

Responsible disengagement from coal as part of a just transition

Exploring due diligence, disengagement and contribution to grave human rights violations associated with coal mining in Cesar Department, Colombia



Joseph Wilde-Ramsing & Katharine Booth & Ben Vanpeperstraete & Mariëtte van Huijstee

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Colophon

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Cover photo: Displaced farmers at a commemoration of a massacre in the municipality of Becerril (2017)



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SOMO

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Executive summary

This paper considers “responsible disengagement” and “just transition” in the context of the Cesar coal mining region in Colombia, in which serious and unremediated human rights violations are intertwined with dependency on mining as a livelihood for entire communities. In Cesar and similar contexts, what are the roles and responsibilities of mining companies when disengaging? What are the responsibilities and expectations of power companies that have profited from Cesar’s coal mines for decades? The answers to these complex questions will have major implications for workers, communities, companies and governments around the world.

The UN Guiding Principles on Business and Human Rights and OECD Guidelines for Multinational Enterprises set down a framework for responsible disengagement and when a company is considered to have “caused”, “contributed” or is “directly linked to” human rights or environmental abuses. A decision to not responsibly disengage from a supplier that is repeatedly contributing to severe abuses may “shift” the company’s relationship to those impacts from “directly linked” to “contributing”.

As part of due diligence, if a company identifies an adverse impact, it should engage with business partners to prevent, mitigate or remediate that impact. If engagement fails to prevent and remediate the impact, the company should consider responsibly disengaging, taking into account the severity



Farmers in La Loma, El Paso, with a map showing how mining has displaced them (2015).

of the impact; the results of previous attempts to address impacts; the likelihood of preventing and remediating impacts in the future; the consequences of not disengaging; and the potential adverse impacts of the disengagement itself.

The Cesar region in Colombia has been the site of severe human rights violations, including the forced displacement of communities for the development of coal mines by paramilitary groups in the 1990s and 2000s. As the paramilitaries committed these violations, two multinational mining companies – Drummond and Prodeco/Glencore – initiated and expanded their operations. SOMO’s analysis of the OECD Guidelines as applied to this case leads to the conclusion that these companies are “contributing” to these ongoing impacts.

Several European energy companies have made significant and repeated purchases of coal from Cesar mines to generate electricity in their power plants. SOMO contends that the relationship between these companies and the forced displacements has shifted from being initially “directly linked” through their relationship with Drummond and Prodeco/Glencore to “contributing”. This shift has taken place over the past decade, but particularly from 2014, as the companies should have known about the violations and it became clear that efforts to address the impacts had failed. It is from January 2017 that SOMO considers that energy companies that continued to purchase coal directly or indirectly mined by Drummond and Prodeco/Glencore in Cesar began “contributing” to the ongoing harms. These companies must cease purchasing coal from the mines, contribute to remediation and mitigate new impacts associated with their disengagement. Companies that disengage should also mitigate and remediate all new adverse impacts arising from their disengagement.

Responsible disengagement from coal has broader policy implications. Coal mining and coal-fired electricity production are associated with severe human rights and environmental harms, including anthropogenic climate change. Mining and energy companies should develop – through meaningful engagement with trade unions, local communities, civil society organisations and governments – ambitious and just plans to disengage responsibly from coal.

Introduction

In late 2020 and early 2021, two announcements related to Colombian coal shook the country, along with coal mining companies and stakeholders around the world. In the first announcement, made in December 2020, the Colombian Office of the Prosecutor General charged the current president and the former president of the Colombian subsidiary of US-based coal mining company Drummond Inc. with complicity in crimes against humanity.¹ The Prosecutor General's indictment asserts that the executives funded and provided logistical and other support to the paramilitary group *Autodefensas Unidas de Colombia* (United Self-Defence Forces of Colombia, AUC) between 1996 and 2001.² The indictment identifies 3,382 victims of gross human rights violations, involving forced displacement, murder, enforced disappearance and kidnapping, allegedly committed by AUC paramilitaries in Colombia's Cesar mining region – a major supplier of coal to many of Europe's coal-fired power plants. The crimes were reportedly committed as part of a strategy to incite terror in the local population with the aim of displacing them and stealing their land, a strategy that eventually resulted in the forced displacement of more than 55,000 individuals.³ Drummond has denied these allegations.⁴

In the second major announcement, made in February 2021, the Cesar region's other coal mining company, Swiss-headquartered Prodeco/Glencore, announced its imminent departure from Colombian thermal coal mines in the region.⁵ Prodeco/Glencore had also been implicated in the forced displacements mentioned above, and in 2019 the company itself noted that it was exploring the possibility of its "complicity with human rights abuses and excessive use of force by security forces".⁶ However, at the beginning of the COVID-19 pandemic in 2020, the company suspended its extractive activities in the Cesar region, apparently due to decreasing demand for coal from power companies and therefore declining international coal prices.⁷ Prodeco/Glencore's decision to disengage was a shock to key local stakeholders, as the decision was reportedly made without any meaningful consultation with workers, trade unions and local communities.⁸ The company's pending departure threatens to leave unremediated severe human rights abuses and numerous unresolved labour conflicts with workers.⁹ Civil society organisations have expressed deep concern about the effects of the closure of the mines on workers and communities and are calling on Prodeco/Glencore to be transparent with information, to convene with stakeholders and organisations that represent workers, and to minimise the negative labour, human rights and environmental impacts caused by the abrupt closure of their Cesar mines.¹⁰

Well-known, well-documented abuses and lack of progress in addressing them

Though the Colombian Prosecutor General's recent indictment brought these human rights violations to the fore, the violations have been well-known and well-documented in Europe for over a decade. Already in 2006, the Danish energy company Ørsted disengaged from Drummond following and amid the ongoing forced displacements.¹¹ In 2010, Dutch television and news outlets broadcast an exposé on the abuses in and around the Cesar coal mines that were supplying coal-fired power stations in the Netherlands.¹² In 2012, SOMO's report 'The Black Box' further detailed the flow of coal from problematic mines in Cesar to the Netherlands, destined for combustion in coal-fired power plants throughout Europe.¹³ The political pressure following these developments led to the 'Dutch Coal Dialogue' (2010-2013) between several multinational coal mining and energy

companies, Dutch government representatives and civil society organisations, with the explicit goal of improving the circumstances of local workers and communities in and around coal mines supplying European power plants.¹⁴ The Dutch Coal Dialogue ended without notable progress in achieving its aim, but led to the establishment, in 2012, of BetterCoal, an industry association with the stated aim of improving social and environmental conditions in coal supply chains, and, in 2014, of the 'Dutch Coal Covenant' between the Dutch government and four European energy companies operating coal-fired power plants in the Netherlands.¹⁵ Notably, civil society organisations were not invited to join the Coal Covenant, which had the same aim as the Coal Dialogue: to improve social and environmental conditions in international coal supply chains.¹⁶ Importantly, the Dutch Coal Covenant intended for energy companies to develop plans for responsibly disengaging from coal suppliers that failed to address negative social and environmental impacts at their coal mines.

Between 2014 and 2018, as the discussions and activities of the Coal Covenant were occurring, several research reports by European and Colombian NGOs, as well as the Colombian government's National Centre for Historical Memory, continued to document and highlight the human rights violations associated with coal mines in the Cesar region and their links to European energy companies.¹⁷ In 2014, the Dutch NGO PAX launched its ongoing 'Stop Blood Coal Campaign', which aimed to increase awareness in Europe of the victims of paramilitary violence in Cesar and encourage mining and energy companies to take responsibility and contribute to effective remedy for the affected communities.¹⁸ Several company and government-led visits and audits to Cesar took place, including a 2014 visit led by the Dutch Minister of Foreign Trade in which the Minister heard directly from victims of the violence still seeking remediation and justice. Despite the focus on and awareness of the abuses that had taken place at the Cesar coal mines still supplying European power plants, the Coal Covenant ended in 2020 without any progress on addressing the ongoing harm from the forced displacements in Cesar.¹⁹

Now that the Coal Covenant has ended and with no further progress to mitigate or remediate the impact of the forced displacements, Prodeco/Glencore's announcement about the closure of its coal mining operations in Colombia brings into sharp focus the potential impacts and implications of the shuttering of an industry that has been associated with grave human rights and environmental violations, and which is on the verge of a potential complete phase-out as part of a global "just transition" to a low-carbon economy. National and international unions and civil society organisations have called on Prodeco/Glencore to meaningfully engage with local communities, workers and their representatives, to remediate past harms that have not been addressed, and to mitigate new negative impacts caused by its abrupt disengagement from its Cesar mines.²⁰ In short, to disengage responsibly.

But what exactly do "responsible disengagement" and "just transition" mean and require in a context like Cesar, where serious, unremediated human rights violations are intertwined with heavy dependency on coal mining as a source of income and livelihood for thousands of workers and entire communities? What are the roles and responsibilities of the mining companies when responsibly disengaging? What are the roles and responsibilities of multinational power companies that have profited from Cesar's coal mines for decades? The answers to these complex and crucial questions will have major implications for workers, local communities, companies and governments around the world, and are the subject of this paper.

1.1 Responsible business conduct and disengagement from coal

Coal mining and coal-fired electricity generation are industries long associated with grave human rights and environmental harms, as well as contributing to human-induced climate change. According to the two most authoritative normative standards for responsible business conduct (RBC) – the UN Guiding Principles on Business and Human Rights (UNGPs) and OECD Guidelines for Multinational Enterprises (OECD Guidelines) – companies causing and contributing to human rights and environmental harms are responsible for ceasing and addressing those impacts.

In order to prevent harm, the UNGPs and OECD Guidelines stipulate that companies should conduct “human rights due diligence”²¹ (HRDD) to prevent or mitigate adverse impacts that they cause, contribute or are directly linked to through a business relationship. To address negative impacts caused by business partners such as suppliers or contractors, companies should use their influence over their business partner to persuade them to prevent, mitigate and remediate those adverse impacts. This includes explicitly proposing the possibility of disengagement – meaning the process or act of withdrawing from or terminating the business relationship²² – if the business partner fails to address an impact. The prospect of disengagement is one way to increase a company’s leverage, to address the adverse impact more effectively, or to avoid (further) contribution to the impact.

Companies must consider responsibly disengaging or ending the business relationship connecting them to the adverse impact if efforts to address the impact fail, if there is no possibility for improvement of the business partner’s activities, or the harm continues or remains ineffectively addressed or remediated. The OECD provides that, if companies do not responsibly disengage in these situations, their responsibility for addressing the impacts increases, as their involvement shifts from being “directly linked” to “contributing” to the ongoing impacts.²³ Thus, during HRDD processes, companies in these situations are faced with important decisions about when to disengage and how to do so responsibly.

SOMO explored responsible disengagement decision-making in our 2016 discussion paper, *Should I stay or should I go?*²⁴ Our 2020 paper on responsible disengagement during the COVID-19 pandemic expanded on this issue.²⁵ The present paper concretises this discussion by applying the lessons and recommendations developed in both of our previous papers to the coal sector.

Disengagement in the coal supply chain may be necessary for various reasons, including human rights violations, a changed business model, or to prevent further adverse climatic impacts, as some energy companies have recently pledged.²⁶ However, disengagement has serious consequences for workers, their families and local communities that depend on the income from the economic activity generated by coal mining and that may have little or no safety net or social protection. This is particularly problematic in countries with absent or weak state governance such as conflict-affected areas.²⁷ In post-conflict regions, irresponsible disengagement may unwittingly reignite conflict and tensions, potentially leading to more violence and the re-victimisation of local communities and populations. Moreover, the long history of coal mining to satisfy demand for cheap, abundant and readily available energy has led entire regions such as the Cesar region of Colombia to become dependent on the income provided by coal. Abandoning these workers and communities – which have borne the brunt of the negative human rights and environmental impacts of coal

mining for decades – without remediating these impacts would be unjust and irresponsible. While the case study in this paper explores disengagement from specific and severe human rights impacts, the energy sector as a whole is facing increasing calls to shift to sustainable energy and to disengage from coal. If or when this shift occurs, it must be done in a manner that is just and responsible in order to avoid causing additional negative human rights and environmental impacts.

1.2 Research scope, questions and methods

The scope of this paper is limited to analysis of the relationship between multinational mining and energy companies and the specific, ongoing adverse human rights impact of forced displacements associated with coal mining in the Cesar region of Colombia, as well as the risk of broader adverse social, economic and environmental impacts associated with companies' disengagement from coal mines in Cesar. The forced displacements in question and the violence that led to those displacements primarily took place between 1996 and 2006, but they remain largely unremediated and the impact is thus considered to be ongoing to this day. The paper further relies on the scope and framework contained in the UNGPs and OECD Guidelines – internationally-recognised normative standards for responsible business conduct – to analyse the actions of the companies in the context of their due diligence to prevent and mitigate the adverse impact of forced displacements and the companies' responsibilities and actions related to (responsible) disengagement.

This paper seeks to answer the following six research questions:

1. What guidance do leading authoritative international normative standards on RBC provide related to responsible disengagement and contribution to adverse impacts?
2. According to the international standards, how and when should companies consider disengagement from business partners causing or contributing to adverse impacts?
3. According to the international standards, what does 'responsible' disengagement entail?
4. Have coal mining companies in Cesar, Colombia and European energy companies purchasing coal from Cesar "contributed to" the adverse impact of forced displacement of farmers and communities from land in and around coal mines in Cesar?
5. If mining and energy companies did indeed contribute to these impacts, what responsibilities for mitigating and remediating the impacts do they have according to the international standards, including if they decide to close or disengage from Cesar coal mines?
6. Based on international standards, what should be expected of companies mining and using Colombian coal in the context of responsible disengagement and just transition to clean, renewable sources of energy, particularly with regard to preventing additional adverse impacts on workers and communities associated with the disengagement?

Each of these research questions will be answered succinctly in the conclusions in Section 5. In order to answer the research questions, the paper employs the normative-empirical analysis research method, relying on international normative standards to empirically evaluate the behaviour of Drummond and Prodeco/Glencore and their European energy company customers in the case study of the Cesar region in Colombia. Several European energy companies, including Enel S.p.A. (Italy), EnWB (Germany), Ørsted A/S (Denmark), RWE AG (Germany), STEAG Energy Services GmbH (Germany), Uniper SE (Germany) and Vattenfall (Sweden) have historically purchased – and some

of these companies continue to purchase – coal from Drummond and Prodeco/Glencore’s Cesar mining operations.

A draft of the present paper was provided to all ten of the mining and energy companies that it mentions, as well as industry association Bettercoal, for review and comment. Eight of these – Bettercoal, Drummond, Enel, EnBW, Ørsted, Prodeco/Glencore, Uniper, and Vattenfall – made use of the opportunity and provided comments. Their comments have been included or addressed in the present version as appropriate, though this does not imply that any company endorses the paper’s findings.

Section 2 of this paper provides an overview of the numerous human rights violations that have occurred at Drummond and Prodeco/Glencore’s coal mines in the Cesar region. Section 3 examines international standards on responsible disengagement. Both the UNGPs and OECD Guidelines outline expectations for companies on HRDD and responsible disengagement. The OECD has provided additional guidance on the shifting responsibilities of companies from being “directly linked” to “contributing” to negative impacts, which is particularly salient for ascribing responsibilities towards coal buyers. This section concludes by setting out a framework for evaluating responsible disengagement decision-making by companies.

Section 4 outlines the relevant RBC norms and applies these norms to the case study of coal mined by Drummond and Prodeco/Glencore in Cesar and utilised by multinational energy companies in coal-fired power plants in Europe. Finally, section 5 concludes by answering each of the six research questions and drawing on those conclusions to generate general recommendations for companies considering responsible disengagement, and specific recommendations for Drummond and Prodeco/Glencore as well as energy companies purchasing coal from their Cesar mining operations.



Inside Drummond’s Pribbenow open pit mine in La Loma, El Paso (2013).

2 Human rights violations in and around coal mines in Cesar, Colombia

Between 1996 and 2006, the Cesar region in northern Colombia was the site of brutal paramilitary violence. It is estimated that throughout the coal mining corridor during that decade, AUC paramilitary groups forced the displacement of 59,000, mainly farming families; killed at least 3,100 people, including trade union and community leaders; and disappeared 240 others.²⁸

At the same time that paramilitary groups were committing mass atrocities, large-scale industrial coal mining in the region was booming. Two multinational coal mining companies, US-based Drummond and Swiss-owned Prodeco/Glencore, acquired and secured mining concessions and operated coal mines directly on or adjacent to land from which the inhabitants had been (and continued to be) forcibly displaced. In 1988 and 1997, Drummond entered into coal extraction contracts with the Colombian government for the La Loma and El Descanso concessions, respectively.²⁹ In 1995, Glencore acquired Prodeco and the Calenturitas mine and, nine years later, commenced large-scale production at the mine.³⁰ In 2005, Glencore acquired the Carbones de La Jagua (CDJ) mine. Both mining companies expanded their operations as the human rights violations continued and became increasingly severe throughout the period 1995 to 2006.³¹

First, with regard to Drummond, several legal proceedings have been brought against Drummond for alleged complicity in crimes committed by AUC paramilitary groups. In 2009, 592 plaintiffs (the next of kin of 131 victims of paramilitary violence in Cesar) brought a claim against Drummond in the District Court of Alabama.³² The plaintiffs alleged that Drummond provided substantial financial and logistical support, intelligence and access to Drummond property in order to drive suspected guerrillas out of areas of Drummond's Colombian operations.³³ The AUC subsequently terrorised towns around the mine and along rail line that transported Drummond's coal from the La Loma mine to its port, resulting in the deaths of innocent civilians.³⁴ The case was dismissed in 2013 on the basis of a US Supreme Court ruling that the relevant legislation (Alien Tort Claims Act) required there be a sufficient nexus between the defendant company, the US and human rights violations abroad – and the involvement of Drummond's Colombian subsidiary did not satisfy this requirement.³⁵

In 2013, Drummond contractor Jaime Blanco Maya was convicted and sentenced under Colombian law for the murder of two Drummond trade union leaders who had been advocating for improved food quality and against the presence of armed paramilitaries in the Drummond canteen.³⁶ According to Blanco Maya's testimony, cited in the 2020 Colombian Prosecutor General's indictment, between 1997 and 2001 Drummond channelled a total of US\$900,000 to the AUC through its food services company.³⁷ Blanco Maya's testimony is strongly refuted by Drummond, and in 2015 a judge in a US District Court found that the lawyer prosecuting the case against Drummond had paid Blanco Maya and other witnesses in the case and failed to disclose that fact to the Court.³⁸ The lawyer in question filed counterclaims against Drummond, and the case remains pending as per the date of publication of this report. In response to a draft of this report, Drummond noted that four proceedings against the company in US courts have been dismissed,³⁹ though it also bears noting that the dismissals are based on jurisdictional grounds, not on the merits or evidence.



The mining concessions in the Cesar region

Nevertheless, following Blanco Maya’s trial and conviction, during which several witnesses claimed that Drummond senior managers had ordered the murders, the judge ordered the Colombian Office of the Prosecutor General to further investigate Drummond’s president and three former employees to determine their role and responsibility in the murders.⁴⁰ In October 2018, the Office of the Prosecutor General concluded that there was “sufficient evidence” to formally open criminal investigations against Drummond.⁴¹

In December 2020, both the current and the former president of the Colombian subsidiary of Drummond were charged with complicity in crimes against humanity.⁴² The indictment alleges that they funded the AUC and provided logistical and other support to paramilitary groups between 1996 and 2001.⁴³ The indictment identifies 3,382 victims of gross human rights violations, involving forced displacement, murder, enforced disappearance and kidnapping, committed in the Cesar mining region as part of a deliberate strategy to displace the local population and steal their land.⁴⁴ The cases against the Drummond executives are supported by voluntary testimony by Jaime Blanco Maya before the Special Jurisdiction for Peace, the judicial component of the Comprehensive System of Truth, Justice, Reparation and Non-Repetition – a transitional justice mechanism investigating and trying the most serious human rights violations committed during the armed conflict between the Colombian government and paramilitary *Fuerzas Armadas Revolucionarias de Colombia* (FARC) groups.⁴⁵ The Drummond executives deny any connection to the murdered trade unionists and dispute that they financed the AUC paramilitary groups.⁴⁶

In 2015, the Colombian government's Land Restitution Unit forwarded 103 of the thousands of land restitution requests related to forced displacement and expropriation of land by AUC paramilitaries to the responsible legal authorities.⁴⁷ Sixteen of these claims resulted in lawsuits over land that AUC groups had violently appropriated and then allegedly sold to Drummond.⁴⁸ Currently, this land is used by Drummond for coal mining or as a waste dump. The company has argued that it had acquired the land in good faith and in compliance with Colombian law.⁴⁹

There is no evidence that Prodeco/Glencore collaborated in any way with Drummond in the activities under investigation, but Prodeco/Glencore has also been linked to forced mass displacement of the community of Santa Fe in the municipality of Becerril in Cesar, via the acquisition of the CDJ mine in 2005 from Carbones del Caribe, another mining company.⁵⁰ In 1997, paramilitary groups attacked local communities and selectively murdered residents of land that was declared 'abandoned' and sold at auction, or otherwise subsequently bought directly by the Carbones del Caribe mining company.⁵¹ In response to a draft of this report, Glencore claimed that, "To date, none of the land covered by the La Jagua Mine's concession has been found to be acquired through the displacement of Santa Fe community," though the company also acknowledged that "a displacement claim has been made" for two plots of land in the concession.⁵² In addition, it should be noted that Colombian authorities have arrested several individuals for using pressure and threats of violence to allow Carbones del Caribe to acquire the land before Prodeco/Glencore purchased the mine in 2005.⁵³ As is explained in section 4.2.1 below, when it purchased the CDJ mine in 2005, Prodeco/Glencore thus also inherited the responsibility to address the impacts of the forced displacements of the Santa Fe community.

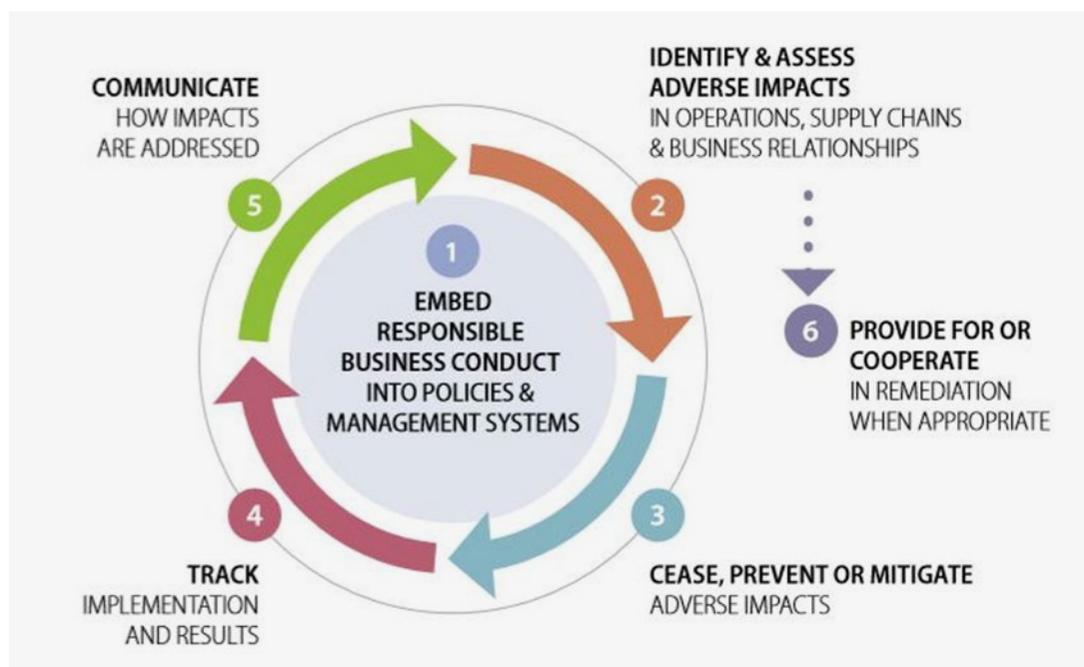
3 Responsible disengagement in international standards

The UNGPs and OECD Guidelines are the most authoritative normative standards on RBC. Both of these instruments propose HRDD as a key strategy for RBC. HRDD requires companies to proactively address potential and actual adverse human rights and environmental impacts with which they are involved. This includes identifying and assessing impacts that a company may cause or contribute to through its own activities, as well as those that are directly linked to a company's operations, products or services through its business relationships.

According to the OECD Guidelines⁵⁴:

- A company causes a negative human rights impact where its activities (meaning its actions or omissions) on their own are sufficient to result in the impact.
- A company contributes to an adverse impact if its activities, in combination with the activities of other actors, cause an impact, or if the activities of the company facilitate another actor in causing an adverse impact.
- A company is directly linked to a negative impact where there is a link between the impact and the company's products, services or operations through another entity (a business relationship).

Figure 1 Overview of due diligence process



Source: OECD⁵⁵

Companies are expected to take appropriate action, including ceasing, preventing and mitigating, according to their involvement in the impact. They should track the effectiveness of measures and processes to address adverse human rights impacts in order to know if they are working. Companies are also expected to communicate on how impacts are being addressed and to show stakeholders – particularly affected rightsholders – that there are adequate corporate policies and processes in place. Companies that are connected to negative impacts are also expected to provide for or cooperate in remediation, when appropriate. Figure 1 provides an overview of the due diligence process.

3.1 The UN Guiding Principles

The UNGPs elaborate on the responsibility of companies to first engage with business partners and to use its (existing or potential) leverage over those partners after an adverse impact has been identified. If the company lacks leverage and is unable to increase it, or if the exercise of leverage does not prevent an impact, the company should consider “ending the relationship”.⁵⁶

Box 1: Responsible disengagement and the UNGPs

“If the business enterprise has leverage to prevent or mitigate the adverse impact, it should exercise it. And if it lacks leverage there may be ways for the enterprise to increase it. Leverage may be increased by, for example, offering capacity-building or other incentives to the related entity, or collaborating with other actors. There are situations in which the enterprise lacks the leverage to prevent or mitigate adverse impacts and is unable to increase its leverage. Here, the enterprise should consider ending the relationship, taking into account credible assessments of potential adverse human rights impacts of doing so. Where the relationship is “crucial” to the enterprise, ending it raises further challenges. A relationship could be deemed as crucial if it provides a product or service that is essential to the enterprise’s business, and for which no reasonable alternative source exists. Here, the severity of the adverse human rights impact must also be considered: the more severe the abuse, the more quickly the enterprise will need to see change before it takes a decision on whether it should end the relationship. In any case, for as long as the abuse continues and the enterprise remains in the relationship, it should be able to demonstrate its own ongoing efforts to mitigate the impact and be prepared to accept any consequences – reputational, financial or legal – of the continuing connection.”⁵⁷

3.2 The OECD Guidelines for Multinational Enterprises

Under the OECD Guidelines, responsible disengagement from a business relationship that is causing or contributing to an adverse impact may be necessary when a company's products or services are considered to be "directly linked" to the impact through a business relationship or a chain of business relationships. Disengagement from business relationships is a measure of "last resort", thus stressing the importance of engagement with business partners as the preferred means for companies to prevent and mitigate adverse impacts, rather than 'cutting and running'. However, companies should communicate with business partners about the prospect of (temporary) disengagement as a part of the exercise of leverage and risk mitigation and, in some situations, disengagement may be the only responsible course of action.

Box 2: The OECD Guidelines on responsible disengagement

"Appropriate responses with regard to a business relationship [causing or contributing to adverse impacts] may include continuation of the relationship with a supplier throughout the course of risk mitigation efforts; temporary suspension of the relationship while pursuing ongoing risk mitigation; or, as a last resort, disengagement with the supplier either after failed attempts at mitigation, or where the enterprise deems mitigation not feasible, or because of the severity of the adverse impact. The enterprise should also take into account potential social and economic adverse impacts related to the decision to disengage."⁵⁸

3.3 The OECD Due Diligence Guidance for Responsible Business Conduct

The 2018 OECD Due Diligence Guidance for Responsible Business Conduct (OECD Guidance) elaborates on RBC in the context of disengagement. The OECD Guidance reiterates that "disengagement from a business relationship may be appropriate as a last resort after attempts at preventing or mitigating severe impacts failed; when adverse impacts are irremediable; where there is no reasonable prospect of change; or when severe adverse impacts or risks are identified and the entity causing the impact does not take immediate action to prevent or mitigate them".⁵⁹ This means that sometimes the only responsible course of action for a company is to disengage from a business relationship, including proactively when the risk or impact is serious enough to warrant disengagement, as well as after mitigation efforts have failed.⁶⁰

The OECD Guidance encourages companies to use the prospect of disengagement as a way to increase their leverage over a business partner, with the aim of encouraging the other entity to prevent or cease impacts that it is causing or to which it is contributing. To increase leverage, it recommends “Communicating the possibility of disengagement if expectations around RBC are not respected (e.g. through contractual clauses, enterprise policies, meetings with management of the business relationship)”.⁶¹ This reflects earlier findings by SOMO that the prospect or threat of disengagement must be “credible” and clearly communicated to business partners in order to be effective.⁶²

The OECD Guidance provides further direction on how to responsibly disengage, including complying with “international labour standards and the terms of collective bargaining agreements” and articulating escalation measures for disengagement upfront with business partners.⁶³ Companies should also be transparent about their decision to disengage by providing sufficient notice of the disengagement to the business partner and providing detailed information supporting the decision to disengage to stakeholders such as trade unions.⁶⁴

Importantly, if a company decides not to disengage and instead to remain in a relationship despite ongoing or unaddressed adverse impacts, the OECD Guidance explains that the company’s relationship to the impact may change over time depending on its efforts effectively preventing or mitigating the impact. A company that was initially “directly linked” to an adverse impact through a business relationship may, after deciding to remain in the relationship despite the failure of HRDD to actually reduce or remediate impacts, be considered to be “contributing” to the ongoing adverse impact.⁶⁵ Both the OECD Guidelines and UNGPs state that the “contributing” relationship carries a more extensive responsibility to address the adverse impact than the “directly linked” relationship.⁶⁶

The OECD Guidance clarifies that for a company to be “contributing” to an impact, its contribution must be “substantial” (i.e. not trivial or minor).⁶⁷ The OECD indicates that three factors can be used to assess whether an activity constitutes a non-trivial contribution. Importantly, “activities” include both actions (i.e. actively doing something) and omissions (i.e. failing to do something that should have been done).⁶⁸ The three factors identified by the OECD are:

1. The degree to which the activity increased the risk of the adverse impact occurring or continuing,
2. The degree of foreseeability of the adverse impact, and
3. The degree to which any of the enterprise’s activities actually mitigated the adverse impact or decreased the risk of it occurring.

These factors are highly interrelated and non-binary, meaning that they need not be answered either yes or no, but rather can be answered in degrees. All of these factors need to be present to some degree to establish that a company is “contributing” to an adverse impact. Each factor is explained in more detail below.

Factor 1***The degree to which the business activity increased the risk of the impact occurring or continuing***

A company can contribute to an impact if its activities increase the risk of an impact occurring or continuing. This can happen either in combination with the activities of another entity (including non-state actors), or if an action or omission by the company encourages or makes it easier for another entity to cause harm.⁶⁹ In the context of HRDD, this means that a failure to (seek to) prevent, mitigate or remediate an (ongoing) impact may be seen as an omission that contributes or makes it easier for another entity to cause or contribute to an impact. In supply chain relationships, this is especially the case when an omission is combined with the ‘action’ of repeated and significant purchases of a product known to be associated with the impact. Considerations of leverage and the strength of the business relationship are also important here: Did the company have leverage (i.e. the ability to effect change) that it declined or failed to use? Did the business relationship involve the exchange of significant amounts of money or volume of goods or services over a considerable period of time? Did the company have an internationally well-regarded reputation that may have legitimised the other entity’s actions? Did the company send signals that the entity causing or contributing to the impact could have interpreted as encouragement (e.g. by staying silent as severe, foreseeable impacts continued unabated)? An answer of ‘yes’ to any of these questions may increase the degree to which the company’s actions increased the risk of the impact (re)occurring.

Factor 2***The foreseeability of the impact***

This factor concerns the extent to which the company could or should have known about the adverse impact or the potential for adverse impact.⁷⁰ The company does not necessarily have to have in fact foreseen the occurrence or continuation of the adverse impact if it could or should have reasonably done so.

Factor 3***The degree to which any of the enterprise’s activities actually mitigated the adverse impact or decreased the risk of it occurring or continuing***

This factor has to do with the adequacy and effectiveness of a company’s HRDD. If a company is conducting adequate HRDD that is appropriate to the scope and complexity of its risk profile, this “should help it effectively identify risks and prevent them from occurring”.⁷¹ In addition to examining what impact or effect the company’s activities had on *actually* mitigating impacts, also important in assessing this factor is the feasibility of improvements in the future (i.e. whether there is a credible prospect that any due diligence activities will actually mitigate or decrease the risk). In situations where there is no credible prospect of improvement or where efforts have proven ineffective or failed over many years, the continuation of the same efforts or activities cannot be said to be adequate. In this regard, a company’s decision to continue business operations or make new purchases from a business relation where an adverse impact caused or contributed to by the

relation continues or reoccurs is relevant in assessing the adequacy of its HRDD.⁷² The OECD states that if a company continues to maintain a business relationship with a supplier causing or contributing to an adverse impact without taking measures that effectively mitigate the impact, then the company may be considered to be facilitating an ongoing, unremediated impact due to inadequate due diligence.⁷³

The severity of the impact is also important when determining the degree of adequacy of HRDD. The more severe the impact, the higher the standard for measuring the effectiveness and adequacy of the due diligence activities. Severe impacts must be addressed quickly and demand a higher degree of effectiveness for the company to avoid being considered to be contributing to the impact.

Companies should consider responsibly disengaging in cases where there is no credible prospect that the impacts will be mitigated or remediated. If a company decides to remain in a business relationship associated with an adverse impact, it should communicate to stakeholders (particularly rightsholders) why and how it has determined that additional efforts to mitigate and remediate the impact are feasible, and be prepared to accept the consequences of the continuing connection. In cases when prevention or mitigation is deemed to be feasible, it is important that the company develop a corrective action plan that clearly includes the prospect of terminating the relationship if targets for preventing, mitigating or remediating impacts are not met within the timeline. A corrective action plan should have credible, clearly-defined time-bound targets and serve as a benchmark for later decisions around disengagement.⁷⁴ This may require the company to divert or invest (additional) resources in support of specific preventative and remedial action.

In conclusion, the standards and guidance provided by both the UNGPs, OECD Guidelines and OECD guidance documents provide a useful overarching framework for assessing contribution to harms and responsible disengagement decision-making in the context of HRDD. These instruments describe common steps for responsible disengagement in the context of RBC. When considering disengagement from a business relationship these standards indicate that companies should consider several factors, including the severity of the potential or actual adverse impact; the results of previous attempts to address adverse impacts; the likelihood of preventing and remediating impacts in the future; the consequences of not disengaging, such as a shift in relationship from directly linked to contributing; and finally, the potential adverse impacts of the resulting from disengagement itself. The following section applies the norms and guidance on responsible disengagement decision-making to the specific case of human rights violations in the coal mines of Cesar, Colombia.

4 Putting the norms into practice: Responsible disengagement decision-making with regard to the Cesar coal mines

In this section, the guidance found in the international normative framework outlined in section 3 is applied to the case study of coal mines in the Cesar region of Colombia. The following sub-sections outline the normative guidance on each factor, then apply the norms to the case study.

4.1 Severity of the potential or actual adverse impacts

4.1.1 Normative guidance

Under the OECD Guidelines, the “severity” of an impact is a factor in determining how quickly companies should (temporarily) disengage from relationships linking them to adverse impacts in order to mitigate further risk of severe impacts. Situations involving multiple, gross human rights violations require rapid responses from companies and serious consideration of immediate disengagement is likely justified in these situations. As the UNGPs state, “the more severe the abuse, the more quickly the enterprise will need to see change before it takes a decision on whether it should end the relationship”. Immediate disengagement may be appropriate in situations in which the business partner has committed a severe, deliberate and irremediable violation of a human right. Impacts on enabling rights such as freedom of association and collective bargaining can also be considered to be severe as they facilitate the enjoyment of other rights. Although the severity of (potential) adverse impacts influences how companies prioritise issues to address first, companies are also responsible for preventing, mitigating and remediating impacts that may not necessarily qualify as the most “severe”.

The norms clarify three factors for determining severity: scale (i.e. the gravity of the impact), scope (i.e. how many people are affected), and the (ir)remediable nature of the impact (i.e. whether the impact can be ‘undone’ or the situation restored to a state equal to or better than before the impact occurred).⁷⁵

4.1.2 Severity of impacts in and around Cesar coal mines

Section 2 of this paper outlines the human rights violations that occurred in the coal mines of Cesar. Using the guidance provided by the normative framework, the impacts in question in Cesar are particularly severe given their scale, scope and irremediable nature. The scale, or gravity, of violent forced displacements is high. The scope of the abuse in Cesar is also significant, impacting tens of

thousands of people. The number of forcibly displaced persons is estimated at 55,000-60,000 in the Cesar coal mining corridor alone.⁷⁶

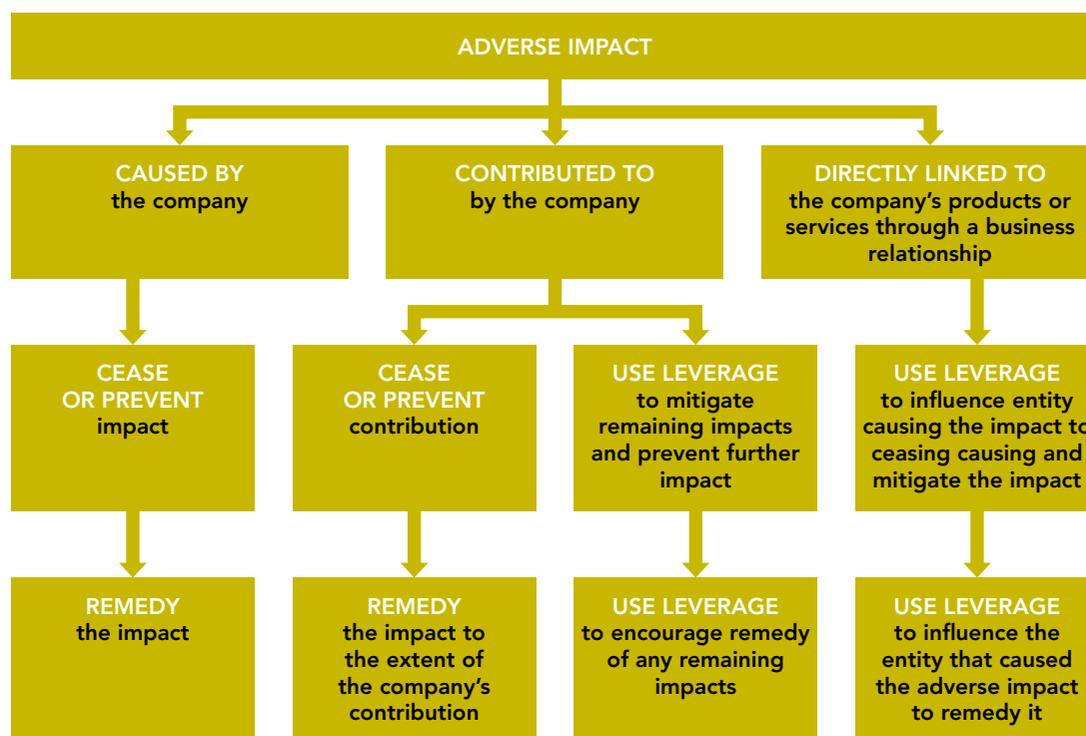
The remedial character of the impacts is equally linked with the nature of the human rights violations, and there has been significant loss of life, land and livelihood. In particular the loss of life is entirely irremediable. Thus, on all three criteria, the human rights impacts in and around the Cesar coal mines can be classified as severe.

4.2 Relationship between companies and adverse impacts

4.2.1 Normative guidance

The normative guidance sets out three responsibility scenarios for addressing adverse impacts – causing, contributing and directly linked to – with different types of action expected of companies in the context of HRDD. Figure 2 depicts how companies should address an impact based on their responsibility for that impact.

Figure 2 Company relationship to adverse impacts and expected behaviour



Source: SOMO, modified from OECD⁷⁷

The causing and contributing categories carry the expectation of companies to cease causing or contributing to the impact and to remediate it, while the directly linked scenario carries the expectation to use leverage to convince the party causing the impact to cease the harm and mitigate and remediate the impact.

Importantly, as mentioned in Section 3, the OECD Guidance stipulates that the level of responsibility is not static but can increase depending on the company's own actions. A company that was initially "directly linked" to an adverse impact through a business relationship may, after deciding to remain in the business relationship despite the failure of HRDD efforts to actually prevent or remediate impacts, be considered to be "contributing" to the ongoing adverse impact. The OECD clarifies that for a company to be contributing, it must provide a non-trivial contribution.

Additional guidance is provided by the OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector (OECD Stakeholder Engagement Guidance), which outlines a framework for mining, oil and gas companies that may be linked to historical human rights violations. According to the OECD Stakeholder Engagement Guidance, prior to making any commitments and investments in a project, companies should identify key historical events in the area or region that may be relevant to companies, and which may affect engagement with stakeholders.⁷⁸ Examples of historical events include inherited legacy issues from prior development projects; the cumulative impacts of past, ongoing or foreseeable activities; a history of conflict in the area; previous protests over land or resources' ownership; and use or access to land.⁷⁹

The OECD Stakeholder Engagement Guidance also encourages companies to clearly identify their relationship with previous operators and acknowledge any perceived issues about lack of engagement or consultation.⁸⁰ Companies should clarify what they can do in the future, what issues remain negotiable and whether they have the ability to address adverse impacts from past operations.⁸¹

Companies should also address adverse impacts that are inherited from a predecessor, but to which they continue to contribute and, in the case of human rights impacts – if no other remedy is available – companies should provide, enable or support remediation.⁸² Indeed, a recent complaint under the OECD Guidelines to the Dutch National Contact Point (NCP) against Pluspetrol Resources Corporation B.V. referred to the responsibility of energy companies that "inherit" adverse impacts from predecessor companies, including to remediate those impacts.⁸³ The Dutch NCP recently accepted the complaint as "material and substantiated".⁸⁴

4.2.2 Relationship of coal mining companies to the forced displacements in Cesar

Some of the forced displacements in Cesar took place prior to Drummond and Prodeco/Glencore initiating operations. When they obtained the licenses to start mining in the area where forced displacements had occurred and were still occurring, the mining companies should have identified these impacts. In purchasing the licenses, both mining companies engaged in a business relationship that directly linked them to the adverse impact of forced displacements. This direct link to the adverse impact also carried with it a responsibility to address the adverse impact, including facilitating

remediation of the impact, and to avoid further involvement with or continuation of the harms. This means that both Drummond and Prodeco/Glencore had responsibilities in relation to land used for mining operations acquired both during and after the paramilitary violence and forced displacement of local populations. For instance, in relation to Prodeco/Glencore's purchase of the CDJ mine from Carbones del Caribe, and the forced displacements that occurred on that land prior to the company's acquisition, Prodeco/Glencore should have identified and addressed all human rights violations committed prior to that purchase and, importantly, given the ongoing, unremediated nature of those violations, engaged in remediation efforts with victims. Additional forced displacements also occurred in and around the mines after the coal mining companies started operations. In both cases, a forced displacement is a severe adverse impact that, if unaddressed, continues until it is remediated.

The forced displacements in the Cesar region can be considered to have been caused by AUC paramilitary forces. To determine whether the relationship between Drummond and Prodeco/Glencore and the forced displacements is one of direct linkage or contribution, we examine their relationship in light of the three-factor test proposed by the OECD (see Section 3.3) to see whether the mining companies' role meets that of a non-trivial contribution.

Factor 1

The degree to which the business activity increased the risk of the impact occurring or continuing

As laid out in the analysis below, SOMO contends that the activities (actions and omissions) of both Drummond and Prodeco/Glencore increased to a non-trivial degree the risk of the ongoing adverse impact of forced displacements in Cesar continuing unremediated (with regard to the unaddressed forced displacements that had already taken place when they acquired the mining rights) and occurring (with regard to forced displacements that occurred after the companies started operations). As a starting point, according to statements made by multiple ex-paramilitaries on multiple occasions in courts, in sworn testimony to Colombian prosecutors, and to the media, the arrival and subsequent expansion of Drummond and Prodeco/Glencore's mining operations created an economic incentive for the paramilitaries to forcibly displace farmers and local communities because paramilitaries saw the land as an object of speculation that could later be sold to the mining companies when the latter entered and then expand their operations.⁸⁵

Beyond the creation of this financial incentive and the general conditions that allowed the impact to occur, we consider that other specific activities by both Drummond and, to a lesser but still significant degree, Prodeco/Glencore further increased the risk of the impact of past forced displacements continuing and new forced displacements occurring. With regard to Drummond, the Colombian Prosecutor General alleges that Drummond has facilitated the paramilitaries in carrying out the forced displacements by giving them free food in the company canteen, providing petrol for the refuelling of their vehicles, and in some cases even paying paramilitaries (through a sub-contractor) to commit violence.⁸⁶ With regard to Prodeco/Glencore, in 2018 the company commissioned a Human Rights Risk Analysis, and in 2019 the company itself noted that it was exploring the possibility of its "complicity with human rights abuses and excessive use of force

by security forces” and/or having links to “breaches of international humanitarian law through the actions of public security forces”.⁸⁷ Prodeco/Glencore has not communicated publicly about the findings or conclusions of either of these assessments; however, it is reasonable to assume that the company’s silence and inaction during the period when the forced displacements were occurring and the victims’ suffering from past displacements was ongoing comprised an omission that increased to a non-trivial degree the risk of additional forced displacements by encouraging paramilitaries to continue causing harm.

Finally, in light of the understanding of an unremediated forced displacement as a severe adverse impact that continues until remediated, Drummond and Prodeco/Glencore’s activities can be said to have further increased the risk of this recurring impact. As companies with at minimum a direct link to the forced displacements that occurred, Drummond and Prodeco/Glencore had a responsibility – according to the OECD Guidelines – to address these impacts and facilitate their remediation, particularly given the substantial nature of both companies’ presence in the area where the abuses had occurred and the revenues their operations were generating. The mining companies’ failure to do so constitutes an omission that substantially increased the risk of the ongoing impact and suffering continuing to this day.

Factor 2

The degree of foreseeability of the impact

It is not clear exactly when Drummond and Prodeco/Glencore became aware of the mass forced displacements of farming families from their lands in the coal mining area of Cesar. However, these severe human rights impacts have been the subject of media attention as well as public campaigns by civil society organisations for many years. It is reasonable to conclude that these impacts, which are the consequence of conducting business in an area under the violent control of paramilitary groups, could and should have been easily foreseen by Drummond and Prodeco/Glencore. When they started operations and subsequently acquired additional land for the expansion of their mines, it is our opinion that Drummond and Prodeco/Glencore could and should have known that paramilitaries had forcibly displaced its inhabitants in order to be able to sell that land to mining companies.

Additionally, the ongoing and recurring nature of the suffering from the forced displacements could and should have been foreseen by the mining companies, adding urgency to the need to remediate these severe impacts.

Factor 3

The degree to which any of the enterprise’s activities actually mitigated the adverse impact or decreased the risk of it occurring or continuing

In response to a draft of this report, Prodeco/Glencore insisted, “The Colombian government is responsible for ensuring a sustainable peace process and delivering both justice and reparation for individuals and groups’ actions during the conflict”.⁸⁸ Indeed, the Colombian government had and continues to have the primary duty to prevent the forced displacements and to remediate the harms

through a process of land restitution. However, given the link between the forced displacements and their mining activities, Drummond and Prodeco/Glencore also have a responsibility to seek to mitigate the adverse impacts, facilitate and cooperate in their remediation, and prevent their continuation or recurrence. In response to a draft of this report, Prodeco/Glencore insisted, “Prodeco cannot go beyond what is currently in the Colombian law”, implying that it cannot take any actions to mitigate or remediate the adverse impacts beyond what the Colombian government is doing.⁸⁹ In fact, as established in the UNGPs, a company’s responsibility to address adverse impacts exists independent of a government’s ability or willingness to fulfil its own duty to protect human rights. Indeed, in contradiction to Prodeco/Glencore’s assertion, the OECD Guidelines are clear that “the Guidelines extend beyond the law in many cases” and that “enterprises should seek ways to honour such principles and standards to the fullest extent which does not place them in violation of domestic law”.⁹⁰ A responsibility to address adverse impacts also despite the fact that the mining companies themselves did not cause the impacts, contrary to Prodeco/Glencore assertion that “Prodeco does not accept responsibility for any actions taken by paramilitary groups, or other organisations that resulted in the displacement of communities”.⁹¹

Despite operating their coal mines in the region for decades, there is little evidence either Drummond or Prodeco/Glencore made any serious efforts to mitigate or facilitate remediation of the impact of the forced displacements or decrease the risk of their (re)occurrence. In response to a draft of this report, both Drummond and Prodeco/Glencore pointed SOMO to their general corporate social responsibility (CSR) and human rights activities and policies, as well as some of their activities related to promoting peace in the region. While such policies and activities can have a positive impact, it is important to note that they do not fulfil nor replace the companies’ responsibility to prevent, mitigate and remediate specific adverse impacts, particularly severe impacts. In their responses, neither company provided information about activities aimed at addressing the specific adverse impact of forced displacements.

It is thus no surprise that, viewed through the lens of effectiveness at actually mitigating or decreasing the harm, the companies have performed even more poorly. There is no evidence that any activities by either company mitigated the impacts to any degree. The high degree of severity of the forced displacements continued unmitigated well into the mining companies’ timespan of operations, and those impacts remain fully unmitigated and remediated to this day. Even if the Colombian government has the primary duty to prevent further impacts by remediating the forced displacements, the mining companies had a responsibility to seek to mitigate the impacts by engaging in dialogue, contributing financially to a remediation fund, making public apologies and promises of non-repetition, and/or supporting victims in seeking other forms of remedy and justice. Yet there is no evidence that either company has attempted to provide a constructive contribution to accelerate or otherwise facilitate the remediation process. For years, victims and civil society organisations have called on Drummond and Prodeco/Glencore to engage in a constructive dialogue with the government and victims in order to facilitate remediation. There is no evidence to suggest that either company has done so, and both mining companies have refused to cooperate with the Colombian Truth Commission.

In response to a draft version of this report, Drummond pointed SOMO to its human rights policy, in which it pledges to respect human rights and conduct HRDD in line with the UNGPs and other international standards.⁹² Drummond also highlighted its participation in the ongoing “Trust Building Initiative” organised by the NGO Centro Regional de Empresas y Emprendimientos Responsables (CREER), though it should again be noted that this initiative is not aimed at mitigating or remediating the adverse impact of forced displacements.⁹³ Furthermore, Drummond claimed that all of its land acquisition was done legally and following “strict due diligence” but did not provide any specific information about its due diligence or land acquisition processes in the focus period of this report (1996-2006).⁹⁴ The company did note that, starting in 2009, it followed “more demanding standards” and a process of negotiation that was required and organised by the Colombian government, and it provided some detail about this process, though SOMO notes that this process is disputed.⁹⁵

For its part, Prodeco/Glencore asserted in a response to a draft of this report that its acquisition of the land in question “took place prior to the [UN] Guiding Principles and during an era with a pure focus on legal due diligence” and, as a result its due diligence conducted at the time “found no areas of concern relating to ownership”.⁹⁶ It should be noted that internationally-recognized expectations of respect for human rights in land purchases and business dealings were the norm (as articulated, for example, in the 2000 version of the OECD Guidelines) prior to the adoption of the UNGPs in 2011, even if “human rights due diligence” as such was not a widely-used term before 2011. Furthermore, when the UNGPs and revised OECD Guidelines were adopted in 2011, the expectation that companies should address ongoing human rights impacts associated with their activities should have become even clearer to Prodeco/Glencore, spurring the company to take action to mitigate and remediate the ongoing harms. Prodeco/Glencore also admitted to SOMO that, due to the armed conflict and violence in Colombia between 1995 and 2016, the company had been unable to do HRDD to the standard expected by international norms, noting that the conflict “severely affected Prodeco’s ability to undertake meaningful community consultations due to the presence of paramilitary groups and a widespread fear of retribution that resulted in community members being unwilling to share information and opinions”.⁹⁷ Rather than scaling back HRDD in such situation, the OECD Guidelines and UNGPs encourage companies to *increase* and strengthen their due diligence efforts due to the heightened risk that business activity can contribute to severe human rights abuses, which appears to be exactly what happened in Cesar.

Finally, Prodeco/Glencore requested that SOMO “acknowledge Prodeco’s participation in the Colombian peace process or its contribution to supporting the establishment of territorial peace in the regions where it operates,” and the company cites CSR projects in two Cesar communities and a forest offset programme.⁹⁸ SOMO acknowledges Prodeco’s efforts in this regard but notes that these activities were not specifically designed for those whose human rights were violated in the forced displacements nor aimed at mitigating or remediating those specific impacts. Prodeco/Glencore also commissioned a third party to conduct human rights impact assessments (HRIAs) on its Cesar operations in 2015 and 2018 (decades after starting and then expanding its operations amid highly foreseeable severe human rights abuses), but it has refused to communicate the results of this study to stakeholders or even affected rightsholders in the area.⁹⁹

Conclusion

Following the three-factor test provided by the OECD, we conclude that:

1. The degree to which the business activities of both Drummond and Prodeco/Glencore increased the risk of the forced displacements occurring or continuing is not trivial.
2. The degree to which Drummond and Prodeco/Glencore should or could have foreseen the (ongoing) severe adverse impacts of forced displacement is high.
3. The degree to which any of Drummond's or Prodeco/Glencore's activities actually mitigated the adverse impact or decreased the risk of it occurring or continuing is low.

As a result, we consider that both Drummond and Prodeco/Glencore "contributed" to a non-trivial degree to the severe human rights impact of forced displacement of tens of thousands of individuals from their land in Cesar. As such, both mining companies have a responsibility, according to the OECD Guidelines, to contribute to the remediation of the impacts, a responsibility that is neither absolved nor reduced by a decision to stop mining and depart from the region. The paper discusses below what form this contribution to remediation by the mining companies could and should take. But first we examine the relationship of European energy companies that have purchased coal from Drummond and Prodeco/Glencore's Cesar mines to the forced displacements.

4.2.3 Relationship of European energy companies to the adverse impacts in Cesar

Several European energy companies have historically purchased and continue to purchase coal from the Cesar coal mines of Drummond and Prodeco/Glencore, companies that we have concluded were contributing to the forced displacements in the region. These European energy companies include Enel S.p.A. (Italy), EnWB (Germany), Ørsted A/S (Denmark), RWE AG (Germany), STEAG Energy Services GmbH (Germany), Uniper SE (Germany) and Vattenfall (Sweden). Their purchases of coal from Cesar comprise a business relationship that "directly linked" the companies' product (electricity generated from coal) to the forced displacements in Cesar. Importantly, the OECD Guidelines and UNGPs are clear that this business relationship and the direct link to the harms exists regardless of whether the energy companies purchased coal directly from the mining companies, from a third party, or through a brokered market such as GlobalCoal. Indeed, several European energy companies have acknowledged their direct linkage to the forced displacement from land used for coal mining in Cesar.¹⁰⁰ As previously discussed, the OECD indicates that a company's relationship to an adverse impact is not static but can shift from being "directly linked" to "contributing" to an impact over time depending on the company's own actions, omissions and disengagement decision-making. As above with the mining companies, we employ the OECD's three-factor test to determine whether European energy companies' relationship to the forced displacements in Cesar remains one of direct linkage, or whether it has indeed shifted to one of contribution to harm.

Factor 1

The degree to which the business activity increased the risk of the impact occurring or continuing

Based on the available evidence, we believe that it is reasonable to conclude that the activities (actions and omissions) of several European energy companies increased to a non-trivial degree the risk of the ongoing adverse impact of forced displacements in Cesar continuing.

Over the course of many years, during and following the forced displacements in Cesar, European energy companies made multiple purchases of substantial volumes of coal from Drummond and Prodeco/Glencore's Cesar mines, even as the mining companies failed to act on their responsibility to address the severe adverse impact of forced displacement from the mining area. As an indication of the significance and strength of the business relations, in 2019, Europe continued to be Colombia's main market, with 50% of Colombia's coal exports – totalling 38 million tonnes of coal – going to energy companies in Europe.¹⁰¹ In relation to Drummond and Prodeco/Glencore specifically, in 2019, Drummond's worldwide exports totalled 31.2 million tonnes and Glencore's volume equalled 13.4 million tonnes.¹⁰² In the Netherlands, for example, Colombian coal exports totalled US\$261 million in 2001, rising to US\$2.51 billion in 2011, then decreasing to US\$1.07 billion in 2016.¹⁰³

It is reasonable to assume that European energy companies' purchases have provided powerful financial incentives for both Drummond and Prodeco/Glencore to continue their operations and business as usual on land from which local communities were forcibly displaced and for which there was no remediation. The business relationships with European energy companies have ensured the profitability of the coal mines and helped to legitimise the status quo in the region (i.e., the historical, forced displacement of communities from their lands). Their continued support and business during and after the period both mining companies expanded their mines may also have increased demand for coal mined from the Cesar region, therefore enabling and facilitating the continuation and expansion of Drummond and Prodeco/Glencore's mining operations on land that is the site of severe land rights violations.

Beyond the creation of this financial incentive and the general conditions that allowed the impact to occur, we consider that other specific actions and omissions by European energy companies further increased the risk of the impact of past forced displacements continuing without remediation. As significant, repeat customers of Drummond and Prodeco/Glencore, energy companies purchasing coal from their Cesar mines had not only a strong responsibility but also considerable leverage to encourage both mining companies to engage in effective and meaningful remediation efforts. By continuing the business relationship in the absence of effective and meaningful remediation efforts by the mining companies and omitting to undertake other action to enable or facilitate remediation, we conclude that European energy companies facilitated their business partners to continue contributing to the ongoing harms and therefore increased to a non-trivial degree the risk of the adverse impact continuing.

Factor 2

The foreseeability of the impact

Prior to entering into commercial relations with Drummond and Prodeco/Glencore, European energy companies should easily have foreseen or anticipated that purchasing coal from these mining companies would have linked them to the forced displacements in the Cesar region. These displacements have been widely reported in European media and the subject of civil society activism for over a decade. As mentioned previously, in 2010 a TV and newspaper exposé focused on the forced displacements associated with the Cesar coal European energy companies were using in their coal-fired power stations in the Netherlands and elsewhere in Europe.¹⁰⁴ Investigations and reports of several NGOs, including PAX¹⁰⁵ and SOMO¹⁰⁶, soon followed. Drummond's involvement in land rights violations has also been an issue in 16 lawsuits over land from which families were forcibly displaced by the AUC and then sold to Drummond. For example, the claims in the District Court of Alabama date from 2009 and criminal cases against Drummond contractors started in 2011, with convictions in 2013.¹⁰⁷ In short, the egregious human rights violations at Cesar's coal mines are well-known and well-documented – and have been so for at least a decade – and were easily foreseeable for European energy companies purchasing coal for many years.

Factor 3

The degree to which any of the enterprise's activities actually mitigated the adverse impact or decreased the risk of it occurring or continuing

Some European energy companies buying coal from Cesar have taken limited steps to mitigate the adverse impact of forced displacements. Several energy companies have claimed that in private engagement with Drummond and Prodeco/Glencore they have encouraged their business partners to do more to mitigate the impacts and prevent the harm from continuing, and some have even travelled to Cesar to visit the mines and meet with the mining companies and other local stakeholders, including victims' organisations.¹⁰⁸ Some energy companies¹⁰⁹ have encouraged Drummond and Prodeco/Glencore to start truth and reconciliation processes with victims of past human rights violations. In 2018, prior to the completion of the Dutch Coal Covenant, its signatories identified "reconciliation for victims of past human rights violations" as one of the most important outstanding issues that needed to be addressed by the mining companies.¹¹⁰ The signatories to the Covenant expressed their expectation that Drummond and Prodeco/Glencore start a dialogue and reconciliation process with victims of past human rights violations.¹¹¹ German-based EnBW confirmed to SOMO that the company "agrees that it has a responsibility for the situation on the ground around the coal mining sites in Colombia".¹¹² In 2014, EnBW organized a multi-stakeholder dialogue that addressed sensitive topics such as resettlement and land-related human rights violations.¹¹³ Sweden-based Vattenfall has perhaps conducted the most extensive HRDD activities of any of the European energy companies purchasing Colombian coal. Vattenfall stopped direct purchases of coal from Drummond since 2011,¹¹⁴ but it continued to purchase coal mined in Cesar via a brokered market through 2019.¹¹⁵ Vattenfall conducted a detailed HRIA on the human rights situation in 2017, meeting with some of the victims of the human rights violations and calling on the mining companies to engage in dialogue with the victims as well.¹¹⁶

European energy companies have also sought to increase their leverage by acting collectively through the industry association Bettercoal, which has conducted audits and engaged in dialogue with the mining companies.¹¹⁷ For example, both Prodeco/Glencore and Drummond participated in the Bettercoal Assessment Process in 2018 and 2019, respectively.¹¹⁸ This involved a site assessment, including an audit against the principles of the Bettercoal Code and interviews with stakeholders related to mining operations, such as mining company employees, civil society organisations, communities, local leaders and government agencies.¹¹⁹ Both companies subsequently agreed to Continuous Improvement Plan monitoring and, according to Bettercoal, have made “significant progress” so far.¹²⁰ Notably, however, this monitoring does not appear to have related to the mining companies’ involvement in forced displacements and land disputes.¹²¹ Given the lack of transparency provided by the companies, the degree to which the assessments and engagement focused specifically on addressing the severe impacts from the forced displacement is unclear. Meaningful engagement of stakeholders, in particular rightsholders such as the victims of the forced displacement, has been severely lacking in these processes, contrary to the expectations in the OECD Guidelines. In 2018, several energy companies¹²² involved in Bettercoal initiated a country specific working group for Colombia, which aimed to foster better relationships between stakeholders to the mining industry.¹²³ Among other things, in 2020, the Colombia Working Group engaged with Drummond and Prodeco/Glencore about its Continuous Improvement Plan and, in 2021, the Working Group intends to continue its engagement, including on the priority issue of mine closure.¹²⁴

Despite these efforts being given years to bear fruit, SOMO does not find any evidence to suggest that any of the companies’ activities have actually mitigated the severe ongoing impact of the forced displacements or decreased the risk of the harm continuing. In its 2021 update on the situation in Colombia, Vattenfall itself concluded that efforts to address severe impacts on communities in Cesar had been “disappointing”.¹²⁵ Energy companies have had ample time to engage with the mining companies, collaborate with other energy companies or otherwise support remediation measures by themselves. Remediation measures can include apologies to local communities for their part in their forced displacement from their lands, restitution of land to its lawful owners, rehabilitation of unlawfully seized lands detrimentally affected by coal mining, compensation to lawful land owners deprived of their lands and the families of victims of targeted killings, and engaging in an open and constructive dialogue with local communities and organised victims’ groups about the past and ongoing human rights violations to which they are linked. However, local communities that were forcibly displaced by AUC paramilitary groups to make way for Drummond and Prodeco/Glencore’s coal mines have not seen any remedy for these egregious human rights harms. They have not returned to their lands, nor received restitution for their lands. Given the period in which the impacts in the Cesar region have remained unaddressed, particularly the forced displacements of local communities, it is clear that efforts to effectively address the impact have failed. This failure and the lack of any credible prospect that continued engagement activities with mining companies would suddenly have an effect should and could have been clear to European energy companies for many years. At the very latest, at the start of 2017, after over a decade of awareness, three years of collective engagement with the mining companies through the Dutch Coal Covenant and Bettercoal, in addition to individual efforts such as Vattenfall’s HRIA, it should have been abundantly clear to European energy companies that Drummond and Prodeco/Glencore were contributing to ongoing severe human rights impacts and that there was no credible prospect that continuing engagement would lead to improvements in actually addressing these impacts.

In contrast to the energy companies that continued purchasing from and engaging with Drummond and Prodeco/Glencore despite the lack of progress in addressing adverse impacts, there are examples of other energy companies that made the decision to disengage from the relationship. For example, already in 2006, the Danish energy company Ørsted disengaged from Drummond¹²⁶, and, in 2016, Ørsted announced its decision not to restart purchases from Prodeco/Glencore as part of a “robust due diligence process”.¹²⁷ In 2017, Europe’s biggest energy company, Italian-headquartered Enel, announced its intention to suspend imports of coal from the Cesar region following due diligence conducted on several sustainability topics, including Drummond and Prodeco/Glencore’s respect for the human rights of local communities in Cesar.¹²⁸ According to Enel¹²⁹, its assessment did not determine that the mining companies themselves had committed human rights violations, but it did find that there were relevant human rights impacts that it felt should have been addressed by the companies, “in particular relating to the local communities in the region”.¹³⁰

Conclusion

Following the three-factor test provided by the OECD, we conclude that:

1. The degree to which the business activities of European energy companies sourcing coal from the Cesar mines of Drummond and Prodeco/Glencore increased the risk of the forced displacements occurring or continuing is not trivial.
2. The degree to which European energy companies should or could have foreseen the (ongoing) severe adverse impact of forced displacements in Cesar is high.
3. The degree to which any of the European energy companies’ activities actually mitigated the adverse impact or decreased the risk of it occurring or continuing is low, nor was there from 2017 onwards any credible prospect that this would be the case.

We recall that the OECD indicates that the following two points are relevant for assessing the adequacy of HRDD: a company’s relationship to an ongoing adverse impact, which can shift over time based on its own activities; and a company’s decision to make new purchases from a supplier where an adverse impact to which the supplier contributed continues or recurs (as is the case with Drummond and Prodeco/Glencore contributing to the ongoing impact of forced displacements in Cesar).¹³¹ If a company continues to maintain a business relationship with the supplier without taking measures that effectively mitigate the impact, then the company may be considered to be contributing to the ongoing, unremediated impact to a non-trivial degree, particularly if the impact is severe and thus demanding urgent and effective action.¹³²

As a result of the test and the ongoing, foreseeable and unremediated nature of the severe adverse impact of forced displacements in the Cesar mining region, we consider that the relationship of European energy companies sourcing coal from Cesar to the adverse impact has shifted from initially being one of direct linkage to being one of contribution. This shift has been gradual, taking place over the course of several years as foreseeability of the impacts and the amount of coal purchased increased while efforts to address the impact continued to fail. The exact ‘turning point’ at which each individual energy company’s relationship to the impacts shifted to one of contribution depends on that particular company’s situation, but it is reasonable to conclude that any energy company that purchased coal mined in Cesar from 2017 onwards should be considered to have contributed to the

ongoing, severe adverse impact of forced displacements. A number of European energy companies fall into this category.

As such, these European energy companies have a responsibility, according to the OECD Guidelines, to contribute to the remediation of the impacts, a responsibility that cannot now be absolved nor reduced by a decision to disengage from their relationship with Drummond or Prodeco/Glencore. The paper discusses below what form this contribution to remediation by the European energy companies could and should take, but first we continue examination of the various facets of disengagement decision-making.

4.3 Potential adverse impacts caused by disengagement

4.3.1 Normative guidance

The UNGPs and OECD Guidelines encourage companies to consider the potential adverse impacts of all business decisions. The decision to disengage is no different from any other business decision, and companies are therefore expected to conduct HRDD on potential negative impacts of disengagement itself (just as with any other business decision) prior to making a final decision.

Potential adverse impacts from disengagement are wide-ranging. Workers may lose their employment and income, possibly affecting workers and their families' rights to health and education. Loss of tax revenues for national governments may impact public services, potentially detrimentally impacting social and economic rights. In post-conflict contexts, mass unemployment with little or no warning and without adequate severance packages may exacerbate unresolved and latent tensions, potentially reigniting conflict and associated human rights violations.

However, with effective due diligence, companies can avoid causing or contributing to new harmful impacts by their disengagement. For example, in cases where buyers reduce or stop orders, buyers should still seek to prevent harms to workers' livelihoods. Companies can ensure the suppliers' workers receive a salary during the period of non-production via payment for future orders and guarantee continuation of the business relationship in the future. If companies must disengage, they should ensure that compensation schemes and social plans are in place to support workers and their families. In these circumstances, it is essential that companies and suppliers engage in good-faith dialogue with workers and their representative trade unions, in order to ensure fair representation.

If companies must disengage and cannot prevent negative impacts from their disengagement, companies are nonetheless expected to mitigate the effects of those impacts. According to the OECD Guidelines, mitigation is especially important when disengagement decisions have "major employment effects, in particular in the case of the closure of an entity involving collective lay-offs or dismissals" where companies need to mitigate impacts to the "maximum extent".¹³³ Measures to mitigate adverse impacts include: providing reasonable notice to suppliers, workers and their representatives, and relevant government entities of the pending disengagement, prior to the final decision being taken; cooperating with workers representatives and appropriate governmental authorities, and providing "meaningful co-operation" to mitigate the effects of business decisions.¹³⁴

'Meaningful cooperation' includes collaboration with other companies, suppliers and state entities to address challenges, such as ensuring safe housing for workers previously housed in company facilities. Companies should use their leverage to encourage suppliers to engage in good-faith dialogue with workers and their representative unions in order to develop a just transition plan for workers including, among other things, compensation for workers, re-skilling and re-training opportunities and other benefits. If a company has no leverage over its supplier, or if the supplier refuses to cooperate, the company should engage with local and global trade union organisations to identify and mitigate adverse impacts of disengagement. In post-conflict contexts such as Colombia, companies should also engage with civil society organisations (i.e. victims' rights groups) and government authorities (insofar as they are not corrupt or complicit in the violence) to establish a commission or body to identify and analyse security risks to workers and the local population, and to issue timely warnings to regional and national authorities of those risks. As with the entire HRDD process, (potentially) affected rights-holders and other stakeholders should be meaningfully involved in the decision-making process around disengagement. This means that they should be well-informed and heard by companies about both the engagement efforts to be able to assess the credibility and quality of those efforts, the decision-making process related to disengagement, as well as their own concerns about disengagement.

In post-conflict contexts, in which there is little or no social safety net or unemployment insurance coverage, and in which there is weak governance due to lack of resources, corporate capture and corruption, the disengagement of large-scale economic activity and its impact relative to the total size of the economy may trigger additional effects at system level. The OECD Guidelines clarify that "a State's failure... to implement international human rights obligations or the fact that it may act contrary to such laws or international obligations does not diminish the expectation that enterprises respect human rights".¹³⁵ It is therefore especially important that companies act responsibly to prevent adverse impacts from disengagement in some sourcing contexts altogether, or for vulnerable groups such as forcibly displaced peasants or involuntary resettled communities, indigenous peoples, minorities and informal workers.

Further, the norms emphasise that companies should operate in compliance with all applicable laws, including with regard to ending business relationships.¹³⁶ As such, if disengagement occurs, it should be done in a manner that honours contractual and legally-mandated terms and procedures.

Finally, if a company causes or contributes to an adverse impact (including an impact arising from a decision to disengage), it is responsible for remediating the impact to the extent of its contribution.¹³⁷ While this section focuses on addressing negative impacts arising from disengagement, companies that (may) cause such impacts should not lose sight of previous, severe impacts that are awaiting remediation in their own right. In fact, addressing impacts relating to decisions to disengage may (partially) overlap with existing remediation obligations.

4.3.2 Potential impacts of mining companies' disengagement from Cesar mining operations

Prodeco/Glencore's decision to disengage from its Cesar coal mines may impact thousands of jobs, livelihoods that depend on these jobs, and community investment programs. The loss of fiscal revenue from the company's operations may even affect the capacity of the government to provide public services. In response to a draft of this report, Glencore claimed that it intends to "support its workers and local communities through the relinquishment process" and that it is developing plans to do so, though it remains to be seen what exact steps and measures the company will take.¹³⁸

In line with the UNGPs and OECD Guidelines, Prodeco/Glencore (and Drummond, if or when it disengages) should conduct effective HRDD to mitigate to the "maximum extent" the harmful impacts of its disengagement. Prodeco/Glencore must engage in meaningful, good-faith dialogue with workers, representative trade unions, suppliers, other companies and government entities to address challenges associated with disengagement and to implement a responsible exit strategy. Good-faith dialogue that provides key stakeholders – particularly workers and their union representatives – with meaningful opportunities to influence decision-making is crucial in order for responsible exit strategies to be seen by workers as fair and successful.¹³⁹ Dutch trade unions FNV and CNV Internationaal have expressed concern about large layoffs currently taking place at coal mines in Colombia.¹⁴⁰ According to FNV, coal companies have put in place exit strategies without engaging in appropriate dialogue with workers and their unions, and these strategies are perceived by workers to be unjust.¹⁴¹ In the case of the Cesar coal mines, responsible exit strategies should provide reasonable notice to workers and their representatives about their decision to disengage from their Cesar operations. In this regard, it is important to note that in response to Prodeco/Glencore's announced departure, five Colombian trade unions representing workers in all three Colombian coal mining companies have banded together to form a "Workers' Collective for a Just Transition".¹⁴² As part of responsible disengagement, it is important that the mining companies engage meaningfully with this collective as an interlocutor for decision-making on transition strategies and disengagement.

Responsible exit strategies could also provide support to the impacted workers through various measures, such as extended severance payments, the provision of training and capacity building to help employees find jobs in other areas or start their own business, or the creation of microcredit schemes to mitigate the loss of employment. Responsible exit strategies should also provide support to impacted communities by buffering the impact on employment and ensuring the continuation of public services.

Meaningful cooperation with relevant stakeholders is especially important in light of the danger that mass unemployment in the Cesar region, with little or no warning and without adequate severance packages and social security, may reignite tensions amongst local populations, potentially leading to further conflict and associated human rights violations, including the re-victimisation of victims of past violence. In Cesar, victims of crimes committed by the AUC have been stigmatised, threatened and at times attacked by residual armed groups. These victims are sometimes seen as "acabaempresas" ('company killers'), acting against business and economic interests of the region in general, as their allegations and legal claims against coal mining companies have placed social

and political pressure on these companies, which are essential to Cesar's economy. Therefore, the departure of mining companies from the Cesar region may lead to economic and social unrest, which may be targeted at vulnerable victim communities and trade union leaders. Violence will lead to numerous rights violations, including violations of the right to life, liberty and safety. In poor regions such as Cesar, with few employment opportunities, a resurgence of violence may cause young people to take up arms and be recruited into armed groups, who may then participate in and perpetuate further violence. This is a real human rights risk of disengagement by coal mining companies in the region of Cesar. In order to mitigate the adverse impacts of its disengagement decision, particularly the risk of the resurgence of violence, Prodeco/Glencore should engage with *Asamblea Campesina del Cesar por la Restitucion de Tierras y el Buen Vivir* (a regional organisation of forcibly displaced communities) and other representative organised victims' groups (including Afro-descendant communities) that represent victims of past violations during the armed conflict.

Relevantly, Prodeco/Glencore's disengagement decision does not absolve the company of its existing responsibilities, including the corporate responsibility to disclose to stakeholders and in particular potentially impacted rightsholders all material information, such as risks and potential impacts on workers and communities, in a timely and accurate manner. In 2015 and then again in 2018, Prodeco/Glencore commissioned the Colombian think tank *Fundación Ideas para la Paz* to conduct a HRIA on its Cesar operations.¹⁴³ Despite the HRIAs presumably containing material information on impacts and risks to rightsholders, Prodeco/Glencore has never disclosed the results of either study, not even to potentially impacted rightsholders. In response to a draft of this report, Glencore stated that it is currently revising the conclusions of the most recent HRIA in light of its decision to shut down its operations in Cesar, and that it plans to share the revised conclusions of the HRIA with the communities.¹⁴⁴ However, it is important to note that (potential/impending) disengagement from the Cesar coal mining operations does not absolve Prodeco/Glencore from its responsibilities under the OECD Guidelines, including to disclose material information about risks to rightsholders and to address and contribute to the remediation of any impacts to which it may have contributed.

Finally, it is important to note that disengagement – if done responsibly – by coal mining companies may potentially have positive impacts on the human rights and environmental situation in a country. For example, disengagement may decrease instances of forcible displacement of families and entire communities to make way for mine expansion projects. Decreased focus on coal production may also signal a need for modern, environmentally sustainable and human rights-compliant business operations in the future.

4.3.3 Potential impacts from energy companies' disengagement from Cesar coal suppliers

Following Prodeco/Glencore's decision to disengage from its Cesar operations, European energy companies buying coal from the mining company should utilise any leverage that is available to them (e.g. through their broader commercial relationship to Glencore) to encourage Prodeco/Glencore to meet its responsibilities under the UNGPs and OECD Guidelines, to engage in meaningful dialogue with all relevant stakeholders, and to ensure the implementation of a responsible exit strategy. In the

event that Drummond also decides to disengage from its Cesar operations, energy companies will also have these same responsibilities.

To increase their leverage, all energy companies (including those still buying coal from the mining companies and those that have previously disengaged) should consider collective action through industry bodies such as Bettercoal – a group of European coal buyers including energy companies purchasing coal from Prodeco/Glencore.¹⁴⁵ In 2019, Bettercoal established the Colombia Working Group, which, among other things, aims to develop a coordinated approach to the monitoring of Drummond and Prodeco/Glencore’s improvement plans and identify complex and systematic issues related to mining in Colombia.¹⁴⁶ Collective action may be particularly useful in issues that transcend a single entity, such as a broader industry-wide phase-out or mitigation of the consequences of disengagement. Collaboration may also increase individual energy companies’ leverage and thus encourage Prodeco/Glencore to act responsibly in its disengagement from its mining operations in Cesar.



Prodeco Billboard in the Cesar Mining Corridor (2013).

5 Conclusions and recommendations

5.1 Conclusions

Section 1.2 of this paper set out six research questions to guide our analysis of the relationship between multinational mining and energy companies and the forced displacements associated with coal mining in Cesar, Colombia. Based on the foregoing analysis and the conclusions that have been drawn, in this sub-section we outline our responses to these questions.

1

Research question 1

What guidance do leading authoritative international normative standards on RBC provide related to responsible disengagement and contribution to adverse impacts?

The most authoritative normative standards on RBC – the UNGPs and OECD Guidelines – set out a comprehensive framework for responsible disengagement decision-making and when a company is considered to have “caused”, “contributed” or be “directly linked to” human rights or environmental impacts. Significantly, the OECD Guidelines provide that a company’s decision to not responsibly disengage from a supplier that is repeatedly contributing to severe abuses may “shift” the company’s relationship to those impacts from one of “directly linked” to “contributing”.

2

Research question 2

According to the international standards, how and when should companies consider disengagement from business partners causing or contributing to adverse impacts?

If a company identifies a potential or actual adverse impact in its value chain as part of its HRDD, it should engage with relevant business partners to prevent, mitigate or remediate that impact. If engagement fails to prevent and remediate the impact, the company should consider responsibly disengaging from the business relationship, taking into account several factors, including the severity of the potential or actual adverse impact; the results of previous attempts to address adverse impacts; the likelihood of preventing and remediating impacts in the future; the consequences of not disengaging (e.g. a shift from directly linked to contributing); and the potential adverse impacts of the disengagement itself.

3

Research question 3

According to the international standards, what does 'responsible' disengagement entail?

The UNGPs refer to the responsibility of companies to first engage with business partners and to use their (existing or potential) leverage over those partners after an adverse impact has been identified. If a company lacks leverage and is unable to increase that leverage, or if the exercise of leverage does not prevent an impact, the UNGPs state that a company should consider "ending the relationship". Companies must demonstrate their ongoing efforts to mitigate an impact and be prepared to accept all (reputation, financial or legal) consequences of their continuing connection to an adverse impact.

According to the OECD Guidelines, responsible disengagement from a business relationship that is causing or contributing to an adverse impact may be necessary when a company's products or services are "directly linked" to the impact through a business relationship or a chain of relationships. Disengagement from business relationships is a measure of "last resort". However, companies should communicate with business partners about the prospect of (temporary) disengagement as a part of the exercise of leverage and risk mitigation. Nonetheless, in some situations, disengagement may be the only responsible course of action.

The OECD Guidance elaborates on RBC in the context of disengagement. If a company decides not to disengage but rather to remain in a business relationship despite ongoing or unaddressed adverse impacts, its relationship to the impact may change over time depending on its efforts effectively preventing or mitigating the impact. A company that was initially "directly linked" to an adverse impact through a business relationship may, after deciding to remain in the relationship despite the failure of HRDD to actually reduce or remediate impacts, be considered to be "contributing" to the ongoing impact.

The OECD Guidance also encourages companies to articulate their escalation measures for disengagement upfront with their business partners. They should also comply with international labour standards and the terms of collective bargaining agreements and be transparent about their disengagement decision by providing sufficient notice to the business partner and detailed information supporting their decision to key stakeholders.

4

Research question 4

Have coal mining companies in Cesar, Colombia and European energy companies purchasing coal from Cesar "contributed to" the adverse impact of forced displacement of farmers and communities from land in and around coal mines in Cesar?

SOMO concludes that Drummond and Prodeco/Glencore are "contributing" to the ongoing impacts of the forced displacements "caused" by AUC paramilitary groups. Efforts to address the forced displacement of local communities from the development of coal mines in the 1990s and 2000s and secure remedy for the victims (including through land restitution and compensation) have repeatedly

failed. While paramilitaries committed these violations, Drummond and Prodeco/Glencore commenced and expanded their mining operations, extracting coal amidst ongoing and repeated human rights violations. In short, Drummond and Prodeco/Glencore's relationship to the impacts was not trivial. Both mining companies could or should have foreseen that the ongoing, severe adverse impact of forced displacement were high. Further, the degree to which the companies' activities in fact mitigated the adverse impact or decreased the risk of it occurring or continuing was low. On these bases, Drummond and Prodeco/Glencore are considered to be "contributing" to a non-trivial degree to the forced displacements.

In relation to the European energy companies purchasing coal from Cesar, SOMO contends that the relationship between these companies and the forced displacements has indeed shifted from being initially one of "directly linked" through their business relationship with Drummond and Prodeco/Glencore to "contributing" to the human rights violations. This shift occurred progressively over the past decade, but especially from 2014 – from which the mining companies could or should have known about the ongoing violations, it should have been apparent that due diligence efforts to address the ongoing impacts of the forced displacements had been unsuccessful, and that engagement efforts seeking improvements were no longer feasible nor credible. Despite this, European energy companies continued to purchase significant volumes of Cesar coal over a considerable period of time. In SOMO's opinion, European energy companies that decided against disengagement from Drummond and Prodeco/Glencore and continued to purchase coal from these mining companies' Cesar operations beyond 2017 crossed the "contributing" threshold, and thus have contributed to a non-trivial degree to the ongoing, unremediated impacts. This 'turning point' marks the winding up of the Dutch Coal Covenant without progress on addressing the impact of forced displacements in Cesar. It is from January 2017 onwards that SOMO considers that energy companies that purchased – directly or indirectly – coal mined by Drummond and Prodeco/Glencore in Cesar began contributing to the ongoing harms. That is, their responsibility shifted from being "directly linked" to "contributing" to the negative and ongoing impacts "caused" by the AUC paramilitary groups in Cesar.

5

Research question 5

If mining and energy companies did indeed contribute to these impacts, what responsibilities for mitigating and remediating the impacts do they have according to the international standards, including if they decide to close or disengage from Cesar coal mines?

In accordance with the OECD Guidelines, mining and energy companies that contributed to the ongoing and unremediated forced displacements must cease their contribution (i.e. Drummond and Prodeco/Glencore should cease mining coal from Cesar, and European energy companies should cease purchasing coal from these mines), contribute to the remediation of the violations, and mitigate new adverse impacts associated with their disengagement.

6

Research question 6

Based on international standards, what should be expected of companies mining and using Colombian coal in the context of responsible disengagement and just transition to clean, renewable sources of energy, particularly with regard to preventing additional adverse impacts on workers and communities associated with the disengagement?

The decision to disengage is in some ways like any other business decision, and companies are therefore expected to conduct HRDD and meaningfully engage stakeholders on potential negative impacts of disengagement itself (just as with any other business decision) prior to making a final decision. The act of disengagement itself can cause new negative impacts (e.g. loss of livelihoods and income for workers and communities) that are distinct from the impacts that led to the decision to disengage. In post-conflict contexts such as the Cesar mining region, mass unemployment with little or no warning and without adequate severance packages may exacerbate unresolved and latent tensions, potentially reigniting conflict and associated human rights violations. In addition to addressing impacts that occurred in the past, mining and energy companies that disengage should also mitigate and remediate all additional, new adverse impacts arising from their disengagement. Mining and energy companies should meaningfully engage in good-faith dialogue with key stakeholders, including trade unions, local communities, civil society organisations and local governments, to develop ambitious and just plans to disengage responsibly from coal.

In relation to Prodeco/Glencore's decision to disengage from its Cesar operations, the mining company must meaningfully cooperate with workers, representative trade unions, suppliers, other companies and government entities to address challenges associated with disengagement and to implement a responsible exit strategy. This strategy should provide support to both impacted workers and communities.

In relation to energy companies specifically, these companies should prioritise disengagement with coal mines and mining companies that are associated with severe human rights abuses as the first from which to disengage, and do so immediately. If energy companies contributed to violations, they must also contribute to remediation of those violations as they disengage. Additionally, energy companies should also use their leverage to mitigate negative impacts to workers and local communities.

5.2 General recommendations on responsible disengagement

Responsible disengagement by companies as part of their HRDD responsibilities, both in general and specifically in the coal sector, has the potential to be a powerful tool for preventing, mitigating and remediating adverse impacts by incentivising business partners to improve their human rights and environmental performance. While disengagement is an option of last resort, companies should consider and communicate the prospect of disengagement at the beginning of a business relationship, including when screening possible trading partners, drafting specific contractual clauses, and equally to agree on a process for triggering such a clause, in order to generate and maintain leverage.

While the nature, scope and timing of an escalation path for disengagement is dependent on the specific circumstances, it is clear that this decision-making process must be commensurate with the severity of the risk, and thus the scale, scope and irremediable nature of the (potential) adverse impact. Even when trying to prevent or mitigate impacts, tabling the option of disengagement might contribute to increasing leverage. Similarly, disengagement decisions can be aligned with the timeline for corrective and remedial action in the due diligence phase.

Companies may contradict RBC principles if they decide not to disengage. These companies must accept the consequences of being considered to be contributing to the ongoing impacts. Such consequences may be legal, financial or reputational.

Responsible disengagement is important. While in some situations it may be irresponsible not to disengage, cutting and running from a relationship equally does not conform to RBC expectations. Companies must examine possible negative impacts of disengagement decisions and formulate and implement preventative and mitigatory actions. In the context of Prodeco/Glencore's disengagement from its Cesar mining operations, such actions should include engaging with workers and their representatives in the coal sector transition to decent jobs in other sectors, providing support in gaining new skills that will enable them to work in other sectors and with new types of technology and financial compensation to help workers bridge the gap in employment. Furthermore, companies disengaging should address and mitigate the specific risks associated with disengagement in a post-conflict context, such as the possible resurgence of violence and subsequent re-victimisation of local communities that experienced paramilitary violence in the past. In post-conflict contexts, meaningful cooperation with civil society organisations (particularly trade unions and victims' rights groups) and government authorities may be necessary, in order to establish a body to identify and analyse potential risks to workers and the local population.

In order to disengage responsibly, the disengaging company must remediate all previous adverse impacts it caused or to which it contributed, even if the company disengages from the business relationship through which it contributed to the impact. Thus, energy companies that disengage from their business relationships with Drummond and Prodeco/Glencore continue to be responsible for the impacts to which they contributed to during their relationship – even after they have disengaged. Similarly, despite its disengagement from its Cesar mining operations, Prodeco/Glencore continues to bear responsibility for its contribution to the forced displacements in the region.

Lastly, the significant contribution of coal to climate change means that all mining and energy companies should develop ambitious and just plans to responsibly disengage from coal completely. Energy companies should prioritise coal mines and mining companies that are associated with severe human rights abuses, such as the Drummond and Prodeco/Glencore's mines in Cesar, Colombia, as the first from which to disengage, and do so in the short term. In all cases, companies should use their leverage to mitigate negative impacts to workers and local communities as they disengage. Disengagement should not occur without responsible exit strategies or just transition plans, developed through meaningful, good-faith bargaining with workers, trade unions and local civil society organisations. The invaluable contribution of workers and local communities to the profitability of companies should be recognised.

5.3 Specific recommendations for the Cesar case

As we have concluded based on the analysis of the normative standards, in addition to Drummond and Prodeco/Glencore, European energy companies that purchased coal from Cesar beyond January 2017 can be considered to have “contributed” to the severe human rights impact of forced displacements. Although the Colombian government has the primary duty to remediate the abuse, both the mining and the energy companies have a responsibility to contribute concretely to the remediation efforts. At the forefront of all remediation efforts should be the wishes of the victims. In the case study of Cesar, the victims include the thousands of victims of mass forced displacement in the region. Victims and civil society groups representing them must be meaningfully consulted and their perspectives taken into account prior to any decisions on either remediation or disengagement. The Asamblea Campesina del Cesar por la Restitución de Tierras y el Buen Vivir (Cesar Peasant Assembly for Land Restitution and Good Living) represents 3,500 victims of forced displacement during the armed conflict in Cesar. The Assembly seeks the legal restitution of the lands of the victims, safety guarantees for the return to those lands, as well as the rehabilitation of their dignity and restoration of their livelihoods.¹⁴⁷ The mining companies as well as the European energy companies that contributed to the adverse impacts in Cesar have a responsibility to make a meaningful and substantial contribution to remedial efforts with local communities and representative civil society organisations.

In addition to contributing to the remediation of all past adverse impacts to which they contributed, the European energy companies still purchasing coal from the Cesar coal mines, either directly or through third parties or trading platforms such as GlobalCoal, also have a responsibility to immediately develop a plan for responsibly disengaging from the Drummond and Prodeco/Glencore coal mines in Cesar. This responsible disengagement plan should contain at least the following elements.

Procedurally: The plan should be developed jointly between the mining company; energy companies that are contributing to the impacts; labour unions, including the recently created Workers’ Collective for a Just Transition¹⁴⁸; local communities, including those affiliated to the Asamblea Campesina del Cesar por la Restitución de Tierras y el Buen Vivir; and other local or regional representative civil society organisations, as well as experts on the Cesar mining region. The execution and implementation of this plan must be regularly monitored, and if needed adapted, by the same companies and stakeholders.

Substantially: The responsible disengagement plan should include at minimum:

- ❑ Analysis of the unremediated impacts.
- ❑ Consideration of foreseeable adverse impacts as a result of the disengagement, especially focusing on the impacts on communities, victims and workers. In post-conflict contexts such as Cesar, disengagement may increase the likelihood of the resurgence of violence and associated human rights harms, potentially re-victimising the local population. The responsible disengagement plan should identify this risk as well as concrete risk mitigation measures that will be taken to prevent this from happening.
- ❑ A strategy to facilitate and contribute to the remediation of all previous and ongoing environmental and human rights impacts, including those related to the conflict as well as otherwise.

- Time-bound actions to prevent and mitigate the foreseeable adverse impacts. The actions need to take into account the severity of the adverse impacts linked to the disengagement, but equally the need to account for the severity of the adverse impacts that led to the disengagement.
- Develop – through meaningful, good-faith dialogue with impacted workers and their representatives – plans for a just transition to new livelihoods and economic activities, including agreements on, for instance, compensation, re-skilling and re-training for new jobs in different sectors, and other necessities for workers and their families who will be affected by disengagement.
- Formulate actions to mitigate and remediate any (potential) adverse impacts that may arise during or as a result of the disengagement itself.

Of particular interest to workers and labour unions are issues related to occupational diseases as well as the situation of outsourced workers. Thus, the responsible disengagement plan should additionally include:

- A meaningful, good faith dialogue on just transition with contractors and outsourced/contracted workers.
- A mapping of workers who are in the process of being recognised as suffering from occupational disease.
- A process of labour reconversion that takes into account the new economic reality of the region.
- A tripartite education program, based on ILO Recommendation 205, for (re)training and professional orientation that evaluates and addresses the new labour skills required.
- A study to identify the impact of mine closures on women and indigenous workers living near the coal mines and measures to prevent or mitigate these impacts. This process of impact mapping should be done through meaningful engagement and dialogue with those affected and their representatives.
- A study to identify potential new sources of child labour and forced labour (including human trafficking or forced or compulsory labour) as a consequence of mine closures and measures to prevent or mitigate these impacts.

Financially: The responsible disengagement plan should be accompanied by a robust and realistic scheme for financing the activities, including:

- A budget to finance the actions to prevent and mitigate the adverse impacts as well as to enable and contribute to remediation, both with regard to the impact of the forced displacements as well as occupational health impacts.
- In case remedial action has financial implications, a payment schedule of participating companies where contributions of individual companies are identified in relation to the total budget and mutually agreed parameters of division.
- An investment fund aimed at the creation of new jobs and economic alternatives in the region.

SOMO calls on all the corporate actors involved in the coal industry in Cesar, Colombia to commit to working toward the remediation of past human rights abuses and ensure that the cessation of coal mining marks the start of a truly just transition and a new beginning for local workers and communities.

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- 77 OECD, 2018, Due Diligence Guidance for Responsible Business Conduct, p.72. SOMO added a "remedy layer" at the bottom of the figure to clarify responsibilities related to remedy in the various relationship scenarios.
- 78 OECD, 2017, Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector, p. 25.
- 79 OECD, 2017, Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector, p. 25.
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- 82 OECD, 2017, Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector, p. 57.
- 83 The complaint is accessible via OECD Watch's database of specific instance complaints: "Peruvian Indigenous Federations et al. vs. Pluspetrol", 11 March 2021, <https://complaints.oecdwatch.org/cases/Case_567?searchterm=pluspetrol> (15 April 2021).
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