

Undermining Human Rights: Ireland, the ESB and Cerrejón coal



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Foreword

Philip Alston¹

This is a carefully researched and compelling analysis that highlights the conjunction of several of the most pressing and challenging issues that should be high on Ireland's agenda for the 2020s. They include: climate change and the country's obligations both at home and abroad; the human rights responsibilities of corporate actors as well as of their clients; and the consequences that flow from being a state that goes well out of its way to design its fiscal policies in order to attract corporate actors whose motivations might diplomatically be said to be mixed at best.

There are several reasons why the various actors to whom the recommendations in this report are addressed should take them very seriously. Those entities include, in particular, the governments of Ireland and Colombia. Given the propensity of corporate actors in such situations to avoid or evade responsibility and to take public relations driven, rather than public interest driven, decisions, it is governments which are best placed to put an end to what clearly are major abuses of human rights and of the environment.

The first reason for the Irish government to address the challenges described in the report is that Ireland has carved out a very particular niche for itself over the past several decades whereby it uses fiscal policies that are both innovative and often accused of encouraging a race to the bottom in order to attract a wide array of corporate interests to its shores. But this cannot be seen as a one-sided transaction in which the actions of the businesses that flock to the country and the circumstances under which they conduct their businesses are of no concern to the government of Ireland. The government itself has recognized this in theory through the various measures it has taken to support the UN Guiding Principles on Business and Human Rights (such as the adoption of the National Plan), and through its engagement with other mechanisms such as the OECD's Guidelines for Multinational Enterprises. The impetus to be seen to be supportive of these relatively minimalist, but nonetheless potentially very important, guidelines is primarily reputational. It is strongly in Ireland's interests, as well as its perception of itself as a human rights respecting state, that it should take these obligations seriously. This report makes clear that there is a long way to go before it can claim to be taking a genuinely principled stand in this regard.

A second reason is that Ireland stands clearly for global integration of financial and other markets and its economic wellbeing depends heavily on this strategy. But this in turn depends on doing all it can to ensure that the forms of globalization which it supports and promotes are not based on arrangements that put the interests of global capital far ahead of the wellbeing of the broader community. Many of the neoliberal policies described in this report have exacerbated income and wealth inequalities, brought previously unknown levels of economic insecurity to the middle classes, and further marginalized the most disadvantaged and vulnerable. It should thus be seen to be strongly in Ireland's interests to ensure that the economic policies that it is often pioneering and championing take full

account of the responsibilities that result from the fact that all nations are now closely inter-related in so many diverse and important ways, and that the actions of one state can have a greatly disproportionate impact on the wellbeing of many others.

This is especially true when it comes to both the environment and human rights. Far from diminishing the deeper underlying realities of inter-dependence, the pushback or backlash that we are seeing in some parts of the world against these concerns, driven by populist, illiberal, and authoritarian leaders, only serves to highlight the responsibilities of countries committed to the rule of law and respect for human rights to do all they can to uphold those values. Just as products made in China by prisoners working in slave labour-like conditions are shunned by consumers in many countries, so too are we increasingly aware of the unacceptability of encouraging and enriching global suppliers of coal and other resources whose modes of operation show contempt for the rights of workers in countries like Colombia.

A third, and closely related, reason is that shared environmental responsibility has become unavoidable in the face of the threat of unsustainable and potentially unlivable global warming caused by greenhouse gas emissions, to which the greatest contributors are fossil fuels. While the Irish government has talked of making Ireland a global leader on climate action, it is clear that its record to date leaves much to be desired, even by the reckoning of its own agencies such as the Irish Environmental Protection Agency. This report outlines several steps that would make major contributions towards Ireland's stated climate change goals.

A fourth reason why the recommendations in this report should be implemented by the Irish government is to ensure that Ireland lives up to its own rhetoric in the field of international affairs. It has long punched above its weight internationally as attested to by its longstanding and impressive commitment to United Nations peacekeeping forces, its significant international development assistance budget, its rapidly expanding network of diplomatic missions around the world and, above all else, the extent of the integration of its economy into the overall global economy. The launch of the major "Global Ireland 2025" campaign and its bid to be elected to the United Nations Security Council in June 2020 for the 2021–22 term also testify to its aspirations.

But at the same time, these ambitious goals and its determination to play a key role at the international level also serve to highlight the need for the government to take seriously its international obligations and to lead by example, as it aspires to do in the Security Council and other settings.

One of the most depressing conclusions to emerge from the systematic and impressively well-informed account contained in this report concerns the ability of corporate actors to play the game of purporting to be responsive to local, national and international pressures while all the while marching full steam ahead in putting their own profits ahead of serious concerns relating to human rights, environmental sustainability, and the basic health of affected communities.

Detailed case studies of this sort should provide a powerful impetus for those who are concerned to ensure that corporations are not immune from the need to respect human rights and environmental standards to re-evaluate the current state of the art.

The report describes the many initiatives that are gradually evolving at the national, regional and international levels to enhance due diligence and other obligations, and it is possible to discern from this account a real commitment on the part of some of the governmental and other actors to ensure that a meaningful accountability regime emerges over time. By the same token, it is difficult to come away from such an account with a great sense of optimism that these existing initiatives will succeed, at least in the foreseeable future, in ensuring that most major international mining companies are interested in anything beyond their own short-term profits regardless of the dire consequences both for local communities and for the global environment.

Philip Alston,

United Nations Special Rapporteur on extreme poverty and human rights and
Professor of Law at New York University School of Law.

Executive Summary

Ireland's largest electricity plant, Moneypoint in County Clare, has burned millions of tons of coal, with the vast proportion sourced from the Cerrejón mine in Colombia. As well as being one of the biggest open cast mines in the world, it is also accused of complicity in grave human rights abuses.

Morally and legally it is highly questionable for the state owned Electricity Supply Board (ESB) to continue purchasing dirty fossil fuel coal from Cerrejón without taking appropriate steps to address these abuses. International law and the UN Guiding Principles on Business and Human Rights (UNGPs) oblige Ireland to ensure that all state owned and Irish companies domiciled in their territory and/or jurisdiction are respecting the human rights of all people that come into contact with the company.

This is not happening in the case of the Cerrejón mine where there are well-documented accounts of human rights abuses, ranging from the forced displacement of people, the pollution of rivers, the degradation of air quality to the intimidation of activists and more.

Firstly, in continuing to burn dirty fossil fuels at Moneypoint, Ireland is contributing to the climate crisis at a time when the need to phase out fossil fuels has never been greater. While plans are in place to shut Moneypoint by 2025, Ireland is viewed as a laggard when it comes to tackling climate change with per capita emissions among the highest in Europe. However, it is the people of La Guajira who are already feeling the consequences of the changing climate brought on in part by the lifestyles and habits of rich countries like Ireland.

Secondly, Ireland's corporation tax rate of 12.5% (on trading profits) has made Ireland a magnet for many international companies, including the Coal Marketing Company, Cerrejón's sales division. Basing their operations in Dublin, as opposed to Colombia, where the rate of corporation tax is 34%, means that Ireland's tax policy is, in theory, enabling Cerrejón to avoid tens of millions of euros in taxation each year. This undermines the Colombian government's ability to raise much needed revenue that could ensure people's basic rights.

These two issues raise serious questions about the coherence of Irish government policy. Ireland has long supported efforts to bring about peace and protect human rights in Colombia, and the establishment of an embassy in Bogotá this year reflects a long-term commitment to the country. But by failing to ensure that Irish companies and state-owned companies like the ESB are living up to their obligations under international law, which includes commitments around climate change and tax policy, Ireland is in danger of undermining its own efforts to support human rights in La Guajira and other communities across Colombia.

The lessons from Cerrejón should be instructive for the government at a time when the country is seeking to expand its global footprint. The government's stated priority of

promoting market penetration and diversification, including through the establishment of new missions in key markets² is not without risk. It is particularly acute in countries where governance institutions are weaker, civil society space increasingly shrinking, and where multinational investors often exert significant influence over government policy. As new trade links between Ireland and countries of the global south are facilitated, Ireland must ensure that trade opportunities do not come at the expense of human rights. An updated Business and Human Rights National Plan that addresses these issues of incoherence would be an important contribution.

Abuses at Cerrejón

Possibly the most overtly violent abuse the mine has been accused of is the forced displacement of local people. Over the course of its history it has been linked to the expulsion of up to 35 indigenous and Afro-Colombian communities.³

Cerrejón's operations also harm local people through their impact on the natural environment. The mine uses 16 million litres of water each day – equivalent to the consumption of 67,000 people – which is then dumped back, full of heavy metals, into the Ranchería River.⁴ As the only major river in the area, the severe pollution is linked⁵ to elevated levels of cancer, reproductive ailments and renal and liver problems.⁶ It also made structural interventions in 19 rivers and streams, exacerbating the water scarcity in a region that has been hit by repeated droughts in recent years⁷ and severely contaminating the quality of air and soil.⁸

So, what should Ireland and the ESB be doing differently?

Having taken the welcome step of launching a National Plan on Business and Human Rights,⁹ the Irish government has reaffirmed its commitment to implementing the UNGPs¹⁰, which outline the responsibilities of states and businesses to human rights. However, the case of the Cerrejón mine exposes the inadequacy of the National Plan, and the ESB's response, to addressing the human rights abuses it is contributing to through its relationship with Cerrejón. Without clear legislation that holds the Irish government and the ESB to account, the National Plan will remain a smokescreen for genuine respect for human rights in business operations.

The following recommendations should not undermine Ireland's pledge to close Moneypoint and divest from fossil fuels as soon as possible. They should merely guide the revision of policies and practices while coal is being imported from the Cerrejón mine and prepare all parties to respect and promote human rights in future business strategies. They echo recommendations made in December 2019 by the UN Committee on the Elimination of Racial Discrimination to Ireland in relation to the Cerrejón mine, particularly in relation to an independent inquiry and access to remedy for victims.¹¹

- **Ireland should introduce legislation making human rights due diligence mandatory for state-owned and large companies including in transnational supply chains.**
- **Ireland should launch a consultation process on the next iteration of the National Plan on Business and Human Rights and address the concerns raised in this report.**
- **Ireland should establish a transparent Policy Coherence for Development mechanism to rectify inconsistencies between international human rights law, and its tax regime, trade and greenhouse gas policies.**
- **The ESB should support an independent human rights and environmental impact assessment deemed acceptable by the affected communities.**
- **The ESB should seek effective engagement with Cerrejón to ensure respect for human rights, including communicating possible disengagement if problems are not resolved.**
- **The ESB should develop and adopt a robust public human rights policy and develop processes to identify and monitor human rights in its supply chains, and report regularly and transparently on all its suppliers.**
- **The ESB should acknowledge the shortcomings of the Bettercoal initiative and, with the collaboration of concerned civil society organisations, seek to strengthen Bettercoal's monitoring, reporting and transparency to make it a meaningful mechanism.**
- **All actors involved must ensure that the right to effective, accessible remedy is protected.**



Climate change pressure

COLOMBIA

Lost tax revenue

€€€

€€€



Lost tax revenue

€€€

LA GUAJIRA

DEMOGRAPHICS

- Population: 902,000
- Indigenous: 45%
- Afro-Colombian: 8%
- Poverty rate: 65%
- Extreme poverty: 25%
- Deprivation basic needs: 45%

CERREJÓN COAL MINE

- 30 million tonnes of coal production a year
- 16 million litres of water used per day
- 35 communities displaced to date
- 19 interventions in water system
- 29 rivers and streams impacted
- 300,000 people directly impacted

Introduction

Ireland's largest power station, Moneypoint in County Clare, has bought millions of tons of coal from a mine in Colombia that is accused of contributing to human rights abuses.¹² Over the course of four decades in operation, the Cerrejón coal mine has been at the centre of myriad controversies over human rights abuses and environmental harms caused by its activities.¹³ These abuses include forced displacement of indigenous and Afro-Colombian communities, along with contamination of air, soil and water supplies fuelling chronic human rights crises in the region affecting thousands of people.

While continuing to source large quantities of coal from Cerrejón, the ESB has rebutted concerns over its relationship with the mine by referencing an assessment report by Bettercoal that said it is 'satisfied' with the ESB's adherence to human rights and environmental standards.¹⁴ Bettercoal is an initiative of major coal buyers and one that has been strongly criticised by civil society.

The case of the Cerrejón mine, and the impact of its relationship with local communities, is a striking example of the role that can be played by large multinational enterprises in fuelling injustices. It also exposes the lack of accountability mechanisms and legal instruments needed to ensure businesses are held to account for malpractices.¹⁵



This report is split into three sections:

Section I: 'Undermining Human Rights' introduces the Cerrejón mine and its relationship with the ESB, before providing a detailed analysis of the human rights and environmental abuses unfolding on the ground in La Guajira, where Cerrejón is located. This includes a focus on the mine's role in these abuses and the corresponding national and international norms and standards that are not being fulfilled.

Section II: 'Taking care of business' explores the broader economic trends and gaps in legal oversight. It then examines the important legal advances in recent years at the international, regional and national levels, seeking to confront the 'accountability gap' that has allowed human rights abuses from business activities to go unchecked for so long.



Image of Moneypoint power station, Co. Clare, Ireland

It also analyses the steps Ireland has taken to implement the UNGPs, and the pressing issue of policy (in)coherence. Separate subsections unpack the ESB's shortcomings in meeting its specific responsibilities under the UNGPs, along with Cerrejón's efforts in the same regard.

Section III: 'What needs to happen?' provides a comprehensive set of targeted recommendations for the Irish and Colombian governments, along with the ESB and Cerrejón, that if meaningfully implemented could serve to confront the long-standing injustices facing the people of La Guajira.

Methodology

This report was produced through desk research combined with extensive interviews of key stakeholders and experts. In total, 35 interviews were conducted during the research process. Those consulted included international experts in business and human rights, UN human rights authorities, and the OECD Due Diligence Department, along with Colombian environmental groups and academics, the Sintracarbón union, the Cerrejón mine, and representatives of impacted communities on the ground in la Guajira. Leading Irish figures in the field of business and human rights were also consulted. A number of requests for a direct dialogue with the ESB were made, but unfortunately a representative was not available for interview ahead of publication of this report. Information regarding the ESB's relationship with Cerrejón was sourced under Access to Information on the Environment regulations and complemented through analysis of publicly available documentation. If a meeting is convened when an ESB representative becomes available, Christian Aid looks forward to engaging on any new information that may emerge.

Other secondary information sources included public records and legal documentation in both Ireland and Colombia, public filings and reports, investor documents and statements, publicly available corporate documentation, social and environmental impact assessments, analysis by independent research and academic institutions, and documentation produced by national human rights ombudsman bodies in Colombia and a variety of European nations. Research on normative standards applying to the ESB-Cerrejón relationship included a thorough review of key instruments and jurisprudence of the United Nations, regional and national human rights bodies, along with relevant areas of international corporate law and regulation, with a focus on the standards of the OECD. This was complemented by broad examination of recent institutional and legislative developments in business and human rights, both internationally and in a variety of European national contexts.

A draft of the report was shared with key stakeholders, including Christian Aid partners in Colombia, human rights and environmental experts and activists on the ground.

Section I:

Undermining Human Rights

Cerrejón mine

Cerrejón is the largest open-pit coal mine in Latin America. It is located in Colombia's northernmost department La Guajira, a semi-arid peninsula, which is home to 902,000 people. Some 45% of the population come from indigenous peoples communities who have been living there for over 3,000 years.¹⁶ The vast majority belong to the Wayúu, with smaller groups belonging to the Arhuacos, Koguis and Wiwas. A further 8% are of Afro-Colombian descent. This makes La Guajira the department with the highest presence of indigenous peoples in Colombia. In 1991, the Colombian Congress approved the ILO Convention (169) on Indigenous and Tribal Peoples by Law 21, and the government issued legislation to domesticate the convention, including the right to land.¹⁷



Image of Cerrejón mine

While small-scale coal mining in the region dates to the 19th century, large-scale industrial mining did not get underway until 1976 when the state-owned Carbones de Colombia signed an agreement with Intercor, a subsidiary of ExxonMobil, to extract the coal in La Guajira. As part of the development, a 150-kilometer private train line was built to carry

extracted coal to the port of Puerto Bolivar for shipping, which cuts through Wayúu territory in northern Guajira.¹⁸ Each day, two 120-car trains carry an average of 48,000 tons of coal to the port.¹⁹

In 2000, the government sold its half of the enterprise to a consortium consisting of BHP Billiton, Anglo American, and Glencore. In 2002, the consortium acquired the remaining 50% of the mine from ExxonMobil. Cerrejón produces an average of 32 million tonnes of coal per year, almost all of which is exported. European countries are the largest buyers of Cerrejón coal, accounting for 43% of total sales.²⁰

Since the earliest days of its operations, Cerrejón has been accused of wide-ranging human rights abuses and environmental devastation.²¹ The original inhabitants of La Guajira have been forced to bear the social, economic, cultural, environmental and spiritual costs of the mine, while receiving little benefit from the profits generated.

Cerrejón's sales are managed through the **Coal Marketing Company (CMC)**, a legally separate entity which is owned by the same consortium of BHP Billiton, Anglo American, and Glencore. CMC is domiciled in Dublin. The company was established in 2003, immediately after the consortium took full control of Cerrejón, as the exclusive global marketer of coal from the mine. It reports having successfully increased the volume of coal sold from 18 million tonnes to 30 million tonnes per year over the past decade.²²

The ESB

The ESB, Ireland's state energy company, was first established in 1927. The company is 95% owned by the Irish government, with the remaining 5% belonging to its employees through a share ownership plan. With a regulated asset base of approximately €9.6 billion, it supplies energy and gas to over two million clients on the island of Ireland and accounts for 38% of the energy market.²³

It is composed of several legally demarcated companies: ESB Networks, which manages the transmission system; ESB Generation and Wholesale Markets, which operates power stations across the country; Electric Ireland, which is the supply and retail arm; ESB International, which provides consultancy services and manages international holdings; and Northern Ireland Electricity, which runs operations in Northern Ireland. One of Ireland's largest companies, ESB employs 7,800 people, and delivered a profit of €455 million in 2018.²⁴ Dividends from ESB's profits accrue in large part to the exchequer, amounting to €1.2 billion over the past decade.²⁵

The ESB operates 10 thermal electricity generation stations across Ireland and the UK, along with nine hydroelectrical plants and 18 wind farms. The Moneypoint power plant, located on the River Shannon at Kilrush, County Clare, is the ESB's largest power plant and the only coal-fired station in the country. It is also Ireland's largest single emitter of greenhouse gases, burning approximately two million tons of coal each year.²⁶

Better coal? The ESB and Cerrejón

Between 2011 and 2016, the ESB purchased the bulk of the coal powering the Moneypoint plant from Colombia, with the majority coming from Cerrejón. Documents released under Access to Information on the Environment regulations reveal that some 7.5 million tons of coal from Cerrejón was burned at the plant over this period.

The ESB has responded to queries and complaints regarding its relationship with Cerrejón by pointing to a recent assessment by **Bettercoal**, an initiative of major coal buyers. In responding to questions about human rights concerns surrounding Cerrejón, the Irish government has likewise cited Bettercoal as evidence of adherence to legal and ethical standards in Ireland's relationship with the mine.²⁷

The Bettercoal Code,²⁸ of which ESB is a member, and Cerrejón aims to comply, comprises 10 principles. These include commitments to abide by applicable national and international laws, actively respect and promote human rights, prevent pollution, protect biodiversity and ecosystems, and contribute to the development of communities where they operate. Under this framework, Bettercoal carries out monitoring of the mine every two years. However, there is a lack of clarity on Bettercoal's full monitoring method showing the need for greater independence and transparency.²⁹

Given the well-documented and wide-ranging spectrum of human rights abuses and environmental harms surrounding the mine, it is surprising that the Bettercoal assessment finds Cerrejón either 'meets' or 'substantially meets' its principles on human rights and environmental protection.³⁰ According to the Bettercoal assessment, the Cerrejón mine has not 'missed' any of its principles.³¹ The Bettercoal assessment does recognise the significant levels of mistrust expressed by communities towards the mine, and the high levels of poverty in La Guajira, but remains silent on the human rights abuses.

Bettercoal, despite its commitment to transparency, does not make the data publicly available, offering only a summary of findings. The initiative is also unable to make binding recommendations, with members obliged only to take findings 'into consideration'. Furthermore, the auditors contracted are selected and paid by Bettercoal itself, without input from other stakeholders. Because of these weaknesses, Bettercoal is criticised by civil society organisations as an industry 'greenwashing' through which energy and extractives companies can outsource their accountability for human rights and environmental harms.³²

Abuses on the ground in Cerrejón

Cerrejón is well aware of its obligations under UNGPs. Since 2011, when they came into effect, it has reiterated its commitment every year in its annual sustainability report.³³ However, the company's reporting on its human rights performance provides little evidence of efforts to address human rights abuses linked to its operations.

Hitting homes: Cerrejón's history of forced displacement

Over its 40-year history, the Cerrejón mine has displaced up to 35 indigenous, Afro-Colombian and campesino communities.³⁴ Of importance here is the principle of free, prior and informed consent, which is at the core of the United Nations Declaration on the Rights of Indigenous Peoples,³⁵ endorsed by Colombia in 2009.³⁶ The history of the Cerrejón mine has been one of repeated forced displacement in which processes for consultation have in some cases been characterised by intimidation and violence, rather than 'meaningful consultation'. The first of these was the Wayúu village of Media Luna, which was forcibly displaced in 1981 to make way for development of the Puerto Bolívar port.³⁷ Some 750 residents who lived in Media Luna entered into negotiations with the company for their collective relocation, but were targeted with anonymous threats of violence, which appeared to be linked to the negotiations and later led to the collapse of talks.³⁸ Subsequently, the company ordered the village to relocate for a second time and, when seven families refused, a metal fence was erected around their homes and armed guards stationed to watch over – a strategy interpreted to intimidate them into leaving.³⁹

In 1991 the Wayúu villages of Caracoli and Espinal were likewise displaced in order to make way for expansion of the mine's operations.⁴⁰ The largest forced displacement to date would not come until a later phase of expansion, when 1,200 residents of the Afro-Colombian community of Tabaco were driven from their homes in 2001. On 9 August 2001, then-owners of the mine, Intercor, arrived with bulldozers and a large force of soldiers and riot police to expel the residents and demolish their village.⁴¹

In May 2002 Colombia's Supreme Court ruled that the community be rebuilt in Hatonuevo, but the municipality was unable to implement the ruling due to a lack of resources. After subsequent complaints were filed against Cerrejón's parent companies at the OECD National Contact Points in Switzerland and Australia, an independent social review panel was established. As a result, the mine's owners agreed to enter talks with community representatives, but to this day the people of Tabaco remain dispossessed and Cerrejón has not complied with calls to effectively address the community's concerns.⁴²

In 2016, violence was used again when eight families from the Afro-Colombian community of Roche refused to be resettled after the company failed to provide guarantees on the conditions of their relocation. Several members of the community, including two women and an intellectually impaired youth, were seriously injured when riot police used tear gas and metal projectiles to force the families out.⁴³

At the time of writing, it is reported that another community of El Rocío will soon be forcibly displaced, after police warned the community they would have to leave their land or be forced from it.⁴⁴ Community leaders believe Cerrejón's plans to divert a local river is the motivation behind these threats.⁴⁵

Paradise lost: impacts on the right to health, water, food and a healthy environment

While forcible displacement is arguably the most overt form of human rights abuse, it may not be the most egregious. Through its devastation of the natural environment, the mine has severely undermined the **right to food, health, water** and indeed the right to life.⁴⁶ These rights are tightly enmeshed with **the right to a healthy environment**, which is recognised as a key component of the right to health. Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) imposes on states the obligation to ensure access to adequate **food** to all people under its jurisdiction. It requires states to implement measures for the production, conservation and distribution of food sufficient to guarantee all persons are free from hunger and malnutrition.⁴⁷ Although the **right to water** is not explicitly mentioned in the text of ICESCR, it is recognised as a key component of other fundamental rights including the right to life, the right to food and the right to an adequate standard of living.⁴⁸



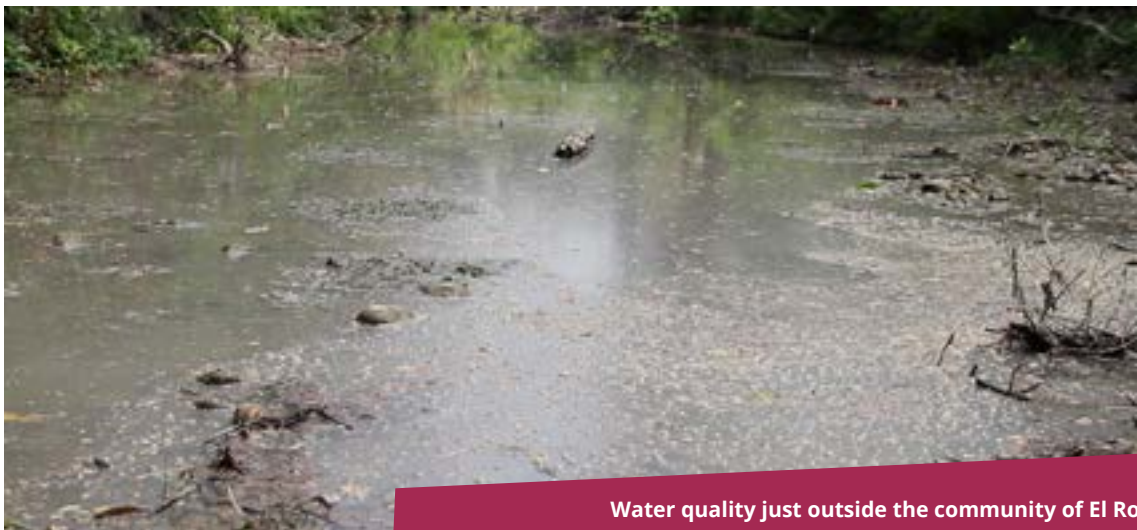
Image of the Community of Provincial with Cerrejón mining pit in the background, La Guajira

The Cerrejón mine, which covers more than 700km², impacts more than 300,000 people over a 200-kilometer stretch of the Guajira peninsula.⁴⁹ In a 2018 submission to the Constitutional Court, Colombia's Human Rights Ombudsman presented wide-ranging evidence of environmental destruction, and corresponding impacts on human health in the indigenous reserve of Provincial, located close to five Cerrejón mining pits.⁵⁰ These included significant levels of coal and coal dust on the ground and roofs of homes, in the soil and water supply.⁵¹ It also found serious failures in the monitoring of air and water quality, and pronounced contradictions between the company's self-reporting on environmental and health impacts and the realities on the ground.⁵² The Ombudsman concluded that the air, water, and soil had been severely contaminated and the cultural integrity of the community compromised.

Moreover, the company's monitoring of particulate matter in the air does not meet international standards established by the World Health Organization and, crucially, until 2018 there was no monitoring on PM.2.5, which is the smallest and most pernicious form of particulate matter for human health.⁵³

The River Ranchería, which is the only major river flowing through the department of La Guajira, has been the lifeblood of the Wayúu people and their culture for over 3,000 years. A thorough analysis of water quality carried out by INDEPAZ (The Institute of Studies for Development and Peace) in 2017 found that levels of lead, cadmium, barium, manganese, iron and zinc repeatedly surpassed levels permissible under environmental legislation and standards set by the World Health Organization, presenting a clear threat to both the natural environment and human health.⁵⁴ The aforementioned heavy metals are known to cause cancer, reproductive ailments, skin diseases, and renal, liver and immunological disorders.⁵⁵ Though it is not suggested that Cerrejón is the sole source of this contamination – agro-industrial enterprises further upstream are also likely to contribute – the presence of toxic metals in the water is particularly pronounced in the areas where Cerrejón dumps waste water.⁵⁶ A ten-year study carried out by a group of Colombian and Brazilian universities in association with Sintracarbón – the main union representing Cerrejón workers – found that pollution from the mine was likely to be 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.⁵⁷ High levels of aluminium, chrome, copper, manganese, nickel, sulphur, and silicon were detected in the blood of both mine workers and those living in the immediate environs.⁵⁸

As a result of these contaminants, and in particular the dispersal of coal dust across the region, local people are experiencing highly elevated incidents of skin and subcutaneous disorders, along with respiratory and gastro-intestinal illnesses, hypertension, cardiovascular ailments, premature birth and pregnancy complications.⁵⁹ Due to the disproportionate burden they bear in domestic work, women are particularly affected by high incidences of leukaemia and renal infections, likely due to more frequent contact with water-borne contaminants.⁶⁰ The worst affected, however, are children and older people.⁶¹



Water quality just outside the community of El Rocío, downriver from Cerrejón

A complaint brought by the lawyers' collective CAJAR on behalf of Moisés Guete Uriana, a three-year-old boy from the indigenous Wayúu reserve of Provincial who presented with severe respiratory problems and began vomiting blood, provoked a national outcry and led a Circuit Court judge to order Cerrejón to reduce its particulate emissions.⁶² In the 2015 ruling, the judge also strongly criticised the Ministry for the Environment and Development for failing to provide detailed scientific studies determining the health impacts of mining activity in the department, particularly among children and older persons.⁶³ To date there has been no meaningful effort to comply with the order.

Access to health services is meanwhile undermined by poor provision of medical facilities and questions of accessibility.⁶⁴ For many of La Guajira's indigenous and Afro-Colombian communities, getting to the nearest hospital or clinic requires a walk of two to three hours across difficult terrain, while ambulance services are either unreliable or non-existent.⁶⁵

Troubled waters: structural interventions in the hydrological system

Alongside contamination, Cerrejón's appropriation of vast volumes of the semi-arid region's limited water supply, along with structural interventions in the water system and the relentless dumping of waste into rivers and streams, further undermines the right to water, food and health in La Guajira.

Cerrejón consumes 16 million litres of water each day – equivalent to the consumption of 67,000 people – which are used in the extractive process and then dumped back into the *Ranchería* complete with contaminants.⁶⁶ Under the existing Environmental Management Plan (EMP), it has intervened in 19 rivers and streams. A further 29 rivers and streams not mentioned in the EMP have been impacted.⁶⁷ Such interventions in the natural water system of La Guajira exacerbates water shortages and undermines food security.⁶⁸

In the latest example, the company's diversion of the Arroyo Bruno stream led the Constitutional Court to order the establishment of an inter-institutional roundtable with the full participation of impacted communities to determine whether it should be returned to its original course.⁶⁹ Civil society organisations report that local community leaders were excluded, however, and as a result the diversion remains, contrary to the Court order.⁷⁰

It is well documented that La Guajira is on the frontline of climate change, having experienced a series of droughts in recent years which have resulted in widespread crop failures.⁷¹ Annual rainfall is predicted to diminish by a further 10 to 20% between now and 2050 as a result of climate change pressures.⁷² These pressures in combination with pollution from Cerrejón have decimated the crops and livestock of communities living along the *Ranchería*.⁷³

Weak state institutions and corruption are also playing a central role in exacerbating the crisis. The El Cercado dam was built in 2011, ostensibly with the goal of providing a secure water supply to nine municipalities, but the necessary infrastructure to deliver water to



Diversion of the Bruno stream

the communities was never built.⁷⁴ As a result, water has been cut off to communities living downstream from the dam, and the only beneficiaries have been agro-industrial installations and the Cerrejón mine.⁷⁵

While a number of state initiatives designed to intervene in the food crisis afflicting La Guajira have been established, these have largely failed due to poor planning and corruption.⁷⁶ In February 2017, in the wake of a series of corruption scandals, the Department of National Planning in Bogotá took administrative control of the health, education and water services in the department.⁷⁷ This move came immediately after rulings from both the Colombian Constitutional Court and the Inter-American Commission on Human Rights (IACHR) demanding precautionary measures to protect the right to food, health and water of Wayúu communities in La Guajira.⁷⁸ The IACHR ruling reiterated information from Wayúu leaders that at least 4,770 children had died of hunger in the region over the previous eight years and a further 37,000 were suffering malnutrition. The IACHR also demanded special measures to protect women and girls who it found to be facing severe impacts.⁷⁹

State agencies have sought to tackle the food crisis through the School Food Program (Programa de Alimentación Escolar, PAE) and various initiatives of the Colombian Institute for Family Wellbeing (Instituto Colombiano de Bienestar Familiar, ICBF). Monitoring by independent human rights organisations has shown serious shortcomings in the implementation of the PAE programme, due to a lack of adequate food preparation facilities and inadequate food quantity or quality.⁸⁰ Similarly, failures in coverage and non-payment of many staff have impeded the impact of the ICBF's interventions.⁸¹

Meanwhile, provisions for alternative sources of potable water in the department are characterised by sporadic initiatives, generally in the wake of media attention to the water crisis, that are not sustained after the news crews go home. For example, President Santos, during his first mandate (2010–2014), pledged that 1,000 new wells would be created for Wayúu communities in northern Guajira,⁸² but of those delivered many ceased functioning due to lack of maintenance within months of their inauguration.⁸³ Similarly, a desalinisation plant built in Puerto Estrella in 2013 in order to provide water for its 600 inhabitants also ceased functioning a few months after its opening. The plant was repaired in 2017, when representatives of the Constitutional Court visited the department, but was only maintained for a few weeks before breaking down once again.⁸⁴

As things currently stand, many thousands of indigenous and Afro-Colombian people in the department of La Guajira are obliged to walk up to three hours each day to fetch water, which is often contaminated, while schoolchildren in some villages have to bring three litres of water to school with them each day in order to benefit from school meals.⁸⁵ Some 90% of the Wayúu population survives on water that has not been treated in any way.⁸⁶

Though Cerrejón funds and implements a variety of programmes to provide food and water to local communities, which might be interpreted as a means to mitigate impacts in accordance with the UNGPs, the company itself recognises that these are manifestly insufficient to tackle the scale of the problems.⁸⁷

A culture in danger of extinction

Attention must also be afforded to the **cultural rights** of those impacted, especially as a result of forced displacement. The displacement of indigenous communities from their ancestral lands frequently leads to the loss of crucial cultural reference points such as burial grounds and access to sacred sites, such as particular mountains and rivers.⁸⁸ In turn, this often leads to forced assimilation into mainstream society, the loss of language, traditions, and social structures, and in time the extermination of distinct cultures.

Wayúu community leaders allege that the large influx of non-local workers that has come with mining has brought with it sexual exploitation of women and, in some cases children.⁸⁹ Social pressures deriving from the high levels of poverty and inequality in the region are reported to be further exacerbating violence against women.⁹⁰

The physical alteration of terrain for mining purposes, along with the construction of the Puerto Bolivar train track, has meanwhile blocked communities' access to their traditional lands.⁹¹ Moreover, the heavy state security presence guarding the train track has left many indigenous people too intimidated to traverse the structure. Noise from the train and from mining activities – both of which operate 24 hours a day – disturbs the sleep and the dream life of indigenous communities, which plays a fundamental role in their culture.⁹²

In 2009, Colombia's Constitutional Court recognised that the Wayúu, Arhuacos, Koguis and Wiwas communities were in danger of extinction.⁹³ In early 2019 the same court, reaffirming the worsening humanitarian crisis and the increasing threat to the Wayúu cultural survival, ordered the Ministry of the Interior to implement a thorough social, cultural and political census as a first step towards better securing their rights.⁹⁴

Green or black? Cerrejón's environmental permit



This grid is located inside a well of the water treatment plant in the New Roche resettlement. Photograph taken during maintenance shows scum accumulated on tubes

Cerrejón is still operating on the basis of an environmental licence issued in 1983, which has been subject to some 60 modifications as the mine has repeatedly expanded the size and scope of its operations. Environmental impact assessments carried out as part of the licensing process are conducted by the mine itself, despite the long-standing complaints of local communities that their findings manifestly contradict realities on the ground.

In the latest in a long series of legal challenges to the company's environmental licence, Colombia's Council of State – the highest court of administration – is currently considering a lawsuit brought by human rights and environmental defenders. It alleges that the mine is responsible for a humanitarian crisis in La Guajira, and the latest modification to its environmental licence, secured to allow the diversion of the River Bruno, was conceded without the required impact assessment.⁹⁵

Whose wealth is it anyway? The right to benefit-sharing

Being mindful of the vast revenues flowing from the seams of Cerrejón – in 2011 alone it reported sales of US\$336 million – international jurisprudence clearly states that local communities, and in particular those directly affected by mining operations, have a right to share in the material benefits emanating from their territories.⁹⁶ Though Cerrejón argues that it is the largest employer in La Guajira, and accounts for some 44% of the department's GDP,⁹⁷ this does not take into account the distribution of this wealth among the population, the multidimensional nature of poverty, or the destruction of traditional ways of life that sustained indigenous communities for millennia.

Regarding the state's role in managing mineral resource revenues, it must also be noted that Article 2(1) of the ICESCR requires them to deploy measures *"to the maximum of available resources... to achieving progressively the full realisation of the rights"* such as healthcare, water and adequate living standards.

The most recent statistics from DANE, Colombia's National Statistics Office, show that La Guajira is among the poorest departments in the country, with 65% of the population living in poverty, over 45% suffering deprivation of basic needs such as food and sanitation, and over 25% living in extreme poverty.⁹⁸ The level of unsatisfied basic needs in La Guajira rose from 37.4% in 2005 to 48.3% in 2011.⁹⁹ Some 28% of Wayúu children in the department suffer malnutrition.¹⁰⁰ In 2018, multidimensional poverty in La Guajira stood at 51%, as compared to 4% in the capital Bogotá. The proportion of the population without access to healthcare was 26% in La Guajira and under 3% in the capital.¹⁰¹

It must be noted that such patterns of chronic and pronounced inequality are underpinned by the country's regressive fiscal regime which undermines sustainable development efforts in peripheral regions such as La Guajira.¹⁰² Up until 2011, local municipalities had a right to collect 50% of mining royalties emanating from their jurisdictions, but under regressive tax reforms implemented by former President Juan Manuel Santos this allocation was reduced to 10% (see also 'Cerrejón's clouded vision', below).¹⁰³ La Guajira is also among the departments with the most ineffective tax collection institutions, which further limits its capacity to generate the resources necessary to tackle such levels of poverty and deprivation.¹⁰⁴

Under siege: violence against human rights defenders

Colombia today has a very high incidence of harassment and violence towards human rights and environmental defenders.¹⁰⁵ Killings of social leaders have risen since the historic peace deal between the Colombian government and FARC was signed in late 2016, as paramilitary gangs have flooded into the power vacuum left behind as 'la guerrilla' laid down its arms. In what has been branded a 'genocide of social leaders', 734 activists have been murdered for protecting human rights and the environment since 1 January 2016.¹⁰⁶

Among the armed groups using violence and intimidation to push back against the work of human rights defenders are Las Aguilas Negras (Black Eagles), a right-wing paramilitary organisation closely linked with Colombia's drug trade, which is active in La Guajira. Las Aguilas Negras have routinely issued death threats and other forms of intimidation against both community leaders in La Guajira and representatives of the Sintracarbón union.¹⁰⁷

As a result of such threats, there are several indigenous leaders, especially women, in La Guajira under the protection of the official measures of the Colombian government. However, those measures are insufficient and inappropriate. According to threatened leaders, the bulletproof vest draws attention to them thereby increasing rather than decreasing their risk; mobile phones in rural areas often do not work because there is too little or no coverage; and transport subsidies regularly do not cover the cost of a return trip to the local town.¹⁰⁸

Although there is no suggestion of complicity on the part of Cerrejón, the authors of these acts have made no secret that their intention is to rid the department of those who oppose business activities. Earlier this year, a Sintracarbón representative Igor Díaz received threats from the group warning that "*anti-business rats will be exterminated*". In recent months, it has also used the circulation of pamphlets listing its targets – a preferred form of intimidation – to issue threats against women's organisations, groups representing victims of the armed conflict, journalists, indigenous peoples' organisations – including Fuerza de Mujeres Wayúu – and a local firemen's union.¹⁰⁹

While Cerrejón has publicly condemned violence and intimidation against human rights defenders and union leaders,¹¹⁰ community leaders allege that Cerrejón's vigorous media efforts¹¹¹ have fuelled hostility towards them, putting their lives at risk.¹¹²

In a recent media interview, Cerrejón's president Guillermo Fonseca declared "*the dynamic of the communities not only has Cerrejón at a standstill, but also other extractive industries. The attitude of the communities has to change.... The communities are focused on profits in a very selfish way... the wellbeing of the country has to come before that of a few communities. These communities are sometimes the only beneficiaries, with lawyers and some NGOs who are profiting from these processes against our companies*".¹¹³

Dirty work: labour abuses

Human rights concerns surrounding Cerrejón are not limited to the impacted communities in the environs of the mine; it has also faced repeated controversies over its treatment of its workers, most notably the right to enjoyment of healthy environment, and the right to safe working conditions.

In accordance with ICESCR, General Comment 14 calls for *“the minimisation of health hazards inherent in the working environment”* and reiterates the obligation to ensure *“safe and hygienic working conditions”*. The core international legal standards concerning health and safety in the workplace are meanwhile detailed under ILO Conventions.¹¹⁴

As explained in the sections above, exposure to coal dust and other contaminants has led to serious concerns over the working conditions of employees at the mine. In 2013, Sintracarbón, the principal trade union at the mine, called a strike amidst allegations that some 700 workers were suffering serious health problems – including respiratory illnesses and back injuries – which were directly caused by unsafe working conditions.¹¹⁵ The strike led to the mine closing for 32 days, before an agreement was reached to improve health and safety provisions, monitoring, along with remuneration.¹¹⁶

Union representatives allege that promises of improved monitoring of workplace safety, including harmful contaminants, have never materialised, however, and at least two workers have died of cancer due to continuous exposure to silicone.¹¹⁷ Another strike was narrowly averted in 2016 when dialogue between the union and management delivered renewed commitments to improve provisions for health and safety.¹¹⁸ In 2017, some 13 industrial accidents were reported over a fortnight, with five of these occurring in a single day.¹¹⁹ The following year, over 98% of union members at the mine voted in favour of strike action¹²⁰ but this was narrowly avoided thanks to a last minute agreement by the company to raise salaries and improve health and safety systems.¹²¹

The repeated disputes have also been marked by threats and intimidation of union representatives.¹²² In 2008, Adolfo González Montes, a Sintracarbón negotiator at Cerrejón, was tortured and murdered by paramilitaries in front of his four children.¹²³

Section II:

Taking care of business

Since the early 1980s, **neoliberal economic policies** have swept the world as the dominant approach to managing both national and international economies. This philosophy of economic management – characterised by increasing competition through deregulation and international opening of markets, whilst reducing the role of the state by privatising public enterprises – is credited by many as driving economic growth. This agenda conflicts with the realisation of human rights at a very fundamental level because: (i) the human rights agenda depends on a robust role for the state in upholding human dignity, yet that power is shrinking with increasingly powerful multinational corporations, and (ii) deregulation has driven high levels of socioeconomic inequality, undermining the entire spectrum of human rights.¹²⁴

In Latin America, the rise of neoliberalism went hand in hand with government policies promoting mining and the extraction of fossil fuels as the motor of economic growth.¹²⁵ As commodity prices rose consistently on global markets and there was a proliferation of international trade and investment agreements, the flows of revenue for Colombia rose significantly between 2000 and 2012.¹²⁶ However, it brought harmful environmental and human rights impacts, and left the economy exposed to fluctuations in prices.¹²⁷

A further tension is that trade agreements, unlike most human rights treaties, generally include provisions for sanctions when they are not observed.¹²⁸ This has resulted in extractives companies, across Latin America, making ample use of trade oversight arbitration bodies.¹²⁹ In a most recent example, one of Cerrejón's parent companies, Glencore, succeeded in forcing the Colombian government to return a US \$19 million fine levied on it in 2016 after the National Comptroller found that its subsidiary Prodeco had incorrectly calculated royalty payments due from its mining operations in the country.¹³⁰ The company's petition for US \$575 million in damages was refused, however.

International progress

Historically, one of the greatest obstacles to accountability for business-related human rights abuses has been the issue of jurisdiction. With many multinational enterprises spread over multiple national territories, and often through complex corporate structures, the question of where complaints should be heard, and which legal standards should be applied has not been straightforward. The fact that abuses often occur in areas affected by conflict or weak judicial enforcement has further contributed to *de facto* impunity for business-related abuses.

In response to this, legislators, human rights oversight bodies and domestic courts have increasingly advanced a variety of policies, standards and mechanisms in order to close the 'accountability gap'. The most significant is the growing momentum for a legally binding

international treaty on business and human rights. In 2014 the Human Rights Council adopted Resolution 26/9,¹³¹ which established an open-ended Working Group on Business and Human Rights with a mandate to elaborate a legally binding instrument¹³² for the proposed treaty. Following extensive intergovernmental negotiations, a revised draft of the treaty,¹³³ along with an optional protocol,¹³⁴ was presented in July 2019. There is continuing uncertainty over both the European Union's¹³⁵ and Ireland's¹³⁶ support for the instrument.

The **UNGPs**,¹³⁷ which were unanimously adopted by the UN Human Rights Council in 2011, were meanwhile developed to provide an authoritative global standard for preventing and addressing the adverse human rights impacts of business activities. They rest on three pillars: (i) the state obligation to protect human rights, (ii) the corporate responsibility to respect human rights, and (iii) the need for victims of human rights violations to be provided access to effective remedies.¹³⁸ The human rights expectations under these pillars are set out in 31 principles that apply to all states and all businesses, regardless of their size or location. Being mindful that the human rights impacts of business activities are experienced differently and disproportionately by women, the UN Working Group on Business and Human Rights also produced a set of guidelines to assist states and businesses to effectively address women's rights through their implementation of the UNGPs.¹³⁹

Of particular importance to Ireland's relationship with Colombia are the **extra-territorial human rights obligations** (ETOs) contained within its international human rights commitments, and soft law duties under the UNGPs, and the OECD Guidelines for Multinational Enterprises¹⁴⁰ and the OECD's Due Diligence Guidance for Responsible Business Conduct.¹⁴¹ UN human rights oversight bodies have repeatedly clarified that states' obligations to respect, protect and fulfil¹⁴² human rights through their regulation and oversight of the corporate sector does not stop at their territorial borders.¹⁴³ In General Comment 24 on State Obligations in the Context of Business Activities, the Committee on Economic, Social and Cultural Rights¹⁴⁴ clarifies that:

"The extraterritorial obligation to protect requires States to take steps to prevent and redress infringements of Covenant rights that occur outside their territories due to the activities of business entities over which they can exercise control."

The Maastricht Principles on Extra-Territorial Obligations, which represent the authoritative interpretation on the scope and application of ETOs, clarify that *"where a state is in a position to influence the conduct of non-State actors even if they are not in a position to regulate such conduct, should exercise such influence"*.¹⁴⁵

Regional advances

Regional human rights oversight bodies have also been pushing to close the accountability gap surrounding business-related human rights abuses. Most notably, the Inter-American human rights system has issued numerous rulings designed to counter business-related human rights abuses through its oversight of member states,¹⁴⁶ and has explicitly incorporated the UNGPs into its jurisprudence. Meanwhile, the IACHR has held dozens of thematic consultations and hearings¹⁴⁷ related to the issue and is currently preparing a report on business and human rights. This forthcoming analysis is expected to build on the 2016 report on Indigenous Peoples, Communities of African Descent, and Extractive Industries,¹⁴⁸ which included detailed guidelines and proposals for member states to reform their laws and policies in order to close gaps in human rights protections and accountability related to the extractives sector.

In Europe, meanwhile, the EU Regulation on Conflict Minerals will come into force on 1 January 2021. This will effectively make due diligence guidelines legally binding at the EU level.¹⁴⁹ This means that importers of minerals from locations where there is a significant risk of human rights violations must identify such risks in the supply chain and implement a strategy to respond to them through their relationships with suppliers. While the new regulations only cover gold, tin, tungsten and tantalum at the time of writing, they repeatedly reference the OECD due diligence guidelines, which explicitly relate to all mineral supply chains from conflict-affected or high-risk areas¹⁵⁰. In the push for greater legal clarity around human rights due diligence, both MEPs and a number of major transnationals are meanwhile calling for complementary legislation in this area.¹⁵¹

Progress in other countries

Recent years have also seen important advances in national legislation designed to bring corporate activities into line with human rights standards. The most talked-about of these has been France's duty of vigilance law,¹⁵² which requires any company with over 500 employees to monitor and report on both the environmental and human rights impacts of their activities, including through their business relationships and supply chains, and to explain how they are seeking to prevent and address such impacts. A similar law is now being considered by the Swiss Parliament, albeit with ongoing resistance from the business sector and the Council of States (Upper House).¹⁵³

While narrower in its human rights focus, 2015 UK Modern Slavery Act¹⁵⁴ likewise requires companies with an annual turnover in excess of £36 million to take steps to monitor and prevent forced labour and human trafficking in their supply chains. In a similar vein, the Netherlands' child labour due diligence law,¹⁵⁵ which is currently pending senate approval and expected to come into force in 2020, obliges companies to identify and eradicate child labour in their international supply chains.

Similar laws in Australia and the United States – while limited to the question of forced labour – have demonstrated the practicability of imposing mandatory human rights

due diligence in the supply chains of relevant sectors. Germany, in its National Plan for Implementation of the UNGPs,¹⁵⁶ has meanwhile pledged that if at least 50% of companies with over 500 employees have not adopted human rights due diligence by 2020, it will legislate to impose this requirement. Finland has committed to making human rights due diligence mandatory at national and EU level, with regard to domestic and international supply chains.¹⁵⁷

While no such legislation exists in Ireland, the country's adherence to the OECD Guidelines for Multinational Enterprises and related due diligence documents establishes a soft law duty. Furthermore, the baseline study commissioned by the government of Ireland on the existing legislative and regulatory framework to assess existing provisions for business and human rights stated: *"For the State to continue to develop its strong reputation in the protection of human rights it is suggested that consideration ought to be given to the adoption of mandatory human rights due diligence"*.¹⁵⁸

In the context of complex transnational supply chains, **domestic courts** are increasingly delivering rulings with extra-territorial reach. While a full exploration of national caselaw in this regard is beyond the scope of this report, it is worth noting the recent decision of the UK Supreme Court to accept jurisdiction over a case brought by 1,800 Zambian villagers against the British mining company Vedanta concerning pollution caused by a copper mine owned by its subsidiary in the country.¹⁵⁹

A previous case taken against BP Exploration Company before the UK High Court alleged that OCENSA, a consortium led by BP, had caused devastating environmental damage to the lands of a group of Colombian farmers. The case, which dates to 2005, eventually led to a settlement in which BP paid out several million pounds to the plaintiffs.¹⁶⁰

Similarly, in 2018, France's Court of First Instance in Paris admitted a case brought by Sherpa, ActionAid France and Peuples Solidaires concerning abusive labour practices by Samsung in South Korea, resulting in an admission of responsibility by the company and an agreement to pay compensation.¹⁶¹ In Germany, meanwhile, the Higher Regional Court of Hamm is currently hearing a claim for compensation being brought by a Peruvian farmer against the German energy company RWE.¹⁶² The claim alleges that the company has exposed his village to flooding because of emissions from its coal-fired power plant, which have driven the melting of two glaciers and concomitant flooding of the village.

In December 2015, the Court of Appeal of The Hague agreed to hear a case brought by a group of Nigerian citizens against Dutch Shell, alleging environmental damage and health and livelihood impacts due to oil spills caused by its subsidiary in the Niger Delta.¹⁶³ In so doing, it overturned a previous ruling by the District Court of The Hague, which had argued that the spills resulted from acts of sabotage by third parties and that under Nigerian law there was no general duty of care on parent companies to prevent their subsidiaries from inflicting damage on others.¹⁶⁴ The case is ongoing.

Also, at the national level, the non-judicial accountability system set up under the **OECD's network of National Contact Points (NCPs)** is increasingly addressing complaints related to human rights abuses by multinational enterprises and, in particular, the extractives

sector. Since the NCPs started operating, they have handled 77 'specific instances' relating to the mining sector. Of note, all three of Cerrejón's parent companies, Anglo American,¹⁶⁵ BHP Billiton¹⁶⁶ and Glencore¹⁶⁷ have been subject to NCP 'specific instances', albeit with limited success. The BNP Billiton complaint¹⁶⁸ centred on the forced displacement of the Tabaco community, referenced in Section I of this report.

Ireland, the UNGPs and the duty to protect

Ireland is party to several international treaties and soft law instruments setting out obligations relevant to its relationship with Colombia and the Cerrejón mine. These include the core treaties of the UN human rights system; most notably the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both of which Ireland ratified in 1989.

Legal duties concerning Ireland's relationship with Colombia are further detailed in the 2012 European Union–Colombia/Peru Free Trade Agreement,¹⁶⁹ which includes a number of provisions¹⁷⁰ for the protection of human rights and the environment.¹⁷¹ During the negotiations of this accord, both the European Commission and the Colombian government repeatedly asserted that it would improve the human rights situation in the country while also helping to diversify the economy.¹⁷² This effect has been precisely the reverse, as the free trade agreement has exacerbated Colombia's overdependence on the export of primary commodities, in turn driving environmental and human rights harms, by driving investment towards extractive industries to the detriment of other sectors.¹⁷³

Ireland has likewise committed to the 2030 Agenda for Sustainable Development and the Paris Climate Accord, thereby committing it to robust international cooperation in the advancement of human rights and sustainable development, along with ambitious targets for the reduction of greenhouse gas emissions.

In November 2017, Ireland took the welcome step of launching its first National Plan on Business and Human Rights.¹⁷⁴ In so doing, it reaffirmed its commitment to full implementation of UNGPs and ensuring Irish businesses respect human rights throughout their operations. While the National Plan, which covers the period from 2017 to 2020, is short on detail and fails to tackle several crucial areas such as international taxation, it includes a number of important provisions and sets the stage for a more comprehensive and meaningful implementation of the UNGPs in subsequent iterations.

Key elements of the National Plan include the establishment of a Business and Human Rights Implementation Group comprising representatives from government, the private sector and civil society, to review progress and to develop a series of activities and resources supporting implementation of the UNGPs. Among these is a practical toolkit on business and human rights due diligence for public and private entities. However, to date, the final year of the plan, progress has been slow, delayed, and some commitments have not yet been fulfilled.

Disappointingly, the National Plan also is limited to proposals “*encouraging*” effective human rights due diligence by state-owned or controlled companies, rather than recognising this as a legal obligation as called for by the Irish Human Rights and Equality Commission¹⁷⁵ and numerous civil society organisations.¹⁷⁶ The National Plan also addresses, albeit in a limited ‘top-line’ manner, the necessity for implementation of the UNGPs through policies and measures concerning supply chains, public procurement, non-financial reporting and the environment. As a first step towards more meaningful implementation of the UNGPs, the government of Ireland also commissioned a baseline study of the existing legislative and regulatory framework which identified shortcomings in Irish law in the areas of *inter alia* supply chains, public procurement and the environment.¹⁷⁷ For example:

- **The 2014 Companies Act** does not require enterprises to respect human rights, either in their own operations or through their relationships with suppliers, outside the national jurisdiction. The baseline study called for an amendment to the Act to incorporate a responsibility to respect human rights, along with stronger reporting requirements to cover operations and investments outside the state of companies domiciled in Ireland, including their supply chains, parent companies, and investments in conflict-affected areas.¹⁷⁸
- **Norms and criteria governing public procurement** are regulated by S.I. 284/2016, S.I. 286/2016 and S.I. 203/2017, which give effect to the 2014 EU Directive on Public Procurement, the 2014 EU Directive on the Award of Concession Contracts, and the 2015 EU Directive on Procurement in the Utilities Sector. Under this regime, entities tendering for public contracts are required to comply with a broad spectrum of environmental, social and labour laws, with non-compliance being a ground for exclusion from bidding processes. However, human rights concerns considered sufficient to result in exclusion are limited to a narrow band of abuses such as child labour and human trafficking.¹⁷⁹
- **With regard to non-financial reporting**, regulations SI 360/2017¹⁸⁰ (which transposes the 2014 EU directive on Non-Financial Reporting into Irish law) and SI 410/2018¹⁸¹ (which transposes the subsequent EU amendment on disclosure of non-financial and diversity information into Irish law) require reporting on environmental matters and human rights, but fall far short of the standards set out in the UNGPs and OECD due diligence guidelines.¹⁸²
- **Similarly, access to remedy** for the transnational human rights impacts of Irish companies, including through their supply chains, remains meagre at best. The OECD’s National Contact Point (NCP) in Ireland (discussed in more detail below) is the only avenue of recourse currently open to people in other countries who are affected by Irish companies. While the National Plan Implementation Group has been tasked with exploring international best practice in the development of operational-level grievance mechanisms and the provision of remedy for victims of human rights abuses overseas linked to Irish companies, progress in this area remains nascent.

Irish judicial mechanisms have not generally been made available to victims of human rights abuses linked to Irish companies through their supply chains. In this context, it is equally worrying that the Irish government is not fully behind international efforts to establish a binding international treaty on business and human rights.¹⁸³

One area of significant potential to provide remedy for business-related human rights abuse is the Irish NCP¹⁸⁴ of the OECD's Responsible Business Conduct complaints system.¹⁸⁵ The Irish NCP, which is based in the Bilateral Trade Unit of the Department of Jobs, Enterprise and Innovation, remains underdeveloped and under-resourced, however. Despite the fact that the NCP system was established almost 20 years ago, it still only has part-time staff and does not promote awareness of their activities.¹⁸⁶ To date it has handled only a handful of 'specific instances'¹⁸⁷ and is among the least active.¹⁸⁸

Taken together, the current gaps in Irish legislation and continuing prioritisation of corporate protections in trade agreements over accountability for human rights violations creates an environment in which the ESB's access to cheap, bountiful coal is given *de facto* precedence over the lives and wellbeing of vulnerable communities in La Guajira.

Policy (in)coherence

Another issue crucial to the effective implementation of the state's duty to protect human rights is **policy coherence**. In the Irish context, emphasis must be placed on Ireland's climate change policies and its fiscal regime, both of which undermine human rights and are incompatible with Ireland's responsibilities under the UNGPs and the Sustainable Development Goals.¹⁸⁹

Climate change is arguably the greatest threat to the future of all human rights¹⁹⁰ and has been the subject of numerous UN resolutions.¹⁹¹ Ireland's policies and performance in this regard have thus far been so weak that the Special Rapporteur on Human Rights and the Environment took the unusual step of supporting a domestic legal challenge to block mitigation plans deemed so inadequate as to be potentially in breach of Ireland's international human rights obligations.¹⁹² Those living in La Guajira, the drought-prone region of Colombia where the Cerrejón mine is located, are meanwhile struggling on the frontline of impacts being felt as a result of such failures by wealthy western nations.¹⁹³

The pace of emission cuts in the run up to 2030 will make or break the prospects of keeping global temperature rise to 1.5°C and the world's governments, including Ireland, must commit to stepping up their climate targets and commit to sustainable pathways to staying below 1.5°C. Coal is one of the most greenhouse gas intensive fuels and therefore one of the main drivers of climate change. In a 1.5°C world, there is no future for the mining, buying, selling or burning of coal. **Consideration therefore should be given to closing the coal-fuelled powerplant at Moneypoint before its scheduled closure date of 2025.** Closure of the plant would have an immediate impact on efforts to reduce emissions, at a time when the country is struggling to achieve EU reduction targets.

Ireland's new All of Government Climate Action Plan envisages a scenario whereby the country will reduce emissions by 2% per annum between now and 2030, which will not be sufficient to put us on a pathway to a 1.5°C future.¹⁹⁴

The role of the recently appointed Just Transition Commissioner, working with the ESB union representatives, will be important in ensuring any early closure at the plant avoids shock closures and overnight redundancies and provides retraining opportunities.

Ireland's role in **facilitating international tax avoidance** is also contributing to human rights violations around the world by undermining other governments' capacity to generate tax to tackle climate change and protect human rights. In recent years, the role of aggressive tax planning and international tax abuse has become an area of concern to human rights oversight bodies.¹⁹⁵ This is because equitable taxation is essential to mobilising the resources necessary for the realisation of all human rights.¹⁹⁶ With historic levels of socioeconomic inequality undermining sustainable development¹⁹⁷ and fuelling climate change,¹⁹⁸ just taxation and effective international cooperation to tackle abusive tax practices is crucial to the achievement of both the Sustainable Development Goals¹⁹⁹ and climate change targets.

Ireland's fiscal regime has long been the subject of negative attention for its role in facilitating corporate tax avoidance. While successive governments have defended Irish tax policy by pointing to its success in attracting many of the world's biggest companies, it is a policy that has come at a cost both to Ireland's international reputation, and to the ability of other countries to tax profits that are generated in their country but are ultimately booked in Ireland. A recent Christian Aid report²⁰⁰ highlighted that Ireland's corporate tax policy not only diverts taxable profits from rich countries of the OECD, but more alarmingly, also countries of the global south, where tax revenue is far more acutely needed. The extensive range of tax incentives provided to multinational companies makes Ireland a hugely attractive location for multinational companies. For example, the ability for companies to offset 80% of their profits against the cost of purchasing the intellectual property rights from a sister company, can have the effect of reducing any tax liability down to as little as 2.5%²⁰¹. Similarly, no withholding taxes are levied on most of the royalty payments leaving Ireland, allowing the country to be used as a tax-free conduit for flows of money out of Ireland and into tax havens.

Under Ireland's favourable fiscal regime, CMC pays a corporate tax rate of 12.5%. This rate – which is half the OECD average of 24% – makes Ireland a significant driver of the 'race to the bottom'.²⁰² Were it located in Colombia – where its tax contributions might contribute to realising the rights of Colombian people – it would face a corporate tax rate of 34%, almost three times the Irish rate. In 2017 CMC – which is owned by the same three companies as the mine itself – made an after-tax profit of €62.5 million and paid €9.2 million in tax in Ireland. In Colombia, assuming the official rate were to be applied effectively, its tax liability would have been closer to €25 million. This is a loss of revenue to the Colombian government that might otherwise have been deployed to protect the human rights of marginalised communities, including the people of La Guajira. Moreover, it also represents a continuing subsidy to an environmentally unfriendly industry that is undermining human rights both in Colombia and, through its contribution to climate change, across the world.

With these facts in mind, Ireland's current fiscal and environmental policies are manifestly incompatible with its development policy, which promises "*a comprehensive Irish response to peace and security challenges*", and pledges to "*strengthen domestic resource mobilisation and tax administrations in developing countries*".²⁰³ To date, Ireland has provided over €14 million in support to Colombia.²⁰⁴ It is a founder member of the EU Trust Fund for the Colombian Peace Process and funds the UN Office of the High Commissioner for Human Rights in Colombia. But just as it supports the protection of human rights through these channels, it undermines them in its policies in other areas.

Issues of policy coherence are particularly important at a time when Ireland is seeking to expand its global footprint. The government's stated priority of promoting market penetration and diversification²⁰⁵, including through new missions in key markets, is not without risk, particularly in countries where governance institutions are weaker, civil society space increasingly shrinking, and where multinational investors often exert significant influence over government policy. As new trade links between Ireland and countries of the global south in particular are facilitated²⁰⁶, Ireland must ensure that trade opportunities do not come inadvertently at the expense of human rights.

Conspicuous absence: the ESB's responsibility to respect

The ESB does not have a **human rights policy**, as is required by both the UNGPs and the OECD due diligence guidelines, nor has it made a public commitment or established processes for the full implementation of human rights standards.

The full and transparent implementation of **human rights due diligence** in supply chains is of particular importance with regard to the ESB's relationship with Cerrejón. This must include policies and processes to identify and monitor human rights issues in its supply chain, along with measures to prevent and mitigate them where they do exist. This should include robust engagement through its relationships with suppliers, including communication of possible disengagement from the business relationship if meaningful efforts to address human rights concerns are not undertaken. It should also participate in sectoral and multi stakeholder initiatives designed to tackle human rights abuses to which supplier companies are contributing. Despite these facts, the ESB does not appear to be carrying out any form of human rights due diligence in its relationship with Cerrejón, much less seeking to engage with the company to address the abuses that are taking place. To date, the ESB's response to concerns raised over the Cerrejón mine have been limited to references to the deeply flawed Bettercoal assessment of the mine (see Section I).

The ESB also has a responsibility to **report regularly and transparently** on the process and findings of its due diligence, and to detail what actions are being taken in its operations and that of their suppliers found to have contributed to human rights abuses. Again, the ESB does not appear to have taken any steps in this regard.

It is worth noting here that the ESB falls under the jurisdiction of the UK owing to its operations in Northern Ireland. It has consequently established a policy for the prevention of slavery in its business relationships through its adherence to the UK Modern Slavery Act 2015, which includes provisions for transparency and regular reporting on related supply chain due diligence.²⁰⁷ The company reports on the implementation of activities giving effect to this policy – including risk assessments of suppliers and the commissioning of independent third party audits – though this is limited to the issue of slavery and little information is provided on the process of assessment.²⁰⁸ Similarly, risk assessments conducted under its procurement, environmental, and sustainability policies are also limited to the issue of modern slavery.²⁰⁹

Nonetheless, it must be recognised that the ESB has, through its efforts to comply with the UK Modern Slavery Act, acknowledged that it has both the capacity to identify human rights issues in its supply chain and the responsibility to take robust measures through its business relationships to address them. Documents released under Access to Information on the Environment regulations reveal that it has included clauses concerning both the UK Modern Slavery Act and the UN Global Compact²¹⁰ in its contracts with the Coal Marketing Company. This is to be commended but would have to be accompanied by thorough and transparent human rights due diligence to have meaningful impact on the ground.

While the ESB has systems for addressing **complaints and grievances**, these are limited to addressing customer service issues. To comply with the UNGPs, the company should have systems to allow access to remedy for human rights abuses in its supply chain.

Correjón's clouded vision of the responsibility to respect

Despite the wide-ranging human rights abuses detailed in this report, the Correjón mine affirms that it adheres rigorously to the UNGPs. In 2011 the company published a human rights policy through which it recognises its responsibility to respect human rights throughout its operations, and pledges to *"identify, prevent, mitigate, remedy, and/or compensate in all cases possible impacts on the people's rights"*.²¹¹

The company has commissioned two external evaluations of its human rights impacts – one in 2010/2011 and another in 2016/2017.²¹² Under its human rights policy, Correjón also states that it has designed and implemented a system of regular **due diligence**. Despite these policy statements, the company's role in chronic and persistent human rights abuses has continued. The functioning of Correjón's due diligence process remains opaque and under-resourced, while efforts to redress human rights harms have remained limited to those that do not require any significant alteration to business activities.

Correjón reports on its performance with regard to human rights through its annual sustainability reports, which consistently reiterate its commitment to the UNGPs and other national and international human rights and environmental standards.²¹³ This reporting has placed a strong focus on 'positive impacts' such as the payment of royalties and the provision of water supplies to a small number of Wayúu communities.²¹⁴

While such measures are to be commended, they do not represent compliance with the responsibility to respect human rights. In its most recent report, the only negative human rights outcome it considered 'verified' was its impact on the 'tranquillity' of local communities through the generation of particulate matter, noise and bad odours, which it insists are within allowable levels and have no impact on human health.²¹⁵

Cerrejón's monitoring of the environmental and health impacts of its activities has been challenged by independent expert analysis.²¹⁶ With regard to its due diligence on these issues, Cerrejón's reporting categorises them as 'perceived impacts' that 'do not have a proven causal relationship with Cerrejón activity'. Despite its reluctance to recognise its role, it affirms that it seeks to address them through monitoring and management processes and references its efforts to deliver drinking water to certain communities. While this might be a means to mitigate its human impacts, some communities report that the water is not suitable for human consumption.²¹⁷ Moreover, the quantities of water supplied are sufficient for household use and not for agricultural purposes.²¹⁸

Another critical concern in Cerrejón's due diligence is the participation of impacted stakeholders in the assessment of human rights and environmental risks, and the design and implementation of measures to prevent, mitigate and remedy them. Cerrejón's Sustainability Reports and its responses to criticism from non-governmental organisations detail numerous community consultations that have been conducted in the context of its expansion plans, security programmes and impact monitoring activities. While not all interactions with local communities have ended in acrimony, there is a consistent pattern of allegations that such consultations were illegitimate or not carried out in good faith.²¹⁹

With regard to provisions for **access to remedy**, Cerrejón established a complaints office in 2010 that it states is specifically designed to meet the UNGP standards of being legitimate, accessible, predictable, equitable, transparent and dialogue-based. From 2013 to 2017, this office handled over 1,500 complaints from local people, with over 80% of these relating to animals killed by the Puerto Bolivar train.²²⁰ A review of the complaints mechanism by the International Commission of Jurists (ICJ) found that despite some positive elements, such as acceptance of complaints of a collective nature, which is in keeping with Wayúu culture, it also had significant limitations.²²¹ Most notably, the ICJ reported that it was not adequately resourced and, despite the company's willingness to engage with those whose livestock it had killed, the mechanism was not effective in addressing resettlements and pollution.²²²

Though the company reports that close to 80% of complaints received have been closed, it appears persistently unwilling to recognise or address the more egregious and systemic human rights impacts caused by its activities. The human rights impacts that it is reticent to provide remedy for – those caused by environmental interventions, degradation, contamination and displacement – appear to be those which would require changes to its activities that might in turn impact profits.

Although the provision of grievance mechanisms and the **public communication** of their functioning through annual sustainability reports is welcome, the ICJ reports that it is not sufficiently disseminated among local communities.²²³ It is also noteworthy that Cerrejón's other communications are often focused on denials of its human rights impacts.²²⁴

In sum, although Cerrejón's adherence to the UNGPs at the level of policy is very welcome, its implementation of these policies appears to reflect a diligent exercise in 'greenwashing' and 'rights-washing', rather than a genuine commitment to identify, prevent, mitigate and remedy human rights impacts of its operations.

Section III:

What needs to happen?

This analysis of the case of the Cerrejón mine has outlined major gaps in policies, regulations and business processes that are needed to practically implement international human rights law and uphold the UN Guiding Principles on Business and Human Rights. Such gaps perpetuate impunity for human rights abuses and show a lack of genuine political willingness to prioritise human rights in trade and investment.

The report sets out recommendations for Ireland and Colombia as well as for the ESB and Cerrejón mine itself to take active measures to mitigate any further human rights abuses linked to the coal mine, provide remedy for impacts and promote a robust system within government and the businesses concerned to ensure human rights due diligence.

These recommendations should not undermine Ireland's pledge to close Moneypoint Power Station by 2025 and ensure a just transition for employees but guide the revision of policies and practices in 1) the short term, while coal is still being imported from the Cerrejón mine, and in 2) the long term, in relation to future business strategies, to respect and promote human rights.

Christian Aid believes that these recommendations will mitigate human rights abuses in Cerrejón, promote access to remedy for abuses and contribute to preventing future human rights abuses related to their business activities. As part of this research, we developed a roadmap for the ESB and therefore invite the Irish government and the ESB to a regular dialogue with Christian Aid Ireland and other relevant civil society actors to discuss and monitor a plan of implementation for the following recommendations.

Recommendations to the Irish government

Ireland enjoys an admirable reputation internationally for its development programme, and its work on peacebuilding and the promotion of human rights. It has invested significant resources in supporting the Colombian peace process and has signalled a long-term commitment to the country by opening its embassy in Bogotá in 2019.

Implementation of the UNGPs is therefore an important opportunity to ensure its own policies are coherent across departments, and do not undermine development objectives.

The Irish government should therefore, at the earliest opportunity begin the process of:

- Launching a consultation process on the next iteration of the Business and Human Rights National Plan, and address the concerns raised in this report.

- Introducing legislation making human rights due diligence, including in transnational supply chains, a legal obligation for all state-owned enterprises and large companies.
- Closing Moneypoint as soon as possible and ensure employees can retrain and find alternative employment
- Implementing the recommendations of the Committee on Elimination of Racial Discrimination to Ireland in December 2019 in relation to the Cerrejón mine.
- Establishing and fully resource a transparent and adequately resourced Policy Coherence for Development mechanism under the Department of an Taoiseach, with a mandate including implementation of the UNGPs and explicit recognition of Ireland's extra-territorial human rights obligations in the context of private sector activities. This mechanism should be mandated to identify and rectify inconsistencies between Ireland's obligations under the Sustainable Development Goals and international human rights law, on one hand, and its tax regime, trade policies and greenhouse gas policies, on the other.

In addition, the government should also:

- Increase financial, staff, and expertise resourcing to the OECD NCP to establish it as a meaningful and effective remedy mechanism available to all peoples impacted by Irish business through their supply chains.
- Ensure that regulations regarding human rights due diligence should include explicit requirements of reporting on the implementation of 'free, prior and informed consent', including documentation on environmental, social and human rights impact studies and the specific rights of indigenous peoples as recognised under ILO Convention 169.
- Ensure that regulatory criteria regarding government procurement be updated to include both incentives and exclusion clauses linked to businesses' human rights records overseas, including through their supply chains.
- Ensure that judicial and non-judicial remedies are available to people impacted by business activities linked to Ireland through transnational supply chains. Specific measures should be taken immediately to provide access to remedy to those impacted by Cerrejón including resources to overcome barriers victims may face in accessing these remedies, and to guarantee their safety and security.
- Push for a thorough human rights and environmental spill over analyses of all international trade and taxation agreements to which it is party.

- Support efforts to establish an international binding instrument on transnational businesses and other business enterprises with respect to human rights.
- Champion full and unequivocal implementation of the UNGPs in all national contexts, with a focus on protections for human rights defenders and women and minority groups, including indigenous populations. Furthermore, it should push for stronger accountability for human rights harms caused by the international institutions, including trade agreements such as the EU–Colombia/Peru FTA.
- Use its influence, to press the Colombian government to fully implement its obligations with regard to the duty to protect human rights. This should include revisions to its fiscal policies as they concern the extractives sector, proper resourcing and implementation of provisions to protect the rights to health, food, water, a healthy environment, an adequate standard of living as well as the right to freedom of expression, association and assembly. It should also comprise measures to fully realise the collective rights of indigenous and Afro-descendent communities, as recognised under Colombian and international law, and the development and implementation of state structures to ensure benefit-sharing.

Recommendations to the ESB

The ESB should strive to become a leader in the area of business and human rights, establishing the standard for other Irish companies to follow. To achieve this, there are certain actions that the ESB should take immediately, these include:

- Developing and adopting a robust human rights policy that is publicly accessible and incorporated into the company's structures particularly at senior management.
- Supporting an independent human rights (including right to health) and environmental impact assessment of Cerrejón operations, deemed acceptable by the effected communities.
- Developing policies and processes for human rights due diligence to identify and monitor human rights issues in its supply chains. Where human rights issues have arisen, as in Cerrejón, it should seek robust engagement to ensure they provide effective remedy. This should include communicating the possibility of disengagement to suppliers like Cerrejón if problems are not resolved.
- Incorporating detailed human rights clauses, including explicit provisions concerning the UNGPs, OECD due diligence guidelines, ILO Convention 169 and the UN Declaration on the Rights of Indigenous Peoples, into the ESB's contracts with CMC/Cerrejón. Its contract should further require that Cerrejón provide detailed reporting on its efforts to comply with these provisions, which is independent and deemed acceptable by impacted stakeholders. Its findings should be approved by the Colombian Human Rights Ombudsman.

- Acknowledging the shortcomings of the Bettercoal initiative and, with the collaboration of concerned civil society organisations, seek to strengthen Bettercoal's monitoring, reporting and transparency to make it a meaningful mechanism.

In addition the ESB should:

- Train senior management and its procurement department, in collaboration with reputable independent business and human rights experts, in the incorporation of human rights standards into procurement negotiations, contracts and monitoring of contracts. Once established, these systems should be properly resourced and maintained into the future as a core element of the ESB's legal compliance and sustainability structures.
- Develop a public exclusion strategy for suppliers that do not comply with standards of human rights due diligence and responsible business conduct. The provisions of this strategy should be incorporated into all future contracts with mineral suppliers.
- Report regularly and transparently on its human rights due diligence on all suppliers, providing detail on how it is seeking to implement findings and to exercise leverage over suppliers found to be contributing to human rights abuses.
- Make the exact origin of all mineral procurements publicly available on its website.

Recommendations to Cerrejón

The owners of the Cerrejón mine should take immediate action to:

- Recognise the legitimate claims of forcibly displaced communities, including those of Tabaco, Roche and others, and deliver compensation as recommended by independent arbitration, along with reconstruction of homes and other community facilities to a standard deemed acceptable by the impacted communities.
- Halt plans for further interventions in the River Bruno and commit to the implementation of a full environmental and human rights impact assessment by independent third parties deemed acceptable by the affected communities.
- Cease dumping waste water into the Ranchería River and its tributaries until it has established facilities to remove potentially toxic substances from the water.

- Explicitly and publicly commit to the standards of free, prior and informed consent as detailed in ILO Convention 169 and the UN Declaration on the Rights of Indigenous Peoples, including the right of communities to veto any planned expansion or environmental interventions. This should include transparent processes so no local peoples are pressured in their deliberations and participate meaningfully in all stages of planning and implementation.
- Comply fully with Colombian judicial bodies, including the Constitutional Court, the Supreme Court and La Guajira District Court, along with the recommendations of IACHR on the right to remedy. Throughout this cooperation, the precautionary principle 225, as advised by the IACHR, should be prioritised in plans and decisions over how best to avoid causing further harms.

In addition, the mine owners should also:

- Publicly recognise that its current environmental licence is not adequate to prevent impacts on human and natural life, and that it must be revised to bring its monitoring criteria and processes into line with international standards. This can be done by:
 - » providing differentiated data on surface and subterranean water from immediately before and immediately after all waste water dumping points
 - » providing data from independent analysis of water supplies delivered to relocated communities, such as Roche, Chancleta, Patilla, las Casitas and Tamaquito II.
- Contract independent human rights and environmental experts, who are deemed acceptable to local communities and Colombian civil society organisations, when reporting on its compliance with the UNGPs. Furthermore, it should ensure that local communities are enabled to fully and meaningfully participate in human rights and environmental monitoring.
- Resource and guarantee the independence of its existing complaints mechanisms and procedures to bring them into line with the recommendations of the ICJ. It should fully address and provide remedy for complaints concerning environmental and human rights harms to local communities, regardless of whether these impact expansions of the mine or the company's profits.

Recommendations to the Colombian government

The Colombian government should strive to be a leader in the area of Business and Human Rights, establishing the highest levels of compliance from which other countries in the region could draw inspiration. To achieve this the government should first:

- Immediately deploy necessary financial and logistical resources to tackle the human rights crisis currently unfolding in La Guajira. This should include increased resource and personnel allocations to structures intended to tackle food shortages in the region, along with strident measures to address the current water crisis. Infrastructure to deliver water from the Cercado dam reservoir to local communities must be a matter of urgency, along with new wells and desalination plants throughout the department. Crucially, measures must be put in place to ensure all these projects are properly maintained and provide adequate potable water on an ongoing basis.
- Immediately develop independent expert monitoring of water and air quality in La Guajira, particularly the environs of the Cerrejón mine, the Puerto Bolivar train line, the Puerto Bolivar port and the Ranchería river system, including its tributaries and subterranean aquifers. Furthermore, both the findings and the raw data gathered through this process should be made publicly available, including in formats accessible to local indigenous and Afro-Colombian communities.
- Publicly and explicitly recognise the right of indigenous and Afro-Colombian peoples to veto plans and projects for the extraction of mineral resources in their territories, in accordance with ILO Convention 169, the UN Declaration on Rights of Indigenous Peoples, international jurisprudence and rulings by the Constitutional Court.
- Review its current fiscal policies as they relate to the extractives sector to ensure the right to benefit sharing among local communities is respected. This review should be carried out with the meaningful participation of indigenous and Afro-Colombian communities impacted by extractive activities and start by ensuring Cerrejón's parent companies commit to fully transparent reporting on their financial affairs, including reporting on their tax planning and financial aspects of their operations on a project-by-project and country-by-country basis.

In addition, the government should also:

- Ensure the right to free, prior and informed consent is fully respected, working in close consultation with impacted communities in La Guajira, along with Colombia's Human Rights Ombudsman and the Office of the High Commissioner for Human Rights in Colombia.
- Ensure meaningful participation of marginalised groups, with specific focus on indigenous communities, Afro-Colombian communities, women, and those living in rural areas such as La Guajira, in the design and implementation of policies and actions.

- Take steps, including the provision of additional resources, expertise and oversight, to enforce legal protections for local communities impacted by extractive industries. Furthermore, dedicate resources to ensure protection for human rights defenders, union representatives, social leaders and environmental activists working to protect rights in the context of mining.
- Ensure, in consultation with Colombia's Business and Human Rights Implementation Group, the Human Rights Ombudsman, the Office of the High Commissioner for Human Rights and concerned civil society organisations, the right to effective, accessible remedy is protected with a particular focus on the situations of marginalised communities impacted by extractive industries.
- And finally, the Colombian government should ensure the development of a fast and fair exit plan by the Cerrejón mine so that there is a just transition for both employees and local communities to engage and benefit from more sustainable economic activities. This should also be part of a transformative economic and social plan for La Guajira and a wider commitment by Colombia to stop extracting fossil fuels.

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Notes



Endorsed by:

