



Shadow report to the United Nations Human Rights Council, for the Universal Periodic Review 2018, 30th Session, Examination of Colombia regarding Citizen Participation Mechanisms in Colombia (Popular Consultations, Free, Prior Informed Consultation) and the Human Rights Situation.

"When people speak up against negative effects of business operations they often face intimidation and criminalization," Dante Pesce, member of the UN Working Group on Business and Human Rights

Introduction

Colombian communities are turning to, convoking and using Popular Consultations as means of direct participation and as a tool to defend their economic, social and cultural rights.

Similarly, indigenous, afro-descendant, Raizal and ROM peoples are using the Free, Prior and Informed Consultation established in the ILO Convention 169 when investment projects are developed in their territories.

The Colombian state systematically refuses to recognize the communities' collective will and the results of popular consultations when these oppose the execution of development projects within their territories. These consultations take place democratically and comply with Colombia's constitutional and legal framework.

We ask to the United Nations Human Rights Council to give its attention to this particular situation that could negatively affect Colombia's democracy, violate its constitutional and legal framework while potentially increasing and aggravating environmental and social conflicts in the country.

Who we are

This alternative report is presented by Colombian communities and local organizations that, through municipal Environmental Committees, have organized and held popular consultations to decide if mining and energy investment projects are executed or not in our territories.

The writing of this report has been accompanied by international human rights organizations promoting democracy, citizen participation and the defense and protection of human rights.

Background

In 2016, Mario Alejandro Pérez-Rincón, professor at the *Universidad del Valle* in Colombia and member of the CINARA Institute, wrote a report titled, "Characterizing Environmental Injustices in Colombia: a study of 115 cases of socio-environmental conflict."

The report registers a series of social conflicts rising from the implementation of mining, energy and petroleum projects in which local communities were not consulted. These conflicts have resulted in the forced displacement of both individuals and entire indigenous, Afro-Descendant and peasant communities, death threats and the assassination of leaders who oppose these projects; judicial persecution of social and environmental leaders, etc.

A few emblematic cases illustrate the nature of these conflicts and the impacts they have caused:

- In June of 2011 the closing of the Anchicayá Dam flooded the territory of six thousand Afro-Descendants, destroying their crops, killing fish central to their diets and affecting their social and cultural structures.
- Drought in the Casanare Department in 2014; petroleum drilling, seismic exploration and highway construction caused an unprecedented drought in the region leaving killing off 20,000 head of cattle as well as wild animals. The drought devastated the regional economy, further impoverishing peasants in the department.
- Construction of the Quimbo Dam in 2016; the filling of the reservoir behind the dam displaced thousands of families and flooded over eight thousand hectares of arable land on which they depend, undermining food security in the region. Presently, two leaders have been victims of judicial persecution for their opposition to the project.
- The case of the Cerrejón coal mine; a number of international organizations have documented the severe environmental, social, economic and cultural harm wrought on the region's communities.
- Thousands of Wayúu indigenous peoples have been displaced by the exploitation of the Cerrejón coal mine in the Guajira Department. Rivers such as the Ranchería River, have been diverted to benefit the Cerrejón mine, while, for lack of water, harvests and livestock have been lost and over 7000 Wayúu children have died. Mining operations have weakened the local economy and eroded the cultural identity of the indigenous peoples, fracturing social and tribal structures.

All of these cases have a common denominator; the consultation process with local inhabitants and the communities of the respective regions were ineffective, and the communities' concerns were ignored. In these cases, the projects were imposed unilaterally by the Colombian government. The opposition, resistance and struggle of local communities against large-scale development projects in their territories and in defense of their economic, social and cultural rights, has at times led to protests that end in violent confrontations with Colombian police and armed forces.

Economic, Social and Cultural Rights in Colombia.

Areas where large-scale investment projects are being developed in Colombia have been the scene of massive forced displacement and drastic changes to local productive processes and subsistence economies. Among other consequences, food sovereignty has been threatened and social protest movements have been criminalized.

Paradoxically, the areas where minerals, energy and hydrocarbons are exploited are also the regions most afflicted by poverty, misery, forced displacement, and the persecution and assassination of those who protest against these extractive projects. In sum, these areas are witnesses to the violation of economic, social and cultural rights. Departments such as Guajira, Choco, Nariño and Cauca which host large mining operations are also the departments which suffer the highest levels of social injustice.

It is relevant to recall Colombia's obligations under international law in terms of human rights. Firstly, Colombia is party to the international covenant on Economic, Social and Cultural Rights, which establishes in first article the right to self-determination¹, and in its eleventh article which recognizes "*the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions*"².

The Colombian State's refusal to accept the results of the Popular Consultations and its failure to recognize the bans on extractive activities that these consultations enact, directly violates the First Article of the Covenant with its guarantee of the people's right to self-determination while hampering the people's right to provide for its own economic, social and cultural development.

The non-application of Article 11 of the Covenant endangers the ways of life of Colombia's rural communities by altering their productive systems and lifestyles. This especially relates to the effects that have been and which continue to be suffered by the peoples who live in areas affected by mining and oil extraction and whose lifestyles are threatened by this activity.

Other articles of the International Covenant on Economic, Social and Cultural Rights, such as the right to earn a living³, and the right to physical and mental health⁴, are at risk from the large-scale mining projects that have led to the organization of popular consultations in the country.

¹ Article 1: 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence. 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

² Article 11: 1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent. 2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed: (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources. (b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

³ Article 6, 1

⁴ Article 12, 1

Furthermore, the International Covenant on Civil and Political Rights, of which Colombia is also a State Party, implies that Colombia must respect the right to freedom of expression, including seeking, receiving and disseminating information by any means⁵; the right to associate freely with others⁶ and the right to participate in the conduct of public affairs⁷.

It is also important to note that, as a State party to the treaties mentioned above, it also has the responsibility to comply with the recommendations of treaty-monitoring bodies, such as the United Nations Human Rights Committee, which encouraged Colombia to adopt a law guaranteeing prior consultation in order to obtain the free and informed consent of ethnic communities prior to any measures that may have a substantial impact on their way of life and culture⁸.

According to data from the Colombian Ombudsman's Office, from January 2016 to 5 July 2017, 186 human rights leaders and social leaders were murdered throughout the country.

Popular Consultations and the Colombian legal framework

Article 105 of the Political Constitution of Colombia clearly defines the obligation of municipalities to conduct popular consultations: "*Prior to compliance with the requirements and formalities established by the general statute of the territorial organization and in such cases as it may determine, Governors and Mayors (as applicable), will be able to make popular consultations to decide on subjects of competence of the respective department or municipality*".

A first step was taken by the Colombian Constitutional Court which, through Ruling C-273 of 2016⁹, declared article 37 of the Mining Code¹⁰ to be unenforceable. This article stated that no regional, sectional or local authority could establish areas of the territory that were permanently or temporarily excluded from mining. Later, through Ruling C-035/2016¹¹, the Court declared the National Development Plan that allowed the central government to create strategic mining reserves for the Nation without consultation with local governments to be unenforceable.

In addition, the Constitutional Court, in recent rulings (C-389/2016¹², T-704/16¹³, SU-133/17¹⁴), made it clear that the fundamental right to citizen participation established in Colombia's Political Constitution must be guaranteed, as current mining regulations affect it directly.

5 Article 19, 2

6 Article 21

7 Article 25, a

8 Concluding observations on the seventh periodic report of Colombia (CCPR/C/COL/CO/7)

9 <http://www.corteconstitucional.gov.co/relatoria/2016/C-273-16.htm>

10 Article 37 of the Mining Code (Law 865 of 2001) which stated: "Legal Prohibition. Except for the national and regional powers referred to in Articles 34 and 35 above, no regional, sectional or local authority may establish areas of the territory that are permanently or temporarily excluded from mining. This prohibition includes the territorial planning plans dealt with in the following article."

11 <http://www.corteconstitucional.gov.co/relatoria/2016/c-035-16.htm>

12 <http://corteconstitucional.gov.co/relatoria/2016/C-389-16.htm>

In a landmark ruling, the Constitutional Court, through the sentence T-445 of 2016¹⁵, warned that Popular Consultations are obligatory and not optional in the municipalities where mining projects are to be carried out. Recently, the fourth section of the Council of State, the highest court of administrative litigation, also clarified that the results of Popular Consultations are mandatory, "*The popular consultation is a manifestation of political content with full legal consequences, as [it represents] the people pronouncing themselves on an important question of national, regional or local interest. The ruler is obliged to incorporate the result into the national, regional or local legal system, as the case may be, by issuing laws, regulations or administrative acts of particular and concrete content.*"

Law 136 of 1994 Article 33¹⁶ "Land uses" makes clear the obligation to carry out Popular Consultations when the development of projects threatens to make significant changes in the use of land.

In this way, and according to declarations made by the high courts and Colombian legislation, Popular Consultations are obligatory and binding, and it is the Municipality who must take the necessary measures to make the decision of the town effective.

Finally, Law 134 of 1994¹⁷ on mechanisms for citizen participation, states in article 55 that the decision taken by the inhabitants of the municipalities will be binding: "*It will be understood that there has been a binding decision of the people, when the question which has been posed has obtained the affirmative vote of half plus one of the valid suffrage, provided that not less than one-third of the voters who make up the respective electoral roll participated.*" This point is ratified by statutory law 1757 of 2015.

The declarations made by the Minister of Mines and Energy of Colombia, Germán Arce, threatening disciplinary sanctions to the councilors of the municipalities that have approved the ban on industrial mining and the exploration of hydrocarbons in their territories, go against those of the high courts of Colombia, and those enunciated in the Constitution.

This is also the case with the Minister's position of ignoring the results of the Popular Consultations that have taken place to date, where in a democratic exercise the majority, of the population decided to reject mining, energy and hydrocarbon projects in defense of their economic, social and cultural rights.

Popular Consultations to date in Colombia

After many attempts, it was finally possible to hold the first Popular Consultation in the municipality of Piedras on July 28, 2013. Subsequently, other consultations have been held, including that of Cajamarca on March 26, 2017.

13 <http://www.corteconstitucional.gov.co/relatoria/2016/t-704-16.htm>

14 <http://www.corteconstitucional.gov.co/relatoria/2017/su133-17.htm>

15 <http://www.corteconstitucional.gov.co/relatoria/2016/t-445-16.htm>

16 Article 33 of Law 136 of 1994: "When the development of projects of a tourist, mining or other nature threatens to create a significant change in the use of land, which results in a transformation in the traditional activities of a municipality, a popular consultation must be carried out in accordance with the Law. The responsibility of these consultations of the respective municipality".

17 <http://www.alcaldiabogota.gov.co/sisjur/normas/Normal.jsp?i=330>

Despite the decisions of the high courts, there is a policy of the Colombian State that hampers voting and conducting consultations. A strategy used by the State is to significantly reduce the number of polling stations by up to 50 per cent compared to voting for normal elections. This hampers the right to vote of isolated communities in rural areas and municipalities.

Also, the government of Colombia, by means of the excessive use of police controls, pressure exerted against mayors and councilors by the Ministry of Mines and Energy not to approve municipal agreements that prohibit mining in their territories, among other practices, tries to prevent the threshold (minimum number of votes) required by law for consultations to be legally binding from being reached.

It is important to say that the popular consultation that was to be held on August 6, 2017 in the municipality of Pasca, Cundinamarca, was canceled by the government of Colombia. They argued that the question which was to be voted on was poorly formulated.

This demonstrates once again that the Colombian government, together with transnational corporations, continue to use any possible methods to prevent communities from discussing mining and hydrocarbons projects, and persist in exercising what the communities refer to as “*The Colombian mining dictatorship.*”

This table shows the electoral results obtained in Popular Consultations so far, which in all cases have rejected by a majority the mining, energy and hydrocarbon projects in question.

Municipality	Number of polling stations for the 2015 elections	Number of polling stations for the Popular Consultation	Results of the Popular Consultation	
			Votes for YES*	Votes for NO*
Tauramena (Casanare); 15-diciembre-2013			151	4.428
Piedras (Tolima); 28 julio de 2013	17	8	24	2.971
Cabrera (Cundinamarca); 26 febrero 2017			23	1.465
Cajamarca (Tolima); 26-marzo-2017	47	18	76	6.165
Cumaral (Meta); 4-junio-2017	48	22	183	7.475
Arbeláez (Cundinamarca); 9-julio-2017	25	9	38	4.312
Pijao (Quindío); 9-julio-2017	20	9	26	2.613
Jesús María (Santander) 17-septiembre-2017	15	6	22	1.667

* YES, citizen support of the mining or energy project

* NO, citizen rejection of the mining or energy project

Free, Prior and Informed Consultation

Prior Consultations have a different legal framework, subjects in question, legally binding nature and jurisprudential development to Popular Consultations. However, the final objective is similar, i.e., to achieve a real and effective participation of citizens in investment projects when these affect their territories, ways of life, customs or the environment.

In these, different, special procedures of the United Nations human rights system and some treaty monitoring bodies, have recommended the need to consult communities and not only indigenous peoples.

With respect to the Prior Consultations, the government of Colombia presented a draft statutory law where it intends to modify and regulate them. However, it is important to bear in mind that this right - contemplated in ILO Convention 169 of 1989 to guarantee the rights of indigenous, raizal, ROM and afro-descendant peoples - was incorporated into the Constitution of Colombia in 1991.

A first draft of the bill intended to regulate prior consultations was delivered to the Congress of the Republic on December 21, 2016 for pre-consultation and in late May was published on the website of the Ministry of Interior.

The main point of contention in this bill is that the consultation will not have a binding effect on whether the projects are carried out; there will be no possibility of vetoing the projects through this procedure.

Statements by the United Nations Human Rights Council Working Group on Business and Human Rights concerning the obligation to carry out consultations In its report (A/HRC/35/32/Add.2¹⁸) from its mission to Mexico, presented during the 32nd session of the Human Rights Council in 2017 and included in Item 3 of the agenda, *Promotion and Protection of all human rights: civil, political, economic, social and cultural rights, including the right to development*, the Working Group clarified the obligation to carry out consultation with communities before developing projects in their territories.

Item 22 of the Working Group's report states that there has been an inadequate level of consultation with individuals and communities affected by major development projects.

This issue is explored in further depth in Item 38: *"A general feature of the cases presented to the Working Group is a lack of human rights due diligence in the form of adequate prior consultation with affected communities, leading to 'lose-lose' situations of social conflict, human rights abuse, reputational damage for companies and financial losses for investors."*

Similarly, the Working Group stresses that the *Guiding Principles on Business and Human Rights* emphasize that *"adequate consultation with communities affected by business operations is a central aspect of human rights"*

18

<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/101/88/PDF/G1710188.pdf?OpenElement>

due diligence, as it is of critical importance to identify risks to human rights before undertaking projects as well as concerns and grievances that may arise.”

The Working Group also stresses that due diligence in the context of human rights not only requires consultation with indigenous peoples, which is governed by specific human rights norms, but also consultation with ALL OTHER AFFECTED COMMUNITIES. This criterion appears, for example, in the OECD's Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector.

A comment on prior consultations made by the Working Group, which is now important in the context of Colombia, was that *“in accordance with ILO Convention No. 169, consultation must be prior (to the authorization of a project), informed (providing clear and complete information about possible effects and risks), in good faith (so that it is not merely a process to legitimate a predefined outcome) and culturally adequate. Also, the consultation should be conducted with the objective of obtaining free, prior and informed consent.”*

Finally, the Working Group makes the following recommendation: *“The Working Group [...] found a lack of practice or tradition for dialogue with communities in the context of large-scale projects and a strong need to design and implement effective mechanisms for consultation and strengthen a culture of social dialogue. Consultations must be undertaken as early as possible in the process of project design, and must leave open the option that some projects may not be viable.”*

All the pronouncements of the Working Group are certainly applicable to the context and case of Colombia, being as it is one of the countries in which there are a large number of socio-environmental conflicts and especially within the framework of the implementation of the peace agreement signed with the FARC and negotiations with the ELN.

Moreover, in the second cycle of Colombia's Universal Periodic Review in 2013, the Report of the Working Group included several recommendations in terms of strengthening through consultation mechanisms, the participation of indigenous peoples in the determination of the public policies that affect them, and Colombia agreed to this.¹⁹

Conclusions

There is a common denominator among the investment projects (mining, energy, hydrocarbons): namely the lack of a consultative process before these projects are carried out. It is clear that the failure to carry out consultations with all the stakeholders in the investment projects has facilitated the proliferation of social conflicts throughout the country. The negative environmental, economic, social and cultural impacts on the communities where these projects are carried out put human rights at risk of being violated and affect the integrity of people and communities.

It is therefore clear that failure to comply with the results of the consultations and decisions taken by the municipal councils seriously affects the economic, social and cultural rights of the affected communities and will undoubtedly generate an increase in social conflicts and violations of human rights, and diminish the credibility of Colombia's democracy.

¹⁹

A/HRC/24/6/Add.1

Recommendations to the Colombian State

1. Provide incentives to ensure that consultations with all stakeholders are carried out before any investment projects are undertaken.
2. Abide by the results of the Popular Consultations and previous consultations and recognize them as an instrument that strengthens citizen participation and, therefore, democracy in Colombia.
3. Accept the decisions that are autonomously and democratically taken by the Municipal Councils of Colombia, namely prohibiting industrial mining, exploitation of hydrocarbons and the construction of dams in their territories. These decisions should be accepted as current norms in Colombia.
4. Respect the right for communities and stakeholders to receive all information regarding mining and other projects, as well as their consequences on all affected communities should be respected.
5. Refrain from presenting bills that restrict the space for engagement and remove the binding nature of the Popular Consultations and previous free and informed consultations; any regulation of the consultations must be discussed in advance with the communities that may be affected.
6. Take up the recommendations that the Working Group on Business and Human Rights made to Mexico, in the sense of consulting all communities affected by development projects: "Consultations must be undertaken as early as possible in the process of project design, and must leave open the option that some projects may not be viable."
7. Provide all necessary guarantees so that the consultations can be carried out. Among these: avoid lowering the number of polling stations, refrain from sending messages that mislead citizens, avoid excessive police controls that would affect the proper conduct of the consultations, schedule consultations with sufficient notice for citizens to prepare their participation on equal terms.
8. Protect civil society leaders and organizations leading the consultation processes throughout Colombia.

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Social organizations and councilors who support this report Social and human rights organizations

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2. COSAJUCA (Colectivo Socioambiental Juvenil de Cajamarca), Tolima. Robinson Mejía Alonso.
3. Comité Ambiental y Campesino de Cajamarca y Anaima, Tolima. José Domingo Rodríguez.
4. Fundación Pijao Cittaslow. Mónica Liliana Flórez Arcila.
5. Comité ambiental del municipio de Arbeláez, Cundinamarca - Colombia. Diego rojas. GUACANA.
6. Comité ambiental de Arbeláez – Cundinamarca. Javier Linares.
7. Comité de impulso a la Zona de Reserva Campesina del municipio de Cabrera, Cundinamarca – Colombia. Edisson Villalobos.
8. Comité Ambiental en Defensa de la Vida del Tolima – Colombia. Renzo García.
9. Mesa departamental por la defensa del agua y el territorio del departamento del Caquetá. Mercedes Mejía Leudo.
10. Mesa municipal por la defensa del agua, el territorio y la vida del municipio del Paujil, Caquetá-Colombia. Martín Trujillo.
11. Mesa municipal en defensa del territorio. Agua y de la vida del municipio de Puerto Rico, Caquetá - Colombia. Joselito Sánchez.

12. Veeduría ambiental del municipio de Piedras, Tolima. Julián Viña Vizcaíno.
13. Observatorio de Derechos Humanos, Facultad de Derecho Universidad la Gran Colombia.
14. Comité por la defensa del agua del municipio de Tauramena- Casanare. July Katherine Méndez.
15. Congreso de los Pueblos, movimiento político de masas social y popular del centro oriente de Colombia. Ricardo Apolinar.
16. Movimiento de Masas Político Social y Popular del Centro Oriente de Colombia. Tauramena – Casanare.
17. Asociación Nacional Campesina. José Antonio Galán Zorro- ASONALCA. Casanare.
18. Veeduría ambiental municipio de Piedras - Tolima, integrante Comité Ambiental en Defensa de la Vida Tolima. Julián Viña Vizcaíno.
19. Veeduría ecológica del municipio de Arbeláez – Cundinamarca. Cesar Danilo Umaña.
20. Asociación de Juntas de Acción Comunal -ASOJUNTAS- del municipio de Arbeláez – Cundinamarca. Luis Ortiz.
21. Fundación GUCHIPAZ.
22. Corporación PODION.
23. Proceso Tejido Territorial.
24. Corporación SOS Ambiental. Alejandro García Pedraza .
25. Red de Comités Ambientales del departamento del Tolima. Jaime Andrés Tocora Lozano.

Municipal councilors:

1. Federico Alviz, Councilor of the municipality of Montañita, Caquetá – Colombia
2. Blanca Flor Linares Acosta, Councilor of the municipality of Cumaral, Meta - Colombia.
3. Javier Jula Muñoz, Councilor of the municipality of Cumaral, Meta - Colombia.
4. Hernando Jiménez Ñungo, Councilor of the municipality of Piedras, Tolima - Colombia.
5. Camilo Andrés Padilla Zapata, Councilor of the municipality of Cajamarca, Tolima – Colombia.
6. Wilson Stiven Baez Amado, Councilor of the municipality of Cajamarca, Tolima – Colombia.
7. Gustavo Roa Torres, Councilor of the municipality of Cajamarca, Tolima – Colombia.

International organizations:

1. International Human Rights Network, RIDH, Geneva, Switzerland.
2. Association Turpial, Geneva, Switzerland.
3. Association Arc- en-Ciel. Geneva, Switzerland.
4. SOLIFONDS, Zürich, Switzerland.
5. Pax Christi International.