



**Submission to the UN Special Rapporteur on the human rights to safe drinking water and sanitation:
Call for Input on the rights of rural communities**

Lessons from Cajamarca, Colombia
December 2021

This submission aims to support the work of the mandate in elevating the claims of rural communities, the socio-cultural value of water, and anti-democratic trends in water-related policy and decision-making. As an example of this pervasive dynamic, we draw on our work on the right to water and with the paradigmatic and precarious case of the peasant communities of Cajamarca, Colombia.¹

On paper, Colombian legislation recognizes water as a public good.² In each department, the regional environmental authority is responsible for granting water concessions. The National Law of Natural Resources and Environmental Protection prioritizes water use for domestic purposes and collective and individual agriculture over mining activities.³ However, despite legal protections for water aimed at protecting and promoting human rights, in practice national authorities have disregarded this in their economic plans and development priorities, giving priority water use to extractive industries.

1. Overview and background on the situation in Cajamarca, Colombia

About the region

Cajamarca is a rural municipality in the department of Tolima, about 230 kilometers west of Bogotá. The municipality is 99.8% rural, with the municipal seat being the only area considered urban (12 neighborhoods).

¹ See Resistencias campesinas frente al extractivismo. Catorce años de lucha del campesinado de Cajamarca contra el proyecto minero La Colosa / Viviana Tacha [Coordinadora]- 1a ed. Bogotá D.C: Centro Sociojurídico para la Defensa Territorial Siembra, 2021.

² Colombian Civil Code: Law 84 1873, Art. 677; Colombian National Code of Natural Resources and Environment Protection Decree 2811 of 1977; Constitutional Court, Judgments T-223 of 2018, T-740 of 2011. See also: Álvarez Pinzón, G.L. (2019). La concesión de aguas. En Tratado de Derecho de Aguas. Tomo I. Derecho de aguas colombiano para el siglo XXI (pp. 191-251). Bogotá: Universidad Externado de Colombia.

³ Art. 41 del decreto 1541 of 1978 , compiled in Art. 2.2.3.7.6 of Decree 1076 of 2015.

This region is known as the “breadbasket of Colombia” because of the prominent, distinctive, and long-standing peasant identity and agricultural vocation. Here, the patterns of life are deeply connected to the natural environment, to the concept of territory,⁴ and to community values. This peasant or *campesino* identity includes the centrality of water to their livelihoods and their sense of territory – their rights to participate in and democratically decide how their local natural resources ought to be used and sustained.

Like many rural communities that are threatened by resource-intensive development projects, Cajamarca is in an area of great ecological importance. Cajamarca is within the Central Forest Reserve⁵ and is part of the Chilí-Barragán and Los Nevados páramo (moorland) ecosystems, which are critical to the natural environment, to the water supply for several cities, and to the cultural identity of the region.⁶

“Water is Worth More than Gold”: The La Colosa gold mine project and community opposition

La Colosa is AngloGold Ashanti’s (AGA) proposed open-pit gold mine spanning across several municipalities in the department of Tolima, Colombia. The plans for the project were made public in 2007 and the community has been organizing to assert their rights in the process ever since. Despite strong opposition by the community, and an important victory with a binding popular referendum that rejected mining, **there is an imminent risk that operations for the project will resume, with devastating impacts on the community’s water resources.**

The project has received several declarations of priority⁷ from the national government aimed at facilitating its approval as a project in the national interest. However, since learning of the planned project, the Cajamarca community has organized in numerous ways to defend their territory and assert decision-making authority over their water, land, and the way of life in their region. In this, they have incorporated demands for environmental and water justice into their organizational processes.

This mobilization has actively asserted rights to participate using a variety of constitutional, legal, and administrative mechanisms, but at the same time has mobilized the community through art, music, and culture.⁸ With the campaign slogan of: “Water is worth more than gold,” leaders have mobilized the community to assert their right to make decisions over their natural resources and way of life.

⁴ Territory here refers to the multidimensional relationship between people or communities and their particular, sub-national natural environment. See e.g. FIAN, *The Right to Land and Other Natural Resources* (April 2021).

⁵ See Law 2/1959; WWF, *¿Qué son las Reservas Forestales Protectoras Nacionales?* 29 December 2020, <https://www.wwf.org.co/?365650/Que-son-las-Reservas-Forestales-Protectoras-Nacionales>.

⁶ See Carlos Lozano, *What are the páramos and what can you do to protect them?*, AIDA, October 10, 2013, <https://aida-americas.org/en/blog/what-are-p%C3%A1ramos-and-what-can-you-do-protect-them>.

⁷ CONPES 3762 del 2013 “Lineamientos de política para el desarrollo de Proyectos de Interés Nacional y Estratégicos –PINES”.

⁸ See newspapers covers such as the *El Cronista*, “Hoy, todos a la gran Marcha Carnaval, que se extiende a nivel nacional e internacional” May 31, 2017, <https://www.elcronista.co/nacion/todo-listo-para-la-gran-marcha-carnaval-que-se-extiende-a-nivel-nacional-e-internacional>

2. Efforts to ensure democratic decision-making and the meaningful participation of rural communities

Despite the documented projected impacts on the territory, affected communities have been completely excluded from all decision-making processes related to the La Colosa project and denied any opportunity to meaningfully participate at any state of the decision-making. Below we describe several efforts of the rural communities to assert their right to participate in the processes, projects, and decisions affecting their right to water.

In Colombia, peasants are a distinct group recognized in the domestic legal framework as deserving particular protection.⁹ However, unlike indigenous peoples and afro-descendants who have more expansive recognition and institutionalization of collective rights to self-determination related to natural resources in their territories, Colombian peasants do not count on distinct participation rights or mechanisms under domestic law. Therefore, affected communities and their allies have creatively leveraged general mechanisms designed for democratic participation more broadly to attempt to express their views and defend their rights. These efforts are being systematically undermined and restricted.

Cajamarca, like other rural communities facing the threat of megaprojects across Colombia, used the *consulta popular* as a mechanism to protect their water resources. The *consulta popular*¹⁰ is a mechanism established in the Constitution to convene a binding referendum with citizens in the form of a yes-or-no question. This process can be invoked by a relevant government authority or by the people themselves.¹¹ The Cajamarca community used this mechanism to force local authorities to hold a binding referendum on whether or not the residents agreed with mining activities and projects in their municipality.

In 2017, the referendum was held and the community overwhelmingly voted to ban mining in their territory. Although the jurisprudence of the Constitutional Court at the time clearly confirmed that this local mechanism could be used to make decisions about extractive activity, the Court subsequently reversed its position.¹² The national government has strongly opposed the use of the *consulta popular* mechanism to oppose central policy on natural resource extraction.¹³ The company has also relied on this reversal to continue to judicially challenge the binding effect of the democratic expression of will through the *consulta popular*.

⁹ For more see, Corte Constitutional judgments such as SU-426/2016; C-028/2018; C-644, 2012; C-006/2002; T-052/2017.

¹⁰ Colombian Constitution, art. 103.

¹¹ Law 1757 of 2015.

¹² Constitutional Court, SU-095/18. The Constitutional Court recalled how the Municipalities have the authority to decide the use and purpose of the land while the Central Government has the authority over the subsoil.

¹³ El Espectador, *Consulta minera en Cajamarca no tiene la capacidad de cambiar la ley: Gobierno*, March 27, 2017, <https://www.elespectador.com/noticias/nacional/consulta-minera-en-cajamarca-no-tiene-la-capacidad-de-cambiar-la-ley-gobierno-articulo-686515>.

It is noteworthy that the departmental (sub-national) environmental authority responsible for the water allocation permits, the Corporación Autónoma Regional del Tolima (CORTOLIMA), has been the only state institution to recognize the legal impacts of Cajamarca's *consulta popular*. Following the vote and approval, CORTOLIMA cancelled AGA's two water concessions in 2018.¹⁴ The company challenged these decisions in 2020 and appealed in 2021. As recently as April 2021, CORTOLIMA reiterated its respect for the *consulta popular* results.¹⁵ Despite the municipality's prohibition on mining activities and the judicial declaration of water scarcity and risk (described below), the company continues to seek to have CORTOLIMA's decision overturned and reactivate the water allocation permits.¹⁶ Judicial action is currently pending and centers largely on the *consulta popular* results, the legitimacy of which continues to be disputed by national authorities.

3. Threats to the human right to water

The actual and projected impact on water availability has been a central concern throughout the exploration phase of La Colosa. The project's impacts on water resources could be catastrophic for the region, which already suffers from water scarcity and droughts, aggravated by climate change.¹⁷ Regional environmental authorities, human rights institutions, fiscal and public service monitoring institutions, and judicial authorities have documented and recognized the exhaustion of water resources and the imminent risk from extractive activity.¹⁸ Nevertheless, the national government and the company have continued to advance with the plans for the project. In doing so, the national government and the company have challenged the competence of specialized agencies with responsibility for monitoring water resources, such as CORTOLIMA, and excluded the community from participation in decision-making processes.

For example, in 2011 national monitoring authorities¹⁹ issued an official warning about the potential negative impacts that the La Colosa project could have on the ecosystem and on the existing economic activities in the department. The warning cited the water scarcity emergency and severe droughts stemming from climatic changes and aggravated by the over-demand on the water supply in the area.²⁰ This eventually led the Tribunal Administrativo del Tolima (district court) to order the National Mining Agency to suspend two of AGA's mining titles in 2013.²¹ This order was a precautionary measure within an *acción popular* and responded to the recognized threat to the right to water of all residents of the department of Tolima. In 2020, the Consejo de Estado reassessed the suspensions of AGA's mining concessions and concluded that to reactivate them would put the water sources at risk. It ordered the continued suspension of all mining activities related to the concessions in question, unless and until the company could prove to CORTOLIMA and

¹⁴ CORTOLIMA, Resolution Nos. 4424, 4425 December 16 2019.

¹⁵ CORTOLIMA response No. 100.04.2021 (Apr. 22, 2021) to information request No. 4346 (Apr. 6, 2021).

¹⁶ See section 5 of the brief

¹⁷ Consejo de Estado judgment of September 17, 2020, file number 73001 23 31 000 2011 00611 03.

¹⁸ *Id.*

¹⁹ Contraloría General de la Nación

²⁰ See Contraloría General, *Función de advertencia – Prevención de amenaza al recurso hídrico en la ejecución del proyecto La Colosa* (2011).

²¹ CG3-145 and GLN-095, No. VSC 0958 of Nov. 8, 2013; No. 000796, Aug. 28, 2013.

the National Mining Agency that it would use an alternative water source that would not jeopardize the Coello River and its tributaries. The company unsuccessfully challenged the decisions regarding the environment risk to the communities’ water resources, including a challenge to the competence of CORTOLIMA as the technical authority for the management of the regional water resources.

4. Additional Environmental Proceedings Exclude Communities’ Concerns about their Rights to Water

Ministry of the Environment permissions

The mining project is within protected zones of the Central Forest Reserve (RFC).²² Therefore, AGA is required to formally seek permission from the Ministry of the Environment to carry out its extractive activities.²³ AGA has made several RFC removal requests related to its exploratory activities: in 2008, 2012, 2014, 2015, and 2018. As with the water allocation permits, these processes have centered on technical and administrative dimensions, without opportunities for affected communities to participate.

The process initially included certain guarantees for democratic participation, but this has since been restricted. The Ministry of the Environment and Sustainable Development (MADS) initially recognized the participation of “third party intervenors”—namely, intervention by the Procuraduría General de la Nación.²⁴ That authority recommended against granting the permission because of the negative impact on the ecosystem. MADS nevertheless granted the permission for the RFC subtraction requested in 2008.²⁵ For all subsequent requests the Ministry changed its position and has no longer allowed the community or other institutions to participate as third-party intervenors nor has it held public environmental hearings.

In December 2016 civil society organizations filed a constitutional action (*tutela*) to seek protection of their rights to procedural due process and to participate in these proceedings. The aim was to situate the right to participate in RFC processes in the context of the growing body of Constitutional Court jurisprudence that has progressively guaranteed the rights of affected communities to participate in environmental decision-making²⁶ – which represents a counterweight to the antidemocratic approach to extractive development. These important domestic advances in the right to participate in environmental proceedings are consistent with parallel developments at the international level.

²² Law 2 of 1959.

²³ See Resolution No. 1526 of 2012 and Decree 2106 of 2019.

²⁴ Procuraduría General de la Nación. The Colombian legal system has a branch dedicated to supervising the use of state power. The three main institutions include: the Contraloría General de la Nación, which is in charge of the fiscal monitoring; the Procuraduría General de la Nación, which is in charge of the monitoring of the public service and offices; and the Defensoría General de la Nación, which is in charge of the monitoring of the protection and fulfilment of the human rights in Colombia.

²⁵ Resolution 814 of May 4, 2009.

²⁶ See Constitutional Court Judgments: T-135/2013, C-123/2014, T-445/2016, C-273/2016, C-035/2016, C-389/2016, and SU-133/2017.

Nonetheless, these litigation efforts were not successful, and the courts have not recognized a right for affected communities to participate in RFC processes.

Despite the exclusion of affected communities in the proceedings, in 2017 MADS concluded on its own accord that the environmental impacts would be negative and decided to deny the permission request from AngloGold Ashanti filed in 2015.²⁷ In July 2017, just three months after the community important vote in the *consulta popular*, AGA filed to appeal this decision without success. In 2018 the company presented another RFC removal, which is still pending evaluation.

Conflicts with Environmental Conservation Zones

Finally, the pursuit of permissions for the mining project also directly conflicts with national administrative and legislative efforts to delimit and protect the *páramo* ecosystems. The effort to delimit the *páramos* was long delayed; by the time MADS finally issued the relevant resolutions in 2016,²⁸ AGA already had mining concession contracts across the *páramo* zones.

The 2016 delimitation resolutions prohibit the exploration and extraction of non-renewable natural resources within the delimited *páramo* zones and establish several actions to guarantee that. Following these delimitation resolutions, the La Colosa mining concession contracts were partially adjusted to exclude some of the protected areas, however there are still remaining overlaps between zones that are delimited as protected *páramos* but which are subject to a mining concession. AGA intervened in the process to challenge the delimitation of the Los Nevados *páramo* to reinstate its rights, and the demand is still pending.²⁹ In 2018, national legislation to regulate the *páramos* passed, which reiterates the prohibition on extractive activity with the delimited zones.³⁰

Recommendations and Conclusions

In the consideration of the human right to water for impoverished rural communities, we urge the mandate to focus on the threats that rural communities face from the impact of resource-intensive development projects on their water resources and the systemic obstacles that make meaningful participation by affected communities impossible, despite their best efforts.

It would be an important contribution for the Special Rapporteur to include a consideration of peasant rights in the upcoming General Assembly report and to explicitly reference the UN Declaration on the rights of peasants and other persons working in rural areas. UNDROP includes the important recognition of special relationship to water, especially in articles 2(3), 4, 5, 10, 11, 15, and 21.

²⁷ Resolution No. 1087, June 9, 2017, Colombian Ministry of the Environment and Sustainable Development “Por medio de la cual se niega la solicitud de sustracción temporal de un área de la Reserva Forestal Central establecida por la Ley 2° de 1959.”

²⁸ Resolutions 1553 and 1987 (2016), MADS .

²⁹ Filed before the el Tribunal Administrativo de Cundinamarca on June 12, 2017, file no.25000234100020170092400.

³⁰ Law 1930/2018, art. 5.

Particular emphasis should be placed on the right of peasant communities to participate in democratic decision-making about their water resources recognizing they are systematically marginalized and disempowered by current water governance policies and practices, which leads to corporate capture of key processes and institutions.

The mandate's efforts to call on States to protect water as a central element of the livelihood of people and of social well-being is key. For this, States must take concrete measures to respect the ethical hierarchy of water uses and to provide and respect democratic decision-making processes regarding the allocation and conservation of water resources.

Finally, we invite the mandate to reference the La Colosa case specifically as a paradigmatic case to illustrate the key role of regional authorities as sites of meaningful participation and the power imbalance between companies supported by national authorities on the one hand, and on the other side, rural communities seeking to preserve their natural resources and way of life.

About us

COSAJUCA

The Colectivo Socioambiental Juvenil de Cajamarca (COSAJUCA) is a civil society organization that defends human rights and the right to territory as essential for remaining in the territory with dignity. COSAJUCA has been one of the most visible organizations opposing the La Colosa mining project in the municipality of Cajamarca, Tolima. Contact: Robinson Mejia, COSAJUCA, rmejia.cosajuca@gmail.com

SIEMBRA

The Centro Sociojurídico para la Defensa Territorial – SIEMBRA – is a non-governmental organization that advocates for human rights in Colombia, the protection of the environment, and the strengthening of the autonomy of territorial processes in the face of the threat of extractivism, in the aim of building a more just and plural society. Contact: Viviana Tacha, SIEMBRA Centro Sociojurídico para la Defensa Territorial, v.tacha@centrosiembra.org

University of Minnesota Human Rights Center

The Human Rights Center at the University of Minnesota law school supports cutting-edge research, trains future advocates, and partners with human rights defenders to impact policy and practice. Contact: Amanda Lyons, Human Rights Center, University of Minnesota, lyon0061@umn.edu

Northeastern University School of Law, Program on Human Rights and the Global Economy

The Program on Human Rights and the Global Economy (PHRGE) specializes in economic, social, and cultural rights and rights-based approaches to development, with a strong emphasis on the human right to water. Contact: Martha F. Davis, Northeastern University School of Law, m.davis@northeastern.edu