headquartered in the UK and serves customers in Northern Ireland.<sup>16</sup> ESB acquired NIE Networks in 2010 in order to ‘give [ESB] a presence outside of the State in a core business area’.<sup>17</sup>

ESB is therefore an MNE for the purposes of the MNE Guidelines, because (i) it is comprised of multiple entities established in more than one country, *i.e.* Ireland and the UK; and (ii) one of its entities, ESB International, operates across the world.

### **B. The supplier: Cerrejón**

Cerrejón is one of the largest open-pit coal-export mining operations in the world.<sup>18</sup> It is a joint venture of BHP (formerly BHP Billiton), Anglo American, and Glencore,<sup>19</sup> and is operated through two holding companies: Carbones del Cerrejón Limited, which is incorporated in Anguilla (a British overseas territory), and Cerrejón Zona Norte S.A., which is incorporated in Colombia (collectively Cerrejón).<sup>20</sup>

### **C. The notifier: GLAN**

GLAN is a registered charity which was established in August 2015.<sup>21</sup> Its members include legal practitioners, investigative journalists, and academics. GLAN’s charitable objects are ‘to protect and promote human rights... throughout the world by... monitoring and reporting cases of human rights... [and] contributing to the sound administration of international legal standards and human rights law through litigation, advocacy, training and information

<sup>14</sup> See ESB Networks, ‘What We Do’ <<https://perma.cc/F3LC-CKKK>>.

<sup>15</sup> ESB, ‘Electric Ireland’ <<https://perma.cc/R9G2-GN8E>>.

<sup>16</sup> Northern Ireland Electricity Networks, ‘About Us’ <<https://perma.cc/6G76-W5XE>>.

<sup>17</sup> The Competition Authority, ‘Determination of Merger Notification M/10/026 – ESB/NIE’, 29 October 2010, para 20.

<sup>18</sup> Cerrejón, ‘Who we are?’ <<https://perma.cc/663V-NHQA>>.

<sup>19</sup> Bettercoal, ‘Bettercoal Assessment Public Report: Cerrejón Coal Company’ (9 January 2019) p. 2.

<sup>20</sup> Cerrejón, ‘Cerrejón Sustainability Report 2018’ (2018) <<https://perma.cc/LQB4-WXE8>> p. 5; BHP Group Limited, ‘BHP Annual Report 2019’ <<https://perma.cc/MJQ8-NLZH>> p. 236; AngloAmerican, ‘Integrated Annual Report 2019: Re-Imagining Mining to Improve People’s Lives’ <<https://perma.cc/AE5Q-M8SM>> pp. 196 and 198.

<sup>21</sup> GLAN is a registered charitable organisation in England and Wales (registered charity number 1167733).

sharing...'<sup>22</sup> GLAN's work focuses on the accountability of actors, particularly those based in developed countries, involved in violations of human rights, especially those committed in developing countries.

Since 21 June 1976, Ireland has maintained a commitment to the OECD Declaration and Decisions on International Investment and Multinational Enterprises,<sup>23</sup> the most recent of which are the MNE Guidelines. When the MNE Guidelines are believed to have been violated, any 'interested party' may submit a complaint to the relevant NCP.<sup>24</sup> The MNE Guidelines do not provide a definition of 'interested party', but the Irish Department for Business, Enterprise and Innovation (DEBI) recognises that the interested party 'may be, for example... an NGO'.<sup>25</sup> GLAN is an NGO and, given its charitable objectives, is an interested party for the purposes of this complaint.

This complaint is submitted by GLAN.<sup>26</sup> This submission is supported by:

- 1) **Christian Aid**, an international aid and development agency of the Protestant Churches of Ireland and Great Britain.<sup>27</sup> Christian Aid recently issued a report entitled *Undermining Human Rights: Ireland, ESB and Cerrejón coal*, which describes the human rights and environmental abuses occurring at Cerrejón.<sup>28</sup>
- 2) **ABColumbia**, the joint advocacy project on Colombia of British and Irish Agencies.<sup>29</sup>
- 3) **Arbeitsgruppe Schweiz Kolumbien (ask!)**, an independent human rights organisation based in Switzerland, which gives voice to the concerns of Colombian civilians.<sup>30</sup>

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<sup>22</sup> Charity Commission, 'Data for financial year ending 30 June 2019: Global Legal Action Network (Glan), Charity no. 1167733, Charitable objects' <<https://perma.cc/8BUZ-FGLE>>.

<sup>23</sup> OECD, *OECD Declaration and Decisions on International Investment and Multinational Enterprises* (latest version 2012).

<sup>24</sup> Cristina Tebar Less and Tihana Bule (Investment Division of the OECD Directorate for Financial and Enterprise Affairs), 'Global Forum on Responsible Business Conduct, National Contact Points: An Overview' (OECD Conference, 18-19 June 2015, Paris) p. 9; Department for Business, Enterprise and Innovation, 'National Contact Points for Ireland – Procedures for Dealing with Complaints Brought Under the OECD Guidelines for Multinational Enterprises' (December 2018) (hereinafter DBEI NCP Procedures) p. 2.

<sup>25</sup> DBEI NCP Procedures, *ibid* p. 2.

<sup>26</sup> Ms Ferial-Tinta is instructed by GLAN under GLAN's licence to instruct counsel.

<sup>27</sup> See Christian Aid, 'Our Aims' <<https://perma.cc/DB9T-R4PE>>.

<sup>28</sup> Christian Aid, *Undermining Human Rights* (n 6).

<sup>29</sup> ABColumbia, 'About Us: British and Irish Agencies working in Colombia' <<https://perma.cc/4XZZ-NAMU>>.

<sup>30</sup> ask!, 'Über uns: Die ask! ist eine Menschenrechtsorganisation' <<https://perma.cc/A2SQ-KNH3>>

- 4) **AIDA** (the Interamerican Association for Environmental Defense), an environmental law organisation which seeks to protect the environment and communities suffering from environmental harm, particularly in Latin America.<sup>31</sup>
- 5) **CINEP** (Centro de Investigación y Educación Popular), a non-profit foundation based in Colombia.<sup>32</sup> CINEP has long been an advocate for those affected by the operation of the Cerrejón mine.<sup>33</sup>
- 6) **CAJAR** (Colectivo de Abogados ‘José Alvear Restrepo’), a non-governmental Colombian legal organisation which has led numerous litigation and advocacy efforts on behalf of those affected by Cerrejón’s operations.<sup>34</sup>

#### **D. NCP jurisdiction**

The MNE Guidelines state that ‘generally, issues will be dealt with by the NCP of the country in which the issues have arisen.’<sup>35</sup> The OECD has explained that the word ‘issues’ is not synonymous with the word ‘impacts’.<sup>36</sup> To illustrate this point, the OECD’s Coordination Guide for NCPs provides an example of ‘trade in minerals used to finance local conflict and human rights abuse. The impact... gives rise to several issues related to responsibilities of commercial actors along mineral supply chains... In this respect the underlying impact may give rise to multiple issues (or allegations) which implicate enterprises across various jurisdictions, and potentially, various NCPs.’<sup>37</sup>

In this case, the direct impact of Cerrejón’s activities is felt in Colombia, and the issue of ESB’s failure to comply with the MNE Guidelines arises in Ireland. ESB is majority owned by the Irish state.<sup>38</sup> **This complaint therefore falls squarely within the remit of the Irish NCP.**

GLAN is simultaneously submitting a complaint to the Irish NCP about CMC-Coal Marketing Company DAC (CMC), an MNE which is headquartered in Ireland and which coordinates the

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<sup>31</sup> AIDA, ‘About Us’ <<https://perma.cc/H778-VSRD>>.

<sup>32</sup> See <<https://perma.cc/8VA7-8AKS>>.

<sup>33</sup> See, for example, Cerrejón statement on lawsuit filed against comprehensive environmental management plan, 22<sup>nd</sup> August 2019 <<https://perma.cc/8QS6-RXAH>>.

<sup>34</sup> See <<https://perma.cc/8NPS-XBTS>>.

<sup>35</sup> MNE Guidelines, Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, para 23, p. 82.

<sup>36</sup> OECD, *Guide for National Contact points on Coordination when handling Specific Instances*, *OECD Guidelines for Multinational Enterprises* (OECD 2019) (hereinafter NCP Coordination Guide) p. 6.

<sup>37</sup> *ibid.*

<sup>38</sup> ESB, ‘About ESB’ (n 5).

sale of Cerrejón coal.<sup>39</sup> These complaints should be read together as they are based on the same factual background.

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

*When issues arise from an enterprise's activity that takes place in several adhering countries or from the activity of a group of enterprises organised as consortium, joint venture or other similar form, based in different adhering countries, the NCPs involved should consult with a view to agreeing on which NCP will take the lead in assisting the parties.*<sup>40</sup>

The OECD Guide for National Contact Points on Coordination when Handling Specific Instances explains that this language 'covers situations where the activities of only one corporate entity are at issue... for example, a specific instance related to the conduct of a subsidiary operating in one jurisdiction, with a holding company in a second jurisdiction and a parent company in third could potentially implicate three NCPs. In these situations it will be necessary to appoint a lead NCP.'<sup>41</sup> The Guide further explains that:<sup>42</sup>

*The provision on appointment of a lead NCP does not cover situations where the conduct of various corporate entities, related to the same impact, is at issue. In these cases appointment of a lead NCP may not be necessary and the separate (but related) specific instances may be considered by several NCPs in parallel in order to correctly address the different issues raised... For example in 2011 a consortium of NGOs filed a specific instance related to alleged human rights impacts by the Pohang Iron and Steel Enterprise (POSCO), and its joint venture POSCO India Private Limited with three separate NCPs (Korea, Norway and the Netherlands). Although stemming from the same underlying impact the submission dealt with the activities of three separate enterprises, POSCO, NBIM and APG, and therefore raised three separate sets of issues (or allegations) (i.e. the*

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<sup>39</sup> CMC Coal Marketing, 'CMC Coal Marketing Company' <<https://perma.cc/42FC-RSAL>>.

<sup>40</sup> MNE Guidelines, Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, para 24, p. 82.

<sup>41</sup> NCP Coordination Guide (n 36) p. 8.

<sup>42</sup> *ibid*, emphasis added.

*activities of POSCO resulting in human rights impacts, and the due diligence approaches of NBIM and APG respectively). As such the NCPs of Korea, Norway and the Netherlands each handled the specific instance with respect to the issues raised involving the enterprise from their jurisdiction.*

On the basis of this guidance, **the complaint against ESB does not require identification of a ‘lead NCP’, and can instead be dealt with by the Irish NCP independently.** However, coordination with the other NCPs dealing with the various issues arising from Cerrejón’s activities will be necessary. NCPs are required to co-operate ‘if such a need arises, on any matter related to the Guidelines relevant to their activities’.<sup>43</sup> The OECD Coordination Guide further highlights the importance of consistent interpretation of the MNE Guidelines where multiple NCPs are dealing with related complaints,<sup>44</sup> and notes that ‘the Guidelines broadly encourage cooperation amongst the NCPs on substantive matters related to them.’<sup>45</sup>

On this basis, **GLAN respectfully requests that the Irish NCP coordinate with the other relevant NCPs when assessing the complaint against ESB.** Since the complaint against ESB is directly linked to Cerrejón’s operations, GLAN is forwarding a copy of this complaint to the Australian, Swiss and UK NCPs.

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<sup>43</sup> Amendment of the Decision of the Council on the OECD Guidelines for Multinational Enterprises OECD/LEGAL/0307 para I.2.

<sup>44</sup> NCP Coordination Guide (n 36) p. 9.

<sup>45</sup> *ibid.*

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

#### A. Introduction

The Cerrejón mine is one of the largest open pit coal mines in the world and the largest in Latin America, covering an area of approximately 69,000 hectares of land in the middle of the ancestral land of the Wayúu.<sup>46</sup> The Wayúu are indigenous peoples scattered across more than 15,000 km<sup>2</sup> of the department (i.e. administrative district) of La Guajira.<sup>47</sup> Their language is Wayúunaiki. La Guajira has also been home to Afro-descendant communities for around 500 years, since the *cimarronaje* process saw groups escape from enslavement and settle in the middle basin of the Ranchería river.<sup>48</sup> Although La Guajira is predominantly desert, the Wayúu and Afro-Colombian communities have historically had sufficient access to waterways.<sup>49</sup> As will be explained in detail below, the operation of the Cerrejón mine has changed this.

La Guajira is divided into three zones: High Guajira, Middle Guajira, and Low Guajira. El Cerrejón concentrates its mining operation in the Middle and Low Guajira zones. However, Cerrejón has built a railway to transport the coal, which runs through the entire Wayúu territory (see Figure 1 below). The railway stretches from the mine in Low Guajira to the Bolivar port, from where the coal is shipped globally.<sup>50</sup>

The Ranchería River flows right beside the mine. Low Guajira used to be fertile, as it was where water resources were concentrated. It was once the *despensa agrícola* of La Guajira: the place that provided agricultural products to the rest of La Guajira.<sup>51</sup>

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<sup>46</sup> Inter-American Commission on Human Rights, Resolution 60/2015 (Provisional Measures No 51/15), *Asunto niñas, niños y adolescentes de las comunidades de Uribí, Manaure, Riohacha y Maicao del pueblo Wayúu, asentados en el departamento de la Guajira, respecto de Colombia*, (11 December 2015) p. 2. <<https://perma.cc/3DUZ-RMPL>>.

<sup>47</sup> *ibid* p. 1.

<sup>48</sup> CINEP, *Bárbaros hoscós: historia de la (des)territorialización de los negros de la comunidad de Roche* (Bogotá, 2015).

<sup>49</sup> CINEP, 'Minería a gran escala y derechos humanos: lo que el des-arroyo trajo a la Guajira' (2020) 61 Noche Niebla pp. 59-102, at p. 67. <<https://perma.cc/JXH7-GJ4T>>.

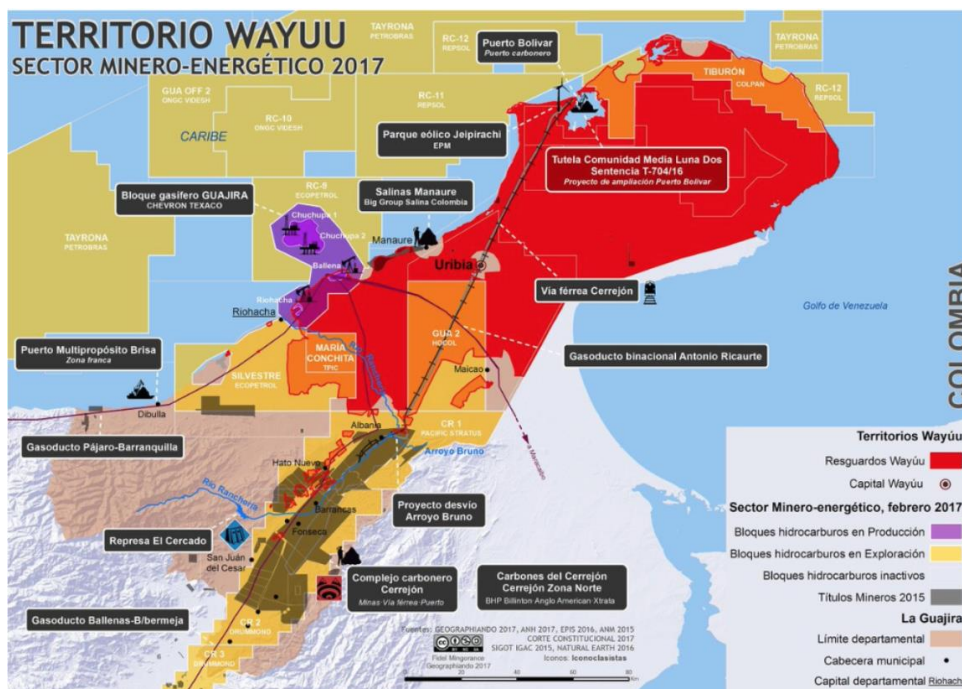
<sup>50</sup> Cerrejón, 'Cerrejón's Sustainability Report 2019' (hereinafter 'Cerrejón Report 2019') <<https://perma.cc/U84D-NYGR>> p. 70: in 2019, Cerrejón transported 27% of its coal to Europe, 42% to the Mediterranean, 25% to America and 6% to Asia.

<sup>51</sup> CINEP (n 49) p. 67.



The most productive lands in Low Guajira and Middle Guajira are precisely those that have been appropriated for the extraction of coal. The Wayúu explain:<sup>52</sup>

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



## Territorio Wayúu Wayúu Land

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

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

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

According to rulings of the Riohacha Administrative Court, the State Council and the Constitutional Court of Colombia, Cerrejón's mining operations directly impact a population of more than 300,000 people, across an area of 200 km<sup>2</sup>.<sup>53</sup> As a result of Cerrejón's activities, 35 communities have been displaced from their lands and 17 waterways have dried up.<sup>54</sup> The

<sup>52</sup> Colombian Constitutional Court, SU-698 of 2017 relating to the Arroyo Bruno (hereinafter Colombian Constitutional Court, SU698/17) <<https://perma.cc/SPN3-V3KE>>.

<sup>53</sup> CAJAR, 'Diez Verdades sobre Carbones Cerrejón' (n 2) p. 7. This includes the municipalities of Fonseca, Barrancas, Hato Nuevo, Albania, Uribí and Maicao in the department of La Guajira.

<sup>54</sup> *ibid* p. 6.

operation of the Cerrejón mine has had major consequences for the health of the communities living near the mine. In 2019, the Colombian Constitutional Court found that harm to human health ‘will be caused or continue to be caused’ by pollution from Cerrejón’s mining activities, and that ‘this would imply serious and irreparable harm to the community’.<sup>55</sup>

This 2019 judgment is the latest in a series of judicial findings denouncing Cerrejón’s activities. Indeed, the Constitutional Court identified the risks linked to mining in La Guajira as early as 1992,<sup>56</sup> and the mine has been the subject of litigation many times since then.<sup>57</sup>

In 2015, for example, the Constitutional Court highlighted that fundamental rights impacts were no longer a merely hypothetical risk, and that mining had caused ‘severe environmental damage, such as the... diversion of important water sources... waste dumps... damage caused to the soil, large-scale tree felling... the impact on the health of inhabitants in the mining area and the loss of biodiversity’.<sup>58</sup> In 2016, the Court again found that ‘mining activity is bringing harmful effects’ in La Guajira, including water pollution, air pollution, and ecosystem destruction.<sup>59</sup> It ordered that consultation take place with affected communities, with a view to modifying, suspending, or cancelling Cerrejón’s environmental licence as necessary.<sup>60</sup> Cerrejón continues to operate under a licence granted in 1983,<sup>61</sup> arguing that this licence exempts it from complying with current Colombian environmental law – an interpretation which is currently being challenged in the courts.<sup>62</sup>

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

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<sup>55</sup> Colombian Constitutional Court, T-614 of 2019 (hereinafter Colombian Constitutional Court, T-614) <<https://perma.cc/W7MS-8LDK>> para 9.8.

<sup>56</sup> Colombian Constitutional Court T-528 of 1992. The Court relied on resolution 02122, issued by the Ministry of Health (12 February 1992), which had identified the area surrounding the Cerrejón mine as ‘uninhabitable’ and dangerous to human and animal life, and plant agriculture. The Court ordered the authorities to ‘ensure the preservation of the quality of life and a health environment’.

<sup>57</sup> Judgments against Cerrejón include the following: Colombian Supreme Court (Corte Suprema de Justicia) 13/0912, 0014-01 of 7 May 2002; Criminal Cassation Chamber of the Supreme Court, sentence of 13 September 2012; Colombian Constitutional Court T-256 of 2015; Colombian Constitutional Court, T-704 of 2016; Barrancas Court (Juzgado Promiscuo de Barrancas) 2015-00473 of 26 February 2016; Administrative Supreme Court of Colombia (Consejo de Estado) 2016-00079-01 of 13 October 2016; Colombian Constitutional Court, SU-698 of 2017; Colombian Constitutional Court, T-329 of 2017 <<https://perma.cc/AX8V-BEQY>> (hereinafter Colombian Constitutional Court, T-329/17).

<sup>58</sup> Colombian Constitutional Court, T-256 of 2015, para 118.

<sup>59</sup> Colombian Constitutional Court, T-704 of 2016, para 5.29

<sup>60</sup> *ibid*, Resolution.

<sup>61</sup> Richard Solly, ‘Legal action against Cerrejón Coal’s environmental licence’ (London Mining Network, 27 February 2019) <<https://perma.cc/UC4Q-ZSQP>>.

<sup>62</sup> See CAJAR, ‘Consejo de Estado estudiará demanda contra la licencia ambiental de Carbones del Cerrejón’ (6 August 2019) <<https://perma.cc/2WMP-FJE7>>.

sovereignty.<sup>63</sup> It held that Cerrejón had given insufficient consideration to social and environmental impacts when deciding to expand the mine.<sup>64</sup>

Referencing this body of precedent its 2019 ruling, the Constitutional Court stated that ‘[this] is not the first time that a case has been resolved against Cerrejón [for] endangering and/or causing damage to the environment and the health of nearby populations’.<sup>65</sup> It went on to highlight that the broader context – namely the vulnerability of local indigenous communities to the impacts of large-scale mining – means that Cerrejón ‘must carry out its operations with a special degree of care and diligence in the face of the magnitude of the damage that it may cause’.<sup>66</sup>

The local population in La Guajira is indeed vulnerable. The maternal mortality rate in the region is 180.9 per 100,000; among local indigenous populations, the rate is 242 per 100,000.<sup>67</sup> The national rate in Colombia is 51.27 per 100,000.<sup>68</sup> Similarly, infant mortality in La Guajira stands at 18.6 per 100,000 live births - 7.45 percentage points above the national average.<sup>69</sup> Between 2016 and 2018, an average of one indigenous child under five died every week in La Guajira due to malnutrition.<sup>70</sup> The high level of infant mortality amongst the Wayúu people was highlighted by the Inter-American Commission on Human Rights (IACHR) in 2015, when it directed the Colombian government to take immediate precautionary measures to safeguard the lives and personal safety of the Wayúu people in La Guajira.<sup>71</sup> The IACHR decision was prompted by the documented deaths of 4,770 Wayúu children during the preceding 8 years, as a result of thirst, malnutrition and preventable disease.<sup>72</sup>

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<sup>63</sup> Colombian Constitutional Court, SU698/17 (n 52).

<sup>64</sup> *ibid.*

<sup>65</sup> Colombian Constitutional Court, T-614 (n 55) para 9.10.

<sup>66</sup> *ibid.*

<sup>67</sup> Alfonso Fernández Reza, ‘The Wayúu village that beat malnutrition’ (Unicef, 8 August 2019) <<https://perma.cc/L6YY-AQSR>>.

<sup>68</sup> *ibid.*

<sup>69</sup> *ibid.*

<sup>70</sup> William Avilés ‘The Wayúu tragedy: death, water and the imperatives of global capitalism (2019) 40 (9) Third World Quarterly 1750, 1750.

<sup>71</sup> Inter-American Commission on Human Rights, Resolution 60/2015 (n 46).

<sup>72</sup> *ibid.* para. 1. See also CAJAR, ‘Diez Verdades sobre Carbones Cerrejón’ (n 2) p. 15; Defensoría del Pueblo de Colombia (Ombudsman's Office of Colombia), ‘Crisis humanitaria en La Guajira 2014’ (June 2014) <<https://perma.cc/JWH9-46AJ>>; Constitutional Court, Sentence T-302 of 2017 <<https://perma.cc/BNN3-Q9NL>>; Colombian Constitutional Court, Sentence T-359 of 2018 <<https://perma.cc/V6CS-SUPY>>; and Colombian Constitutional Court, Sentence T-216 of 2019 <<https://perma.cc/AJV8-XJBF>>.

## **B. Recent statement of UN Special Rapporteurs**

The impacts caused by the Cerrejón mine were recently highlighted by the UN Special Rapporteur on human rights and the environment, David Boyd. Professor Boyd is an associate professor of law, policy, and sustainability at the University of British Columbia, and has advised various governments on environmental, constitutional, and human rights policy.<sup>73</sup> The UN released the following statement on the 28<sup>th</sup> September 2020, relaying the Special Rapporteur's concerns:<sup>74</sup>

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

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

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

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

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<sup>73</sup> UN, 'David R. Boyd, Special Rapporteur on human rights and the environment' <<https://perma.cc/959U-F926>>.

<sup>74</sup> UN, 'UN expert calls for halt to mining at controversial Colombia site' (28 September 2020) <<https://perma.cc/5UT9-JKBG>>.

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

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

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

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

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

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

This statement was also endorsed by six additional UN Special Rapporteurs and by the UN Working Group on Business and Human Rights. The signatories were:<sup>75</sup>

- Michael Fakhri, Special Rapporteur on the right to food. Professor Fakhri teaches courses on human rights, food law, development, and commercial law at the University of Oregon School of Law.<sup>76</sup>
- Tlaleng Mofokeng, Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. Dr Mofokeng is a medical doctor with expertise advocating for universal health access.<sup>77</sup>
- Anita Ramasastry, Chair of the Working Group on the issue of human rights and transnational corporations and other business enterprises. Professor Ramasastry is the Director of the Graduate Program in Sustainable International Development at the University of Washington School of Law.<sup>78</sup>
- Dante Pesce, Vice-Chair of the Working Group on the issue of human rights and transnational corporations and other business enterprises. Mr Pesce is the Founder and Executive Director of the VINCULAR Center for Social Responsibility and Sustainable Development at the Catholic University of Valparaíso, Chile, which works on sustainability and responsible business practices in fourteen Latin American countries.<sup>79</sup>
- Surya Deva, member of the Working Group on the issue of human rights and transnational corporations and other business enterprises. Professor Deva is based at the School of Law of City University in Hong Kong, where he specialises in business and human rights and corporate social responsibility, among other areas.<sup>80</sup>
- Elżbieta Karska member of the Working Group on the issue of human rights and transnational corporations and other business enterprises. Professor Karska is the Head of the Department of Protection of Human Rights and International Humanitarian Law at the Faculty of Law and Administration, Cardinal Stefan Wyszyński University in Warsaw, Poland.<sup>81</sup>

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<sup>75</sup> *ibid.*

<sup>76</sup> UN, 'Mr. Michael Fakhri - Special Rapporteur on Right to Food' <<https://perma.cc/9L6V-Z5KD>>.

<sup>77</sup> UN, 'Ms. Tlaleng Mofokeng: Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of health' <<https://perma.cc/D23Y-NLBT>>.

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

<sup>79</sup> *ibid.*

<sup>80</sup> *ibid.*

<sup>81</sup> *ibid.*

- Githu Muigai, member of the Working Group on the issue of human rights and transnational corporations and other business enterprises. Professor Muigai is an Associate Professor of Law at the University of Nairobi.<sup>82</sup>
- Leo Heller, Special Rapporteur on the rights to water and sanitation. Professor Heller is a researcher in the Oswaldo Cruz Foundation in Brazil, which seeks to disseminate knowledge and technologies to promote health and quality of life.<sup>83</sup>
- Olivier De Schutter, Special Rapporteur on extreme poverty and human rights. Professor De Schutter is a Professor at the University of Louvain (UCL) and at the College of Europe (Natolin).<sup>84</sup>
- Marcos A. Orellana, Special Rapporteur on hazardous substances and wastes. Dr Marcus has worked with United Nations agencies, governments and non-governmental organizations, including on wastes and chemicals issues.<sup>85</sup>
- Francisco Cali Tzay, Special Rapporteur on the rights of indigenous peoples. Mr Cali Tzay is Maya Kaqchikel and has founded various indigenous organisations in Guatemala.<sup>86</sup>

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

### C. Air and noise pollution and related health impacts

The extraction and transportation of coal causes the emission of particulate matter pollutants into the air known as **PM 2.5** and **PM 10**.<sup>87</sup> Both pollutants are dangerous to human health.<sup>88</sup> According to the WHO, ‘[t]he range of health effects [caused by particulate matter] is broad, but [the effects] are predominantly to the **respiratory and cardiovascular** systems... The risk for various outcomes has been shown to increase with exposure... the numerical guideline and interim target values given [by the WHO] reflect the concentrations at which **increased**

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<sup>82</sup> *ibid.*

<sup>83</sup> UN, ‘Mr. Léo Heller, Special Rapporteur on the human rights to safe drinking water and sanitation’ <<https://perma.cc/6TGK-WETF>>.

<sup>84</sup> UN, ‘Olivier De Schutter’ <<https://perma.cc/7Z9H-73Q6>>.

<sup>85</sup> UN, ‘Dr. Marcos A. Orellana, Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes’ <<https://perma.cc/DJ8K-6MEM>>.

<sup>86</sup> UN, ‘Francisco Cali Tzay, Special Rapporteur on the rights of indigenous peoples’ <<https://perma.cc/298M-9A9D>>.

<sup>87</sup> ‘PM’ refers to ‘particulate matter’. The numbers 2.5 and 10 refer to the diameters of the respective types of pollutants in micrometres.

<sup>88</sup> On the relative dangers of PM<sub>10</sub> and PM<sub>2.5</sub> in causing lung cancer, see Ole Raaschou-Nielsen et al, ‘Air pollution and lung cancer incidence in 17 European cohorts: prospective analyses from the European Study of Cohorts for Air Pollution Effects (ESCAPE)’ 14(9) *The Lancet* (2013) 813.

**mortality responses** due to [particulate matter] air pollution are expected based on current scientific findings.’<sup>89</sup> PM 2.5 is the deadliest and smallest form of particulate matter, and is capable of causing diseases such as asthma, pneumonia, hypertension, cancer, damage to the skin and eyes, miscarriages, premature births and pre-eclampsia.<sup>90</sup> Measurement of its concentration in the air around Cerrejón only began in 2018, by which time the mine had been operating for 35 years.<sup>91</sup>

A research project in 2018, which assessed almost half of the population living within 23km of the mine, concluded that **annually there are 442 emergency room visits and 336,832 respiratory symptom cases directly attributable to the Cerrejón mining operations.**<sup>92</sup> A study carried out from 2011 to 2018 also found evidence indicating that **pollution from the Cerrejón mine is driving elevated levels of cellular damage, in turn raising the risk of cancer, DNA damage, and chromosomal instability** among employees and those living around the mine.<sup>93</sup>

Cerrejón claims to have a ‘solid air-quality management system that combines best practices for emission controls with long-term and hourly forecasts, and the continuous analysis of data for timely decision-making’.<sup>94</sup> Cerrejón states that the concentration of particulate matter in the air around the mine falls below the maximum limits set by Colombian regulations of general application.<sup>95</sup> However, earlier this year **the Colombian Constitutional Court expressed concern about Cerrejón’s emission levels and ordered the mine to reduce air pollution as an ‘urgent transitional measure’.**<sup>96</sup> Air quality analysis had previously found that particulate

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<sup>89</sup> World Health Organization, ‘WHO Air quality guidelines for particulate matter, ozone, nitrogen dioxide and sulfur dioxide: Global update 2005’ p. 9 <<https://perma.cc/EY54-RZB4>>.

<sup>90</sup> CAJAR, ‘Diez Verdades sobre Carbones Cerrejón’ (n 2) p. 18.

<sup>91</sup> Monitoring of PM<sub>2.5</sub> at Cerrejón only began after a Colombian domestic regulation mandated it in 2018. See Resolution No. 2254 by which the ambient air quality standard is adopted and other provisions are dictated, available at <<https://perma.cc/2PEM-NR6N>>; see also Gabriel Bustos, ‘New Air-Quality Regulation’ (Cerrejón, 1<sup>st</sup> March 2018) <<https://perma.cc/DC6S-BHDB>>.

<sup>92</sup> Heli A Arregocés, Roberto Rojano, Luis Angulo and Gloria Restrepo, ‘Intake Fraction of PM<sub>10</sub> from Coal Mine Emissions in the North of Colombia’ Journal of Environmental and Public Health (2018) Article ID 8532463 <<https://perma.cc/S2VE-UKXM>> p. 5: ‘We appraised that annually there are 22 hospital respiratory disease admissions, 442 emergency room visits, 105835 restricted activity days, and 336832 respiratory symptom cases attributable to the direct impact of the mining.’

<sup>93</sup> Vega Vargas, M., Carbón Tóxico: Daños y riesgos a la salud de trabajadores mineros y población expuesta al carbon - evidencias científicas para Colombia. Fundación Rosa Luxembourg, 2018 <<https://perma.cc/VBA3-3ZQK>>. Main findings summarised at pp. 8-11.

<sup>94</sup> Cerrejón Report 2019 (n 50) p. 50.

<sup>95</sup> *ibid* p. 51.

<sup>96</sup> The Colombian Constitutional Court ruled that as an urgent transitional measure, Cerrejón must control its mean emissions (calculated by month) to a maximum of 20 µg/m<sup>3</sup> for PM<sub>10</sub> and 10 µg/m<sup>3</sup> for PM<sub>2.5</sub>. The measure is to remain in force until agreement on particulate matter limits is reached between Cerrejón and the affected communities. Constitutional Court of Colombia, T-614 (n 55) Order 3.



matter in the air around the Cerrejón mine **exceeds the limits recommended by the WHO.**<sup>97</sup> Cerrejón bears full responsibility for these high levels of particulate emissions. Researchers have concluded that **‘[t]he main source of [air particulate] emissions in the region is the opencast coal mine’.**<sup>98</sup>

In 2019, a group of indigenous women from Provincial (a Wayúu settlement of 679 inhabitants) filed an action of protection (*Acción de Tutela*) with the Constitutional Court of Colombia. The action demanded ‘the urgent protection of the fundamental rights to life, personal integrity, health, a healthy environment and the privacy of the inhabitants of their community’, which they argued were in ‘serious danger due to the proximity of the [Provincial] reservation to the mining operation carried out by the company Carbones del Cerrejón Limited’.<sup>99</sup> They argued that the **rights to life and health of the Wayúu children of Provincial were particularly affected.**<sup>100</sup> Due to their greater vulnerability (as a result of living close to the mine), these children have suffered serious and recurring respiratory and skin diseases, fevers, headaches, and diarrhea, among other conditions.<sup>101</sup> The health effects for children in Provincial were covered in a 2017 documentary by DW, the German state broadcaster.<sup>102</sup> The documentary showed how the environmental impacts of the mine, particularly from air pollution, have severely impacted the health of children within Wayúu communities.

The brief described the various ailments and illnesses suffered due to particulate matter emitted by the mining operations and Cerrejón’s use of heavy machinery and explosions.<sup>103</sup> The most frequent symptoms in the community are **headaches, nasal and breathing discomfort, dry cough, burning eyes and blurred vision**; these ailments appear to become more acute with

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<sup>97</sup> Golda Amanda Fuentes, Jesús Olivero Verbel, Juan Carlos Valdelamar Villegas, Daniel Armando Campos and Alan Phillippe, *Si el río suena, piedras lleva: Sobre los derechos al agua y a un ambiente sano en la zona minera de La Guajira* (Indepaz 2018) pp. 111-117 <<https://perma.cc/PHX9-C2J3>>. Recent reports from Cerrejón also show that emissions exceed the limits set out in the WHO guidelines: Cerrejón reports annual emissions of 45 µg/m<sup>3</sup> for PM10 and 10 µg/m<sup>3</sup> for PM2.5, Cerrejón Report 2019 (n 50) p. 51. WHO Guidelines state that annual mean admissions should not exceed 20 µg/m<sup>3</sup> for PM10 and 10 µg/m<sup>3</sup> for PM 2.5, so even on Cerrejón’s own reporting it is failing to comply with the standard for PM10. See World Health Organization, Air quality guidelines (n 89) p. 9.

<sup>98</sup> Arregocés et al (n 92) p. 3. See also R Rojano, H Arregocés, L Angulo and G Restrepo, ‘PM<sub>10</sub> emissions due to storage in coal mines in a mining industrial area’ 207 WIT Transactions on Ecology and the Environment (2016) 87 <<https://perma.cc/4DDN-XLVH>>.

<sup>99</sup> Constitutional Court of Colombia, T-614 (n 55) para 1.2.

<sup>100</sup> *ibid.* See for example paras 1.6 and 4.2.

<sup>101</sup> *ibid.* See 7.1 f., 7.2 b

<sup>102</sup> DW, ‘Colombia – The Curse of Coal’ (2017), available at <[https://www.youtube.com/watch?v=t1xLZWp2eBc&ab\\_channel=DWDocumentary](https://www.youtube.com/watch?v=t1xLZWp2eBc&ab_channel=DWDocumentary)> (last accessed 28 October 2020).

<sup>103</sup> *ibid* paras 1.3, 1.4, 1.5, 1.6, and 1.8. The explosions cause tremors which result in the dispersion of coal dust: *ibid* paras 1.4, 1.5, and 1.6.

the presence of strong and prolonged bad odours, which are described as ‘sulphur’ or ‘burned coal’.<sup>104</sup>

In December 2019, after reviewing all the available evidence, the Colombian Constitutional Court (in its judgment T-614) made the following findings with respect to Provincial:<sup>105</sup>

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

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<sup>104</sup> *ibid* paras 1.4, 1.6, 3.1, and 4.3.

<sup>105</sup> *ibid* para. 9.7. Emphasis added.

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

Having observed the above, the Court ordered Cerrejón to ‘carry out exhaustive cleaning of coal dust in the houses of the reservation, the water wells used by its inhabitants and the surrounding vegetation’,<sup>106</sup> and to ‘reduce the noise level generated by its activities [to a maximum] of 65 decibels during the day and 55 decibels at night’.<sup>107</sup> It further instructed Cerrejón to ‘control its emissions of particulate matter’ PM 2.5 and PM 10 as an ‘urgent transitory measure’ until an agreement on limits could be reached with the Ministry of the Environment and Sustainable Development and the affected communities.<sup>108</sup>

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

*Ruling T-614, notified by the Constitutional Court in January of 2020, has imposed certain measures (e.g. regarding air-quality levels in an area near the mine) that are more restrictive for Cerrejón than those in effect for the rest of Colombia and Latin America. These measures reveal a lack of awareness concerning the normal conditions in nature in the region as well as the impact that activities other than mining can have on air-quality measurements.*<sup>109</sup>

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<sup>106</sup>*ibid* Order 4.

<sup>107</sup>*ibid*.

<sup>108</sup> *ibid* Order 3.

<sup>109</sup> Cerrejón Report 2019 (n 50) p. 51.

#### D. Contamination of the Ranchería River and other waterways

According to Corpoguajira, the most senior environmental body in La Guajira,<sup>110</sup> the Ranchería River is the most important source of water in the department of La Guajira, playing a key role in the maintenance of ecosystems in its basin and providing water for domestic, recreational, cultural, spiritual, farming and industrial activities.<sup>111</sup> Previously, an estimated 450,000 people depended directly and indirectly on the water of the Ranchería River.<sup>112</sup> Many people in La Guajira relied on the river for cleaning, bathing, and cooking.<sup>113</sup> Some communities also relied on the river for their drinking water.<sup>114</sup> However, the operation of the Cerrejón mine has damaged the Ranchería River.<sup>115</sup> It can no longer provide the population with drinking water.<sup>116</sup>

As recently noted by the UN Special Rapporteur on human rights and the environment, **the Cerrejón mine is ‘the largest water polluter in the region’**,<sup>117</sup> and it ‘not only diverts and uses an enormous number of streams and tributaries, but also returns them contaminated with heavy metals, chemicals and sediments’.<sup>118</sup>

A 2017 analysis found that, as a result of the mine, various metals known to cause serious health effects were present in the waters in and around the Ranchería River.<sup>119</sup> Specifically, it found that the **levels of lead, cadmium, barium, manganese, iron and zinc surpassed permissible levels under World Health Organization (WHO) guidelines**. A subsequent study published in July 2019 also found dangerously high levels of **mercury** in the water.<sup>120</sup> Long-term overexposure to these metals, particularly in drinking water, causes **nausea and**

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<sup>110</sup> Corpoguajira, ‘Historical Review’ (11 September 2014) <<https://perma.cc/E2D9-KHM8>>.

<sup>111</sup> Corpoguajira, ‘Plan de acción 2016-2019 prosperidad, paz y sostenibilidad# (Action Plan 2016-2019) p. 13 <<https://perma.cc/Z743-TAF2>>.

<sup>112</sup> *ibid.*

<sup>113</sup> Lydia James, ‘Dangerous levels of mercury found in river in Colombian region of La Guajira’ (London Mining Network, 25<sup>th</sup> November 2019) <<https://perma.cc/VXG8-676M>>.

<sup>114</sup> *ibid.*

<sup>115</sup> CENSAT Agua Viva, ‘La desviación del arroyo Bruno: entre el desarrollo minero y la sequía’ (2015) p. 9 <<https://perma.cc/QYB7-LLL7>>.

<sup>116</sup> See Johana Rodriguez, ‘Indigenas wayúu en la Guajira denuncian que no tienen agua por culpa de Cerrejón’ (AFM News, 2 September 2019) <<https://perma.cc/K5DX-36XE>>.

<sup>117</sup> UN, ‘UN expert calls for halt to mining at controversial Colombia site’ (n 74).

<sup>118</sup> *ibid.* See also CAJAR, ‘Diez Verdades sobre Carbones Cerrejón’ (n 2).

<sup>119</sup> Daniel Armando Campos and Allan Philippe, ‘Monitoring and assessment of polluting metals in the southeastern mining-impacted region of La Guajira, Colombia’ (University of Koblenz Landau, 2017).

<sup>120</sup> Informe de Resultados de Laboratorio, 9 July 2019 <<https://perma.cc/53N6-BX2F>>. See also Lydia James, ‘Dangerous levels of mercury found in river in Colombian region of La Guajira’ (n 113). The lab results show that the mercury presence was 0.0749 mg/L. The World Health Organization recommend a maximum mercury limit of 0.006 mg/L, while the Colombian Government’s Resolution 2115 (22<sup>nd</sup> June 2007) sets the recommended limit at 0.001 mg/L, <<https://perma.cc/K5GX-H7EQ>>.

**vomiting,<sup>121</sup> impaired kidney function,<sup>122</sup> constriction of blood vessels,<sup>123</sup> muscle pain and muscle weakness,<sup>124</sup> neurological disorders,** and – in cases of particularly high or long-term exposure – **death.**<sup>125</sup> Mercury, which appears in the WHO’s top ten chemicals of major public health concern, can have **toxic effects on the nervous, digestive, and immune systems, and on the lungs, kidneys, skin and eyes,** even in small quantities.<sup>126</sup>

In its own reporting, Cerrejón claims that it has ‘progressed enormously’ in its ‘capacity to improve water and air quality’.<sup>127</sup> Dumped water waste, it states, is ‘treated using different mechanisms to comply with the maximum allowable concentrations’ of contaminants under Colombian law.<sup>128</sup> **Cerrejón dumped 578 million litres of liquid waste (primarily runoff from dump sites and pits) into bodies of water in 2019.**<sup>129</sup> Research has shown that manganese, selenium, barium and strontium are all present in higher concentrations close to where Cerrejón dumps its waste materials.<sup>130</sup> **Cerrejón’s 2019 Sustainability Report does not contain any information about the presence of contaminants in this waste or at the dumping sites,** despite stating that water quality along the Ranchería River is monitored.<sup>131</sup>

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<sup>121</sup> World Health Organization, ‘Zinc in Drinking-water’ WHO/SDE/WSH/03.04/17 (2003) p. 3.

<sup>122</sup> World Health Organization, ‘Cadmium in Drinking-water’ WHO/SDE/WSH/03.04/80/Rev/1 (2011) p. 5.

<sup>123</sup> World Health Organization, ‘Barium in Drinking-water’ WHO/FWC/WSH/16.48 (2016) p. 9.

<sup>124</sup> World Health Organization, ‘Manganese in Drinking-Water’ WHO/SDE/WSH/03.04/104/Rev/1 (2011) p. 11.

<sup>125</sup> World Health Organization, ‘Lead poisoning and health’ (23 August 2019) <<https://perma.cc/8JQT-HMHM>>; World Health Organization, ‘Iron in Drinking-water’ WHO/SDE/WSH/03.04/08 (2003) p. 3.

<sup>126</sup> World Health Organization, ‘Mercury and health’ (21<sup>st</sup> March 2017) <<https://perma.cc/YJ2H-PZEJ>>.

<sup>127</sup> Cerrejón Report 2019 (n 50) p. 13.

<sup>128</sup> *ibid* p. 49. Cerrejón reports that it dumped 578 million litres of waste in 2019, primarily runoff water from dump sites and pits; this represented a 31% reduction in discharges as compared with 2018.

<sup>129</sup> *ibid*.

<sup>130</sup> Campos and Philippe (n 119) p. 35.

<sup>131</sup> The Report states that: ‘At Cerrejón, we steward the water catchments of the various streams that supply the Ranchería River and we also measure water quality with 45 different parameters. Those data tell us that the water meets all the indices established by Colombian regulations for water for household use and human consumption.’ Cerrejón Report 2019 (n 50) p. 13. It further states that: ‘We have a system of 29 sensors for the real-time monitoring of the quality and amount of surface water. These sensors measure diverse variables at key points, which lets us ensure our activities are carried out in compliance with regulations and do not affect either the quality or usage of water downstream of our operations.’ *ibid* p. 49. Cerrejón has also stated that it ‘annually take[s] more than 4,000 samples [of water from the River] to make physical, chemical and bacteriological analyses.’ Cerrejón, ‘How we use water from the Ranchería River in our operation’ (February 2020) <<https://perma.cc/XB9B-4P4H>>.

In December 2019, the Constitutional Court of Colombia found that:<sup>132</sup>

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

*Non-compliance with the discharge regulations [was identified] and the presence of oily liquid residues from the company, as well as coal-like material were found in the Ranchería River. In addition, discharges that were carried out without the corresponding permission were evidenced.*<sup>133</sup>

The Constitutional Court ordered Cerrejón to ‘prevent contamination of nearby water sources’ as an urgent matter.<sup>134</sup> To date, the order has not been complied with. Instead, Cerrejón criticised the Court’s ruling in its most recent Sustainability Report.<sup>135</sup> The Sustainability Report also makes repeated references to the fact that Cerrejón provides drinking water to affected communities.<sup>136</sup> However, as a network of NGOs has pointed out, potable water has been provided only to *some* of the affected communities and this measure fails to address the fact that Cerrejón has impeded access to water for 450,000 people.<sup>137</sup>

#### **E. Structural interferences with the hydrological system in La Guajira**

The Cerrejón mine is one of the largest consumers of water in La Guajira. The mine uses 24 million litres of water a day, enough to supply 150,000 people in regions without shortage problems.<sup>138</sup> In La Guajira, where the local population has adapted to the aridity of the region, this figure would be significantly lower. **In 2019, Cerrejón extracted 10,733 million litres of surface water**, including water from wetlands, rivers, lakes, and oceans.<sup>139</sup> 11 percent of its

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<sup>132</sup> Constitutional Court of Colombia, T-614 (n 55) p. 123, para 9.7.

<sup>133</sup> *ibid.*

<sup>134</sup> *ibid* para 11.14.

<sup>135</sup> Cerrejón Report 2019 (n 50) p. 51.

<sup>136</sup> *ibid* pp. 11-13, 25, 40, 43, and 45.

<sup>137</sup> See letters from ABColombia to the Corporación Autónoma Regional de la Guajira and to Cerrejón, 31<sup>st</sup> July 2018 <<https://perma.cc/8FHB-ELSR>>.

<sup>138</sup> DW (n 102); CAJAR, ‘Diez Verdades sobre Carbones Cerrejón’ (n 2).

<sup>139</sup> Cerrejón Report 2019 (n 50) p. 49.

total water extraction – 1,241 million litres of freshwater – was drawn directly from the Ranchería River.<sup>140</sup>

Cerrejón has also carried out various structural changes to the river's waterways. As part of its operations, **Cerrejón has diverted more than 17 streams<sup>141</sup> and damaged another 30.<sup>142</sup>** In 2016, Cerrejón decided to divert the Arroyo Bruno, a Ranchería tributary.<sup>143</sup> This decision was taken with the objective of increasing production from 32 to 40 million tonnes of coal per year.<sup>144</sup> The following year, a group of NGOs and community representatives challenged the diversion in court, adducing evidence of consequent damage to the ecosystem. These proceedings culminated in the Colombian Constitutional Court upholding an injunction suspending the diversion and expansion of the La Puente mining pit until an inter-institutional group could carry out a technical study on the uncertainties of the environmental and social impacts of the diversion, in order to assess its environmental viability.<sup>145</sup> Although the judgment required that 'the inter-institutional roundtable... must open sufficient participation spaces to the representatives of the acting communities',<sup>146</sup> according to civil society groups their views have not been taken into account.<sup>147</sup> The diversion of the Arroyo Bruno remains in place.<sup>148</sup>

**In June 2020, the lack of compliance with the Constitutional Court's judgment relating the Arroyo Bruno was the subject of a pronouncement by the Colombian Contraloría (i.e. Controller General),<sup>149</sup> which published an 89-page report criticising this inaction.<sup>150</sup> The Contraloría highlighted the failure to properly comply with the eighth order in the *Arroyo***

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<sup>140</sup> *ibid*: 'Rainwater runoff and coal seam water provide 89% of the water used in our processes, primarily for reducing particulate matter emissions. The remaining 11% is freshwater withdrawn from the mid-valley of the Ranchería River and its alluvial aquifer...' Freshwater extraction is shown to total 1,241 megalitres.

<sup>141</sup> Colombia, Ministerio de Ambiente, Resolución 2097 de 2005 <<https://perma.cc/Q6SL-XAWG>>.

<sup>142</sup> Ramírez (n 2).

<sup>143</sup> Lydia James, 'British multinational disobeys Colombia court by diverting water source' (London Mining Network, 8 July 2019) <<https://perma.cc/LZE9-J8JT>>.

<sup>144</sup> Discussion with CINEP.

<sup>145</sup> Colombian Constitutional Court, SU698/17 (n 52), Orders 3, 4, 8 and 9.

<sup>146</sup> *ibid* Orders 3 and 4.

<sup>147</sup> Discussion with CAJAR.

<sup>148</sup> Richard Solly, 'Saving the river: the struggle for Colombia's Arroyo Bruno' (London Mining Network, 20 July 2019) <<https://perma.cc/CSX7-8G4B>>; Colectivo de Abogados José Alvear Restrepo (CAJAR), 'Carbones de Cerrejón mantendrá taponado el Arroyo Bruno desconociendo fallo de la Corte Constitucional' (12 June 2019) <<https://perma.cc/BD9F-L963>>.

<sup>149</sup> The Contraloría General de la República de Colombia (Officer of the Comptroller General of Colombia) is the Colombian independent governmental institution responsible for fiscal control and monitoring of public expenditure.

<sup>150</sup> Contraloría General de la República, Informe de Auditoría de Cumplimiento, 'Aspectos Ambientales de la Sentencia SU-698/17 en relación con el proyecto de desvío de cauce del Arroyo Bruno' (June 2020) <<https://perma.cc/6SCN-ZFYG>>.

*Bruno* judgment, which had required that the tributary be returned to its natural course while an inter-institutional round-table could decide on the long-term implications of its diversion.<sup>151</sup> It also highlighted a number of deficiencies in the round-table's decision-making, and concluded that since the group had failed to make a final and substantive decision on the future of the Arroyo Bruno, the judgment had not been properly complied with.<sup>152</sup>

The Contraloría also explained that:

*Despite the El Cerrejón mining operation and its subsequent modifications having been authorized since 1983... the expansion of the exploitation area, which [resulted in] interventions such as the diversion of the Arroyo Bruno channel, [and other] modifications are not in accordance with the current environmental legal regime.*<sup>153</sup>

Cerrejón has carried out activities which would ordinarily contravene domestic environmental law, such as expanding the mine without completion of an adequate environmental impact assessment. Cerrejón contends that such actions are lawful because its environmental licence was issued in 1983, and as such it need only comply with environmental law as it stood in 1983.<sup>154</sup> The legality of Cerrejón relying on its old licence in this way is currently the subject of litigation in Colombia.<sup>155</sup>

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

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

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<sup>151</sup> Colombian Constitutional Court, SU698/17 (n 52), Eighth Order.

<sup>152</sup> Contraloría General de la República (n 150).

<sup>153</sup> *ibid* p. 4.

<sup>154</sup> On Cerrejón's use of its original licence, which has been subject to sixty modifications, see Richard Solly, 'Legal action against Cerrejón Coal's environmental licence' (n 61).

<sup>155</sup> The case will be determined by El Consejo de Estado, the High Court of Administrative Affairs in Colombia.



*capture processes, a situation that would lead to possible supply costs due to the low availability of water resources and consequent desertification of the area.*<sup>156</sup>

It also noted the possible consequences that this failure could have for fires in the region.<sup>157</sup>

Cerrejón's activities have thus caused irreparable damage both to the hydrographic basin of the Ranchería River<sup>158</sup> and beyond. Experts have further noted that '[t]he Ranchería River [was] a natural retainer of the biodiversity of Sierra Nevada. Without the river, the Sierra will gradually become desertified.'<sup>159</sup> Cerrejón's structural interventions also affect underground water: experts have noted that 'the underground water is the most affected by the mining'.<sup>160</sup>

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

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

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

*...there is a particularly critical situation of [food and water] shortages in the territories of the Wayúu communities of La Guajira... In this same region, the communities have been denouncing the **impacts caused by coal extraction**, such as loss of territories, loss of bodies of water, adverse effects on health, adverse effects on traditional culture, and **threats to food security**... In this process, the communities have resorted to court actions...*<sup>161</sup>

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<sup>156</sup> Contraloría General de la República (n 150) pp. 83-84.

<sup>157</sup> *ibid* p. 84.

<sup>158</sup> Tathiana Montaña, 'La desviación del Río Ranchería: algunos elementos a consideración' (Notas visita Riohacha 16-18 October 2012, Indepaz) <<https://perma.cc/U8KA-QQJ7>>.

<sup>159</sup> *ibid*.

<sup>160</sup> *ibid*. See also Constitutional Court of Colombia, T-614 (n 55) p. 123, para 9.7: 'the surface and underground water sources of [the Provincial] community were being affected by the Cerrejón operations, due to... the disappearance and alteration of channels and aquifers.'

<sup>161</sup> Defensoría del Pueblo, *XXVI Informe del Defensor del Pueblo al Congreso de la República, Parte I - Informe Analítico: Situación de los Derechos Humanos y Derecho Internacional Humanitario en Colombia – 2018* (July 2019) pp. 151-152 <<https://perma.cc/QNF5-GT7P>>.

One example of a court action is the above-mentioned judgment concerning the diversion of the Arroyo Bruno. In that case, the Colombian Constitutional Court concluded that **the reduction in access to water for use in agriculture, the reduction in access to drinking water, and uncertainty about the ecological effects of the diversion, constituted a ‘concrete, certain and direct threat to the rights of water, health, and food security and sovereignty of the communities dependent upon the Arroyo Bruno.’**<sup>162</sup> The Contraloría subsequently noted that ‘the threat to the rights to health, water and food security of the indigenous communities affected by the project to divert the channel of the Arroyo Bruno by the company Carbones del Cerrejón Limited, a threat that was recognized by the Constitutional Court’ had not been addressed.<sup>163</sup>

Water scarcity, and the food scarcity to which it gives rise, has particularly affected children in La Guajira.<sup>164</sup> In 2015, the Wayúu communities from High Guajira submitted a complaint to the Inter-American Commission on Human Rights about the shortage of water associated with the operations of the Cerrejón mine. The communities requested urgent measures of protection against the risk to their lives and personal integrity caused by the ‘lack of access to drinking water and the state of malnutrition that this causes to members of the community, especially girls and boys’.<sup>165</sup> The Inter-American Commission on Human Rights granted the interim measures requested, but the situation has not improved.<sup>166</sup>

### **G. Context of climate change**

The impacts described above take place in a context of significant vulnerability to climate change. The Colombian governmental agency IDEAM (the Institute of Hydrology, Meteorology and Environmental Studies), in collaboration with the UN Development Program, has predicted that in La Guajira the main effects of global climate change will be felt on the **agricultural and livestock** sectors, with particular impacts on food crops.<sup>167</sup> The report notes that **decreased water** in the ecosystem ‘could continue to be one of the main effects [of global

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<sup>162</sup> Colombian Constitutional Court, SU698/17 (n 52) Consideration 5.7.4.

<sup>163</sup> Contraloría General de la República (n 150) p. 13.

<sup>164</sup> Carolina Mila, ‘La sed de los niños Wayuu’ (Semana Sostenible, 13 July 2018) <<https://perma.cc/4ZMP-U5HH>>.

<sup>165</sup> Inter-American Commission on Human Rights, Resolution 60/2015 (n 46) p. 1. These relevant communities were from the municipalities of Uribía, Manaure, Riohacha y Maicao.

<sup>166</sup> See, for example, Colombian Constitutional Court, T-302/17 (n 72).

<sup>167</sup> Institute of Hydrology, Meteorology and Environmental Studies and United Nations Development Program, *Nuevos escenarios de Cambio climático para Colombia 2011-2100* (2015) <<https://perma.cc/7JB8-8LAT>> p. 40.

climate change] in the [region], affecting health due to nutritional factors related to food security. Diseases... could be accentuated.’<sup>168</sup>

Cerrejón’s activities have already contributed to water shortages on a local level in La Guajira,<sup>169</sup> and global climate change is also inextricably linked to the enterprise’s activities. Cerrejón operates the largest open cast coal mine in Latin America, and sells much of its coal to energy companies. The energy sector is responsible for some 40 *percent* of global carbon dioxide emissions,<sup>170</sup> and almost two-thirds of these emissions come from coal.<sup>171</sup> Coal is a particularly dirty fuel: its combustion emits more carbon dioxide per thermal unit than any other fossil fuel.<sup>172</sup> Water shortages in La Guajira, which have been caused by Cerrejón’s coal mining, are now being exacerbated by global climate change which is in part caused by coal combustion. Cerrejón’s activities thus combine to heighten the severity of the adverse impacts felt in La Guajira.

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

Over the past forty years, Cerrejón has forcibly displaced thousands of individuals from Wayúu, Afro-Colombian, and campesino (rural subsistence farmer) communities in La Guajira.<sup>173</sup> The first example of this was in 1981, when 750 residents from the Wayúu village of Media Luna were displaced to make way for the construction of Puerto Bolívar.<sup>174</sup> Cerrejón entered into collective relocation negotiations with the residents, but these broke down after a number of residents were threatened by company employees.<sup>175</sup> The inhabitants were subsequently forcibly relocated.<sup>176</sup> When the initial relocation site turned out to be unsuitable,

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<sup>168</sup> *ibid.*

<sup>169</sup> See Section III E.

<sup>170</sup> UN News, ‘Is the world ready to end the coal era and embrace clean energy?’ (29 November 2019) <<https://perma.cc/RNS9-59CA>>.

<sup>171</sup> The World Bank, *Understanding CO2 Emissions from the Global Energy Sector* (2014/15) <<https://perma.cc/RS42-HKJR>>.

<sup>172</sup> See U.S. Energy Information Administration, ‘How much carbon dioxide is produced when different fuels are burned?’ <<https://perma.cc/HU8S-354A>>.

<sup>173</sup> Noel Healy, Jennie C Stephens and Stephanie A Malin, ‘Embodied energy injustices: Unveiling and politicizing the transboundary harms of fossil fuel extractivism and fossil fuel supply chains’ 48 (2019) *Energy & Social Science* 219, 224.

<sup>174</sup> Remedios Fajardo Gómez, ‘The Systematic Violation of the Human Rights of the Indigenous People, Black people and Campesinos by the Coal Mining Multinationals in the Department of La Guajira, Colombia’ in Chomsky, Leech and Striffler (eds), *The People Behind Colombian Coal* (Casa Editorial Pisando Callos, 2007) pp. 19-20.

<sup>175</sup> Dennis Rømer Adamsen, Anne Sofie Poulsen and Maren Urban Swart, ‘The Curse of Coal: Our consumption causes diseases, pollution, and poverty in Colombia’ (Danwatch, 2010) <<https://perma.cc/3SSQ-T5BK>> p. 9.

<sup>176</sup> Christian Aid, *Undermining Human Rights* (n 6) p. 20.

the inhabitants were told to move again.<sup>177</sup> Seven families refused to do so, and Cerrejón subsequently built a fence around their homes and stationed armed guards in the area.<sup>178</sup>

Another example of community displacement by Cerrejón is the eviction of 1,200 Afro-Colombian residents of the community of Tabaco in 2001.<sup>179</sup> The eviction was carried out by police, armed guards, and the military.<sup>180</sup> Bulldozers were used to demolish the village.<sup>181</sup> The Colombian Supreme Court ordered that the village be reconstructed,<sup>182</sup> but this order was not followed.<sup>183</sup> Complaints were subsequently lodged with the Australian and Swiss NCPs in respect of two of Cerrejón's parent companies.<sup>184</sup> These NCPs, as well as the UK NCP, facilitated negotiations between the complainants and Cerrejón's parent companies. In 2008, a settlement agreement was concluded.<sup>185</sup>

However, this agreement was concluded by a small number of arbitrarily selected leaders, and was never democratically ratified by the Tabaco community as a whole.<sup>186</sup> Moreover, the enterprise's responsibilities focused on compensation, as opposed to substantive remediation of the harms caused.<sup>187</sup> In 2017, the Colombian Constitutional Court pointed out that the displacement of the Tabaco community **'cannot be treated exclusively as a problem of compensation'**.<sup>188</sup> The more substantive obligations – such as the requirement to provide housing and infrastructure to replace that which was destroyed – were passed on to the local

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<sup>177</sup> *ibid.*

<sup>178</sup> *ibid.*

<sup>179</sup> Rømer Adamsen et al (n 175) p. 7.

<sup>180</sup> Karin Gregow, *As Black as Coal: Business and human rights with a focus on coal mining in Colombia* (Forum Syd 2016) <<https://perma.cc/4LLP-EK5N>> p. 17.

<sup>181</sup> *ibid.*

<sup>182</sup> Colombian Supreme Court, Chamber for Civil Cases, Decision No. 0014-01 of 7 May 2002.

<sup>183</sup> Gregow (n 180) pp. 16-17

<sup>184</sup> See Patrick Colmer, *Statement by the Australian National Contact Point: BHP Billiton – Cerrejon Coal Specific Instance*, 12 June 2009 <<https://perma.cc/78TQ-6HHG>>; National Contact Point of Switzerland, *Specific Instance Cerrejon Coal Mine, Columbia: Closing Statement*, 15 July 2009 <<https://perma.cc/C2P7-5HJZ>>. The UK NCP was involved in the mediation process but did not issue a public statement as it had not received a complaint.

<sup>185</sup> *ibid.*

<sup>186</sup> Tabaco representatives (Luis Carlos Romero Daza, Samuel Arregoces, Rogelio Manuel Ustate Arregoces, Kendris Deluquez, Ines Estela Perez Arregoces, Juana Díaz de Medina, Yenis Cecilia Zambrano, Édgar Enrique Arregoces Arregoces, Argemiro Pérez, and Antonio Manuel Solano Arregoces), 'Manifiesto Istanacia Coordinadora Comunidad de Tabaco' (February 2020). The leaders also note that the displacement of the community has led to a breakdown in social cohesion and collective identity.

<sup>187</sup> *ibid.*

<sup>188</sup> Colombian Constitutional Court, T-329/17 (n 57) para 4.7.

authority, which failed to comply with the agreement.<sup>189</sup> As a result, the Tabaco community remains dispossessed to this day.<sup>190</sup>

In 2019, Paul Warner – the BHP representative who negotiated the 2008 agreement and who previously had direct responsibility for its implementation – noted that an enterprise cannot, ‘having handed [the requirement to provide housing to displaced communities] off to local government... leave the issue of adequate housing unaddressed when that local government ultimately proves unwilling or unable [to provide it]’.<sup>191</sup> On this basis, he accepted that **‘the time has come for Cerrejón to assume responsibility for providing Tabaco with the housing and infrastructure that is part of a socially responsible resettlement process.’**<sup>192</sup> The enterprise nonetheless still to fail to act.

In October 2020, a group of community representatives issued a statement setting out the continuing inadequacy of ostensible remediation efforts, and made the following requests:<sup>193</sup>

- i. That a consultation process be initiated with the Tabaco community in order to reach agreements with those who have received no reparations for the violations of their rights;
- ii. That future meetings between the enterprise and the community be observed by a supervising committee comprised of, *inter alia*, members from the Office of the Attorney General, the Office of the Ombudsman, and the Office of the Contraloría, as stipulated by the Colombian Court’s 2017 judgment;<sup>194</sup>
- iii. That future meetings be attended by individuals from both the enterprise and the local government who have the power to make decisions;
- iv. That the continuing impacts on the Tabaco community be identified, acknowledged and reflected in the reparations;
- v. That this process begin with the allocation of a budget, the development of an action plan, and an initial schedule for work lasting no longer than three months;

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<sup>189</sup> Letter from Paul Warner to Aviva Chomsky, 8 July 2019.

<sup>190</sup> Eliana Mejía, ‘El drama de un pueblo que lleva casi 20 años esperando su reubicación’, (*El Tiempo*, 28<sup>th</sup> May 2020) <<https://perma.cc/VE56-K8NG>>. See also Richard Solly, ‘Ten years on from the independent evaluation of Cerrejón Coal’ (London Mining Network, 17 September 2018) <<https://perma.cc/ZC3Q-V5ZS>>; and Lydia James, ‘Tabaco, Colombia: still no justice after 18 years’ (London Mining Network, 9 August 2019) <<https://perma.cc/5PFQ-CKLH>>.

<sup>191</sup> Letter from Paul Warner to Aviva Chomsky, 8 July 2019.

<sup>192</sup> *ibid.*

<sup>193</sup> Tabaco representatives (n 186).

<sup>194</sup> Colombian Constitutional Court, T-329/17 (n 57) para 10.2.

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

Cerrejón has not responded to this statement.

**The Tabaco community is not alone in its experience of displacement.** In 2016, eight Afro-Colombian families refused to be resettled when Cerrejón failed to provide guarantees on the conditions of their relocation.<sup>195</sup> Tear gas and metal projectiles were used to force the families out, and several individuals were seriously injured.<sup>196</sup> By way of other examples, the communities of Manantial, Las Mulas, Oreganal, El Descanso, and Sarahíta have all been displaced, have not been reaccommodated, and have not received any reparation.<sup>197</sup>

Even when Cerrejón claims to have sought the consent of local communities in relation to displacement, the process has been shown to be fundamentally flawed.<sup>198</sup> In 2012, for example, Cerrejón proposed to divert the Ranchería River.<sup>199</sup> Widespread protests broke out, with local groups arguing that the compensation offered by Cerrejón was insufficient to offset the damage which would be caused to the ecosystem in La Guajira.<sup>200</sup> Jackeline Romero, a member of the Wayúu Women's Force Movement, described the 'consultation' process as follows:

*The Ministry of Interior and the company held a meeting... in which they told the community: 'here's a project', and described its benefits. Sometimes money was given out, but never information about the project's pros and cons. The process would end up being a buy-sell agreement with the communities, which is illegitimate because the process had not provided all the tools for proper community participation.*<sup>201</sup>

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

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<sup>195</sup> Richard Solly, 'Cerrejón Coal: brutal evictions of villagers resisting relocation' (London Mining Network, 26 February 2016) <<https://perma.cc/M8KE-WRPW>>.

<sup>196</sup> *ibid.* Cerrejón has stated that it 'laments what occurred on that day', Cerrejón Statement on the Christian Aid Report (21 February 2020) (on file with authors) p. 4.

<sup>197</sup> CINEP (n 49) pp. 59-102, p. 77.

<sup>198</sup> U.S. Office on Colombia, 'Large-scale mining in Colombia: Human rights violations past, present and future' (May 2013) <<https://perma.cc/JM5T-UL4Q>> p. 28

<sup>199</sup> *ibid.* p. 26.

<sup>200</sup> *ibid.* p. 28.

<sup>201</sup> U.S. Office on Colombia (n 198) p. 29.

that production growth required the extraction of 500 million tons of coal from under the Ranchería River.<sup>202</sup>

Cerrejón was ultimately taken to court, and in September 2012 the Criminal Cassation Chamber of the Supreme Court found that there had been a violation of the right to prior consultation for indigenous and Afro-descendant communities.<sup>203</sup> The diversion was subsequently suspended, with Cerrejón citing changes in the coal market.<sup>204</sup>

The International Council on Mining and Metals (ICMM), a group of extraction companies to which all the parent companies belong,<sup>205</sup> references the above series of events as a case study for *good practice* in relation to indigenous peoples and mining.<sup>206</sup> The Council reports that the process of securing the free prior and informed consent of the local communities was ‘carried out according to best practice’ and that ‘[d]uring the whole process, Cerrejón... reconfirmed that it would not carry out the expansion project without the communities’ approval’.<sup>207</sup> This directly conflicts with the Supreme Court ruling.

As explained above, Cerrejón diverted another waterway in 2016: the Arroyo Bruno tributary. Within months, the Council of State had ordered that this diversion be suspended and that prior consultation take place with more than 25 communities.<sup>208</sup> The following year, the Colombian Constitutional Court ordered that the diversion be suspended for a full assessment of its foreseeable environmental and social impacts to be carried out (as explained above).<sup>209</sup> Applying the precautionary principle, the court highlighted that the following uncertainties, among others, would have to be considered:<sup>210</sup>

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

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<sup>202</sup> *ibid* p. 26.

<sup>203</sup> Judgment of the Criminal Cassation Chamber of the Supreme Court of Justice of 13 September 2012.

<sup>204</sup> Cerrejón, ‘Cerrejón Postpones Studies on the Possible Diversion of the Ranchería River’ <<https://perma.cc/7QAA-HD54>>.

<sup>205</sup> Anglo American and BHP are founding members of ICMM. See ICMM, ‘Company members’ <<https://perma.cc/E49W-58EN>>.

<sup>206</sup> International Council on Mining & Metals, ‘FPIC and Expansion Project’ <<https://perma.cc/J783-DUC5>>.

<sup>207</sup> *ibid*.

<sup>208</sup> See Indepaz, ‘Una consulta previa sin garantías: El caso del arroyo Bruno’ <<https://perma.cc/4KKD-R2WM>>.

<sup>209</sup> Colombian Constitutional Court, SU698/17 (n 52).

<sup>210</sup> *ibid* para 5.1.

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

**This evaluation has still not been completed, and legally Cerrejón remains under an obligation to return the stream to its natural channel as a precautionary measure until the study is carried out.**<sup>211</sup> In 2019, Cerrejón representatives stated that restoration of the tributary was no longer feasible.<sup>212</sup> In June 2020, the Contraloría found that there had been a failure to properly consider the evidence and reach a determinative conclusion about the future of the tributary.<sup>213</sup>

The El Rocío community, which lives close to the Arroyo Bruno, is now also facing eviction.<sup>214</sup> The land on which the communities live may technically be owned by private individuals, although this legal title appears to have been granted in contravention of laws against sale of indigenous property.<sup>215</sup> Cerrejón recently expressed interest in purchasing these lands, and the private landowners began to explore eviction options.<sup>216</sup> In October 2019, Cerrejón stated that it had commenced ‘consultation... with the communities of El Rocío’, as well as other communities living close to the Arroyo Bruno, **‘to identify, and compensate for, possible**

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<sup>211</sup> Discussion with CAJAR, November 2020.

<sup>212</sup> Richard Solly, ‘Saving the river’ (n 148).

<sup>213</sup> Contraloría General de la República (n 150).

<sup>214</sup> ABColombia, Letter of Concern to Colombian Government: Forced Eviction of El Rocío (27 August 2019) <<https://perma.cc/5VMM-FD3D>>; Cerrejón newsletter October 2019: ‘Prior consultation process begins with Tigre Pozo and El Rocío communities’ <<https://perma.cc/KL9F-UELC>>.

<sup>215</sup> El Tiempo, ‘La disputa por un predio clave para el agua de La Guajira’ (26 November 2019) <<https://perma.cc/8K8N-2DAM>>. In 1989, the State granted ownership of this 18-hectare plot to private landowners. This award was apparently in contravention of the law against such awards for any purpose other than the establishment of an indigenous reservation.

<sup>216</sup> *ibid.* The community has also faced forcible displacement by armed groups apparently linked to the private landowners at various points since 1998.



effects caused by... [the] diversion' of the stream.<sup>217</sup> In other words, the consultations appear to be premised on the assumption that the tributary will not be returned to its natural course, and that the communities of El Rocío and Tigre Pozo will therefore be displaced.<sup>218</sup> According to the ICMC case study, one of the 'lessons learned' by Cerrejón following its previous attempt to divert the Ranchería was that 'communities have the expectation of resolving all of their needs through a *prior* consultation process', rather than 'receiving compensations according to the impacts of a project'.<sup>219</sup>

### I. Destruction of cultural heritage

The Wayúu normative system, which includes a set of principles, procedures and rites that govern the social and spiritual conduct of the community, has been inscribed in the List of Intangible Cultural Heritage of Humanity of UNESCO.<sup>220</sup> Yet the environmental devastation of La Guajira, and the forcible displacement of its people by the mine, has led to irreparable cultural harm. The cultural heritage of the Wayúu is inextricably linked to their ancestral lands.<sup>221</sup> As one member of the displaced Tabaco community explains:

*We ethnic communities, Afro-descendant and Wayúu, have always lived off of agriculture, fishing, hunting, and from herding our animals. We have a spiritual anchor to our land... Because we have been displaced, we have lost our sacred places, our meeting places, we have lost our ancestral medicine.*<sup>222</sup>

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

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

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<sup>217</sup> Cerrejón newsletter (n 214).

<sup>218</sup> As previously noted, the diversion of the Arroyo Bruno remains in place contrary to the decision of the Constitutional Court: Richard Solly, 'Saving the river' (n 148).

<sup>219</sup> International Council on Mining & Metals (n 206). Emphasis added.

<sup>220</sup> See UNESCO, Intangible Cultural Heritage, 'Wayuu normative system, applied by the Pütchipü'üi (palabrero)' (2010) <<https://perma.cc/X66V-QTEP>>.

<sup>221</sup> Katrin Blanta, 'Interdependency and Interference: The Wayuu's Normative System and State-based Conflict Resolution in Colombia' (Berghof Foundation, 2016) p. 12 <<https://perma.cc/CYV7-ANTU>>.

<sup>222</sup> Statement by Rogelio Ustate Arrogoes, see Hilda Lloréns and Ruth Santiago, 'Coal's Open Wounds / Las Heridas Abiertas del Carbón' (NACLA, 28 September 2018) <<https://perma.cc/6XYB-WT2V>>.

*intrusion into our culture and fragmented our communities, families and friendships forged over 400 years ago.*<sup>223</sup>

...

*The soil was fertile, it allowed the grazing of goats, sheep and cows; yucca, ahuyama, bananas, corn, millet, melon... were cultivated, there was also a great variety of wild fruits. In the mornings the melodious songs of the birds could be heard, and throughout the day, the springs ran from the source to the mouth, along with the rain watering the green grass and the immense trees of caracolí, oak, trupillo, jobo, ceiba, guáimaro, cotoprix, mamoncillo and the algarrobillos that refreshed us and produced fruits and food for domestic and wild animals. We felt privileged with the water sources that gave us the precious liquid for our families, such as the Ranchería River, the streams, jagüeyes and springs of crystalline waters.*<sup>224</sup>

The Guáimaro tree provides an example of how environmental destruction caused by the mine has led to both the food insecurity detailed above, and to a loss of cultural heritage. The Guáimaro tree is a sacred tree for the Wayúus. It bears fruits and nuts, with food properties that are even superior to those of avocado.<sup>225</sup> It has as much protein as milk, four times more potassium than bananas, as much iron as spinach, and four times the magnesium of red beans.<sup>226</sup> Thanks to its roots that extend up to 50 metres deep into the earth, it is resistant to droughts and hurricanes.<sup>227</sup> It can live 100 years and is productive until its death.<sup>228</sup> The tree was revered by the Wayúu for its medicinal properties capable of treating respiratory diseases and rheumatism.<sup>229</sup> The Guáimaro tree is now on the brink of extinction, in part because of water shortages and structural changes to the hydrological system caused by Cerrejón's

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<sup>223</sup> CINEP (n 49) p. 65

<sup>224</sup> *ibid* p. 67.

<sup>225</sup> *El País*, 'Guáimaro, guardián ambiental nacido de la entraña de la Tierra' (22 March 2018) <<https://perma.cc/7YMM-H5GC>>.

<sup>226</sup> *El Nuevo Siglo*, 'Guáimaro, guardián ambiental nacido de la entraña de la Tierra' (19 March 2018) <<https://perma.cc/K3G7-C493>>.

<sup>227</sup> CAJAR, 'Diez Verdades sobre Carbones Cerrejón' (n 2) p. 17

<sup>228</sup> *ibid*.

<sup>229</sup> *ibid*.

activities.<sup>230</sup> As a result, the Wayúu and Afro-Colombian communities can no longer engage in the cultural and commercial practices associated with this tree.<sup>231</sup>

Other surviving flora of cultural significance have also been harmed by pollution generated by Cerrejón's operations: in its December 2019 judgment, the Constitutional Court found that 'the flora of the region [has been] affected by its proximity to the mining complex, causing constant exposure to pollution and the accumulation of particle material.'<sup>232</sup> The loss of indigenous plants has impaired the practice of customary traditional medicine by the people of La Guajira.<sup>233</sup>

As well as devastation of the natural environment, Cerrejón's expansion has led to the destruction of indigenous communities' churches and cemeteries.<sup>234</sup> The bulldozing of sacred sites is a direct incursion into the cultural heritage of the Wayúu people. On a spiritual level, community members have also explained how the train which runs between the Cerrejón mine and Puerto Bolívar disrupts their dreams.<sup>235</sup> Dreams hold spiritual significance for the Wayúu people. One member of the Wayúu community of Paradero explains:

*My mother is a dreamer and the train interrupts her dreams and she is unable to continue dreaming once she is awake. And this is upsetting because her dreams are a source of important information for us.*<sup>236</sup>

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<sup>230</sup> CINEP, *Noche y Niebla 61* (June 2020) <<https://perma.cc/95UE-9W5D>> pp. 84-85; AIDA, CAJAR, and the Global Initiative for Economic, Social and Cultural Rights, *Parallel Report on Colombia for the Committee on the Elimination of Racial Discrimination (CERD): Climate Change and Ethnic Communities in La Guajira* p. 8 <<https://perma.cc/5T5M-BGH2>>. See Sections II D and E on Cerrejón's impacts on water in La Guajira. In its submission for the *Arroyo Bruno* case, Cerrejón tacitly accepted that its structural interventions into La Guajira's hydrological system have contributed to the loss of the tree. See Colombian Constitutional Court, SU698/17 (n 52) para 6.3.2.5: 'Of course... it will take a while for the riparian forest conditions to return to [their natural state]. You cannot have that forest overnight, but we are... even planting... the Guáimaro as recommended by the communities themselves.'

<sup>231</sup> *El Espectador*, Ambiente 'Guáimaro, el árbol que renace para luchar contra la desnutrición en Colombia' (20 March 2018) <<https://perma.cc/XK9M-RA7V>>.

<sup>232</sup> Constitutional Court of Colombia, T-614 (n 55) p. 123, paragraph 9.7.

<sup>233</sup> The Wayúu, Afro-Colombian and campesinos communities have traditionally used over 170 types of plants in their medicines. The growth of these plants has been impeded by the operation of the mine. CINEP (n 49) p. 84.

<sup>234</sup> CINEP (n 49) p. 75. In particular, the communities of Palmarito, Caracolí, Espinal, and Tabaco have been affected.

<sup>235</sup> ABColombia webinar, 'How Mining Companies Silence and Nullify the Actions of Indigenous Peoples to Protect their Rights: Case Study Carbones de Cerrejón' (11<sup>th</sup> September 2020); Lloréns and Santiago (n 222).

<sup>236</sup> Lloréns and Santiago (n 222).

The damage caused to the cultural property and identity of indigenous people in La Guajira – a region where almost half of the population is indigenous<sup>237</sup> – is both immeasurable and irremediable.

## **J. Inadequate response to threats against activists**

Harassment and violence towards human rights and environmental defenders is a significant problem in Colombia.<sup>238</sup> Since January 2016, at least 734 environmental and human rights activists have been murdered.<sup>239</sup> In La Guajira, community leaders routinely receive death threats and intimidation from right-wing paramilitary organisations such as Las Aguilas Negras (The Black Eagles).<sup>240</sup> In March 2020, Las Aguilas Negras circulated pamphlets identifying various human rights defenders, including several members of the Fuerza de Mujeres Wayúu (Wayúu Women’s Force), as targets for violence.<sup>241</sup> In June 2020, the president of Nación Wayúu, an NGO which defends the human rights of the Wayúu people, received a floral wreath at the entrance to his home with a note reading: ‘your funeral is approaching’.<sup>242</sup>

The activists who face threats of violence are often those who speak out against Cerrejón.<sup>243</sup> Moreover, threatening incidents often take place before or after hearings and judicial actions presented by indigenous peoples opposing Cerrejón’s operations.<sup>244</sup> Indeed, one convicted paramilitary leader has stated that he met with a mine official to discuss the assassination of Cerrejón union members;<sup>245</sup> and other paramilitaries have stated that they ‘watched over El Cerrejón’.<sup>246</sup> As a result, some leaders of groups opposing Cerrejón’s projects have had to

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<sup>237</sup> Christian Cwik, ‘Displaced Minorities: The Wayuu and Miskito People’ in Steven Ratuva (ed), *The Palgrave Handbook of Ethnicity* (Palgrave, 2019) <<https://perma.cc/LWN3-F93K>>.

<sup>238</sup> UN News, Colombia: “Terrible trend” of rights defenders killed, harassed; UN calls for “significant effort” to tackle impunity’, 10 May 2019 <<https://perma.cc/ZQ79-9D2Z>>. See also letter from ABColombia to Irish Minister Simon Coveney, 2 August 2019 <<https://perma.cc/ZDB4-CVLH>>.

<sup>239</sup> Luis Jaime Acosta, ‘Miles de personas marchan en Colombia para exigir cese de violencia contra líderes sociales’ (Reuters, 27 July 2019) <<https://perma.cc/5AXL-2GBB>>.

<sup>240</sup> Sandra Guerrero, ‘Ola de amenazas contra líderes, funcionarios y víctimas en La Guajira’ (El Heraldo, 10 June 2019) <<https://perma.cc/6P8K-DUE3>>.

<sup>241</sup> Fuerza de Mujeres Wayúu (Wayúu Women’s Force), ‘Comunicado a la Opinión Pública y a la Comunidad Nacional e Internacional Sobre Las Recientes Amenazas por Medio de Panfletos de las Aguilas Negras – Comando Central Bloque Capital D.C.’ (12 March 2020) <<https://perma.cc/F7U3-ZFYQ>>.

<sup>242</sup> See formal complaint, 17 June 2020 <<https://perma.cc/KY3L-L7RP>>.

<sup>243</sup> Consultation with CINEP, CAJAR and AIDA, 5<sup>th</sup> October 2020; ABColombia webinar (n 235); CINEP (n 49) p. 100.

<sup>244</sup> Consultation with CINEP, CAJAR and AIDA, 5<sup>th</sup> October 2020.

<sup>245</sup> Victoria McKenzie & Steven Cohen, ‘Death and Displacement: A USAID Export’ (2018) 50(2) NACLA Report on the Americas 128, 131.

<sup>246</sup> *ibid.*

request special protection under the National Protection Unit schemes, which involves wearing a bulletproof vest and carrying a panic button.<sup>247</sup>

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

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

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

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

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

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<sup>247</sup> Letter to Director of the National Protection Unit Re: Urgent action required to guarantee the rights and safety of defenders, social leaders, and communities in the context of COVID-19 pandemic and obligatory social isolation measures (Bogotá, May 2020) <<https://perma.cc/EW8W-VSD6>>; letter to Colombia Vice-president concerning the security risks by indigenous leader Samuel Arregoces and the insufficient response by the National Protection Unit, dated 11 September 2019.

*throughout 2019 that there are three issues hindering the exploitation and export of coal [namely, inter alia]: i) "greater social, judicial and media activism against them, which has made it difficult to advance mining projects such as La Puente" [...]*<sup>248</sup>

CINEP's brief further remarked that:

*This aggressive situation of pointing out [people opposing Cerrejón's projects] and [their] stigmatization was multiplied by social networks condemning the ethnic communities that defend the territory and the human rights organizations as "obstacles to development" or a "threat to the economy of the department and the country", which has had the effect of discouraging and intimidating participation in actions taken in defence of the territory, in addition to increasing the risk situation and the vulnerability of the plaintiffs and the Wayúu communities who disagree with the expansion of the La Puente pit which require the diversion of its most important water source.*<sup>249</sup>

Although Cerrejón has publicly condemned violence and intimidation against human rights defenders and union leaders,<sup>250</sup> community leaders report that Cerrejón's media efforts have fuelled hostility against them.<sup>251</sup> For example, Cerrejón's former president recently stated in a media interview that 'the attitude of the communities has to change... the wellbeing of the country has to come before that of a few communities. These communities are sometimes the only beneficiaries, with lawyers and some NGOs... profiting from these processes against our companies.'<sup>252</sup>

In February 2020, Cerrejón issued a response to Christian Aid's report, which had highlighted concerns about the effects of such statements.<sup>253</sup> The response stated that:

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<sup>248</sup> CINEP, Brief before Juzgado 20 de Ejecución de Penas y Medidas de Seguridad de Bogotá, 26 December 2019, p. 9.

<sup>249</sup> *ibid* p. 10.

<sup>250</sup> See, for example, Cerrejón, 'Cerrejón condemns threats against fuerza de mujeres Wayúu leaders and sintracarbón's Igor Díaz and requests prompt investigations from authorities' (16 May 2019) <<https://perma.cc/F35E-TFLT>>.

<sup>251</sup> Christian Aid, *Undermining Human Rights* (n 6) p. 28. See also PAX communication with Bettercoal, email of 18<sup>th</sup> December 2017, FOI doc 264 (on file with authors): 'it's one thing to make statements to European actors that you condemn violence and threats, it's something else to actually contribute to addressing these threats.'

<sup>252</sup> Jorge Hernán Peláez, Interview with Cerrejón President Guillermo Fonseca, 'La dinámica de las comunidades tiene a Cerrejón parado y a otras industrias' (La República, 9 February 2019) <<https://perma.cc/44HV-CGWC>>.

<sup>253</sup> Christian Aid, *Undermining Human Rights* (n 6) p. 28

*Cerrejón has heard the complaints from specific communities regarding the effect of some public messages about the company's future and the impact these have had on the safety of community leaders. We take these comments seriously and have revised our messages to ensure that the company is transparent about current economic challenges without placing anyone at risk.*<sup>254</sup>

In the very same document, Cerrejón also stated that:

*...we comply with laws, ruling and treaties, standards, and commitments agreed with the community, not calls by activists which appear to only give voice to the views of critical stakeholders...*<sup>255</sup>

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

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<sup>254</sup> Cerrejón Statement on the Christian Aid Report (n 196) point 28.

<sup>255</sup> *ibid* point 20.

#### IV. ESB'S NON-COMPLIANCE WITH THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES

Two-thirds of the coal burned at ESB's Moneypoint power station since 2001 has come from Cerrejón.<sup>256</sup> Since 2011, this has totalled some 7.8 million tonnes of coal.<sup>257</sup> In February 2020, after the Christian Aid report was published, ESB stated that it had not purchased coal from the Colombian mine since 2018.<sup>258</sup> This claim has not been verified by any documentation, and ESB has never publicly committed to permanently terminating its relationship with Cerrejón.

In December 2018, ESB joined the BetterCoal Colombia Working Group – a group of coal purchasers set up to monitor three Colombian mines, one of which is Cerrejón.<sup>259</sup> It is unclear why ESB would join such an initiative after ending its relationship with Cerrejón. Moreover, when the UN Committee on the Elimination of Racial Discrimination examined ESB's relationship with Cerrejón as part of its periodic review of Ireland in 2019, there was no mention of ESB's relationship with Cerrejón having ended.<sup>260</sup> Indeed, having received written and oral submissions from the Irish State, the Committee concluded in December 2019 that Ireland should 'consider *stopping* purchasing coal from the Cerrejón mining complex', '[1]end its support to the initiation of an independent inquiry into the operation of the mine, and restitution and compensation for victims of displacement and other human rights abuses', 'and 'guarantee that the victims have access to effective remedies and compensation in Ireland'.<sup>261</sup>

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<sup>256</sup> Noel Healy, 'Blood coal: Ireland's dirty secret', *The Guardian* (London, 25<sup>th</sup> October 2018).

<sup>257</sup> Niall Sargent, 'Legal action in Colombia against ESB coal supplier' *The Green News* (27 February 2019) <<https://perma.cc/5WRT-4KXH>>.

<sup>258</sup> RTE, 'Christian Aid calls for Moneypoint power station to be closed' (21<sup>st</sup> February 2020) <<https://perma.cc/C8PF-3F5T>>.

<sup>259</sup> ESB, 'Powering the Transition to a Clean Energy Future: ESB Responsible Business Report 2019' (hereinafter ESB, Responsible Business Report 2019) <<https://perma.cc/3VBC-2Q6N>> p. 28.

<sup>260</sup> See Committee on Elimination of Racial Discrimination 100<sup>th</sup> session, Summary record of the 2784<sup>th</sup> meeting held at the Palais Wilson, Geneva, on Monday, 2 December 2019, at 3 p.m. (6<sup>th</sup> December 2019) (CERD/C/SR.2784) para 31; Committee on Elimination of Racial Discrimination, Summary record of the 2785<sup>th</sup> meeting (6<sup>th</sup> December 2019) (CERD/C/SR.2785) para 32. An Irish representative told the Committee that a state official 'had visited La Guajira in September 2019, where she had met with various stakeholders, including representatives of the mine, the local community, NGOs and the local government... It was a complex issue, however: the region was poor; local people were economically dependent on the mine, one of the area's largest employers; and there had admittedly been local governance challenges.' CERD/C/SR.2785 para 32. It is unclear why an Irish representative would have visited the mine in 2019 if ESB had not purchased from it since 2018 and had no intention to resume the relationship.

<sup>261</sup> Committee on the Elimination of Racial Discrimination, 'Concluding observations on the combined fifth to ninth reports of Ireland' (12<sup>th</sup> December 2019) CERD/C/IRL/CO/5-9 (last accessed 24<sup>th</sup> June 2020) paras 47 and 48. Emphasis added. See also the Irish Human Rights and Equality Commission's submissions to CERD, in which it expressed concern about the 'heavy reliance' of ESB on Cerrejón coal and noted that the operation of Cerrejón has been 'linked with serious human rights abuses, including the forceful displacement of thousands of indigenous Wayúu, Afro Colombian, and Campesino populations, and contamination of farmland and drinking water.' Irish



This section explains how, by purchasing coal from Cerrejón, ESB has failed to comply with its responsibilities under the MNE Guidelines

### A. ESB's responsibilities as a state-owned enterprise

ESB is a state-owned enterprise (SOE).<sup>262</sup> The MNE Guidelines explain that 'State-owned multinational enterprises are **subject to the same recommendations as privately-owned enterprises**' but note that the *OECD Guidelines on Corporate Governance of State-Owned Enterprises* (the SOE Guidelines) are 'a useful and specifically tailored guide for these enterprises.'<sup>263</sup> The SOE Guidelines state that:

*SOEs should observe high standards of responsible business conduct, including with regards to the environment... and human rights. Their actions should be guided by relevant international standards, including... the UN Guiding Principles on Business and Human Rights.*<sup>264</sup>

The UN Guiding Principles on Business and Human Rights stipulate that: '**States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State...**';<sup>265</sup> 'States should exercise adequate oversight in order to meet their international human rights obligations when they contract with... business enterprises to provide services that may impact upon the enjoyment of human rights';<sup>266</sup> and 'States should promote respect for human rights by business enterprises with which they conduct commercial transactions.'<sup>267</sup> As the UN Working Group on the issue of human rights

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Human Rights and Equality Commission, 'Submission to the UN Committee on the Elimination of Racial Discrimination on the List of Themes for the Examination of Ireland on its Combined 5th to 9th Report' (July 2019) <<https://perma.cc/VBP2-VWJK>> para 81; Irish Human Rights and Equality Commission, 'Submission to the United Nations Committee on the Elimination of Racial Discrimination on Ireland's Combined 5<sup>th</sup> to 9<sup>th</sup> Report' (October 2019) <<https://perma.cc/ZE7W-X3RW>> p. 149.

<sup>262</sup> An SOE is '[a]ny corporate entity recognized by national law as an enterprise, and in which the State exercises ownership... This includes joint stock companies, limited liability companies and partnerships limited by shares.' OECD, *OECD Guidelines on Corporate Governance of State-Owned Enterprises* (OECD 2015) (hereinafter SOE Guidelines) p. 14.

<sup>263</sup> MNE Guidelines, Commentary to Chapter II, para 10.

<sup>264</sup> SOE Guidelines, Annotations to Chapter V Art D.

<sup>265</sup> UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (United Nations, 2011) HR/PUB/11/04 Ch I princ B (4). The Commentary to this principle notes that: 'A requirement for human rights due diligence is most likely to be appropriate where the nature of business operations or operating contexts pose significant risk to human rights.'

<sup>266</sup> *ibid* princ B (5). The Commentary to this principle notes that 'States should ensure that they can effectively oversee the enterprises' activities, including through the provision of adequate independent monitoring and accountability mechanisms.'

<sup>267</sup> *ibid* princ B (6).

and transnational corporations and other business enterprises has noted, ‘**State-owned enterprises [should] lead by example in relation to human rights**’.<sup>268</sup>

The below analysis must therefore be considered in light of ESB’s particular status as a state-owned entity.

**B. ESB has not carried out adequate due diligence to identify, mitigate and prevent adverse impacts caused by Cerrejón**

Under the MNE Guidelines, enterprises should:

**CHAPTER II – General Policies**

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

**12.** Seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business relationship.

**CHAPTER IV – Human Rights**

**3.** Seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts.

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

*i. Adverse impacts caused by the Cerrejón mine*

On the basis of the foregoing facts, the operation of the Cerrejón mine has caused, and continues to cause, severe adverse human rights impacts. The Commentary to the MNE Guidelines makes clear that enterprises must respect, ‘at a minimum...the internationally recognised human rights expressed in the International Bill of Human Rights, consisting of the Universal Declaration of Human Rights and the main instruments through which it has been

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<sup>268</sup> Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises (Human Rights Council, 4 May 2016) A/HRC/32/45 para 52. Emphasis added.

codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights...'<sup>269</sup>

The UN Human Rights Committee, the organ that monitors implementation of the International Covenant on Civil and Political Rights (ICCPR), has stated that the right to life under Article 6 ICCPR 'is not to be interpreted narrowly' and that it includes 'the right to **be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death**', as well as the right 'to **enjoy a life with dignity**'.<sup>270</sup> The Committee has acknowledged that in this sense, **degradation of the environment can give rise to a violation of the right to life with dignity**.<sup>271</sup> This approach to the right to life has been applied in a recent case raising an environmental issue, the *Portillo case*, in which the Committee found a violation of the right to life of individuals exposed to toxic substances in their surrounding environment.<sup>272</sup> The Committee reaffirmed the principle that a violation of article 6 of the Covenant can take place 'even if such threats and situations do not result in loss of life.'<sup>273</sup>

The notion of the right to life with dignity has also been understood in the context of other binding instruments in Colombia,<sup>274</sup> as protecting indigenous peoples' rights to enjoy their ancestral lands, 'acceding to their traditional means of subsistence, as well as of the use and enjoyment of the natural resources needed to obtain clean water and for the practice of traditional medicine to prevent and cure illnesses,' and 'living conditions compatible with their dignity.'<sup>275</sup> In short, the right to life guarantees indigenous peoples' basic economic, social and cultural rights which include being able to exercise traditional activities for subsistence and access to natural resources (like water, trees, land) deeply connected with the cultural identity of aboriginal communities.<sup>276</sup>

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<sup>269</sup> MNE Guidelines, Commentary to Chapter IV, para 39. Emphasis added. It further notes that '[e]nterprises can have an impact on virtually the entire spectrum of internationally recognised human rights.' See MNE Guidelines, Commentary to Chapter IV, para 40.

<sup>270</sup> CCPR/C/GC/36. General Comment 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the Right to Life, 30 October 2018, para 3.

<sup>271</sup> *ibid* para 26.

<sup>272</sup> Human Rights Committee, *Portillo Cáceres and Others v. Paraguay* CCPR/C/126/D/2751/2016, Communication 2751/2016 ('*Portillo case*').

<sup>273</sup> *ibid* para 7.3.

<sup>274</sup> Colombia ratified the American Convention on Human Rights on 28 May 1973.

<sup>275</sup> Int-Am Ct H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment 17 June 2005 §§ 158(d) and 158(e) ('*Yakye Axa Case*').

<sup>276</sup> Indigenous peoples enjoy similar protection via the right to take part in cultural life contained in Article 15(1)(a) of the International Covenant on Economic, Social and Cultural Rights. See Committee on Economic, Social and Cultural Rights, General Comment No. 21: Right of everyone to take part in cultural life (art. 15, para 1(a), of the International Covenant on Economic, Social and Cultural Rights) (E/C.12/GC/21) paras. 36 and 37.

For its part, the International Covenant on Economic, Social and Cultural Rights (ICESCR) enshrines **‘the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.’**<sup>277</sup> The right to health is also recognised in various other human rights instruments.<sup>278</sup> For example, Article 24 of the Convention on the Rights of the Child recognises ‘the right of the child to the enjoyment of the highest attainable standard of health’ and requires states to ‘pursue full implementation of this right’ through *inter alia* ‘the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution.’ The Committee on Economic, Social and Cultural Rights (CESCR), in its General Comment on the rights to health and an adequate standard of living (Articles 11 and 12 ICESCR), explains that the right to health is dependent on the ‘underlying determinants of health’, including **access to safe drinking water and adequate sanitation, safe food, and healthy environmental conditions.**<sup>279</sup> The General Comment further notes the need for states to ensure that **‘[i]ndigenous peoples’ access to water resources on their ancestral land is protected from encroachment and unlawful pollution’.**<sup>280</sup> The UN High Commissioner for Human Rights and the WHO have recognised that extractive industries can ‘indirectly infringe upon the right to health by polluting water [and] air.’<sup>281</sup>

Environmental degradation can therefore lead to adverse impacts upon human rights as recognised in the ICCPR and the ICESCR. Moreover, **the right to a healthy environment is a fundamental right under the American Convention on Human Rights.** This was recently confirmed by the the Inter-American Court of Human Rights’ in its Advisory Opinion on the Environment and Human Rights (requested by Colombia).<sup>282</sup>

The ICESCR also guarantees the **right to adequate housing.**<sup>283</sup> It therefore protects individuals against ‘forced evictions,’ defined as ‘the permanent or temporary removal against

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<sup>277</sup> Art 12(1).

<sup>278</sup> See the International Convention on the Elimination of All Forms of Racial Discrimination art 5(e)(iv); the Convention on the Elimination of All Forms of Discrimination against Women arts 11(1)(f), 12, and 14(2)(b); the Convention on the Rights of the Child art 24; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families arts 28, 43(e) and 45(c); and the Convention on the Rights of Persons with Disabilities art 25.

<sup>279</sup> CESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12) (E/C.12/2000/4) para 4. The rights to food and water are both independently protected by Article 11 of the ICESCR. See further CESCR, General Comment No. 12: The right to adequate food (Art.11) (E/C.12/1999/5) and CESCR General Comment No. 15: The right to water (Arts. 11 and 12) (E/C.12/2002/11).

<sup>280</sup> CESCR General Comment No. 15: The right to water (Arts. 11 and 12) (E/C.12/2002/11), para 16 (d).

<sup>281</sup> Office of the United Nations High Commissioner for Human Rights and the World Health Organization, ‘The Right to Health’ (Fact Sheet No. 31) p. 30.

<sup>282</sup> Int-Am Ct H. R, Advisory Opinion 23 on Environment and Human Rights, OC-23/17 of November 15, 2017, Requested by the Republic of Colombia §59.

<sup>283</sup> Art 11(1).

their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.<sup>284</sup>

The Commentary to the MNE Guidelines notes that ‘[i]n practice, some human rights may be at greater risk than others in particular industries or contexts, and therefore will be the focus of heightened attention.’<sup>285</sup> Attention should therefore be paid to the specific risks associated with mining generally and with mining in lands occupied by indigenous communities. In this respect, the MNE Guidelines recognise that ‘enterprises should respect the human rights of individuals belonging to specific groups or populations’, and note that ‘the United Nations instruments have elaborated further on the **rights of indigenous peoples**...’<sup>286</sup>

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

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

The requirement for free, prior and informed consent (FPIC) is also recognised in Article 16 of the ILO Indigenous and Tribal Peoples Convention,<sup>287</sup> ratified by Colombia in 1991:

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

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<sup>284</sup> CESCR, General Comment No. 7: The Right to Adequate Housing (Art 11(1)): Forced Evictions (E/1998/22), para 3.

<sup>285</sup> MNE Guidelines, Commentary to Chapter IV, para 40.

<sup>286</sup> *ibid.*

<sup>287</sup> ILO C169 – Indigenous and Tribal Peoples Convention, Convention, 1989 (No. 169) art 16.

The principle of FPIC is also binding on Colombia under the American Convention on Human Rights<sup>288</sup> and, more generally, under the right to self-determination which is a fundamental principle of international law.<sup>289</sup> The CESCR has stated that: ‘States parties and businesses should respect the principle of free, prior and informed consent of indigenous peoples in relation to all matters that could affect their rights, including their lands, territories and resources that they have traditionally owned, occupied or otherwise used or acquired.’<sup>290</sup>

The importance of FPIC in the mining context is reflected in the OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector, which states that **mining companies should ‘[e]ngage in the process of seeking consent as soon as possible during project planning, before activities for which consent should be sought commence or are authorised, including in the context of exploration activities’.**<sup>291</sup>

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

*ii. ESB’s failure to identify, prevent, mitigate, and account for adverse impacts caused by Cerrejón*

The Commentary to the MNE Guidelines explains that ‘due diligence is... the process through which enterprises can **identify, prevent, mitigate and account for how they address their actual and potential adverse impacts...**’<sup>292</sup> This process must ‘[go] beyond simply identifying and managing material risks to the enterprise itself, to include risks of adverse impacts related to matters covered by the Guidelines.’<sup>293</sup> The Guidelines cover both

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<sup>288</sup> Colombia ratified the American Convention on Human Rights on 28 May 1973.

<sup>289</sup> As recognised in the Charter of the United Nations (art 1(2)), the International Covenant on Civil and Political Rights (art 1(1)) and the International Covenant on Economic, Social and Cultural Rights (art 1 (1)).

<sup>290</sup> General comment No. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities (E/C.12/GC/24), para. 12.

<sup>291</sup> OECD, *OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector* (OECD 2017) p. 97. See also UN Declaration on the Rights of Indigenous Peoples art 10.

<sup>292</sup> MNE Guidelines, Commentary to Chapter II, para 14. Emphasis added.

<sup>293</sup> *ibid.*

environmental impacts<sup>294</sup> and impacts on human rights.<sup>295</sup> Assessments should cover ‘measures that the enterprise or its business relationship is implementing to prevent and mitigate adverse impacts’.<sup>296</sup>

The due diligence requirements apply to ‘adverse impacts that are... directly linked to [the MNE’s] operations... by a business relationship’.<sup>297</sup> The Commentary to MNE Guidelines explains that “[b]usiness relationships” include relationships with business partners [of the MNE], **entities in [the MNE’s] supply chain**, and any other non-State or State entity directly linked to [the MNE’s] business operations, products or services.<sup>298</sup> ESB is in a business relationship with Cerrejón, and the adverse human rights impacts that are caused by coal mining in La Guajira are directly linked to ESB’s purchase of that same coal.<sup>299</sup>

Due diligence requirements continue to apply throughout a business relationship: the OECD Guidance on Due Diligence (the Due Diligence Guidance) highlights the importance of assessing the adverse impacts of ‘*existing* high-risk business relationships (i.e. business relationships that involve geographies, products, or sectors, that have been identified as presenting high risks of adverse impacts)’.<sup>300</sup>

ESB has expressed that it is ‘aware of problems reported by the media and others in previous years’ in relation to Cerrejón.<sup>301</sup> It is therefore aware that Cerrejón is a high-risk business relationship. As will be shown below ESB has nonetheless failed to properly assess and mitigate the impacts of Cerrejón’s activities.

#### a) **Bettercoal**

As an individual coal purchaser, ESB does not seek to carry out its own assessment of the potential impacts of Cerrejón’s activities. When faced with criticism about its complicity in the

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<sup>294</sup> MNE Guidelines, Ch VI.

<sup>295</sup> MNE Guidelines, CH IV.

<sup>296</sup> Due Diligence Guidance, Annex, Q26.

<sup>297</sup> *ibid*; MNE Guidelines, Ch II art 12.

<sup>298</sup> MNE Guidelines, Commentary to Chapter IV, para 43

<sup>299</sup> See, for example, Due Diligence Guidance p. 71, providing the example of an enterprise which sources cobalt mined using child labour.

<sup>300</sup> Due Diligence Guidance, Annex, Q27. Emphasis added.

<sup>301</sup> Letter from ESB to Joint Committee on Communications, Climate Action and the Environment (Reference CCAE\_I\_333\_2018), 30<sup>th</sup> November 2018. ESB has also been monitoring media in this respect, see correspondence of 18<sup>th</sup> October 2018, FOI doc 081; and correspondence of 4<sup>th</sup> January 2019, FOI doc 282 (documents on file with author).

human rights and environmental abuses taking place in La Guajira, it generally points to its membership of Bettercoal.<sup>302</sup>

Bettercoal is an initiative set up by major coal buyers to carry out assessments of coal mines. Bettercoal assessments evaluate compliance with the ‘Bettercoal Code’, which contains standards on both human rights and the environment.<sup>303</sup> ESB joined the Bettercoal scheme in 2015.<sup>304</sup>

As the OECD has highlighted, ‘[e]nterprises can collaborate at an industry or multi-industry level... [but] they always remain responsible for ensuring that their due diligence is carried out effectively.’<sup>305</sup> The Due Diligence Guidance also states that ‘[p]articipation in an initiative does not shift responsibility from the enterprise to the initiative for adverse impacts... to which it is directly linked.’<sup>306</sup> Bettercoal itself states that it is ‘not a certification mechanism’ and that ‘[e]ach individual Bettercoal Member can choose to buy from any Supplier and they use the results of the assessments in their determination.’<sup>307</sup> Bettercoal’s most recent assessment of Cerrejón, published in 2019, concluded that the company either ‘meets’ or ‘substantially meets’ the Bettercoal principles on human rights and environmental protection.<sup>308</sup>

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<sup>302</sup> Following criticism of ESB’s operations by US academic Professor Aviva Chomsky, an ESB representative told *The Irish Times* that ESB was ‘satisfied the [Bettercoal] assessment was robust’. Kevin O’Sullivan, ‘US academic criticizes ESB’s use of coal from Colombia open-pit mines’ *The Irish Times* (Dublin, 21<sup>st</sup> January 2019) <<https://perma.cc/BD6B-6QL3>>. An ESB statement to the Irish Times in May 2019 began: ‘ESB has received a number of queries recently on our sourcing of coal from the Cerrejón mine in Columbia. As part of our commitment to use responsibly sourced coal ESB joined Bettercoal in 2014.’ Statement to the *Irish Times*, internal ESB email, 2 May 2019. When the Tánaiste and Minister of Foreign Affairs and Trade wrote to ESB in September 2019 request information about ESB’s sourcing of coal for Cerrejón, he also ‘received a response... in which ESB outlined a recent assessment of the mine carried out by Bettercoal.’ Written answers, Department of Foreign Affairs and Trade, 14<sup>th</sup> November 2019 <<https://perma.cc/NAD9-UN38>>. In response to the Christian Aid report in February 2020, ESB told RTÉ news that Bettercoal ‘provides the best platform to achieve continuous improvement in the mining industry’, RTÉ (n 258).

<sup>303</sup> Bettercoal, ‘Bettercoal Code’ 5, 6, 7, 8, 9 and 10. Bettercoal’s stated aim is to improve the mining and sourcing of coal: Bettercoal, ‘Our purpose’ <<https://bettercoal.org/>>.

<sup>304</sup> ESB, Responsible Business Report 2019 (n 259) p. 16.

<sup>305</sup> Due Diligence Guidance p. 19.

<sup>306</sup> Due Diligence Guidance Q12.

<sup>307</sup> Bettercoal Answers to Christian Aid Questions, June 2020, p. 2 (on file with authors). See also Bettercoal’s response to Christian Aid asking how ESB can state it is ‘satisfied’ with its adherence to human rights and environmental standards: ‘Bettercoal only assesses the performance of the mine. We do not assess the Members of Bettercoal or their adherence to guidelines on human rights. Bettercoal provides Members with the Assessment Reports on the company, highlighting the performance against the Code on different issues. A company then makes their own purchasing decisions based on those reports. ESB purchases from Cerrejón and their assessment report and scoring can be found on our website.’ *ibid* p. 3.

<sup>308</sup> See Bettercoal, ‘Bettercoal Assessment Public Report: Cerrejón Coal Company’ (9<sup>th</sup> January 2019) <<https://perma.cc/2EXE-J9TU>>.



The Bettercoal initiative is fundamentally flawed in two ways. First, despite its commitment to ‘transparency’,<sup>309</sup> Bettercoal offers only a summary of its findings, without providing any specific information about the impacts identified by the assessment.<sup>310</sup> This is particularly concerning because **although Bettercoal recently concluded that Cerrejón ‘meets’ the requirements of the Bettercoal Code, it also issued a ‘Continuous Improvement Plan’ on the basis of numerous ‘findings against’ the Code.** These include six ‘findings against’ Principle 1, which requires companies to ‘comply with national applicable laws and regulations, and widely accepted international laws and strive to meet generally accepted international standards for ethical, social, and environmental performance where those exceed national standards.’<sup>311</sup> No details were provided as to what the violations were, or how Cerrejón ‘met’ the Code despite the findings against it.

Documents obtained from ESB through a freedom of information request appear to show that Bettercoal’s unpublished findings included the fact that water which Cerrejón deemed to ‘compl[y] with standards for human use’ had been found by local authorities to contain faecal materials.<sup>312</sup> The assessment also found that Cerrejón had no explicit policy against mining in areas which had been granted the highest level of international environmental protection.<sup>313</sup>

Other findings appear to have included the following:<sup>314</sup>

- Cerrejón was providing poor working conditions for some employees, including lack of facilities for rest or meal breaks and limited access to hydration.
- Cerrejón was refusing to accept late employee arrival as legitimate when the lateness had been caused by road blockages due to civil unrest.
- Cerrejón had failed to properly monitor water quality in La Guajira.

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<sup>309</sup> Victoria Veber, ‘Bettercoal reiterates commitment to further transparency’ (Bettercoal, 25 February 2019) <<https://perma.cc/PT3J-2YAD>>.

<sup>310</sup> Disclosure of public reports only commenced in 2019. See also Bettercoal, ‘Bettercoal response to Christian Aid Report “Undermining Human Rights: Ireland, ESB and Cerrejón coal’ p. 2: ‘Bettercoal does share a high-level report which outlines the key issues highlighted in the assessment. Details are shared with relevant stakeholders by Bettercoal. The detailed report, which is made accessible to all Bettercoal Members, goes into some details on human rights and outlines some of the major issues there. The report also delves into some of the possible ways in which Cerrejón could address [the human rights abuses].’

<sup>311</sup> Bettercoal assessment (n 308) p. 7.

<sup>312</sup> See letter from Bettercoal Colombia Working Group to Cerrejón, June 2019, FOI Doc 303.

<sup>313</sup> *ibid.* The document refers to a finding that Cerrejón does not have an explicit policy against mining in IUCN category I protected areas. Generally speaking, Category I areas are geographical areas which protected against human activity other than scientific study. For example, human visitation is to be kept to a minimum in these areas. The International Union for Conservation of Nature and Natural Resources (IUCN) is an international organisation established in 1948 and its categorisation system has been recognised by bodies such as the UN.

<sup>314</sup> See letter from Bettercoal Colombia Working Group (n 312).

- Cerrejón had failed to submit a required hazardous waste report in time.
- Cerrejón had failed to certify its compliance with internationally recognised occupational health and safety standards.

Because the above findings are unpublished, ESB has been able to rely on Bettercoal’s summary assessment – which states that Cerrejón ‘meets’ its Code – to legitimise its relationship with Cerrejón. In summary, **ESB’s reliance on Bettercoal to assess the impact of Cerrejón’s activities does not constitute adequate due diligence for the purposes of the MNE Guidelines.**<sup>315</sup>

Secondly, **Bettercoal is unable to make binding recommendations on the basis of its findings, with members only expected to take findings ‘into consideration’.**<sup>316</sup> Freedom of information requests have revealed no evidence that ESB has taken these findings into consideration in its procurement decisions. In a July 2019 update to ESB’s Board of Directors, ESB Moneypoint’s Trading Director explained that the reasons for buying from Colombia included price and dedication to export markets.<sup>317</sup> None of the ‘findings against’ the Bettercoal Code were cited as factors for consideration.<sup>318</sup>

ESB’s apparent failure to take any action in light of Bettercoal’s findings and the many public accounts of human rights issues at Cerrejón constitutes a failure to ‘prevent and mitigate’ actual adverse impacts which have been identified.<sup>319</sup> ESB’s membership of Bettercoal is not effective due diligence. A detailed report by Christian Aid in 2020 instead termed it ‘greenwashing’: a way for ESB to legitimise its relationship with Cerrejón.<sup>320</sup>

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<sup>315</sup> ESB’s reliance on Bettercoal’s assessments is demonstrated by internal ESB communication before the most recent assessment, which suggested ‘if the Better Coal review is not definitive, that ESB should satisfy ourselves that the charges are unfounded or else source elsewhere.’ (FOI doc 50). It seems that when due diligence questions about ESB’s relationship with Cerrejón were addressed to ESB in 2018, proposed responses were sought from Bettercoal: see FOI doc 270.

<sup>316</sup> See Bettercoal response to Christian Aid (n 310) p. 3: ‘Bettercoal cannot force its Members to buy or not buy coal from certain producers. Our purpose is to work with coal mining companies to improve their practices.’

<sup>317</sup> Board Update on Cerrajon [sic], Trading Manager, 23<sup>rd</sup> July 2019, FOI doc 084, slide 4

<sup>318</sup> *ibid* see slide 12.

<sup>319</sup> MNE Guidelines Ch II art 10.

<sup>320</sup> Christian Aid, *Undermining Human Rights* (n 6) p. 41. See also Kevin O’Sullivan (n 302), quoting Clodagh Daly of the Latin American Solidarity Centre (‘It’s greenwashing. It’s a way of legitimising the lack of sustainability.’) and internal ESB email, 11<sup>th</sup> December 2017, FOI doc \_266: ‘...the Bettercoal membership is coming to the end of the current 3 years approval which ends May 2018. Therefore we are recommending that we continue membership given... the fact that this allows positive PR in relation to correspondence we have had with stakeholders, including the media.’

## b) Modern slavery policy

ESB did establish a policy for the prevention of slavery following the enactment of the Modern Slavery Act 2015 in the UK,<sup>321</sup> and began reporting on related supply chain issues<sup>322</sup> as per the relevant legal requirements.<sup>323</sup> It also formulated a new contract template for suppliers to reflect its modern slavery obligations.<sup>324</sup> While these steps are welcome, they are targeted narrowly at modern slavery and have failed to address any of the serious human rights abuses taking place at Cerrejón.<sup>325</sup> Indeed, discussions within ESB about the tenability of retaining Cerrejón as a supplier have focused on the risk of modern slavery occurring at Cerrejón, to the exclusion of other human rights and environmental abuses.<sup>326</sup> As such, ESB has done what is required under UK modern slavery due diligence law, but has not done what is required under the MNE Guidelines.<sup>327</sup>

## c) Use of leverage

In addition to *identifying* adverse impacts directly linked to its operations, an MNE must *prevent* and *mitigate* these impacts.<sup>328</sup> This means that the MNE should **‘use its leverage to influence the entity causing the adverse impact to prevent or mitigate that impact.’**<sup>329</sup> An

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<sup>321</sup> ESB Policy on Modern Slavery (Revised May 2019) <<https://perma.cc/LY5Q-WFJC>>.

<sup>322</sup> See ESB, ‘Statement on the Prevention of Slavery and Human Trafficking – 2020’ <<https://perma.cc/T66D-QBJ5>>.

<sup>323</sup> Modern Slavery Act 2015 s 54. See also ‘Transparency in Supply Chains etc. A practical guide’, Guidance issued under section 54(9) of the Modern Slavery Act 2015 <<https://perma.cc/V4GW-VW38>>.

<sup>324</sup> Discussed in internal ESB email chain, 25<sup>th</sup>-27<sup>th</sup> July 2018 (FOI doc 021).

<sup>325</sup> For example, the policy sets out ESB’s intention to ‘identify, monitor and assess those areas of our business and supply chain *most at risk from modern slavery*’. ESB Policy on Modern Slavery (n 321) para 3.1. The most recent ESB statement notes that three vendors were identified for an external audit, but ‘no incidents of modern slavery or forced labour were found’ during the audits. ESB, ‘Statement on the Prevention of Slavery and Human Trafficking – 2020’ (n 322).

<sup>326</sup> See, for example, email chain from 25<sup>th</sup>-27<sup>th</sup> July 2018 (n 324), containing comments such as: ‘From the allegations made it is not entirely clear whether the mine operators etc. are engaging in activities which would be contrary to the UK Modern Slavery Act’; ‘we have recently put a considerable amount of work into ensuring that future contracts we may have with CMC address the UK Modern Slavery Act and Anti-Bribery and Corruption legislation’; ‘On the face of it if we have reason to believe that there or may be instances of modern slavery occurring in our supply chain (i.e. all the way back to the mine in question) then it would be difficult – given our policy and the public statements that we have made in relation to our obligations under the Modern Slavery Act, to standard over a failure to act to either ensure that those activities are eliminated, or to terminate our relationship with the supplier in question.’

<sup>327</sup> See, for example, internal ESB emails dated 20<sup>th</sup> – 22<sup>nd</sup> November 2018 (FOI doc 060): ‘we have obligations under the Modern Slavery Act (which is UK law) but he [the legal adviser] wasn’t aware of any laws other than usual procurement rules applying to the purchase of coal from Columbia or elsewhere.’

<sup>328</sup> MNE Guidelines, Ch II Arts 10 and 12.

<sup>329</sup> MNE Guidelines, Commentary to Ch II, para 20.

enterprise is considered to have leverage if it ‘has the ability to effect change in the wrongful practices of the entity that causes harm’.<sup>330</sup>

The Guidelines anticipate that there will be situations in which individual MNEs do not possess sufficient leverage to effect change on the part of its suppliers,<sup>331</sup> for example because of the enterprise’s market position vis-à-vis the relevant supplier.<sup>332</sup> Historically, ESB has purchased two to three *percent* of Cerrejón’s output.<sup>333</sup> ESB may therefore consider that, as an individual actor, it cannot influence Cerrejón’s behaviour.<sup>334</sup> Even in these circumstances, the Guidelines make it clear that MNEs should seek to prevent and mitigate adverse impacts.

First, the enterprise should **cooperate with other actors in order to leverage collective influence**.<sup>335</sup> ESB has joined the Bettercoal initiative but, as outlined above, this initiative is deeply flawed. ESB is also a member of **Bettercoal’s Colombia Working Group (CWG)**. The stated purpose of this group is to facilitate a more coordinated approach to the monitoring of coal suppliers’ responses to Bettercoal’s recommendations, ‘as well as build knowledge and measure impact’.<sup>336</sup> The group is part of Bettercoal’s broader Country Prioritization Strategy, which identifies countries and coal suppliers to be prioritised for assessment by Bettercoal.<sup>337</sup>

Collective action targeted specifically at Cerrejón could, in theory, constitute use of leverage in line with the MNE Guidelines. However, based on materials secured through freedom of

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<sup>330</sup> Due Diligence Guidance p.24, para 19.

<sup>331</sup> MNE Guidelines, Commentary to Ch II, para 20 explains that Emphasis added. See also OECD Guidelines Commentary

<sup>332</sup> MNE Guidelines, Commentary to Ch II, para 21.

<sup>333</sup> Email from Peter O’Shea (ESB) to Sorley McCaughey (Christian Aid), 19 February 2020.

<sup>334</sup> See, for example, internal ESB email, 2 May 2019 (names redacted) (FOI doc 009) ‘just 2% of the mine’s production is for ESB, hence we are better engaging through Bettercoal than directly in trying to influence change.’; internal ESB email, 10 May 2019 (FOI doc 097) ‘We purchase just 2% of the coal from Cerrejon hence our influence on the legacy issues is amplified if we direct it through Bettercoal and that is what we should and are doing.’; internal ESB email, 1 May 2019 (FOI Doc 46): ‘Did I hear you say the amount that we purchase is half of one percent of total annual output??? Am trying to get a sense of the amount of leverage we have...’

<sup>335</sup> OECD Guidelines, Commentary to Ch II, para 20: the relevant enterprise should ‘acting alone *or in co-operation with other entities*, as appropriate... use its leverage to influence the entity causing the adverse impact to prevent or mitigate that impact’. MNE Guidelines, Commentary to Ch II, para 22: ‘Enterprises may also engage with suppliers and other entities in the supply chain to improve their performance, in co-operation with other stakeholders... enterprises are encouraged, with due regard to anti-competitive concerns, to participate in industry-wide collaborative efforts with other enterprises with which they share common suppliers to coordinate supply chain policies and risk management strategies, including through information-sharing.’ MNE Guidelines, Commentary to Ch II, para 24: ‘Enterprises are also encouraged to participate in private or multistakeholder initiatives and social dialogue on responsible supply chain management...’ See also Due Diligence Guidance p. 30, para 3.2 (d).

<sup>336</sup> Bettercoal Colombia Working Group 2019 Revision p. 1. See also Bettercoal Country Working Group Colombia Terms of Reference (2018).

<sup>337</sup> Bettercoal, ‘Country Prioritisation 2018, Version 3.0’ (March 2018) <<https://perma.cc/768P-HRFB>>.

information requests, it would appear that the motivation for ESB's participation in the CWG stems more from the need to manage reputational risk than from a desire to reduce Cerrejón's abuses.<sup>338</sup> This is also demonstrated by the language used by Bettercoal to describe its Country Prioritization Strategy,<sup>339</sup> which is echoed by ESB in its most recent annual report:

*Bettercoal has developed a Country Prioritization Strategy that aims to explain why some countries and coal suppliers are prioritised in the Assessment Programme. The objective of this strategy is to prioritise for inclusion in the Bettercoal Assessment Programme the greatest volume of coal from sources that present **significant reputation and non-technical risk** to Bettercoal Members, and by doing so, be able to show that over time these sources are being produced at operations that meet the **Bettercoal Code**.*<sup>340</sup>

Secondly, MNEs should seek to '**influence suppliers through contractual arrangements**',<sup>341</sup> in order to 'build leverage into new and existing business relationships, e.g. through policies or codes of conduct, contracts, written agreements...'<sup>342</sup> The contract for sale between ESB and CMC contains the following clause:<sup>343</sup>

*Seller [Cerrejón] guarantees that it respects, and acts in accordance with, the **Ten Principles of the United Nations Global Compact** and that it is committed to policies, procedures and programmes that support the Ten Principles as well as the requirements of national legislation. Furthermore, Seller agrees that:*

*Buyer [ESB] may conduct second or third party audits of Seller relating to the latter's **allegiance to the Global Compact initiative**. Any such audit conducted by Buyer hereunder shall be subject to both parties' agreement and to any signature of a Memorandum of Understanding (MOU) outlining the audit procedures, a draft copy of which shall be provided to Buyer at Buyer's request. For the avoidance of doubt, any audit commissioned by the Buyer will following international best practices, including*

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<sup>338</sup> See internal ESB emails discussing funding for the CWG (FOI doc 094): 'Two members of the Colombia Working Group have already agreed to provide €10,000 each and as members we are being asked to fund this also. I think it is a worthwhile project... We have spoken of sponsoring such initiatives when we were looking at the various press reports that were published recently.'

<sup>339</sup> *ibid* p. 3.

<sup>340</sup> ESB, Responsible Business Report 2019 (n 259) p. 28. Emphasis added.

<sup>341</sup> MNE Guidelines, Commentary to Ch II, para 21.

<sup>342</sup> Due Diligence Guidance p. 30, para 3.2 (e).

<sup>343</sup> Coal Sale and Purchase Contract LTD17-028 between CMC – Coal Marketing DAC and Electricity Supply Board, clause 9.03, FOI doc 402. Emphasis added. See also other contracts, FOI docs 401 – 414.

*holding a comprehensive closing meeting at the Seller's site and submitting to the Seller for review, completion or corrections, the complete draft auditing report before it is issued.*

*Buyer is entitled to engage in open dialogue with local and national authorities regarding Seller's compliance with local and national legislation.*

The UN Global Compact is a commitment by businesses to adopt sustainable and socially responsible policies in areas such as human rights and the environment.

**The inclusion of this contractual term has not resulted in ESB using its leverage.** ESB has never publicly conditioned its procurement on the results of the 'third party audits', *i.e.* the Bettercoal reports. Moreover, despite the inclusion of a transparency provision, GLAN has found no evidence to suggest that the ESB has 'engage[d] in open dialogue' to address Cerrejón's environmental and human rights impacts,<sup>344</sup> even though doing so would have put pressure on Cerrejón to comply with the relevant standards.

ESB has therefore failed to build and use leverage to change Cerrejón's behaviour. As such, it has failed to 'prevent and mitigate' adverse impacts directly linked to its operations, as required by the MNE Guidelines.<sup>345</sup>

The OECD explains that MNEs who identify that adverse impacts are linked to their business relationships should:

*Consider **disengagement from the supplier**... after failed attempts at preventing or mitigating severe impacts; when adverse impacts are irremediable; where there is no reasonable prospect of change; or when severe adverse impacts or risks are identified and the entity causing the impact does not take immediate action to prevent or mitigate them.*<sup>346</sup>

All of these conditions are satisfied. Cerrejón has been pressured to change its behaviour multiple times in recent decades, but despite having been reprimanded by domestic courts and by other NCPs, it continues to displace local and indigenous communities, continues to ignore domestic court orders, and continues to abuse the environment in La Guajira, causing further

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<sup>344</sup> See Section V(D).

<sup>345</sup> MNE Guidelines Ch II, Arts 10 and 12.

<sup>346</sup> Due Diligence Guidance p. 31, para 3.2 (h). See also MNE Guidelines, Commentary to Chapter IV, para 43.

human rights abuses. Moreover, some of the most adverse impacts of Cerrejón’s activities in La Guajira are irremediable.<sup>347</sup> These include:

- Deaths and long-term incurable health conditions of indigenous Wayuu people caused by environmental hazards, including those of children;
- Loss of cultural heritage and agricultural self-reliance caused by displacement of indigenous and Afro-Colombian communities;<sup>348</sup>
- Pollution of land and water (including underground water);
- Deforestation of what was previously arable land;
- Disappearance of flora and fauna relied on by indigenous people for cultural medicinal practices, as well as for food security; and
- Environmental alterations such as the rerouting of waterways.

**ESB must therefore publicly disengage from Cerrejón** in a way that is compliant with the OECD guidance on responsible disengagement.<sup>349</sup> ESB should also take a role in the remediation of the adverse impacts.<sup>350</sup> Further details on these obligations are provided at Section V.

### **C. ESB has not encouraged Cerrejón to act in accordance with the MNE Guidelines**

Under the MNE Guidelines, enterprises should:

#### **CHAPTER II – General Policies**

**1.** Contribute to economic, environmental and social progress with a view to achieving sustainable development.

**13.** In addition to addressing adverse impacts in relation to matters covered by the Guidelines, encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of responsible business conduct compatible with the Guidelines.

<sup>347</sup> Irremediable character means ‘any limits on the ability to restore the individuals or environment effected to a situation equivalent to the situation before the adverse impact’: Due Diligence Guidance Q3; see also pp. 43-44.

<sup>348</sup> See Edwin Hernández, ‘Minería y desplazamiento: el caso de la multinacional Cerrejón en Hatonuevo, La Guajira, Colombia (2000-2010), “Nuestra tierra es nuestra vida”’ 13(26) *Ciencia política* 2006 97.

<sup>349</sup> See Due Diligence Guidance Q39.

<sup>350</sup> Due Diligence Guidance Q52.

## CHAPTER VI – Environment

6. Continually seek to improve corporate environmental performance... of its supply chain, by encouraging such activities as:

- a) adoption of technologies and operating procedures in all parts of the enterprise that reflect standards concerning environmental performance in the best performing part of the enterprise;
- ...
- d) exploring and assessing ways of improving the environmental performance of the enterprise over the longer term, for instance by developing strategies for emission reduction, efficient resource utilisation and recycling, substitution or reduction of use of toxic substances, or strategies on biodiversity.

The Commentary explains that MNEs are encouraged to ‘engage with suppliers’ to ‘improve their performance... and to support the integration of principles of responsible business conduct compatible with the Guidelines into their business practices’.<sup>351</sup> The Commentary further explains that ‘[s]ound environmental management is an important part of sustainable development’, and that this embodies ‘activities aimed at controlling both direct and indirect environmental impacts of enterprise activities over the long-term, and involving both pollution control and resource management elements’.<sup>352</sup>

ESB has expressed its commitment to ‘encouraging... suppliers to use natural resources in a prudent and efficient manner’ and ‘working with... suppliers to embed sustainability considerations into [ESB’s] procurement activities’.<sup>353</sup> It also states that it ‘expects all suppliers... to respect internationally recognised human rights’.<sup>354</sup> However, **beyond its involvement with Bettercoal,<sup>355</sup> there is no evidence that ESB has ever encouraged Cerrejón to act in a more environmentally sustainable manner or to respect human rights.**

To its credit, ESB did meet with CMC, the company that coordinates the sale of Cerrejón coal, in 2018 to discuss both the situation of the Tabaco community and the diversion of the Arroyo

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<sup>351</sup> MNE Guidelines, Commentary to Chapter II, para 23.

<sup>352</sup> MNE Guidelines, Commentary to Chapter VI, paras 61 and 63.

<sup>353</sup> ESB Group Policy Statement on Environmental Management and Sustainability <<https://perma.cc/8KE2-LJ74>>.

<sup>354</sup> ESB, Responsible Business Report 2019 (n 259) p. 16. Emphasis added.

<sup>355</sup> The Commentary does suggest that ‘[w]here suppliers have multiple customers’, MNEs may ‘participate in industry-wide collaborative efforts with other enterprises...’ MNE Guidelines, Commentary to Ch II, para 23. Whilst ESB’s membership of Bettercoal could be interpreted as efforts to encourage Cerrejón to comply with the MNE Guidelines, its membership fall short in this respect due to fundamental flaws in the Bettercoal constitution and ESB’s response to its reports: see Section IV B ii a.



Bruno.<sup>356</sup> ESB also met with both Cerrejón representatives and community representatives in 2019 to discuss the displacement of the Tacabo community.<sup>357</sup> The displacement of the Tabaco community, a harm which has been ongoing for twenty years, has been the subject of both domestic court orders and negative NCP assessments.<sup>358</sup> The diversion of the Arroyo Bruno was the subject of a ruling by the Colombian Constitutional Court in 2017,<sup>359</sup> and Cerrejón's failure to comply with that ruling led the Colombian Contraloría to issue an 89-page report in June 2020.<sup>360</sup>

However, both of these issues remain unresolved. Moreover, there is no evidence that ESB has consulted on any *other* human rights or environmental abuses, i.e. abuses which have not been the subject of a negative court or NCP decision. In short, engaging in discussions about Cerrejón's judicially recognised failures to comply with minimum legal obligations does not constitute adequate encouragement of responsible business conduct.<sup>361</sup> At a minimum, given the vast evidence of human rights and environmental abuses, ESB should have conditioned its procurement on improved business practices.

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<sup>356</sup> See internal ESB email, 17<sup>th</sup> November 2018 (FOI doc 119).

<sup>357</sup> See 'Notes from meeting at Cerrejón Mine with Community Leadership, Cerrejón and ESB', FOI doc 43; internal ESB emails, 26<sup>th</sup> March – 1<sup>st</sup> April, FOI doc 062.

<sup>358</sup> See Section IV H above.

<sup>359</sup> Colombian Constitutional Court, SU698/17 (n 52).

<sup>360</sup> Contraloría General de la República (n 150).

<sup>361</sup> MNE Guidelines, Ch II, Art 13.

## **D. ESB has been insufficiently transparent about its relationship with Cerrejón**

The MNE Guidelines stipulate that:

### **CHAPTER III – Disclosure**

1. Enterprises should ensure that timely and accurate information is disclosed on all material matters regarding their activities... This information should be disclosed for the enterprise as a whole, and, where appropriate, along business lines or geographic areas...
3. Enterprises are encouraged to communicate additional information that could include:
  - a) value statements or statements of business conduct intended for public disclosure including, depending on its relevance for the enterprise's activities, information on the enterprise's policies relating to matters covered by the Guidelines;
  - b) policies and other codes of conduct to which the enterprise subscribes, their date of adoption and the countries and entities to which such statements apply;
  - c) its performance in relation to these statements and codes;
  - d) information on internal audit, risk management and legal compliance systems;
  - e) information on relationships with workers and other stakeholders.
4. Enterprises should apply high quality standards for... non-financial disclosure, including environmental and social reporting where they exist. The standards or policies under which information is compiled and published should be reported...

The Guidelines further state that MNEs should:

### **CHAPTER VI – Environment**

1. Establish and maintain a system of environmental management appropriate to the enterprise, including:
  - a) collection and evaluation of adequate and timely information regarding the environmental, health, and safety impacts of their activities;
  - b) establishment of measurable objectives and, where appropriate, targets for improved environmental performance...
  - c) regular monitoring and verification of progress toward environmental, health, and safety objectives or targets.
2. Taking into account concerns about cost, business confidentiality, and the protection of intellectual property rights:
  - a) provide the public... with adequate, measureable and verifiable (where applicable) and timely information on the potential environment, health and safety impacts of the activities of the enterprise, which could include reporting on progress in improving environmental performance...
3. Assess, and address in decision-making, the foreseeable environmental, health, and safety-related impacts associated with the processes, goods and services of the enterprise over their full life cycle with a view to avoiding or, when unavoidable, mitigating them. Where these proposed activities may have significant environmental, health, or safety impacts, and where they are subject to a decision of a competent authority, prepare an appropriate environmental impact assessment.

i. *Lack of transparency about Cerrejón's activities*

ESB has not been transparent about Cerrejón's activities. The Commentary to the Guidelines notes that '**communication with the public... may... cover information on the activities of... suppliers...**'<sup>362</sup> The Commentary also explains that:<sup>363</sup>

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

To the extent that ESB accepts any responsibility to report on its suppliers' activities, it generally references its Bettercoal membership.<sup>364</sup> As described above, however, the publicly available Bettercoal assessments are summary documents which fail to detail the specific impacts identified by the assessment.<sup>365</sup> The detailed assessment, which has never been published, contains numerous 'findings against' Cerrejón. **Bettercoal has stated that it cannot publish detailed reports because '[Bettercoal] Members (the buyers [such as ESB]) actually pay for the whole assessment costs... Therefore, they technically own the assessment reports and they have to agree to these being made public.'**<sup>366</sup> **ESB does not appear to have given its consent for the publication of these reports.**

As explained above, documents obtained through a freedom of information access request appear to show that these 'findings' included failures to monitor and report on pollution levels, poor working conditions for some staff, and the absence of an explicit policy against mining in

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<sup>362</sup> MNE Guidelines, Commentary to Chapter III, para 33.

<sup>363</sup> MNE Guidelines, Commentary to Chapter VI, para 65.

<sup>364</sup> See ESB, Responsible Business Report 2019 (n 259) p. 28. The exception to this is modern slavery, which is reported on independently as per ESB's obligations as a UK-resident company.

<sup>365</sup> See Section IV B ii a above.

<sup>366</sup> Bettercoal Answers to Christian Aid Questions, June 2020. There appears to be some internal confusion within ESB as to the confidentiality of these reports: see email of 22<sup>nd</sup> November 2018, FOI doc 145; email of 18<sup>th</sup> December 2018, FOI doc 283.

protected areas.<sup>367</sup> **By relying on the more favourable public assessment ESB has avoided disclosing the severity of these findings.** In a letter to the Oireachtas Joint Committee on Communications, Climate Action and the Environment, written shortly after Bettercoal’s Cerrejón assessment was shared with buyers, an ESB representative stated that:

*The Bettercoal assessment indicates that the mine’s operating principles, including how it conducts its business, treats its staff and works with its neighbours are essentially in line with the Bettercoal best practice code.*<sup>368</sup>

Moreover, as a form of disclosure, the Bettercoal public assessments are inadequate because they are provided only in English. The Due Diligence Guidance notes that ‘[a]ccessibility of information means that it is not only physically accessible, but also understandable and disclosed at a time and in a format, language, and location that will best ensure those for whom it is intended will notice it and be able to use it effectively.’<sup>369</sup> The SOE Guidelines state that ‘SOEs should ensure that stakeholders have access to relevant, sufficient and reliable information on a timely and regular basis to be able to exercise their rights.’<sup>370</sup> Because Bettercoal does not publish its reports in Spanish, Wayuunaiki, or any other language spoken in La Guajira, affected individuals will be unable to access even its public assessments.

**ESB is aware of shortcomings in Bettercoal’s transparency.**<sup>371</sup> Per its obligations under the MNE Guidelines, ESB **should therefore have been addressing those shortcomings.** The OECD Due Diligence Guidance notes that MNEs should:<sup>372</sup>

*Seek to encourage periodic reviews of relevant multi-stakeholder and industry initiatives of which the enterprise is a member, including their alignment with [the Due Diligence Guidance], and their value to the enterprise in helping it identify, prevent or mitigate adverse impacts linked to its business.*

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<sup>367</sup> See letter from Bettercoal Colombia Working Group to Cerrejón, June 2019, FOI Doc 303. See further above, n 313.

<sup>368</sup> Letter from ESB to Joint Committee on Communications, Climate Action and Environment, 30 November 2018, FOI doc 005.

<sup>369</sup> Due Diligence Guidance Q 46.

<sup>370</sup> SOE Guidelines, Annotations to Chapter V, p.58, Art A.

<sup>371</sup> See, for example, ‘Bettercoal’s Public Assessment Disclosure Disappointing and Inadequate: Joint statement of European organizations regarding the reports on Cerrejón, SDS and Prodeco’, February 2019, obtained from ESB through a freedom of information request, FOI doc 308 190219.

<sup>372</sup> Due Diligence Guidance, p. 32, para 4.1(d).

ESB has never publicly questioned the value of Bettercoal in helping it to ‘prevent or mitigate adverse impacts linked to its business’.

*ii. Lack of transparency about ESB’s procurement activities*

**As well as reporting on the impacts of Cerrejón’s activities, ESB should have been reporting on its own response to those activities, i.e. on how Cerrejón’s abuses have affected its decision-making, and how ESB has sought to prevent or mitigate adverse impacts.**

Under the MNE Guidelines, ESB should be disclosing information about its procurement decisions, and should be tracking and reporting on whether its due diligence in the supply chain is mitigating or preventing adverse impacts.<sup>373</sup> The Due Diligence Guidance also explains that disclosure obligations include carrying out ‘periodic assessments of business relationships, to verify that risk mitigation measures are being pursued or to validate that adverse impacts have actually been prevented or mitigated.’<sup>374</sup> The SOE Guidelines state that ‘[w]hen SOEs engage in public procurement... as... procurer, the procedures involved should be... safeguarded by appropriate standards of transparency.’<sup>375</sup>

**ESB has never explained how its decision to continue purchasing coal from Cerrejón can be reconciled with its commitment to protecting human rights and the environment.**

When asked about this apparent mismatch, Bettercoal pointed out that it is ‘not a certification mechanism’ and that it expects power companies to ‘use the results of the [Bettercoal] assessments in their determination’ of whether to buy from a given supplier.<sup>376</sup> ESB should have been transparent about how it was using – or not using – these assessments.

Similarly, ESB’s own Supplier Charter states that it ‘expects all suppliers... to respect internationally recognised human rights, and that it ‘aims to purchase goods, services and works that are produced... with due regard to the environment and in compliance with all

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<sup>373</sup> The MNE Guidelines require that MNEs disclose ‘timely and accurate information... on all material matters regarding their activities’: MNE Guidelines Ch III art 1. The SOE Guidelines state that ‘SOEs should report... non-financial information... including areas of significant concern for... the general public’: SOE Guidelines Chapter VI Art A. The Due Diligence Guidance further explains that MNEs should ‘[t]rack the implementation and effectiveness of the enterprise’s due diligence activities’ and should ‘[c]ommunicate externally relevant information on due diligence policies, processes, activities conducted to identify and address actual or potential adverse impacts, including the findings and outcomes of those activities.’ Due Diligence Guidance p. 32, para 4.1(b); Guidance p. 33, para 5.1.

<sup>374</sup> Due Diligence Guidance p. 32, para 4.1(b).

<sup>375</sup> SOE Guidelines, Ch III art G.

<sup>376</sup> Bettercoal Answers to Christian Aid Questions, June 2020, pp. 2-3.

applicable environmental laws and regulations.<sup>377</sup> Under the MNE Guidelines, ESB should communicate ‘information... [about] its performance in relation to... statements to which it subscribes’.<sup>378</sup> ESB has never communicated information about how its decision to purchase coal from Cerrejón can be reconciled with this Charter, particularly in light of Cerrejón’s judicially recognised failures to comply with environmental laws and regulations.

**ESB has also failed to transparently monitor whether its due diligence in the supply chain is mitigating or preventing adverse impacts.**<sup>379</sup> For example, it has never reported on Cerrejón’s compliance with the Continual Improvement Plan issued by Bettercoal.

ESB’s environmental policy commits ESB to ‘identifying the environmental impacts associated with [its] activities and managing them appropriately’ and ‘openly reporting on [its] environmental performance in a verifiable way and communicating progress against environmental and sustainability targets on an annual basis’.<sup>380</sup> The policy also commits ESB to ‘encouraging... suppliers to use our natural resources in a prudent and efficient manner’; and ‘working with... suppliers to embed sustainability considerations into our procurement activities...’. Despite these commitments, **ESB’s reporting on its environmental impacts does not consider the impacts of its procurement activities.**<sup>381</sup> Instead, reporting on environmental impacts adopts a narrow domestic lens.

The same is true of ESB’s reporting on stakeholder engagement: ESB representatives travelled to La Guajira in 2019 to meet with community leaders, Cerrejón, CMC, and local government representatives;<sup>382</sup> but this meeting was not referenced in the Stakeholder Engagement section

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<sup>377</sup> ESB Supplier Charter, April 2017 <<https://perma.cc/M9KS-VU2P>>.

<sup>378</sup> MNE Guidelines Chapter III art 3.

<sup>379</sup> MNE Guidelines require that MNEs disclose ‘timely and accurate information... on all material matters regarding their activities’: MNE Guidelines Ch III art 1. The SOE Guidelines state that ‘SOEs should report... non-financial information... including areas of significant concern for... the general public’: SOE Guidelines Chapter VI Art A. The Due Diligence Guidance further explains that MNEs should ‘[t]rack the implementation and effectiveness of the enterprise’s due diligence activities’ and should ‘[c]ommunicate externally relevant information on due diligence policies, processes, activities conducted to identify and address actual or potential adverse impacts, including the findings and outcomes of those activities.’ Due Diligence Guidance p. 32, para 4.1(b); Guidance p. 33, para 5.1.

<sup>380</sup> ESB Group Policy Statement on Environmental Management and Sustainability (n 353).

<sup>381</sup> See generally ESB, ‘Environmental Information: ESB and the Environment’ <<https://perma.cc/R7BR-YNJU>>.

<sup>382</sup> See ‘Notes from meeting at Cerrejón Mine with Community Leadership, Cerrejón and ESB’, FOI doc 43; internal ESB emails, 26<sup>th</sup> March – 1<sup>st</sup> April 2019, FOI doc 062.

of ESB's 2019 sustainability report.<sup>383</sup> The SOE Guidelines note that 'large SOEs should report on stakeholder relations'.<sup>384</sup>

### **E. ESB has not adopted and implemented a human rights policy**

Under the MNE Guidelines, enterprises should:

#### **CHAPTER IV – General Policies**

##### **4. Have a policy commitment to respect human rights.**

The Commentary recommends that this policy: '(i) is approved at the most senior level of the enterprise; (ii) is informed by relevant internal and/or external expertise; (iii) stipulates the enterprise's human rights expectations of... parties directly linked to its operations, products or services; (iv) is publicly available... (v) is reflected in operational policies and procedures necessary to embed it throughout the enterprise.'<sup>385</sup>

**ESB does not have a single, consistently applied human rights policy.** Its Supplier Charter states that 'suppliers must provide a safe workplace for their employees' and that ESB 'aims to purchase goods... that are produced... with due regard to the environment and in compliance with all applicable environmental laws and regulations'.<sup>386</sup> ESB's most recent annual report states that it 'respects human rights and expects all suppliers... providing goods, services or works to ESB... to conduct their business in an honest and ethical manner, in accordance with all applicable laws, and to respect internationally recognised human rights'.<sup>387</sup>

However, these principles are not reflected in ESB's operational policies and procedures, and are therefore not embedded throughout its procurement. ESB's requirements for suppliers stipulate only that they must 'comply with all [binding legal obligations]... including... obligations in respect of... health and safety in the workplace',<sup>388</sup> and do not make reference to obligations under international human rights law. ESB's contract with Cerrejón guarantees

<sup>383</sup> ESB, Responsible Business Report 2019 (n 259) p. 18.

<sup>384</sup> SOE Guidelines, Chapter V arts A and B.

<sup>385</sup> MNE Guidelines, Commentary to Chapter IV, para 44.

<sup>386</sup> ESB Supplier Charter (n 377). 'These principles are intended for guidance only...' ESB Supplier Charter, *ibid*.

<sup>387</sup> ESB, Responsible Business Report, p. 16.

<sup>388</sup> ESB, 'Requirements for Agents, Suppliers, Contractors, Advisors and Third Parties Arising in Connection with ESB Policies' <<https://perma.cc/Y7WU-6ZD8>> para 4.1(i).

that the latter will comply with the human rights and environmental standards set out in the UN Global Compact, but this guarantee is not supported by any consequences if violated.<sup>389</sup>

## VI. CONCLUSIONS AND RECOMMENDATIONS FOR ESB

For the following reasons, GLAN requests that the Irish NCP call upon ESB to take the following actions:

- i. **Permanently terminate its relationship with Cerrejón.** As explained above, this relationship is untenable under the MNE Guidelines.<sup>390</sup>
- ii. **Compile and publish a human rights policy** in line with the standards set by the MNE Guidelines.<sup>391</sup> This should set out due diligence procedures, including with respect to procurement, and should contain a commitment to reporting on due diligence. It should set out *specific* and, where possible, *measurable* requirements for suppliers based on the UN Global Compact<sup>392</sup> and the MNE Guidelines.
- iii. **Update its Supplier Charter.** ESB's Supplier Charter is currently a guidance document which states, *inter alia*, that suppliers should comply with relevant laws on health and safety and the environment.<sup>393</sup> It is less than two pages long. This Charter should be updated to reflect the provisions on procurement contained in the new human rights policy.
- iv. **Incorporate the relevant provisions of its human rights policy into its contracts** with suppliers, and **condition procurement on compliance with the human rights policy.** At present, ESB's contracts refer to the UN Global Compact, but do not contain any *specific* human rights or environmental obligations for suppliers.<sup>394</sup> Meanwhile the Supplier Charter, which refers to compliance with environmental laws, is only a 'guidance' document.<sup>395</sup> Suppliers should be required to comply with the minimum standards set out in the human rights policy.

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<sup>389</sup> Coal Sale and Purchase Contract LTD17-028 between CMC – Coal Marketing DAC and Electricity Supply Board, clause 9.03, FOI doc 402. See also other contracts, FOI docs 401 – 414.

<sup>390</sup> See pp. 55-56 above.

<sup>391</sup> MNE Guidelines, Chapter IV art 4; Commentary to Chapter IV, para 44.

<sup>392</sup> See pp. 54-55 above.

<sup>393</sup> ESB Supplier Charter (n 377).

<sup>394</sup> Coal Sale and Purchase Contract LTD17-028 between CMC – Coal Marketing DAC and Electricity Supply Board, clause 9.03, FOI doc 402. See also other contracts, FOI docs 401 – 414.

<sup>395</sup> ESB Supplier Charter (n 377).



v. **Include extraterritorial impacts in its annual reporting.** In particular:

- ESB’s environmental policy commits ESB to ‘identifying the environmental impacts associated with [its] activities’, ‘openly reporting on [its] environmental performance in a verifiable way and communicating progress against environmental and sustainability targets on an annual basis’, ‘encouraging... suppliers to use our natural resources in a prudent and efficient manner’, and ‘working with... suppliers to embed sustainability considerations into our procurement activities...’<sup>396</sup> Annual reports should therefore cover **all environmental impacts associated with ESB’s activities, including its procurement activities.**<sup>397</sup>
- ESB’s current Supplier Charter states that it ‘expects all suppliers... to respect internationally recognised human rights, and that it ‘aims to purchase goods, services and works that are produced... with due regard to the environment’.<sup>398</sup> As per the MNE Guidelines, ESB should communicate ‘information... [about] its performance in relation to... statements to which it subscribes’.<sup>399</sup> ESB’s annual reporting should therefore include compliance with the updated human rights policy and Supplier Charter. ESB should **transparently assess suppliers’ compliance with each provision in its new human rights policy** and set out **steps taken to prevent or mitigate identified adverse impacts in its supply chain.**
- ESB should report on **stakeholder engagement** with relevant stakeholders located outside of Ireland.<sup>400</sup>

vi. As a member of both Bettercoal and the Colombia Working Group, and in light of the expectation that MNEs should ‘encourage periodic reviews of relevant multi-

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<sup>396</sup> ESB Group Policy Statement on Environmental Management and Sustainability (n 353).

<sup>397</sup> ESB’s reporting on its environmental impacts does not consider the impacts of its procurement activities. See generally ESB, ‘Environmental Information’ (n 381).

<sup>398</sup> ESB Supplier Charter (n 377).

<sup>399</sup> MNE Guidelines Chapter III art 3.

<sup>400</sup> ESB representatives travelled to La Guajira in 2019 to meet with community leaders, Cerrejón, CMC, and local government representatives; but this meeting was not referenced in the Stakeholder Engagement section of ESB’s 2019 sustainability report alongside other stakeholder engagement. See text to n 382 - 384.

stakeholder and industry initiatives of which the enterprise is a member’,<sup>401</sup> to take all steps available to it as a member of Bettercoal to promote:

- **the publication of Bettercoal’s detailed reports on Cerrejón and other suppliers; and**
- **the conditioning of membership of Bettercoal on compliance with the MNE Guidelines.**

The Due Diligence Guidance states that:<sup>402</sup>

*...if an enterprise has not caused or contributed to an adverse impact, but is rather directly linked to the impact, the enterprise may... take a role in remediation... For example, the enterprise may **use its leverage**, to the extent practicable, with its business relationship **to compel the business relationship to participate in processes to provide for remedy**. Where relevant, the enterprise may provide information which can facilitate investigations or dialogue.*

On this basis, ESB should use its status as a state-owned organisation with an internationally recognised brand to **put public pressure on Cerrejón / the parent companies to remedy the impacts caused by the mine.**<sup>403</sup> GLAN submits that the Irish NCP therefore ought to urge ESB to issue a **public statement** indicating the following:

- i. ESB has formally terminated its relationship with Cerrejón because of the human rights and environmental abuses associated with the mine.

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<sup>401</sup> Due Diligence Guidance, p. 32, para 4.1(d). Such review should include ‘[the initiative’s] alignment with [the Due Diligence] Guidance, and their value to the enterprise in helping it identify, prevent or mitigate adverse impacts linked to its business.’

<sup>402</sup> Due Diligence Guidance Q52.

<sup>403</sup> MNE Guidelines Ch II art A.12: ‘Enterprises should... Seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business relationship.’ MNE Guidelines, Commentary to Ch II, para 20: ‘Meeting the expectation in paragraph A.12 would entail an enterprise, acting alone or in co-operation with other entities, as appropriate, to use its leverage to influence the entity causing the adverse impact to prevent or mitigate that impact.’

- ii. Cerrejón / the parent companies must stop causing adverse impacts in La Guajira and must provide adequate remedies for the human rights impacts caused by their activities;<sup>404</sup> such remediation will require environmental rehabilitation.<sup>405</sup>
- iii. ESB will use its best endeavours as a member of Bettercoal to ensure that the latter operates in a manner consistent with the MNE Guidelines, including with regard to transparency of reporting.

Finally, in light of ESB's status as a state-owned enterprise and the consequent expectation that it should lead by example,<sup>406</sup> GLAN requests that ESB issue a **formal apology to the affected communities for its failure to comply with the MNE Guidelines by purchasing coal from Cerrejón.**

GLAN submits that **ESB should comply with these recommendations within one month of the Irish NCP issuing them.** GLAN requests that the Irish NCP specify this deadline in its recommendations, and that it **follow up on ESB's compliance** accordingly.<sup>407</sup>

The importance of following up on recommendations was recently highlighted by the OECD:<sup>408</sup>

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

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<sup>404</sup> Due Diligence Guidance Q52 notes that an enterprise which is directly linked to an adverse impact may 'take a role in remediation' by 'us[ing] its leverage... to compel the business relationship to participate in processes to provide for remedy.' By putting public pressure on Cerrejón's parent companies, ESB will be using the leverage created by its status as a state-owned enterprise and a former purchaser of Cerrejón coal to compel the parent companies to participate in processes to provide for remedy.

<sup>405</sup> The enterprise's operations have drastically altered the peninsula's landscape, rendering much of it inhospitable for agriculture, see Aviva Chomsky, 'Closing coal mines can further victimise victims of coal mining' (*The Irish Times*, 21 January 2019) <<https://perma.cc/S93C-NUEF>>.

<sup>406</sup> See pp. 42-43.

<sup>407</sup> MNE Guidelines, Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, paras 34 and 36: 'The parties may... agree to seek the assistance of the NCP in following-up on the implementation of the agreement and the NCP may do so on terms agreed between the parties and the NCP... If the NCP makes recommendations to the parties, it may be appropriate under specific circumstances for the NCP to follow up with the parties on their response to these recommendations. If the NCP deems it appropriate to follow up on its recommendations, the timeframe for doing so should be addressed in the statement of the NCP.'

<sup>408</sup> OECD, *Guide for National Contact Points on Follow Up to Specific Instances* (OECD 2020).

*norms and recommendations be closely monitored, they may be able to achieve high levels of effectiveness.*

The Irish NCP has also recognised the importance of following up on compliance, stating that ‘the NCP will consider [the issue of follow-up] in reviewing [its] Rules of Procedure as part of an overall action plan (planned for 2020).’<sup>409</sup> Although no new Rules of Procedure have yet been published, GLAN submits that the Irish NCP should therefore commit to following up on the recommendations and ensuring ESB’s compliance with the outcomes of this process.

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<sup>409</sup> OECD Watch, ‘NCP Ireland’ <<https://www.oecdwatch.org/ncp/ncp-ireland/>>.