

**Gold Mining, Human Rights and Due Diligence in Colombia: analysis and recommendations towards the implementation of the EU Regulation on Responsible Sourcing and further legislation** (Summary of Study Betancour Betancour, María Soledad (2019), *Producción minera, territorio y conflicto en Colombia. Retos globales y locales para la protección de los derechos humanos.*)

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The main objective of the Raw Materials Initiative<sup>1</sup>, which was launched in by the European Commission in 2008 and relaunched in 2011, was to guarantee access to raw materials for European companies. Although its first pillar focuses on the ‘Fair and sustainable supply of raw materials from global markets’, human rights violations in the context of mining were barely addressed. Responding to this lack of attention to human rights in the EU’s policies on supply of raw materials, the European Parliament pushed for egulation on conflict minerals<sup>2</sup> (EU Regulation on Responsible Minerals), which was approved in 2017 and will come to force in 2021.

Through this regulation, risks such as the worst forms of child labor, forced labor, forced prostitution and the financing of armed groups in the context of mineral extraction and the trade in four minerals (tantalum, tungsten, tin and gold) are addressed in conflict regions. It is an important piece of legislation, though it needs to be implemented well.

However, many of the risks occurring in mineral extraction are not addressed by EU raw materials policy, nor in supply chain policies. These include environmental destruction such as pollution of drinking water or acid mining drainage, as well as violent displacement and illegal agreements with police. Moreover, conflicts that arise in the context of minerals extraction outside of so-called conflict-affected or high-risk regions are not addressed with this legislation.

Colombia is one of the countries categorised as a conflict region by the EU Regulation on Responsible Sourcing. This paper will take a closer look at gold extraction in Colombia in the context of the violent conflict and human rights abuses taking place there. From there, the paper will present recommendations directed towards the implementation of Accompanying Measures of the EU Regulation on Responsible Sourcing in Colombia, as well as additional measures needed to diminish the levels of conflict and human rights violations in this sector.

This paper summarises the findings made by the study “Producción minera, territorio y conflicto en Colombia. Retos globales y locales para la protección de los derechos humanos”<sup>3</sup> (Mining production, territory and conflict in Colombia. Global and local challenges for the protection of human rights) by Maria Soledade Bentancur Bentancur (IPC) in close collaboration with Germanwatch, Broederlijk Delen, and the Heinrich-Böll Stiftung. While the study includes a thorough analysis of different regions (territories) in Colombia this paper give a summarised picture.

## The Colombian Context

**Gold is mainly produced in 6 departments in Colombia: Antioquia (47%), Chocó (21%), Bolívar (10%), and Nariño, Cauca and Caldas (each producing 6%). There is clear evidence in these**

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<sup>1</sup> [https://ec.europa.eu/growth/sectors/raw-materials/policy-strategy\\_en](https://ec.europa.eu/growth/sectors/raw-materials/policy-strategy_en)

<sup>2</sup> Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas (see <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2017:130:TOC>)

<sup>3</sup> Betancour Betancour, María Soledad (2019), *Producción minera, territorio y conflicto en Colombia. Retos globales y locales para la protección de los derechos humanos.* Link <https://www.germanwatch.org/de/17220>

**territories of the close relationship between gold production, armed conflict, social conflict and environmental conflicts. Forced displacement, assassinated leaders, stigmatisation of local producers, destruction of the environment and serious violations of all human rights is the common denominator. Political decisions over the last decade have actively promoted a differentiated access to and control over land-based resources in Colombia, excluding local communities from accessing environmental goods in their territories while favouring private stakeholders, in particular multinational companies from overseas.**

**Private investment in mining increased more than fourfold between 2002 and 2011 and the social conflicts associated with mining have intensified.<sup>4</sup> The gold-producing territories have been the epicentre of these serious violations of human rights. Between the years 2016 and 2019, the greatest number of murders of social leaders, environmentalists and human rights advocates occurred in departments such as Antioquia and Cauca, the first and fourth biggest producers of gold in Colombia.**

#### *Free Trade Agreements and militarisation of mining projects*

In the case of Colombia, International Investment Agreements (IIAs) and Trade Agreements (such as the Trade Agreement with the EU) have contributed significantly to favourable conditions for companies, with agreements for the promotion and reciprocal protection of investments (APPRI), as well as investment chapters contained in free trade treaties, creating particularly good conditions for overseas investors. This has given them so much power that they have managed to have their interests take precedence over the protection of human rights. The protection of these rights exercised by the Constitutional Court in Colombia, has led to lawsuits against the state in international tribunals, arguing the primacy of investor rights.

In the framework of this State-Multinational alliance, certain security strategies were created in Colombia to protect the operation of such companies. These include 21 “Mining and Energy Battalions” consisting of 68,000 people assigned to protect the mining and energy sector in all aspects of infrastructure and roads, and 1,229 agreements between companies and public security forces of which 24% are mining companies. For example Battalions No. 5 and No. 8 are stationed within the installations of mining companies Mineros S.A. and Gran Colombia Gold respectively.<sup>5</sup>

#### *Conflict between large and small-scale mining and the militarisation of mining operations*

The miners who have historically inhabited the gold-mining regions are not recognised politically, and national legislation such as the mining code makes it very difficult for them to formalise their operations. Without title, artisanal miners are mostly treated as illegal and/or criminal producers. This stigmatising discourse has justified the use of a strategy of warfare against them. For that reason, the deployment of mining and energy battalions was followed by the creation of police and military structures to attack so-called criminal mining activity. In 2012 UNIMIN, the special unit of the National Police to combat illegal mining, was created. Decree 2235 of the same year authorised the police to destroy the machinery in mines without title.<sup>6</sup>

BRCIMI, the Army Brigade to combat illegal mining, was created in 2015; in 2019 President Iván Duque promised the big mining companies in the Colombian Mining Association the creation of a

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<sup>4</sup> Vélez-Torres (2013): Governmental extractivism in Colombia: Legislation, securitization and the local settings of mining control. In: Political Geography. Vol. 38, p. 68-78.

<sup>5</sup> Castro, Ivan Cepedes (2015) Convenios entre empresas del sector minero-energético y fuerza pública <http://www.ivancepedacastro.com/wp-content/uploads/2015/11/DEBATE-CONVENIOS.pdf>

<sup>6</sup> According the Ministry of Mines and Energy illegal mining is that which is developed without being inscribed in the national mining register (Ministry of Mines and Energy, 2012: 40).

special unit to combat the illegal extraction of minerals, as well as a bill to strengthen the sanctions against those who undertake such practices. The communities and associations of small-scale miners insist that, far from dismantling paramilitary structures, these measures are erasing small-scale and ancestral miners from the map, not just legally, but in terms of their actual territory as well.

Case study: Gran Colombia Gold

Gran Colombia Gold is currently the country's second largest exporter of gold after International Trader Gutiérrez. When it arrived in Segovia in 2010, it encountered 5,000 miners and proposed partnership contracts to them which meant that they had to deliver their gold to the company and had to share their income with the company. The rejection of these contracts by numerous miners led to repeated strikes, violence and consistent threats from paramilitary groups against the miners. The Inter-American Human Rights Commission became involved in the case and granted protective measures for several miners. In 2018 the company officially asked the government to use military, police and "any other force" to get rid of the miners. This was considered by many as a call to violence against unformalised miners and an attempt to call for the Government to respond with severe violence.

Since 2010 the percentage of the gold sold by Gran Colombia Gold which was mined by miners with a subcontract has increase immensely. In 2016, already 83% of the gold sold by the corporate came from subcontracted small-scale miners. As the company receives new mining concessions from the government, the number of forced displacements and other serious human rights violations continues to increase in the gold mining region Segovia. Today, the entire subregion has been declared to be in a humanitarian emergency. In 2018, 62% of forced displacements in the department of Antioquia –which has 125 municipalities – came from just 6 municipalities in the Bajo Cauca subregion where the company of operates (see Bentancur Betancur 2019)

Case study: Mineros S.A.

This company's mineral exploitation project is located in the Bajo Cauca subregion of the department of Antioquia. A total of 85% of its production in Colombia comes from its alluvial mining project which operates in the Nechí river basin and its wetlands, over an area of approximately 37,000 hectares. Different studies about the impacts of mining on ecosystems have concluded that the exploitation of alluvial gold and underground veins of gold have the greatest impact compared to other extractive activities<sup>7</sup>. So far the operation has had a number of severe environmental impacts, affecting the lives of local population: 1) Mercury contamination: Mineros S.A. only stopped using mercury in 2013. The contaminated waters not only impact the municipalities directly, but also affect the entire ecosystem, which is of strategic importance for the ecological conservation. 2) Disappearance of wetlands, destruction of flora and fauna: According to local communities, at least 80% of the natural feedback into the wetlands has disappeared. Due to the load of contaminants – the amount of sediment and suspended solids generated– much of the fauna that thrived in the old wetlands of the region has disappeared. 3) Impacts on the right to land and the right to work: The riverside communities that have lived around the wetlands of the river for more than 60 years were displaced when the mining company arrived. Due to the contaminated water resulting from the activities of Mineros S.A. and from informal miners in the region, fishing is no longer possible and

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<sup>7</sup> Ayala Mosquera, Helcías José, et al. (2019). Identificación y análisis de impacto de la actividad minera y la explotación ilícita en los ecosistemas del territorio nacional. (Available at: <http://www.humboldt.org.co/images/documentos/3-identificacin-de-impactos-expertos.pdf>)

farmers cannot return to cultivate their land at the riverside, which before the operation was very fertile (see Betancur Betancur 2019)

#### *Difficulties for artisanal miners in formalising their operations*

The size of the informal mining economy in Colombia was shown in the last census of mining production units, which was carried out by the Direction of Formalisation of the Ministry of Mines and Energy in 2011. Of 4,134 Units of Mining Production (UMPs) that were producing gold, 87% did not have titles to mining rights. This can be clearly seen in the gold-producing departments of Antioquia, which in 2011 had 80% informality, and Chocó with 99% lacking titles to mining rights. At the same time miners have tried to legalise their rights, but mostly without success. According to a study conducted by the Ombudsman's Office in 2010, 86% of all applications to formalise mining activity through a mining title were rejected.

According to the Miners' Association of Bajo Cauca (Region of Antioquia), there are 1,200 informal mining- exploitation units, with 45,000 people dependent on them. The regional government committed to formalise a great deal of it, but in 2015, out of 150 mining units that had initiated the process, not a single one had been legalised. In fact, in the final phase of the formalisation process, many miners have been victims of army operatives who burn their mining machinery. Moreover, the productive capacity of artisanal miners, even when registered, is limited. Those known as *barequeros* can only produce 35 grams of precious metals per month, 420 grams per year, according to Resolution 40013 of 2017. This is an example of how mining policies since the last census in 2011 have deepened their exclusion and their criminalisation even more throughout the entire decade.

#### *Neo-paramilitary groups benefit from illegal mining*

Neo-paramilitary groups (Autodefensas Gaitanistas, Caparrapos, Clan del Golfo), the ELN and dissidents from the former FARC have occupied the territories where the FARC had operated in the past. The state has not worked effectively to protect the territories and to disarm paramilitary groups. In an exact reversal of state protection, the promotion of mining as the "locomotive" of development, in addition to the high price of gold on the international market, has incentivised armed groups to see the gold economy as a way to feed their finances and thereby their wars.

In most cases they do not obtain this income as direct producers, but rather by extorting small-scale producers, or controlling the market of inputs (explosives, mercury, etc.) and the gold market itself. For that reason, the direct producers are not the criminals. The criminality lies in the armed structures that profit from different activities in the production chain, or with the international traders that export the mineral without implementing due diligence strategies, while actively interfering in cases that are being investigated, and engaging in asset laundering (see case I.C. Gutierrez).

The current treatment of artisanal and small-scale miners stigmatises and criminalises them, disregards their social status as citizens and repudiates their historic presence in the territory. It increases the historical tendency for the value generated in the gold-production chain to be appropriated at the international level by large mining companies, international traders and foreign refineries who capture the income and value generated all along the gold production process, disregarding the provenance of the metal and/or the consequences in terms of human rights violations in the territories where it is produced.

The European Regulation on Responsible Sourcing could actually worsen this situation of marginalisation if it focuses only on some aspects of the picture and fails to consider the overall impacts on human rights and the right to land. Consequently, there is a need for binding due diligence initiatives that incorporate all human rights and environmental standards. In this way, these initiatives can contribute to radically reducing the serious human rights violations and destruction of

the environment in the territories where minerals such as gold are obtained. Moreover, there is a need for effective accompanying measures.

## Recommendations

### General recommendations

- Given the analysis that current frameworks are not enough to protect human rights and the environment and the observation that binding supply chain approaches like the EU Regulation on Responsible Sourcing (also EU Conflict Minerals Regulation) do not address most of the human rights violations committed by large scale-mining companies, there is a need for more comprehensive due diligence legislation. The concept of due diligence, based on the Guiding Principles of the United Nations, has to be implemented sincerely in binding regulations in mineral-importing countries. The EU and its member states must therefore develop and implement general and binding due diligence legislation.
- As this paper shows, these laws must include environmental standards to prevent the continued destruction of the environment, which also impacts the basis of life and human rights.
- Company initiatives on transparency or public relations should not replace the challenges and commitments of due diligence or the strategy of integral reparation for affected communities in Colombia.
- Given the observation that the interests of corporations are given priority over the protection of human rights due to international trade agreements, within the framework of the Trade Agreement between the EU and Colombia, Ecuador and Peru, proper follow-up must be provided to Chapter IX on Trade and Sustainable Development through the Domestic Advisory Group (DAG), paying special attention to the social and environmental conditions of mining production and implementing sanctions in the case of non-compliance.
- Furthermore, states should contribute constructively to the process of elaborating a Binding Treaty on Business and Human Rights at the level of the United Nations, based on the draft discussed the 5th session (October 2019).

### Recommendations regarding the implementation of the EU Regulation on Responsible Sourcing:

For the **European Regulation on Responsible Sourcing**<sup>8</sup> to advance in the right direction, it is necessary that the accompanying measures take into account aspects that are indispensable for the promotion of human rights, such as preventing further marginalisation of artisanal producers in zones where the minerals originate. Thus, it is important that civil society organisations of the mineral-producing countries, defending the rights of these producers, are involved in the design of the accompanying measures. The following points also need to be taken into account:

- Based on this analysis and the anticipated goal of the European Union's accompanying measures to support small-scale miners, work should be done on the process of formalising the small-scale producers in order to give them the possibility of selling their products on the formalised and legal market.

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<sup>8</sup> Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas (see <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2017:130:TOC>)

- Programmes should be established in collaboration with the importing companies, focused on how to import raw materials from traditional and local producers, and strengthen them so that they can become formalised.
- A system should be established to ensure that the cost of certifications is distributed among all the actors in the supply chain, and not assumed only by the artisanal miners as it the case at the moment.
- It is necessary to assign resources for the development of pilot projects to implement the Due Diligence regulation, including environmental, health and human rights aspects. The results of these pilot projects must be taken into account in the revision of European Union regulations in the future.

#### **Monitoring:**

- The EU should establish an evaluation system that makes it possible to measure, in the producer countries, the advances achieved regarding implementation of instruments to support the due diligence of the OECD/EU.
- As part of the accompanying measures the EU should assign resources to an independent report from the viewpoint of civil society on facilitation of implementation of the OECD Guidance on Due Diligence for responsible management of supply chains of minerals coming from conflict-affected and high-risk areas. This report should be presented at the OECD Forum.
- The monitoring policy of the regulation should include a requirement for an analysis of participatory context, on aspects of mining, conflict, territories and protection of the environment in the auditing procedures established in the Due Diligence process.

#### **Transparency:**

- In the application of European regulation, reports of the individual companies on the implementation of due diligence have to be published, including supporting evidence. In these reports it is necessary to specify the steps taken and the risks encountered and mitigated. These reports have to be published on the website of the competent authority to enable civil society in producing countries to approach the companies and competent authorities when they discovered irregularities at a mining site.

#### **In the political dialogue with the government of Colombia, the EU and its member states should:**

- Demand that the government of Colombia proceed in compliance with the agenda established in the Agreement for a Stable and Lasting Peace as the minimum condition to ensure that the minerals exported do not come from conflict zones.
- Demand that the Colombian government urgently increase its efforts to protect human rights and environmental defenders, as well as former FARC combatants, and that it ratify the Regional Accord on Access to Information, Public Political Participation and Access to Justice on Environmental Affairs in Latin America and the Caribbean (The Escazú Convention).<sup>9</sup>

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<sup>9</sup> The Escazú Convention establishes the right to Access to Information, Public Participation and Justice in Environmental Matters, as well as the need to protect environmental defenders. Unfortunately, the Colombian government **decided not to sign it** because national and international instruments already exist that make it possible to achieve this objective. See: Semana Sostenible, 2019/10/09. Available at: <https://sostenibilidad.semana.com/medio-ambiente/articulo/colombia-no-firmo-el-acuerdo-de-escazu/47010>.

- Remind the Colombian state of its responsibilities within the framework of international human rights treaties, of the Guiding Principles and the National Action Plan on Business and Human Rights and its obligation to protect communities from human rights violations by companies.

### **At the national level**

Small-scale and artisanal miners have been expelled from their role as key actors in the production chain, so it is up to the state to accompany them in the process of recognition and inclusion into the formal supply chain so that they can deepen their knowledge of mining practices that respect the environment and demonstrate social responsibility, strategies they say they are willing to develop.

- The truth about the responsibility and consequences of the conflict in mining territories should be a priority case for the Commission for Clarification of the Truth.
  - Support the documentation of concrete cases of human rights violations by companies in specific mining territories.
  - Present cases to the Commission for Clarification of the Truth about what has been happening in mining territories over the past 50 years.
- The defence of the environment must be the foundation upon which to construct new mining policy and it must be accompanied by a strategy of inclusion and productive reconversion in territories of long-standing mining tradition and block the entry of mining projects into agricultural territories and where ecosystems are put at risk. The process of construction of this new mining policy has to be democratic, and has to focus on non-repetition of the tragedy caused by the conflict, territorial autonomy and the inclusion of local producers into the legal supply chain. That also includes the right to construct other models of life that go beyond extractivism. This requires the recognition of the value created by medium-scale and small-scale miners, as well as *barequeros*, just as it commits them to and educates them about their social and environmental responsibilities.