Center for Social Justice Studies et al. v. Presidency of the Republic et al.
Judgment T-622/16
Constitutional Court of Colombia (November 10, 2016)
The Atrato River Case[·]

Translator's comment:

This is an acción de tutela by disadvantaged ethnic communities before the constitutional court to protect the fundamental rights to life, health, water, food security, a healthy environment, the culture and the territory of the active ethnic communities, and to address the health, socio-environmental, ecological and humanitarian crisis in the Atrato River Basin, its tributaries and surrounding territories. The court's syllabus and decision follows the excerpts provided below.

"In summary, plaintiffs asked the constitutional court to protect the fundamental rights to life, health, water, food security, a healthy environment, and the culture and the territory of the active ethnic communities. And as a result, this court issues a series of orders and measures to address the serious health, socio-environmental, ecological and humanitarian crisis that exists in the Atrato River Basin, its tributaries and surrounding territories."

"It is necessary to remember that the plaintiffs, being ethnic communities, farmers, and subjects of special constitutional protection, are working with the objective that their fundamental rights to life, human dignity, health, water, to food security, a healthy environment, to culture, and to territory are protected."

"[The law] developed by the Constitutional Court has been characterized by ensuring, in general terms and according to the possibilities of the State, a broad catalog of fundamental rights under the founding principles of the social justice, human dignity and general welfare, three concepts that are central to our constitutionalism insofar as they constitute the starting point to eradicate … injustices."

"One of the main concerns of the 1991 Constituent in constructing the SRL formulation was focused on the most adequate, modern and efficient way to protect the environment, as a whole. At the same time, the need to guarantee a sustainable model of development, a fact that resulted in the consecration in the constitutional text of a series of principles, rights and duties, immersed, of course, within the notion of the SRL. At the same time, this model seeks to achieve the ends mentioned, by allowing human beings - the foundation of every constitutional construction since the origins of modern constitutionalism - to live and interact within a healthy environment that allows him to develop his existence in decent conditions, without the latter being threatened by the extractive activity of the state. In simpler words: the defense of the environment is not only a primary objective within the structure of our SRL, but it also integrates, in an essential way, the spirit that informs the entire Political Constitution."

· This is a Spanish-English translation by Thomas Swan, Delaware Law '19, and Professors Erin Daly and James R. May of the *Dignity Rights Project* at Widener University Delaware Law School, in consultation with Professor Hugo Echeverría. Images and endnotes omitted. Any errors in form or translation are unintended and the responsibility of the translating team.

Protection action filed by the Center of Studies for Social Justice "Tierra Digna", on behalf of the Greater Community Council of the Popular Farmer Organization of the Alto Atrato (Cocomopoca), the Greater Community Council of the Integral Farmer Association del Atrato (Cocomacia) , the Association of Community Councils of Bajo Atrato (Asocoba), the Inter-Ethnic Forum of Solidarity Chocó (FISCH) and others, against the Presidency of the Republic and others [1].

SYLLABUS

RIGHTS OF THE ETHNIC COMMUNITIES– Origin of the protection action

RIGHTS OF THE ETHNIC COMMUNITIES– International Instruments

SOCIAL RULE OF LAW – Historical background

POLITICAL FORMULA OF THE SOCIAL RULE OF LAW – Scope

SOCIAL JUSTICE– Scope / **PRINCIPLE OF DISTRIBUTIVE JUSTICE** – Scope

AUTONOMY OF TERRITORIAL ENTITIES– Consequences of the Social State of Law

PLURALIST PRINCIPLE OF THE SOCIAL RULE OF LAW– Characterized by the effective protection of minorities

PRINCIPLE OF ETHNIC AND CULTURAL DIVERSITY OF THE NATION– Scope

HUMAN DIGNITY IN THE SOCIAL RULE OF LAW– Content

PRINCIPLE OF SOLIDARITY IN THE SOCIAL RULE OF LAW– Involves obligations for the state and society

FRAMEWORK OF THE PRINCIPLE OF SOLIDARITY–
On particular interests as long as the particular interest is not covered by a fundamental right

SOCIAL RULE OF LAW– General welfare / SOCIAL RULE OF LAW – Objective

NATURAL AND CULTURAL WEALTH– Protection

ECOLOGICAL CONSTITUTION– Concept

HEALTHY ENVIRONMENT– Principal objective within the current structure of the social Rule of law

ECOLOGICAL OR GREEN CONSTITUTION – Protection.

HEALTHY ENVIRONMENT AND BIODIVERSITY– Planning policies for protection

ECOLOGICAL CONCEPTION OF THE POLITICAL CONSTITUTION– Eco-centric principles

BIOCULTURAL RIGHTS– Concept and scope

The so-called bio-cultural rights, in their simplest definition, refer to the rights that ethnic communities have to administer and exercise sovereign autonomous authority over their territories - according to their own laws, customs - and the natural resources that make up their habitat. Their culture, traditions, and way of life are developed based on the special relationship they have with the environment and biodiversity. In effect, these rights result from the recognition of the deep and intrinsic connection that exists between nature, its resources, and the culture of the ethnic and indigenous communities that inhabit them, . all of which are interdependent with each other and cannot be understood in isolation.

BIOCULTURALISM AND BIODIVERSITY– Legal and jurisprudential fundamentals for their protection

ETHNIC AND CULTURAL DIVERSITY– Jurisprudential thread.

SPECIAL PROTECTION OF RIVERS, FORESTS, FOOD SOURCES, ENVIRONMENT AND BIODIVERSITY

FUNDAMENTAL RIGHT TO DRINKING WATER– Normative and jurisprudential evolution

FUNDAMENTAL RIGHT TO WATER– Constitutional protection

FUNDAMENTAL RIGHT TO WATER – Obligations of the State to guarantee availability, accessibility and quality of water service

FUNDAMENTAL RIGHT TO FOOD – Content and scope

RIGHT TO FOOD SECURITY– International Instruments

PROTECTION OF FORESTS AND FOOD SECURITY OF THE ETHNIC COMMUNITIES

RIGHT TO THE PHYSICAL, CULTURAL AND SPIRITUAL SURVIVAL OF THE ETHNIC COMMUNITIES – Territorial and cultural rights

CULTURAL CONSTITUTION– Concept

TRADITIONAL MINING IN COLOMBIA

MINING IN COLOMBIA – Legal development

MINING ACTIVITY – Constitutional jurisprudence

MINING – High risk activity

ENVIRONMENTAL PRECAUTIONARY PRINCIPLE AND ITS APPLICATION TO PROTECT THE RIGHT TO HEALTH OF THE PEOPLE– Application of mining activity to the ethnic communities of Chocó that inhabit basin of the Atrato River

GOLD MINING IN CHOCÓ – Past and Present

CLASSES OF MINING THAT DEVELOPED IN THE CHOCÓ – Inputs and substances for their use

MERCURY AS A TOXIC CONTAMINANT SUBSTANCE– It is used mainly in mining activities to separate and extract gold from the rocks in which it is found because it is very easily alloyed with gold and silver

Its use in mining is to add mercury to the material where the gold is found, forming an amalgam that, after being heated, facilitates the separation of the different minerals, resulting in the evaporation of the mercury during the process.

PRINCIPLE OF PREVENTION– Concept / **PRINCIPLE OF PREVENTION IN ENVIRONMENTAL LAW** – Content

This principle insists that the actions of the States are aimed at avoiding or minimizing environmental damage, as an objective in itself, regardless of the repercussions that may occur in the territories of other nations. It therefore requires actions and measures - regulatory, administrative or otherwise - to be undertaken at an early stage, before the damage occurs or becomes worse.

PRINCIPLE OF PRECAUTION IN ENVIRONMENTAL LAW – Content

The principle of precaution stands as a legal tool of great importance. It responds to the technical and scientific uncertainty that often hangs over environmental issues, due to the incommensurability of some contaminating factors, the lack of adequate measurement systems, or by the fading of the damage over time.

PRINCIPLE OF ENVIRONMENTAL PRECAUTION – Constitutional jurisprudence

MINING – Effects on water, the environment and human populations

RIGHT TO HEALTH, TO LIFE, AND TO A HEALTHY ENVIRONMENT OF ETHNIC COMMUNITIES – Liability of state authorities for not taking effective actions to stop the development of illegal mining activities in the Atrato River Basin

ILLEGAL MINING IN COLOMBIA – Consequences

RIGHT TO HEALTH, LIFE, FOOD SECURITY, AND A HEALTHY ENVIRONMENT OF ETHNIC COMMUNITIES– Liability of state authorities for not taking effective actions to stop the development of illegal mining activities in the Atrato River Basin

EFFECTS INTER COMMUNIS – adopted to protect the rights of all those who are similarly situated.

RIGHT TO WATER AS A SOURCE OF WATER – Vulnerability due to illegal mining that takes place in the Atrato River Basin and its tributaries. The mining and its serious contamination threatens one of the most important sources of water and biodiversity in the world

RIGHT TO FOOD SECURITY OF ETHNIC COMMUNITIES– Vulnerability due to illegal mining activities that pollute and seriously threaten water sources and forests

RIGHT TO WATER AS A SOURCE OF WATER– The Atrato River, its basin and tributaries are recognized as an entity subject to rights of protection, conservation, maintenance and restoration by the State and ethnic communities

RIGHT TO HEALTH, LIFE, FOOD SECURITY AND A HEALTHY ENVIRONMENT OF ETHNIC COMMUNITIES– An order with inter communis effect for national and international organizations in conjunction with the active ethnic communities, to design and implement a plan to decontaminate the Atrato River Basin and its tributaries

RIGHT TO HEALTH, LIFE, FOOD SECURITY AND A HEALTHY ENVIRONMENT OF ETHNIC COMMUNITIES– An order with inter-communis effects to entities in conjunction with the involved ethnic communities, to implement a plan of action to neutralize and definitively eradicate the activities of illegal mining that take place in the District of Chocó

Center for Social Justice Studies et al. v. Presidency of the Republic et al.
Judgment T-622/16
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The Atrato River Case[·]

Reference: File T-5.016.242

[·] This is an English-Spanish translation by Thomas Swan, Delaware Law '19, and Professors Erin Daly and James R. May of the *Dignity Rights Project* at Widener University Delaware Law School, in consultation with Professor Hugo Echeverría. Any errors are unintended and the responsibility of the translating team.

Chief Justice: JORGE IVÁN PALACIO PALACIO

Bogotá, D.C., 10 November 2016

The Sixth Chamber of Review of the Constitutional Court, composed of Justices Aquiles Arrieta Gómez (e), Alberto Rojas Ríos and Jorge Iván Palacio Palacio (Chair) in the exercise of its constitutional and legal powers, professes the following:

JUDGEMENT

Within the process of review of the judgments delivered by the State Council -Second Section, Subsection A-, and the Administrative Court of Cundinamarca -Section Four, Subsection B-, in the *acción de tutela* instituted by the Center for Social Justice Studies "Tierra Digna" on behalf of the Greater Community Council of the Popular Farmer Organization of the Alto Atrato (Cocomopoca), the Greater Community Council of the Integral Farmer Association of the Atrato (Cocomacia), the Association of Community Councils of the Bajo Atrato (Asocoba), the Inter-ethnic Forum of Solidarity Chocó (FISCH) and others, against the Presidency of the Republic, the Ministry of Environment and Sustainable Development, and others.

I. BACKGROUND

1. Context

The district of Chocó, where the facts of the present protection action have developed, has an area of 46,530 km² (28,913.40 mi²), which is equivalent to 4.07% of the total area of Colombia. The district contains 30 municipalities distributed in 5 regions: Atrato, San Juan, North Pacific, Baudó (South Pacific) and Darién [2]·. It is inhabited by multiple racial groups, with a population of approximately 500,000 inhabitants, of which 87% of the population is Afro-descendant, 10% indigenous and 3% mestizo. 96 percent of the continental surface is constituted by collective territories of 600 black communities grouped into 70 larger community councils with 2,915,339 titled hectares and 120 indigenous reserves of the Embera-Dobida, Embera-Katío, Embera-Chamí, Wounan and Tule ethnic groups, which correspond to 24 of the 30 municipalities of Chocó; the remaining 4% is inhabited by the mestizo farmer population.

Chocó is located in one of the most bio-diverse regions of the planet known as the bio-geographic Chocó [3]. It is one of the richest territories in natural, ethnic, and cultural diversity in Colombia. Chocó hosts four regions of humid and tropical ecosystems, where 90% of the territory is a special conservation area [4] and has several national parks such as "Los Katíos", "Ensenada de Utría" and "Tatamá". It also has a large valley located from south to north, through which, run the Atrato, San Juan and Baudó Rivers. The Atrato River Basin, with 40,000 km² (24,854.85 mi²), represents just over 60% of the area of the district, and is considered one of the highest water yields in the world. The San Juan River (15,000 km2) (9,320.56 mi²) runs north/south and flows into the Pacific Ocean. It is one of the richest rivers in the world in timber and mineral resources. The Baudó River (5,400 km²) (3,355.4 mi²) runs parallel and between the San Juan River, and the Pacific Coast.

· Translator's note: Bracketed numbers refer to endnotes in the opinion, which are omitted for the sake of brevity.

The Atrato River is the largest in Colombia and also the third most navigable in the country, after the Magdalena River and the Cauca River. The headwaters of the Atrato River are to the west of the Andes mountain range, specifically in the Cerro Plateado at 3,900 meters (2.4 mi) above sea level, and empties into the Gulf of Urabá, in the Caribbean Sea. Its extension is 750 kilometers (466 mi), of which 500 km (310 mi) are navigable. The widest part of the river is 500 meters long (547 yd.) and the deepest part is estimated to be close to 40 meters (44 yd.). It receives more than 15 rivers and 300 streams. Among the main ones are: Andágueda, Baté, Bojayá, Buchadó, Cabí, Cacarica, Capá, Domingodó, Napipí, Neguá, Muguindó, Murrí, Opogodó, Puné, Quito, Salaquí, Sucio, Tagachí and Truandó.

The Atrato River Basin is bordered to the east by the western mountain range and to the west by the mountainous areas of the Baudó and Darién. To the south is the watershed of the San Juan River defined by the isthmus of Istmina. It is rich in gold, wood and is considered one of the regions with the highest fertility for agriculture. The hydrographic basin of the Atrato River is made up of ethnic communities that live in the municipalities of Acandí, Bajo Atrato, Riosucio, Bojayá, Lloró, Medio Atrato, Quibdó, Río Quito, Unguía, Carmen del Darién (Curvaradó, Domingodó and Bocas), Bagadó, Carmen de Atrato, in Chocó; and Murindó, Vigía del Fuerte and Turbo, in Antioquia.

The banks of the Atrato are home to many Afro-Colombian and indigenous communities, including the plaintiffs, who have inhabited them ancestrally; where there are also mestizo communities descended from migrants from different regions of the country. Among the traditional forms of life and sustenance characteristic of these communities are artisanal mining, agriculture, hunting and fishing, with which they ensured for centuries a total supply of their food needs.

Some of these activities - which remained intact until the 1980s - were mainly: (i) agriculture, carried out through the sowing and programmed cultivation of various food crops such as corn, rice, chontaduro, cocoa, coconut, caimitos, guamas, sugar cane and banana; and, (ii) fishing, by means of arrows, cast nets and rustic tools; (iii) artisanal mining that applies various ancestral methods of gold and platinum extraction.

The communities have made the Atrato River Basin not only their territory, but the space to reproduce life and recreate culture. They are settled - along the upper and middle Atrato - and are organized through the following Community Councils: (i) the Greater Community Council of the Popular Farmer Organization of the Alto Atrato – Cocomopoca - which is composed of 3,200 afro-descendant families congregated in 43 communities with 73,000 hectares titled as collective territories [5]; (ii) The Greater Community Council of the Integral Farmer Association of Atrato, Cocomacia, is composed of 120 Afro-descendant communities with 695,245 hectares titled as collective territories [6]. Additionally, there is the Association of Community Councils of Bajo Atrato, Asocoba, and the Inter-ethnic Forum of Solidarity Chocó -FISCH- (made up of 47 organizations), both of whom have lived in their territories ancestrally, and in which they have established their traditional ways of life through agriculture, hunting, fishing and artisanal mining. Activities with which guarantee their total food supply, which now, in the opinion of the Court, is in danger due to the intensive development of illegal mining and logging activities; in a region that has suffered the rigors of war and forced displacement within the framework of the intensification of the internal armed conflict.

Additionally, social exclusion in Chocó has deep historical roots due to the fact that after independence, inclusive political-administrative institutions were not adopted, but rather purely extractive institutions, with very few controls, which has favored corruption since colonial times.

At present, the district of Chocó presents population indexes according to which, 48.7% live in extreme poverty. According to the Index of Unsatisfied Basic Needs (NBI), which measures if the basic needs of the population are covered according to minimum criteria in the different regions of the country, it is found that the NBI for this region is 82.8%, the highest of the country, within which about 79% of its inhabitants have at least one NBI, which is why they have the lowest quality of life indicator in the country with 58%, compared to the national average of 79% [7].

2. Motivation for the Request for Protection

2.1. In this case, the representative of the ethnic communities is claiming that the *acción de tutela* is necessary to restrain the intensive and large-scale use of various methods of mining and illegal logging. These methods include heavy machinery, such as dredgers and backhoes, and highly toxic substances, such as mercury, in the Atrato River (Chocó), its basins, swamps, wetlands and tributaries. The methods have been intensifying for several years and are having harmful and irreversible consequences on the environment, thereby affecting the fundamental rights of ethnic communities and the natural balance of the territories they inhabit.

2.2. In regard to mechanized mining exploitation, which has been developing on a large scale illegally since the end of the 1990's by different actors, it mainly affects the upper and middle basin of the Atrato River (and even its mouth in the Gulf of Urabá). As well as its main tributaries, in particular, the Quito River, the Andágueda River (Cocomopoca territory), the Bebará River and the Bebaramá River (Cocomacia territory). Specifically, through the use of heavy machinery, such as suction dredgers, also called by the locals "dragons," hydraulic elevators and backhoes, these destroy the riverbed and perform indiscriminate dumping of mercury and other substances and supplies required for the development of these activities in the Atrato and its tributaries; in addition [plaintiffs complain of] the dispersion of vapors of the above-mentioned chemical entailed by the mining.

2.3. The illegal mining exploitation that takes place in the Atrato River, its currents and contiguous territories, which in 2013, according to data from Codechocó, the regional environmental authority, estimated 200 established miners and approximately 54 dredges in operation. These are characterized by the extraction of precious metals, especially gold and platinum, for which different types of exploitation are used with heavy machinery.

The first form of mining is *alluvial mining*, which involves the direct extraction of metals from the riverbed by means of suction dredges and the application of mercury. The second form is open-pit vein mining through the use of backhoes that lift large layers of earth, thereby opening deep holes in which mercury is used for ore separation.

2.4. In the same sense, it is affirmed that among the pollution factors associated with the activities of illegal mining in the Atrato river basin, one of the most serious is the dumping of mercury, cyanide and other toxic chemical substances related to mining. The toxic chemicals

represent a high risk for the life and health of the communities since the river water is used for direct consumption. The river water is the main source of water for agriculture, fishing and for the daily activities of the communities. In consequence, it is considered that the pollution of the Atrato River is threatening the survival of the population, the fish and the development of agriculture that are indispensable and essential elements of food in the region, which is the place where the communities have built their territory, and their culture.

It highlights that the situation of the environmental crisis that has been unleashed as a result of the activities described, has had a dramatic effect concerning the loss of life of the indigenous and Afro-descendant children. According to several reports from the Ombudsman's Office [8], in the indigenous communities of Quiparadó and Juinduur, which are located in the sub-region of Bajo Atrato (Riosucio), during 2013 the death of 3 minors and the poisoning of 64 people by ingesting contaminated water were recorded. Similarly, the Embera-Katío indigenous people, located in the basin of the Andágueda River, a tributary of the Atrato, in 2014 reported the death of 34 children for similar reasons.

Regarding the Afro-Colombian communities, it is affirmed that as a consequence of the contamination produced by illegal mining and forestry activities there is a growing proliferation of diseases such as diarrhea, dengue and malaria in the communities according to the reports from the Ombudsman's Office. [9] In addition, concerning the situation described above, the region does not have an adequate health system to address these diseases or the ethnic groups.

2.5. Additionally, logging is characterized by the use of heavy machinery, chemical substances to immunize the wood, and by the construction of artificial canals for carrying it. These actions have endangered living species of the area, both plants and animals, and have changed the natural course of the rivers; thereby affecting their marshes and wetlands. All of which implies serious consequences for the subsistence of the communities settled there. In fact, it is argued that of the 18 navigable branches of the Atrato River, currently only one branch is navigable, due to the clogging and sedimentation of the water sources, which is produced by the inadequate disposition of the woods and their waste.

2.6. It is affirmed that despite several urgent appeals, including that of the Ombudsman's Office that declared a humanitarian and environmental emergency in Choco in September 2014, it is highly worrisome that the competent state institutions, including the Presidency of the Republic and the Ministries of Health, Environment, Mining, Agriculture, Housing, Education, Defense, the National Health Institute and the Districts of Chocó and Antioquia, among others, have not taken comprehensive actions to face and resolve this serious situation that threatens the quality of the waters of the Atrato River, its main tributaries, the existence of its forests, and its population.

2.7. In the same way, it is denounced the complete abandonment of the region by the Colombian State, in terms of basic infrastructure, which does not include an aqueduct, sewerage or final waste disposal systems. In this regard, it is indicated that the lack of an adequate and efficient supply system of drinking water and basic sanitation deepens the described consequences. Since there are no sanitary landfills or other mechanisms of final disposal and treatment of garbage, the waste is mostly located in the open or thrown into the Atrato River and its tributaries.

2.8. It is reiterated, that without there having been concrete actions by part of the State, for several years the communities and their representatives have warned about the urgency of protecting and guaranteeing the dignity of the ethnic communities - Afro-Colombian and indigenous - that live along the Atrato Basin. Nowadays, the problems reported have deepened to the point of setting an unprecedented crisis, caused by the contamination of water by toxic substances, erosion, palisades that restrict mobility, accumulation of garbage, intensive sedimentation, dumping of solid waste and liquids into the river, deforestation, plugging of creeks and navigational branches of the river, and loss of species; all this, in the middle of a historical scenario of armed conflict.

It is pointed out, that the multiple environmental, social and health impacts that the illegal mining and forestry exploitation that is taking place in the Atrato River, has motivated the creation of some spaces for institutional cooperation such as the so-called "Inter-institutional Mining Table." This institution has not operated to the extent, that they are not addressing the structural policies required by the district of Chocó to overcome this socio-environmental crisis caused by mining, nor the measures needed to achieve the protection of the rights of communities, amongst the activists.

2.9. It also highlights that several popular actions have been presented, some of which have been ongoing for several years and others have failed in favor of the ethnic communities, even without having achieved any state action to safeguard the populations and undertake the recovery of the rivers. Finally, it points out that these judicial claims have not been effective: with the passage of time, this serious problem faced by the communities has increased exponentially, which has led to a massive and systematic violation of their rights.

2.10 In summary, plaintiffs ask the the constitutional judge to protect the fundamental rights to life, health, water, food security, a healthy environment, the culture and the territory of the active ethnic communities, and to issue a series of orders and measures to detail structural solutions to the serious health, socio-environmental, ecological and humanitarian crisis that exists in the Atrato River Basin, its tributaries and surrounding territories.

3. Procedure of Petition and Arguments of the Defendant

3.1. The *acción de tutela* was filed by the plaintiffs on January 27, 2015 before the Administrative Tribunal of Cundinamarca. The Tribunal convened on the same day, took notice of the action and ordered the defendants to be notified so that they could exercise their right of defense. As a result of this procedure, the following answers were obtained:

3.2. In their response, the Ministry of Environment and Sustainable Development requests to deny the protection claimed by the plaintiffs. The Ministry alleges that plaintiffs lack standing because in accordance with Decree 3570 of 2011 [10] the Ministry is not in charge of the functions of issuing environmental licenses nor can it exercise any type of control in relation to the facts that support the *accion de tutela*.

Additionally, it is the responsibility of the Ministry to direct the SINA - National Environmental System - whose purpose is to ensure the adoption and execution of environmental policies, plans, programs and projects, but that the specific power to take action on the reported

facts rests with other entities such as the Ministry of Housing, City and Territory, Vice Ministry of Water and Basic Sanitation, in regards to public services; the National Agency of Environmental Licenses -ANLA-, regarding licenses for mining activities; the Regional Autonomous Corporations with jurisdiction in the area, regarding forest use; and finally, in the territorial authorities that exercise police powers.

3.3. The Ministry of Housing, City and Territory, states that Article 365 of the Constitution and Law 142 of 1994 [11] made a precise distribution of powers in domiciliary public services between the nation, districts and municipalities. To the extent, the national government only corresponds, in a general way, to provide financial, technical and administrative support to the entities providing public services. For their part, the districts are responsible for the functions of support and coordination, and at the municipal level the formulation and execution of projects. According to the Public Services Law (Article 5), the municipalities are responsible for ensuring the effective provision of the public services to its inhabitants, functions that are not in charge of the Ministry of Housing.

In conclusion, it is requested: (i) the *accion de tutela* be denied because the argument presented in this case lacks standing since the Ministry of Housing is not competent to hear the claims made by the Plaintiffs, and no fundamental right has been violated or threatened; and (ii) the action is declared inadmissible because other means of judicial defense can be applied.

3.4. The Ministry of Agriculture and Rural Development requests to be dissociated from the process of this action, and in subsidy, that the protection is declared inadmissible, due to the lack of passive defendant. Based on Article 59 of Law 489 of 1998 [12] and Decree 1985 of 2013 [13], the Ministry of Agriculture as head of the agricultural sector has to fulfill functions of direction, coordination and evaluation of agricultural policies, fisheries and rural development.

It is pointed out that although the Ministry is effectively responsible for drawing up public policies on food security, the execution of these corresponds to other government entities attached to this ministerial portfolio, such as the Colombian Institute of Rural Development (INCODER), and the Department of Social Prosperity (DPS). These portfolios are attached to the Presidency of the Republic, whose participation in the implementation of such policies is integral, therefore there is no relationship between the facts reported by the Plaintiff and the actions or omissions of the Ministry of Agriculture and Rural Development. The alleged responsibility that is intended to be endorsed does not have any legal or material justification.

3.5. The Ministry of Mines and Energy considers that the *acción de tutela* is not appropriate in the present case because other means of judicial defense exist. In the first place, it affirms that the Study Center "Tierra Digna" instituted a land restitution process before the First Civil of the Specialized Circuit in restitution of lands of Quibdó. In which it requested as a precautionary measure the suspension of the study and the processing of several applications and mining titles. The petition was denied by order of July 1, 2014.

Regarding the suspension of mining concession contracts, the Ministry of Mines and Energy warns that Title II of Chapter V of the Mining Code establishes the events in which the mining concession can be suspended and adds that in accordance with the provisions of Decree 4134 of

2011 [14], the mining authority of the country is the National Mining Agency -ANM- and not the Ministry of Mines and Energy. Due to this, the Plaintiff should be before the National Mining Agency, which should decide on the suspension of the mining concession.

Finally, it is argued that within the framework of execution of the formalization and compliance policy of the mining strike agreements of Chocó carried out in 2013, the framework is continually advancing work tables with the population through the Mine Formalization Directorate. It is affirmed that these efforts have yielded good results in the 2013-2014 period, which shows that the Ministry has been a guarantor in formulating serious sustainable mining policies for all communities.

3.6. The Ministry of Health and Social Protection requests that the acción de tutela protection action be declared inadmissible. It indicates that in the exercise of its functions of monitoring and evaluation of compliance with public policies of water quality for human consumption, has been defined through the Ten-Year Public Health Plan - Environmental Health - a series of goals for 2021, to address the problem of drinking water, diseases and protection of the environment within the components of "Healthy Habitat" and "Health Situations related to environmental factors."

The District of Chocó also argues that there is a health model that is based on primary and intercultural care strategies, which are based on the exchange of knowledge between Western medicine and traditional medicine, to restore confidence in the EPS. Similarly, it is added that a service provision model has been built, based on the strengthening of the physical structure and the provision of checkpoints.

Finally, it is indicated that the *acción de tutela* is residual and subsidiary, and to that extent it only proceeds in those events in which there does not exist a different constitutional or legal instrument that allows the Plaintiff to request the protection of his or her rights; unless the Plaintiff intends to avoid irreparable damage, the damages must be accredited in the process. It is concluded that for these reasons the tutelage action is inadmissible.

3.7. The mayor of Carmen de Atrato requests not to process the *acción de tutela*. In his brief answer, he highlights the historical, cultural and economic factors that characterize the municipality, to then point out that his city is a pioneer in the provision of water and sewerage services.

Likewise, it is affirmed that within the jurisdiction of El Carmen de Atrato there are no illegal miners that affect the environment with the dumping of mercury, cyanide or other toxic substances; only traditional (pan-sifting) mining is carried out by the indigenous communities. The mayor also warns that timber extraction is not carried out indiscriminately, given that the majority of timber operations are carried out for domestic use and those destined for other uses are regulated by Codechocó.

Consequently, the mayor considers that if the claims of the plaintiffs are processed, continuity in the excellent administrative service provided to the inhabitants of the municipality could be affected. Neither illegal mining or logging are matters that occur within the municipality, and that

contaminate the Atrato River. Such situations do occur ostensibly in other regions of the district of Chocó.

3.8. The Delegate Ombudsman for Constitutional and Legal matters intervenes in this process in compliance with its constitutional functions to contribute to the claims of the lawsuit. The Ombudsman adds that as being responsible for promoting the defense of human rights in Colombia, he has carried out a permanent follow-up work in different areas of the country, including in the district of Chocó, where there have been serious situations of threat and violation of fundamental rights in the communities of the region.

The Ombudsman affirms that in the studies carried out by the entity in the area where the active communities are located, it is evident how the gold mining activities generate serious socio-environmental conflicts. The jungle is being destroyed due to indiscriminate deforestation. The course of the rivers and water sources are being destroyed with the dumping of fats, oils and heavy metals such as mercury, thus threatening the conservation of the natural heritage of Chocó, which is listed as one of the richest areas of biological diversity in the world. There, 90% of the territory is a special conservation area. Also, to promote the effective protection of human rights, the Ombudsman's Office has expressed its concern for the humanitarian crisis suffered by the inhabitants of Chocó. As well as its multiple social, economic and environmental consequences, which were referenced in the Ombudsman Resolution No. 64 "Humanitarian Crisis in Chocó" of September 29, 2014.

It states that this *acción de tutela* was presented on behalf of several community councils and Afro-descendant and indigenous organizations that inhabit the basin and on the bank of the Atrato River. The Afro-descendant and indigenous organizations, according to Article 1 of Decree 2591 of 1991, have full legitimacy as an ethnic community and as subjects of special constitutional protection, whose rights can be protected through this action. In effect, it points out that in the case under examination there is no other remedy or means of effective judicial defense for the protection of the fundamental rights of the communities whose protection is sought through the action of tutelage. It adds that a popular action is not an effective judicial remedy in this case because: (i) what is sought to protect are the fundamental rights of communities and not only collective rights; and, (ii) it is a structural problem that a class action cannot protect because this case requires the taking of complex measures and inter-institutional articulation that exceed the scope of the action in question.

Finally, the Ombudsman considers it a priority to adopt the necessary measures to cease the violation of fundamental rights of the communities that are active in the enjoyment of: a healthy environment, ecological balance, water, public safety and health, access to public services and that the delivery of these services are efficient and timely; health, among other rights, are being violated in other municipalities to which this action refers.

3.9. The Ministry of National Education and the municipalities of Acandí, Bojayá, Lloró, Medio Atrato, Murindó, Quibdó, Vigía del Fuerte, Turbo, Riosucio, Río Quito, Unguía, Carmen del Darién, Bagadó and Yuto remained silent.

II. JUDICIAL DECISIONS UNDER REVIEW

1. Instance of First Judgment

By decision, on February 11, 2015, the Administrative Tribunal of Cundinamarca -Section Four, Subsection B- decided not to proceed with the action of tutelage. The court verified that the action cannot proceed because what was intended with it was the protection of collective rights and not fundamental rights. For this reason, the court added that the Plaintiffs should go to a popular action and not to tutelage to pursue the defense of their interests.

In the same regard, the court added that despite what the plaintiffs argued, after examining the file, the requirements of constitutional jurisprudence were not met, to the regard of demonstrating that class actions are not the ideal mechanism in the specific case for the effective protection of the rights allegedly violated. In conclusion, the tribunal considered that the plaintiffs, before filing an *acción de tutela*, should have made use of the complaint contained in Article 41 of Law 472 of 1998 to address the failure to comply with the judgments in the popular action venue.

2. Objection

The Center of Studies for Social Justice "Tierra Digna" filed an objection against the first instance ruling, addressing three matters: (i) ignorance of the violation and threat to the fundamental rights of the communities in the class action; (ii) irregularities in the judicial process of the *accion de tutela*, and (iii) the execution of other judicial actions that have not been effective.

The plaintiffs considered that the aforementioned aspects are fundamental in the study of the case, and that they were not taken into account by the trial judge, who, in general terms opted for the inadmissibility of the action. The judge, estimating that "through the action impetrated by Afro-descendant and indigenous communities settled in the Atrato River Basin, they pursue the protection and safeguarding of collective rights", particularly that of the environment in connection with the right to food. Therefore, the trial judge erroneously concluded that the appropriate judicial mechanism to address the legal problem that arises is a class action.

3. Instance of Second Judgment

The State Council - Second Section, Subsection A - in the order of April 21, 2015, confirmed the contested decision. The section concluded that there is no violation of the collective rights alleged by the Center of Studies for Social Justice "Tierra Digna," as the plaintiffs: (i) failed to demonstrate the irreparable harm or the ineffectiveness of the class actions for protection of the rights that they consider violated; (ii) they have the opportunity to present the complaint to a judge, who retains the competence on popular actions to execute the necessary measures to comply with the judgment insofar as it cannot be sought through the *accion de tutela* to replace the ordinary means of access to the administration of justice.

Consequently, the State Council confirmed the instance of first judgment proffered by the Administrative Tribunal of Cundinamarca, which declared the action for protection filed by the plaintiffs as inadmissible.

III. ACTIONS IN REVIEW

1. This Appellate Review, by order of October 14, 2015, the Chief Magistrate decided to link and request information related to the case and sub-examine several entities of the national order and district order to consider that, although they were not sued in the present *accion de tutela*, given the scope and seriousness of the situation denounced, the national and district order could be involved with what is finally decided in this process.

In response, 26 replies were received, which by their extension will be referred to in the attached footnote [15].

2. Subsequently, by order of November 13, 2015, the Sixth Chamber of Revision invited several universities, NGOs and international organizations to consider some issues of interest to the Court in this case. The Court, also ordered the carrying out of a judicial inspection in Quibdó and some sectors of the Atrato River Basin in the district of Chocó on January 28 and 29, 2016. Lastly, it decreed the suspension of terms, to rule on the preliminary matter.

In response, 17 interventions were received, which by their extension will be referred to in the attached footnote [16]. Additionally, a judicial inspection was carried out in the city of Quibdó (Chocó), on January 28 and 29, 2016. The Judicial Inspection Final Act is on pages 2095-2193 in the Num. 5.

3. Finally, by order of April 29, 2016, as a result of the findings of the judicial inspection, the Chamber decided to make a new link of three state entities and request information related to the case under the study of the Ministry of Finance and Public Credit, the Special Administrative Unit of Information and Financial Analysis -UAIF- and the Office of the Attorney General of the Nation [17]. Additionally, in this act the suspension of terms that had been previously decreed was extended.

The complete recount of the aforementioned actions, including answers, concepts, interventions as well as the Final Act of the Judicial Inspection constitute the Annex to the judgment and there they can be consulted. With this, the Chamber will refer to the relevant evidence that appears in the files in the chapter of this judgment in which it analyzes the specific case.

III. CONSIDERATIONS AND BASIS

1. Scope

This Court is competent to issue judgment of revision, in accordance with the provisions of Articles 86 and 241-9 of the Political Constitution and Articles 31 to 36 of Decree 2591 of 1991.

2. Presentation of the case and approach to legal problems

Based on the foregoing background, and taking into account the claims of the complainant communities in this tutelage action [18], the Court considers that the case under examination raises several complex constitutional legal issues. These issues relate to illegal mining exploitation, which may some repercussions over the content, scope and limitations of the Colombian state mining-energy policy.

In this order of ideas, the Court considers that the legal problem to be solved on this occasion is to determine whether due to illegal mining activities in the Atrato River Basin (Chocó), its tributaries and surrounding territories, and whether by the omission of the state authorities sued (in charge of dealing with this situation, both at the local and national levels), there is a violation of the fundamental rights to life, health, water, food security, a healthy environment, and to the culture and territory of the active ethnic communities.

For the purpose of resolving this matter, the Court will address, as a preliminary question, the analysis of the procedure of the tutelage action to protect the fundamental rights of ethnic communities. Then, this Court will conduct the study of: (i) the conception of the social Rule of law in relation to (a.) the constitutional relevance of the protection of rivers, forests, food sources, the environment and biodiversity, (b.) the right to physical, cultural and spiritual survival of ethnic communities, as a guarantee of a traditional way of life; (ii) mining and its effects on water, the environment and ethnic communities in relation to the precautionary principle. Finally, (iii) this Court will carry out the analysis of the specific case.

3. The *accion de tutela* and its procedure to protect the fundamental rights of ethnic communities. Reiteration of jurisprudence.

3.1. **Requirement of Immediateness.**The *accion de tutela* is designed to obtain the immediate protection of fundamental rights, so that in principle, whoever goes to this mechanism must do so within a fair and reasonable period of time [19]. However, the jurisprudence of this Court has argued that this is not an absolute parameter, but it should verify the timely exercise of the *accion de tutela* in each particular situation.

To establish the reasonableness of the time elapsed between the unknown of the fundamental attribution and the claim before the constitutional judge, the law has established a set of steps or timeline of justification. In this regard, judgment T-743 of 2008 stated that it must be determined: (i) if there is a valid reason for inactivity of the plaintiffs; (i) if justified inactivity violates the essential core of the rights of third parties affected by the decision; (iii) if there is a causal link between the late exercise of the action and the violation of the fundamental rights of the interested party [20]; (iv) if the basis of the tutelage action arose after the violation of fundamental rights, in any way within a period not too far from the filing date [21].

From the development of the notions mentioned by the tutelage judge, one can find the proportionality between the judicial means used by the plaintiff and the end pursued; to determine the origin of the tutelage action of as an appropriate mechanism for the protection of the fundamental right complained.

Additionally, jurisprudence has also indicated that it may be admissible for a considerable period of time to elapse between the fact that caused the violation and the filing of the tutelage action whenever two circumstances arise [22]: (i) when it is demonstrated that the damage is permanent in time, and (ii) when it can be established that "the special situation of that person whose fundamental rights have been violated, makes discharging the burden of going to a judge

disproportionate; for example, the state of defenselessness, interdiction, abandonment, minority of age, physical disability, among others "[23].

In conclusion, the limit for filing the request for protection is not the passing of a specific period, but rather there is an actual impact of fundamental rights to be remedied. [24].

With regard to the foregoing, the Court must point out, that according to the assertions of the plaintiffs, in the present case there has been damage that has been occurring for several years. Against which both the Regional Attorney's Office and the communities have filed several actions, both administrative and constitutional (three class actions, six injunctions). The actions filed were done with the objective to achieve a solution to the problems generated by the large-scale development of illegal mining activities. Even if the problems from illegal mining have not occurred yet, it is the Regional Attorney's Office's- opinion that the illegal activity continues as a result of the omission in the fulfillment of the functions by the defendant entities. In this sense and because the action was filed on January 27, 2015, before the aggravation of the situation was denounced by the ethnic communities, it is considered that the claim is actual and that it persists over time.

As a result, this Court concludes that in the preliminary matter meets the requirement of immediacy.

3.2. ***Legitimation by active***. This Court has insisted that the procedure of protection promoted by ethnic minorities and, in general, by groups and subjects in a situation of vulnerability, should be examined with weighted criteria. Such flexibility is justified in the need to break down the obstacles and limitations that have prevented these populations from accessing the judicial mechanisms that the legislature designed for the protection of their rights under the same conditions that other sectors of the population can do [25].

In order to compensate for these difficulties and to make effective the duty of special protection, the authorities and, especially, the tutelage judges, have a duty to the groups and subjects of special constitutional protection. The Court has admitted, for example, that the *tutelas* seeking the protection of the fundamental rights of an ethnic community, can institute those rights by any of its members, or even, by the organizations that group the members of the community concerned.

That possibility, that again, seeks to facilitate access to justice for populations traditionally removed from the judicial system for reasons of geographical isolation, economic prostration or cultural diversity. It is fully justified within the framework of a comprehensive State, the existence of ethnic diversity and of the specificities that characterize those groups that identify themselves as culturally distinct from the dominant society.

With this purpose, the Constitutional Court has relaxed the procedural conditions of the protections promoted to safeguard the fundamental rights of ethnically differentiated communities; a fact that also responds to the need to ensure that the authorities comply with their commitments to the protection of indigenous and tribal populations. Recall, in this regard, that the International Labor Organization's (ILO) Covenant 169, incorporated into domestic law by Law 21 of 1991, commits its member States to protect the peoples concerned against the violation of their rights

and to ensure that they can initiate legal proceedings, "personally or through their representative bodies," to ensure that these rights are respected.

In the same sense, judgment T-955 of 2003, interpreted in a broad way ILO Convention 169, extending its interpretation to black communities. Thereby consolidating a bio-cultural approach by recognizing the ties of the ways of life of indigenous, tribal peoples, and the ethnic communities with the territories and the use, conservation and administration of their natural resources. In this regard, the judgment pointed out that "the subsistence of indigenous and tribal peoples depends on the recognition of ethnic and cultural diversity, and it is they who can preserve and project the pluri-ethnic and multicultural nature of the Colombian nation, the basis of the social Rule of law embraced in the Charter. This recognized pluri-ethnic and multicultural nature, refers to the indigenous and tribal peoples, among them the black communities."

Additionally, in regards to the active legitimization of the members of ethnic communities or their representatives to file the tutelage action, the Court has recognized "not only the status of collective fundamental rights by which the ethnic communities are subject to, but has additionally established that both the leaders and the individual members of these communities have standing to file the acción de tutela in order to pursue the protection of the rights of the community; as well as "the organizations created for the defense of the rights of the indigenous and tribal peoples and the Ombudsman's Office."[26].

In any case, for the Court, it is clear that the Center of Studies for Social Justice "Tierra Digna", has fully demonstrated that the active ethnic communities have conferred the power to represent them legally in this process. It is understood that "Tierra Digna" is legitimized to promote the present tutelage action in the name and on behalf of the Greater Community Council of the Popular Farmers Organization of the Alto Atrato (Cocomopoca), the Greater Community Council of the Integral Farmers Association of Atrato (Cocomacia), the Association of Community Councils of the Bajo Atrato (Asocoba) , the Inter-ethnic Forum of Solidarity Chocó (FISCH) and others [27].

3.3. Compliance with the subsidy requirement. By virtue of the principle of subsidiarity as a requisite of the admissibility of the tutelage action, this Court has argued that in cases where there are ordinary judicial means of protection available to the plaintiff, the protection will be applicable if the constitutional judge is able to determine that: (i) ordinary defense mechanisms and resources are not adequate and effective enough to guarantee the protection of rights allegedly violated or threatened; (ii) constitutional protection is required as a transitory mechanism, since, otherwise, there would be irremediable damage; and (iii) the holder of the fundamental rights threatened or violated is a subject of special constitutional protection [28].

In this regard, it is necessary to remember that the plaintiffs, being ethnic communities, farmers, and subjects of special constitutional protection, are working with the objective that their fundamental rights to life, human dignity, health, water, to food security, a healthy environment, to culture, and to territory are protected.

The argument of the trial judges is that the *tutela* is not appropriate because it seeks to protect non-fundamental collective rights. Additionally, the non-fundamental collective rights are susceptible to protection through other means of judicial defense. The *acción de tutela* is not

acceptable in the present case for two main reasons. In the first place, it is true that the plaintiffs' claim serious damage to the environment in which they live and that the right to a healthy environment is a collective right. However, in the present case, the violation of the right to enjoy a healthy environment has repercussions on other constitutional rights and principles that both the text of the Constitution and the jurisprudence of the Court recognize as fundamental. Such are the rights to health, both of children and of the elderly, and the principle of human dignity, recognized as a fundamental principle in Article 1 of the Constitution. Is in this way Article 44 of the Political Constitution recognizes the distinctive fundamental right to health and physical integrity of children, while from Judgments T-060 of 2007, T-148 of 2007 and T-760 of 2008, the distinctive fundamental of the right to health was recognized.

Secondly, it must be remembered that the plaintiffs are black communities, duly recognized, as already outlined in the statement of facts of the lawsuit. These communities have historically occupied territories that have been recognized as being under common ownership according to their practices, uses, and traditional customs, as established in Article 1 of Law 70 of 1993. To that extent, the protection of a healthy environment of which these communities are holders, is closely linked with the protection of the territory. A healthy environment goes beyond simple biological diversity; it is a necessary condition for the effective enjoyment of the right to territory. In this sense, it is understood that having a healthy environment is a necessary condition to guarantee other fundamental rights of ethnic communities, such as: collective identity and cultural integrity.

When the conditions of environmental deterioration of the territory does not allow the members of an ethnic community to have basic individual goods such as health and personal integrity, they are forced to move to other parts of the country where those rights are guaranteed, or less, not directly threatened. On the other hand, this phenomenon of displacement not only affects the lives of individuals who leave their land, it also destroys the social fabric that holds communities together, which allows them to maintain cultural traditions and the different ways of life that are, in short, those that maintain the validity of the pluralist character of the Colombian State, a fundamental principle enshrined in Article 1 of the Constitution Charter. Therefore, the protection of a healthy environment of the black communities acquires special relevance from the constitutional point of view, since it is a necessary condition to guarantee the validity of their lifestyle and their ancestral traditions.

In a complementary sense, the argument of the inadmissibility of the present *acción de tutela* will not be accepted due to the existence of other judicial defense such as class actions (Article 86 Superior), is not accurate either. Although class actions, in theory, are designed to protect collective rights such as the environment, in this case, said mechanism faces two problems: (i) the impairment of both fundamental and collective rights, and (ii) the ineffectiveness of class actions as a suitable resource to solve the complex problems raised in the preliminary case. Regarding the first assumption, the Court must point out that according to the crisis generated by illegal mining exploitation that equally affects the rights to life, human dignity, health, food security, culture, territory and the health of the environment, this case equally involves the alleged violation of fundamental rights of ethnic communities as collective rights and in this sense, the tutelage action is the appropriate remedy to protect the claims of the plaintiffs.

In relation to the second point raised, both the active ethnic communities and the Judicial and Agrarian Attorney of Chocó [29] have filed and previously won several class actions that had not been en enforced by the time of the submitting of this *acción de tutela*. As an example of the above, it is worth bringing up the Annual Report 2013 of the aforementioned judicial attorney of the region, in which a review is made of the filing of three class actions and six injunctions before the Administrative Court of Chocó and several administrative court offices of different municipalities of the district. All of which have been ruled in favor of the Public Ministry and the ethnic communities for the protection of water and the environment without having concrete results of the implementation of said decisions.

It is worth adding, that in November 2015, the Administrative Court of Cundinamarca [30] ruled another class action in favor of several ethnic communities in the Quito River Basin (tributary of the Atrato), in order to achieve protection of their collective rights to the environment, water and natural resources, that to this day, after more than a year of a series of orders to protect the collective rights referred to, have yet to be fulfilled by the defendant authorities.

In conclusion, the Court considers that one of the reasons that could explain the ineffectiveness of class actions such as this set forth can be found in the nature of the matter to be resolved. Since it is a structural problem, it requires the adoption of complex measures and an inter-institutional articulation that exceeds the normative and practical scope of the action in question; but with the ones that do have the *accion de tutela*, it was designed precisely to respond to complex and structural problems. From the foregoing, the tutelage action is the appropriate resource for the effective protection of the fundamental rights of the ethnic communities of the Atrato River Basin.

Due to the above, it is clear that all the requirements for the admissibility of the action of tutelage are met. Having said that, we will proceed to study the merits of the matter.

4. The Formulation of the Social Rule of Law

The case that occupies this Court raises important reflections on the concept, development and scope of the formulation of the Social Rule of Law. The Social Rule of Law was conceived by the Constituent Assembly of 1991 and its subsequent implementation was by the Constitutional Court, over the course of 25 years of jurisprudence. This formulation was implemented, in particularly, towards the satisfaction of the most basic needs of Colombians, in terms of human dignity, social justice and general well-being; the protection of the weakest or people in a highly vulnerable condition, the recognition of diversity, ethnic, and culture of the nation, and the protection of the environment and natural resources; all of which, are founding pillars of the Republic.

Thus, this section will examine the nature, meaning and scope of the formulation of the Colombian Social Rule of Law (hereinafter SRL), in the following order: (i) historical background; (ii) jurisprudential development of the formulation of the SRL, and finally (iii) some brief reflections on the concept of SRL will be presented.

Historical Background

4.1. The formulation of the SRL emerged gradually in a particularly convulsive era. Although some authors trace their first backgrounds in the social movements and the workers' demands of the 19th century (Forsthoff, 1954, Abendroth, 1977), the fact is the SRL did not appear until the Constitutions of Mexico (1917) and of the Weimar Republic (Germany, 1919). Those texts were the first in the whole tradition of Western constitutionalism to include a list of social rights.

4.2. More specifically, some years after the First World War, theorist Hermann Heller, who in a famous article entitled "Rechtsstaat oder Diktatur?" (1930), would define the Rule of Law - hereinafter, ROL - in the terms of a SRL as a form of opposition to the old abstract vision of liberal constitutionalism. At that time, liberal constitutionalism was already considered obsolete and worn out in the face of the advent of social revolutions and industrialization. The SRL will introduce the "social" adjective in the classical conception of ROL to recover the ideas-values to which this formulation was originally associated when it served as an instrument in the struggle of the Americans and French against absolutism, namely: social justice, equality, freedom, general well-being, and even happiness.

This fact, of capital importance for the modern constitutionalism, constituted much more than the introduction of a simple ornament to the classic formulation of the ROL, since it evidenced the deep transformation of the old structure, ROL, in relation to the State-civil society in the postwar period. The liberal bourgeoisie, several centuries before, had taken great pains to construct a theory following the Hegelian theory of dualism. Each theory, has clearly differentiated interests and spheres, in which the State dominated all areas of "general interest". The "general interest" is understood as the overcoming of the contradictory private interests of civil society and as the guarantee of internal and external security of the state organization. These theories were constructed without dealing with any issues related to the most basic social needs of the population, for example, work, social security, health or education. Thus, under this State model, an abstract conception of the "general interest" and of rights were imposed, in which the individual, as part of civil society, understood himself with the ability to ensure his own physical, material, and cultural subsistence. However, everything was about to change.

4.3. It took nearly two decades, a new world war and a major economic crisis for the formulation of the SRL conceived by Heller to be formally hosted in a Constitution. It happened with the Fundamental Law of Bonn in 1949. It is precisely this German constitutional text that will integrate a whole new form of organization of State-civil society relations; in which the State is defined as "democratic and social" (article 20), governed by the principles of the "republican, democratic and social State of Law" (article 28) [31]. In this way, the constitutionalization of the SRL model implied a great transformation, since that moment, the State and its institutions are thinking about the obligation of satisfying individual needs not achievable by civil society and with that, the construction of a Social State that, from now on, will watch over the provision of such basic services and benefits.

By posing the ROL as a SRL, and linking it to the ideas of reason and social justice, Heller found an alternative way to overcome the classical conception of ROL and correct its limitations in terms of new social demands. Thus was born a novel form of state organization that we know today as a social State of law, whose purpose is to "create the social assumptions of the same freedom for all, that is, to suppress social inequality." [32]

4.4. In this context, it is pertinent to specify that, unlike the ROL model, which, as has been pointed out, exclusively deals with a formal concept of equality and freedom, in the SRL, material equality is a fundamental principle that guides the tasks of the State in order to correct existing inequalities, promote inclusion and participation, and guarantee people or groups at a disadvantage the effective enjoyment of their fundamental rights. In this way, the SRL seeks to realize social justice and human dignity through the adherence of public authorities to the principles, rights and social duties of constitutional order [33].

The SRL formulation did not take long to replicate progressively in other countries and in other constitutions, with some drafting and scope differences, both in Europe (Italy, 1949, France, 1958, Spain, 1978) and in Latin America (Peru, 1979, 1987, Brazil, 1988, Colombia, 1991, Paraguay, 1992, Venezuela, 1999, Ecuador, 2008) and even in some countries that are tributaries of the English common law tradition, such as India (1950) and South Africa (1996).

Jurisprudential development of the formulation of the Social Rule of Law

As had been pointed out at the beginning of this section, the case at this time that occupies the Court raises important reflections on the concept, development and scope of the formulation of SRL. This is in relation to the protection of the weakest or people in condition of great vulnerability; the recognition of the ethnic and cultural diversity of the nation, but in particular, the protection of the environment and natural resources. Next, the construction of the main constitutional guarantees will be outlined.

4.5. From the moment of the issuance of the new constitutional order, it was the duty of Constitutional Court to interpret the content, nature and scope of the new Political Charter: a modern instrument that incorporated - for the first time in our history - the three generations of human rights in a single catalog of rights and principles that is included in Title I. The Fundamental Principles and Title II. Of rights, guarantees and duties, both of which constitute a constitutional toolbox for the construction of a SRL, which is the ultimate goal of Colombian society and the state organization that, moreover, would be completely meaningless but the new Political Charter is understood as a mechanism aimed at the realization of rights.

4.6. One of the first tasks undertaken by the Constitutional Court was to interpret the SRL formulation conceived by the 1991 constituent. In particular, it has been doing so since the early years of its jurisprudence. One of the first judgments that undertook the mentioned clause (SRL) was the T-406 of 1992 [34] -now considered precedent setting- that analyzes and develops the postulates that inspired the consecration of the SRL as a cardinal principle of our legal-political order; which radiates to all the institutions and state authorities in order to achieve the promotion and establishment of dign living conditions for all people, and the solution of real inequalities that arise in society. In this regard, it is pointed out that the primary challenge of values and principles translated into fundamental rights does not lie in their enunciation, but in their application and effectiveness, whose guarantee is at the head of constitutional judges:

"There is a new strategy for achieving the effectiveness of fundamental rights. The coherence and wisdom of interpretation and, above all, the effectiveness of fundamental

rights in the Constitution of 1991, are assured by the Constitutional Court. This new relationship between fundamental rights and judges means a fundamental change in relation to the previous Constitution; This change can be defined as a new strategy aimed at achieving the effectiveness of rights, which consists of granting priority to the judge, and not to the administration or the legislator, the responsibility for the effectiveness of fundamental rights. In the previous system the effectiveness of fundamental rights ended up being reduced to its symbolic force. Today, with the new Constitution, rights are what judges say through tutela orders. "[35]

This provision also states that constitutional principles and values constitute the legal axiological structure on which the entire regulatory system is constructed and oriented. This provision clarifies the nature and scope of the catalog of fundamental rights, establishing that in connection with a fundamental right it is also possible to protect economic, social, cultural rights, ESCR (Articles 42 et seq.), collective and environmental (Articles 78 et seq.), and that by express criteria, also express the rights incorporated through the Constitutionality Block (article 93).

4.7. Since then, the jurisprudence of the Court has continued to develop broadly the normative postulates of the SRL, as a foundational element of the Political Charter or a constitutional principle, which gives meaning to the entire legal system. The SRL is derived from the following mandates and constitutional obligations: (i) the commitment for the defense of fundamental principles and rights, and compliance with the guiding principles of state activity [36]; (ii) to promote real and effective equality through the adoption of measures in favor of marginalized or discriminated groups (article to eradicate the injustices present) [37]; (iii) special protection for persons who, because of their social, economic, physical or mental condition [38], find themselves in a circumstance of manifest weakness [39]; (iv) the need for the adoption, by Congress, of legislative measures that allow the construction of a just political, economic and social order [40]; (v) the guarantee of rights that allow the enjoyment of basic conditions to maintain or improve the quality of life of people in a dignified manner [41]; (vi) the promotion and defense of pluralism and the ethnic and cultural diversity of the nation [42]; (vii) respect for the founding principles of solidarity and human dignity [43]; (viii) the best interest in protecting the environment through the so-called "Ecological Constitution" [44]; (ix) the prevalence of general interest [45]; and (x) the prioritization of any other allocation to public social spending for the solution of the unmet needs for health, education, basic sanitation and drinking water, among others, in the plans and budgets of the nation and territorial entities [46].

The formulation of the SRL thus demands that the state entities construct and articulate an institutional reality - based on an intimate relationship of collaboration between the state and the social sphere - that responds to the fundamental principles of a just social organization. The SRL thus allows a solution to the unsatisfied basic needs that should be addressed as a priority, thus overcoming the classic conception of the ROL, in which the State did not intervene to attend to social needs.

4.8. Specifically, the statement that Colombia is an SRL state implies the legal linking of the authorities to principles tending towards the achievement of material equality, and the effectiveness of the rights and duties of all. In particular, as a fundamental principle that guides the State's tasks with the goal of correcting existing inequalities, promoting inclusion and participation and guaranteeing people or groups at a disadvantage the effective enjoyment of their fundamental

rights. In this way, the Colombian SRL model seeks to achieve *social justice, human dignity and general well-being* by subjecting public authorities to constitutional principles, rights and social duties. In this sense, the judgments T-426 of 1992 [47], T-505 of 1992 [48], SU-747 of 1998 [49] and C-1064 of 2001 [50], respectively, have clarified the scope of our Social Rule of Law.

The aforementioned means that the Colombian State, as a direct consequence of the interpretation and development of the 1991 Charter, has effectuated a substantial change in various matters related, essentially, to the protection, guarantee and effectiveness of rights: this has generated a whole revolution of rights towards the construction of a genuine Social Rule of Law.

4.9. Next, a brief characterization will be made of some of the fundamental principles that cover the entire list of rights that make up our SRL, and will be of special importance for the case that at this time occupies the attention of the Court, in terms of equality and material justice, social justice, equal justice, autonomy of the territorial entities, pluralism, ethnic and cultural diversity of the nation, human dignity, solidarity, prevalence of the general interest and construction of the general welfare.

In the first place, constitutional jurisprudence has been concerned with examining the evolution of justice from a formal to a material concept, which implies the recognition that law -- and therefore, institutions -- must address the existence of situations of natural, historical, social or economic inequality of diverse groups, collectives, communities, populations and, consequently, with favorable treatment -- translated as affirmative actions and resources-- for those who suffer discrimination. In other words, the concept of material equality that emboldens the SRL is fully manifested in the mandate of special protection for the weakest [51].

4.10. Regarding the principles of social and equal justice [52], the Court has indicated that in relation to the first, the social nature of the Colombian rule of law implies an active role for the authorities and a permanent commitment in the promotion of social justice and the creation of general conditions of equity through public policies and inclusive and effective development plans. In effect, the defense of the supreme values of the Political Charter then forces the State to intervene decisively, within the constitutional framework, to protect people in their human dignity and demand social solidarity when it is indispensable, to guarantee the full effectiveness of fundamental rights.

In relation to equal justice, it has been estimated that the allocation of the economic resources of a society should tend to privilege the less favored sectors. This principle serves as the basis for the design and implementation of a tax regime, rules of budget preparation, the hierarchy of spending, and the setting of priorities in the provision of public services. In fact, one of the essential purposes of our SRL model is to promote general prosperity and guarantee the effectiveness of constitutional rights, duties and principles, which, together with the fundamental right to equal opportunities, guide the interpretation of the Economic Constitution, and animate all areas of regulation, such as for example, in matters such as tax regime, budget, public expenditure; exploitation of natural resources and production, distribution, and use and consumption of goods and services.

4.11. Regarding the autonomy of territorial entities, [53] the Court has indicated that, apart from the State, territorial entities play a fundamental role in offering material access to the set of rights recognized in the Constitution, and in the realization of the SRL. Article 288 Superior establishes that the competency attributed to the different territorial levels must be exercised in accordance with the principles of coordination, concurrence and subsidiarity.

The first of the principles, stipulates that the administrative authorities must coordinate their actions for the adequate fulfillment for the purposes of the State (Article 209), coordination that must occur, both between territorial entities, and between those entities and the nation. On the other hand, the principle of concurrence implies a process of participation between the nation and the territorial entities, so that they intervene in the design and development of policies, programs and projects aimed at guaranteeing the general welfare and the improvement of the quality of life. Only in this way will it be possible to advance in the effective realization of constitutional principles such as decentralization and territorial autonomy. Finally, the principle of subsidiarity establishes that only when the territorial entity can not exercise certain functions independently, is it allowed to appeal for the help of higher levels - such as the district or the nation - so that they assume, in principle temporarily, the exercise of their competencies until the situation that led to the application of these measures is resolved. This of course implies the understanding that the autonomy recognized to the territorial entities is not absolute and admits limitations like the ones exposed.

4.12. The pluralist principle [54] is another of the material values that informs the SRL formulation as an integral part of the 1991 Constitution. In effect, the constitutional text consecrates an integration of diverse values, principles and ideologies, at the same time, that the confluence of different races, ethnic groups, languages, sexes and beliefs is protected with the aim of establishing a normative framework that allows tolerance and peaceful coexistence. These aspirations are reflected in the precepts contained in the Preamble and in articles 1 (participatory and pluralist democracy), 5 (supremacy of the inalienable rights of the person), 13 (equal rights, freedoms, opportunities), 16 (free development of personality), 26 (freedom to choose profession or trade), 27 (freedom of education), 67 (right to education), 70 (access to culture), 71 (freedom in the pursuit of knowledge) and 72 (protection of cultural heritage).

In the particular case of ethnic communities, whether Afro-Colombian or indigenous, constitutional jurisprudence has recognized the importance of pluralism in the configuration of the SRL. In particular, taking into account: (i) the diversity of cultures and ethnic identities that coexist in Colombia, (ii) the need to assure them equal treatment and respect, (iii) the fact that they all form part of the general identity of the country and, finally, (iv) that they have the right to subsist and remain in the national territory indefinitely, under decent and fair conditions [55].

4.13. With regard to the constitutional recognition of the principle of ethnic and cultural diversity of the nation [56], the Court has understood that it responds to a new vision of the State, in which the human person is no longer conceived as an abstract individual, but as a subject of particular characteristics, who claims for himself his own ethical conscience. Values such as tolerance and respect for differences become imperatives within a society that is strengthened in diversity; in the recognition that each individual is unique and a subject that can make their life

project possible. In this new model, the State has the special mission of ensuring that all forms of seeing the world can coexist peacefully.

In this sense, the State has to make compatible its duty to preserve peaceful coexistence within its territory while guaranteeing the rights of its citizens, and with the recognition of their particular needs, as members of multi-ethnic and multicultural groups. In this task, the state organization is forbidden to impose a particular conception of the world and individual development, because such an attitude would undermine the principle of respect for ethnic and cultural diversity, and against the equal treatment of different cultures that it has recognized in the Constitution.

Likewise, the Court has indicated that the fundamental rights of ethnic communities are specified, among others, in the right to subsistence, derived from the constitutional protection of life (Article 11); the right to ethnic, cultural and social integrity, which in turn derives not only from the mandate to protect the diversity and pluralistic nature of the nation (articles 1 and 7), but also from the prohibition of any form of disappearance and forced displacement (article 12); the right to collective ownership of land (articles 58, 63 and 329); and, the right to participate and to be consulted on decisions regarding the exploitation of natural resources in their territories, that is, the right to prior, free and informed consultation.

4.14. In conjunction with the guarantee of the principle of ethnic and cultural diversity of the nation, this Court has also expressed that human dignity [57] is a superior value and a founding principle of the SRL. A principle in which all people should receive the same treatment in accordance to their human nature, and that more than a right in itself, is the essential form of the consecration and effectiveness of the whole system of rights and guarantees contemplated in the Constitution. In this way, dignity stands as a fundamental right of direct effectiveness whose general recognition compromises the political foundation of the Colombian State. This means that the principle of human dignity must be understood: (i) as a founding principle of the legal system; (ii) as a constitutional principle, and (iii) as an autonomous fundamental right.

Additionally, the Court has established that the 1991 Charter is essentially humanistic, insofar as the entire normative system has been constructed to protect dignity and personal autonomy, not in the abstract, but from a material and concrete dimension: that is why the respect for human dignity should inspire all actions of the State.

In this way, in our SRL, the person is the subject, the reason and the ultimate goal of political power and the entire constitutional order. The Charter not only tends to the person in a formal sense, but in his ontological materiality, adds an indispensable quality: dignity. It is then about defending life, but also a certain quality of life. In the term "dignity" predicated on "human", there is a quality - or level - of life, which is a qualitative criterion. In that order of ideas, for our constitutionalism, it is not enough simply that the person exists; it is necessary that it exists within a framework of material, cultural and spiritual conditions that allow us to live with dignity [58].

In this sense, the Court has identified in its jurisprudence three clear and differentiable guidelines on the principle of human dignity as an axiological center of our constitutional order, namely: (i) human dignity understood as autonomy or as a possibility to design a plan of life and of

self-determination according to one's own preferences, that is, to live as one likes or as chosen; (ii) human dignity understood as certain concrete material conditions of existence, that is, living well or in welfare conditions; and (iii) human dignity understood as intangibility of non-property assets, such as physical, moral, and spiritual integrity, which means living free of any kind of harassment[59].

In synthesis, in constitutional jurisprudence, human dignity has been treated as an expression of individual autonomy, as a manifestation of certain material conditions of existence, or as a symbol of the intangibility of physical and moral integrity. In this context, the constitutional provision according to which the State is founded on respect for human dignity, imposes on public authorities the duty to adopt the indispensable measures of protection to safeguard the legal rights that define man as a person; and these include freedom, autonomy, physical, moral, spiritual and cultural integrity, the exclusion of degrading treatment, personal and family privacy, as well as certain material conditions of existence that the SRL must guarantee [60].

4.15. Closely related to the principle of human dignity, the Court has also referred to the principle of solidarity [61] under the understanding that it constitutes one of the basic postulates of the Colombian SRL. In general terms, it is pointed out that solidarity is that community of interests, feelings and aspirations, from which it emanates, an agreement of mutual aid and a shared responsibility for the fulfillment of the proposed purposes: the satisfaction of individual and collective needs.

The constituent of 1991 instituted solidarity as the founding principle of our SRL, in the respect of human dignity, work and the prevalence of the general interest. The Court has indicated that the consecration of the principle of solidarity constitutes a way of fulfilling the essential purposes of the State - for which it has been instituted - and to ensure the recognition of the rights of all the members of the social conglomerate. Regarding its content, this Court has defined it as a duty, a tax on every person by the mere fact of belonging to the social conglomerate, consisting of the nexus of one's own effort and activity to the benefit or support of other associates or collective interests.

Similarly, it has been pointed out that the solution of the unsatisfied basic needs of important sectors of Colombian society - framed in a reality of deep social, territorial imbalances and a lack of resources - is a commitment from all that appertains to both the State and society as a whole. Hence, solidarity is interpreted as a kind of backbone for the articulation of will towards the common purpose of the construction of peaceful coexistence, equity, socioeconomic development and the general welfare of the population.

4.16. Regarding the principle of prevalence of the general interest[62], it has been understood as a general rule, that it allows preferring the achievement of common objectives - within the framework of the principle of solidarity - over particular interests, as long as the particular interest is not protected by a fundamental right. Indeed, the Court has repeatedly pointed out that this principle does not imply, *per se,* that the interests of the majority and the collective well-being should be preferred, or that, by virtue thereof, the achievement of common objectives over particular interests be privileged, since the latter works as a limit of general interest when it is linked to a fundamental right. In this sense, it must be understood that respect for fundamental rights is a component that also integrates the complex concept of general interest [63].

Thus, the Court has reiterated an interpretation of this principle according to which, it is clear that the simple invocation of the general interest or the need to ensure peaceful coexistence, economic development or public order, does not represent an argument that justifies, by itself, the limitation and restriction of one or more fundamental rights. In summary, it has been pointed out that in the study of each specific case, the constitutional principles in tension must be harmonized and weighted to resolve the issue in question.

4.17. Finally, with respect to the concept of general well-being[64], according to which it corresponds to the public power to guarantee the satisfaction of social demands in relation to a wide range of collective basic needs, which has been taking shape since the beginning of the 20th century. It is a direct consequence of the model of the European "Welfare State". The Court has indicated that the concept of general well-being constitutes one of the social purposes of the State, together with the improvement of the quality of life of the population and the satisfaction of the most basic needs such as health, work, education, food, security, environmental sanitation and drinking water. And, in general, an adequate infrastructure that allows for the continuous and efficient supply of public services. Because of the concept of general well-being, one can demand the national and territorial entities be required to design and include special attention to these needs within their plans and budgets, which must also receive priority over any other allocation as they are part of what has been called social public expenditure[65].

Likewise, it has been pointed out that the State is required, both at the national level and territorial entities, to prioritize the financing of policies, plans and projects that contribute to the realization of the State's social goals:

> "This legitimacy [co-financing mechanisms of nation-territorial entities] finds support in the mandates of the Constituent enshrined in Articles 366 and 288 of the Political Charter. The first establishes as essential purposes of the State the general welfare and the improvement of the quality of life of the population, especially in aspects related to health, education, environmental sanitation and potable water, for which it enables the Nation and the territorial entities to include in their plans and budgets the required allocations, which, in addition, in when they constitute public social expenditure, they will have priority over any other assignment.
>
> (...) The unitary character that the Constituent gave to the State and the validity in it of principles such as solidarity and community participation, justify the concurrence of the Nation and territorial entities in the design and development of programs and projects aimed at guaranteeing the general welfare and the improvement of the quality of life. Because only in this way will it be possible to advance in the effective realization of principles also of constitutional rank, such as, for example, decentralization and territorial autonomy. "[66]

In summary, the Court has interpreted that the Colombian SRL model seeks to realize social justice, human dignity and general well-being through the subjection of public authorities - in all levels - to constitutional principles, rights and social duties. In this sense, the concept of *general well-being* is especially important because in its immensity rests the key to the contemporary

implementation of what it means to satisfy the most basic needs of citizens, the improvement of the quality of life, and the notion of full citizenship in rights.

4.18. Precisely, the Nobel Prize winner in economics Angus Deaton, referring to the origins of inequality and the modern construction of the concept of well-being, as one of the most forceful ways of overcoming poverty indicated that the main objective of the general welfare, in the twentieth century has consisted in allowing an escape, perhaps the greatest in the history of mankind, the "escape from poverty and death" [67]. Where it is understood that welfare - in its simplest sense- represents all the good things that can happen to a person in his life and that make his life worthy. This means that the concept of general well-being must include, in turn, material well-being, understood as quality of life - in terms of good nutrition, education and safety -, and decent income, based on the guarantee of a stable job; whereas physical, psychological and spiritual well-being is represented by access to health, culture, the enjoyment of the environment and the legitimate aspiration to happiness; and in any case, the ability - and also the possibility - to participate in civil society through democratic institutions and the rule of law. Consequently, this will be the teleological protection standard that the Chamber will take as a reference and will develop in its argumentation in this ruling.

4.19. Thus, the model of the SRL developed by the Constitutional Court in these 25 years has been characterized by ensuring, in general terms and according to the possibilities of the State, a broad catalog of fundamental rights under the founding principles of the social justice, human dignity and general welfare, three concepts that are central to our constitutionalism insofar as they constitute the starting point to eradicate what jurisprudence has called present injustices.

4.20. This implementation of the profuse catalog of rights of the Political Charter, which constitutes - as already warned - a constitutional toolbox, has allowed rights to be exercised with some degree of instrumental efficacy and that any Colombian, regardless of their condition, can count on a suitable and effective resource to face a highly unequal society, fragmented in its governmental and territorial organization, and with notable deficiencies in the satisfaction of the most basic needs of its citizens. In this sense, it is important to highlight that it is not enough to recognize and enunciate the rights so that they can be effective - as Norberto Bobbio has maintained - [68], it is also necessary, as Professor Mauricio García Villegas has also pointed out, "to reduce the gap that exists between normative ideals and social realities "[69], so that fundamental and human rights can be guaranteed in practice (instrumental efficacy).

4.21. Thus, in jurisprudential matters it can be concluded that the main objective of the Colombian SRL is, precisely, the guarantee of minimum conditions -or essential points of departure - that allow the development of a dignified life, full in the exercise of rights and in welfare conditions for all Colombians. As already referred to earlier in this section-, represented in the protection and defense of the principles, obligations and fundamental mandates of the 1991 Constitution, it is precisely within this constitutional framework that the case of the ethnic communities of Chocó, submitted to the consideration of the Court on this occasion, represents one of the greatest challenges for the constitutional judge. A challenge against what has been the adoption or not of structural measures by the Colombian State in the construction of a genuine SRL, which the Chamber will examine in detail in this ruling.

5. The constitutional relevance of the protection of rivers, forests, food sources, the environment and biodiversity. General context.

In a preliminary manner, it should be noted that in accordance with the provisions of the first chapter of this judgment, which established the general theoretical-constitutional framework on which our SRL is built -in terms of its obligations and mandates-, this second chapter will discuss its development, in a concrete way, regarding the constitutional relevance of the protection of rivers, forests, food sources, the environment and biodiversity. With this purpose, in this section some considerations will be made on: (i) the natural and cultural wealth of the nation; (ii) the Ecological Constitution and biodiversity; (iii) the concept and scope of biocultural rights; (iv) the special protection of rivers, forests, food sources, the environment and biodiversity, in particular with regard to the fundamental right to water, the protection of nature and food security.

Preliminary considerations about the natural and cultural wealth of the nation.

5.1. One of the main concerns of the 1991 Constituent in constructing the SRL formulation was focused on the most adequate, modern and efficient way to protect the environment, as a whole [70]. At the same time, the need to guarantee a sustainable model of development, a fact that resulted in the consecration in the constitutional text of a series of principles, rights and duties, immersed, of course, within the notion of the SRL. At the same time, this model seeks to achieve the ends mentioned, by allowing human beings - the foundation of every constitutional construction since the origins of modern constitutionalism - to live and interact within a healthy environment unthreatened by the extractive activity of the state, which allows him to develop his existence in decent conditions, without the latter being threatened by the extractive activity of the state. In simpler words: the defense of the environment is not only a primary objective within the structure of our SRL, but it also integrates, in an essential way, the spirit that informs the entire Political Constitution[71].

5.2. In this order of ideas, in relation to the natural and cultural wealth of the nation, which are closely linked, Article 8 of the Political Charter establishes as a fundamental obligation of the State and society to ensure the care of our natural and cultural resources. Additionally, in the chapter on collective rights (articles 79 and 80) and specific obligations (article 95-8), the general parameters that guide the relationship between the human being and his living environment are established: natural, environmental and biodiverse. In this sense, as a consequence of the attributions consecrated at the head of the State, society and individuals in the above-mentioned articles, the obligation to protect the environment is established in order to prevent and control the environmental deterioration factors, procuring its conservation, restoration and sustainable development.

In this way, the disposition and exploitation of natural resources cannot be translated to the detriment of individual or collective welfare, nor can it lead to damage or deterioration that threatens biodiversity and the integrity of the environment, understood as a whole. Therefore, sustainable development, conservation, restoration and environmental compensation, are part of the constitutional guarantees for the general welfare and productive and economic activities of the human being to be carried out in harmony and not with sacrifice or to the detriment of nature. In this regard, for the Court, the environment from a constitutional point of view:

> "(...) involves aspects related to the management, use, exploitation and conservation of natural resources, the balance of ecosystems, the protection of biological and cultural diversity, sustainable development, and the quality of life of man understood as a member of that natural world. Issues that, among others, have been widely recognized by our Political Constitution in many norms that establish clear mechanisms to protect this right and exhort the authorities to design strategies for their guarantee and development. In fact, the protection of the environment has acquired in our Constitution a social objective, which is also related to the efficient provision of public services, health and natural resources as a guarantee for the survival of present and future generations. It has been understood as a priority within the purposes of the State and as a recognition of the duty to improve the quality of life of citizens "(Article 366 of the Constitution)" [72]

In virtue of the above, and based on the different principles, values, duties and obligations that the Constitution contemplates in terms of protecting the natural and cultural wealth of the nation, the jurisprudence of this Constitutional Court has developed a systemic interpretation based on the postulates that the Political Charter consecrates in ecological, environmental, and cultural matters. On the one hand, this construction has been called "Ecological, green or environmental Constitution", and on the other, the "Cultural Constitution" [73], which will be developed later in the section dedicated to the right to physical, cultural survival and spirituality of the ethnic communities. It is in this context that the constitutional relevance of the protection of rivers, forests, food sources, the environment and biodiversity, as they are part of the nation's natural and cultural wealth, make full sense in the Ecological Constitution.

Ecological Constitution and Biodiversity.

5.3. The Political Charter of 1991, in line with the main international concerns regarding the protection of the environment and biodiversity, has recognized that the fundamental right to a healthy environment has the character of a higher interest, and in this way, the Political Charter has developed it extensively. Through an important catalog of provisions - about 30 in total - that consecrate a series of principles, mandates and obligations focused on a double dimension aimed at: (i) protecting the environment in an integral manner, and (ii) guaranteeing a model of sustainable development, on which the concept of the "Ecological Constitution"has been built [74].

The concept of the Ecological Constitution includes some of the most important legal developments for the protection of the environment that have taken place within the framework of international law in recent decades. Mainly since the United Nations Conference on the Protection of the Environment, the Human Environment in Stockholm (1972). From that moment, the influence that international law has had on the national constitutions in environmental matters is clear and has been concretized, according to recent estimates, in the express recognition of the right to a healthy environment by 76 nations, and its constitutional consecration in at least 120 constitutions that protect a wide range of factors that make up nature and biodiversity such as water, air, land, fauna, flora, ecosystems, soil, subsoil and energy, among others [75].

Thus, in our constitutionalism, which follows the global trends in the matter, the environment and biodiversity have progressively acquired valuable socio-legal connotations.

However, it has not been an easy process. The conceptual evolution of law in recognition of the importance of "mother earth", and its multiple components in the strategy of sustainable development have been the result of a complex and difficult process that still generates controversy when trying to reconcile at the same time three elements: economic growth, social welfare and protection of the environment in the understanding that this conjugation allows the possibility of sustainable use of resources in the present and in the future.

In this context, it must be remembered that Colombia has been recognized by the international community as a "mega-biodiverse" country, as it constitutes a source of invaluable natural wealth on the planet; which merits special protection under universal co-responsibility. Of course, this consideration has not been gratuitous, the Institute of Biology of the University of Antioquia in its intervention before the Court, states that:

> "Colombia, in its forests, moors, wetlands, dry areas and many other ecosystems, has thousands of species of plants and animals -even with many more still in the process of discovery and research-, in addition to an almost unknown variety of microorganisms. Many of these species and some ecosystems present in Colombia are exclusive, that is, endemic, so if they disappear from our territory they will disappear from the face of the earth.This is why the country has a great responsibility to protect these unique ecosystems, in addition to helping in the conservation of all biodiversity in general.
>
> The conservation of biodiversity is not based solely on the protection of species and ecosystems because of their intrinsic value: the survival of human communities is undoubtedly linked to the integrity of their environment.Most of the goods we use (water, food, medicines, fuels, construction materials, etc.) come directly from or need well-functioning ecosystems. In addition, we receive many other indirect benefits of biodiversity, such as regulation of water cycles, carbon, climate and cultural services. "[76]

5.4. Indeed, taking into account that the environment and its biodiversity are part of the vital environment of man and that it is essential for their survival and that of future generations, our Political Charter has rightly recognized the importance of said goods and, consequently, it has been concerned -from early jurisprudence- to set the budgets from which the relations of the State and society with nature must be regulated, starting from specific mandates of conservation and protection of the environment [77]. These budgets and mandates make up what the Court has called the Ecological Constitution, a definition that, moreover, is far from being a simple rhetorical statement insofar as it comprises a precise normative content composed of principles, fundamental rights and obligations in charge of the State.

5.5 In this sense, this Court has warned that the defense of the healthy environment constitutes a fundamental objective within the current structure of the Colombian SRL. It simultaneously represents a constitutional legal good that has a triple dimension, since it is a principle that radiates the entire legal order corresponding to the State to protect the nation's natural wealth (articles 1, 2, 8 and 366 above); it is a fundamental and collective constitutional right that can be demanded by all people through various judicial actions (Articles 86 and 88) [78]; and it is an obligation of the heads of the authorities, society and individuals, as it implies qualified duties of protection (articles 8, 79,

95 and 333). In addition, the Constitution provides for "environmental sanitation" as a public service and a fundamental purpose of state activity (Articles 49 and 366) [79].

In this way, the Constitution and constitutional jurisprudence, in harmony with international instruments, have opted for the defense of the environment and biodiversity, for the benefit of present and future generations,thereby consecrating a series of principles and measures directed to the protection and preservation of such legal assets, objectives that must be achieved not only through concrete actions of the State, but with the participation of individuals, society and other social and economic sectors of the country. In this sense, the Charter recognizes, on the one hand, the protection of the environment as a constitutional right, intimately linked with life, health and physical, spiritual and cultural integrity; and on the other, as a duty, inasmuch as it demands from the authorities and from the private actions directed to its protection and guarantee.

5.6. The multiple normative dispositions that exist and the pluralistic approach promoted by the Political Charter itself, make the relationship between the Constitution and the environment dynamic and in constant evolution. In this sense, it is possible to establish at least three theoretical approaches that explain the superior interest of nature in the Colombian legal system and the special protection granted to it: (i) in the first place, it begins on an anthropocentric vision [80] that conceives the present human being as the only reason of there is a legal system, and the natural resources as simple objects at the service of the first, (ii) a second biocentric point of view [81] claims more global and solidary conceptions of human responsibility, which advocate - in equal measure - for the duties of man with nature and future generations; (iii) finally, ecocentric positions have been formulated [82] that conceive nature as a true subject of rights and that support plural and alternative worldviews to the approaches recently exposed [83].

5.7. According to the previous interpretations, with respect to the anthropocentric approach, being the most widespread in the West [84], responding to an ancient philosophical and economic tradition - which ranges from naturalist theorists like Smith and Ricardo to neoliberal pragmatists as Stiegler and Friedman - that has conceived man as the only rational, dignified and complete being on the planet. From this point of view, the only thing that matters is the survival of the human being and only to this extent should the environment be protected, admitting the possibility of controlled exploitation of natural resources to promote state development.

5.8. The biocentric vision derives in first instance from an anthropocentric conception in the sense that nature must be protected only to avoid the production of a catastrophe that extinguishes the human being and destroys the planet. Under this interpretation, nature is not subject to rights, but simply an object at man's disposal. However, it differs from the purely anthropocentric approach in that it considers that the environmental patrimony of a country does not belong exclusively to the people who inhabit it, but also to future generations and to humanity in general. So that what happens with the environment and natural resources in China may end up affecting other nations, such as the United States, and Latin America, as well as Africa and Oceania, which constitutes a global solidarity that is based on the concept of sustainable development [85].

5.9. Finally, the ecocentric approach starts from a basic premise according to which the land does not belong to man and, on the contrary, assumes that man is part of the earth, like any other species [86]. According to this interpretation, the human species is just one more event in a long

evolutionary chain that has lasted for billions of years and therefore is not in any way the owner of other species, biodiversity, or resources, or the fate of the planet. Consequently, this theory conceives nature as a real subject of rights that must be recognized by the States and exercised under the protection of its legal representatives, such as, for example, [namely] by the communities that inhabit nature or that have a special relationship with it.

This particular approach, like the previous ones, is fully based on the Political Constitution of 1991, and in particular, on the formulation of the SRL (Article 1 above) which defines Colombia as a democratic, participatory and pluralist Republic; it is based, too, on the constitutional mandate to recognize and protect the ethnic and cultural diversity of the nation (articles 7 and 8). Regarding the latter approach, the Court has indicated in the recent judgment C-449 of 2015 that the ecocentric perspective can be found in some decisions of this Court. For example, judgment C-595 of 2010 notes that the Constitution also demonstrates the importance that the environment has, to protect itself and its close relationship with the beings that inhabit the earth. In the same sense, judgment C-632 of 2011 stated that:

> "At present, nature is not only conceived as the environment that surrounds human beings, but also as a subject with its own rights, which, as such, must be protected and guaranteed.In this sense, ecosystem compensation involves a type of restitution applied exclusively to nature '. This is a position that has mainly found justification in the ancestral knowledge according to the principle of ethnic and cultural diversity of the Nation (Article 7 Superior) "[87]. (Underlined and bold not in original text)

In the same sense, the ruling T-080 of 2015, indicated that in this vein, "the constitutional jurisprudence has served the ancestral knowledge and the alternate currents of thought, coming to support the conclusion that 'nature is not conceived only as the environment and surroundings of human beings, but also as a subject with its own rights, which, as such, must be protected and guaranteed'. [88]

5.10. In this line of thinking, the greatest challenge of contemporary constitutionalism in environmental matters is to achieve the safeguarding and effective protection of nature, the cultures and life forms associated with it, and biodiversity [89] not by the simple material, genetic or productive utility that these may represent for the human being, but because being a living entity composed of other multiple forms of life and cultural representations, they are subjects of rights; this produces a new imperative of comprehensive protection and respect on the part of States and societies. In summary, only from an attitude of deep respect and humility with nature, its members and their culture, is it possible to enter into relationships with them in fair and equitable terms, leaving aside any concept that is limited to the simply utilitarian, economic or efficiency [90].

In other words: nature and the environment are a cross-cutting element of the Colombian constitutional order. Its importance lies, of course, in attention to the human beings that inhabit it and the need to have a healthy environment to live a dignified life in decent conditions; but also in relation to the other living organisms with whom the planet is shared, which are understood to be worthy of protection in themselves. It is about being aware of the interdependence that connects us to all living beings on earth; that is, recognizing ourselves as integral parts of the global ecosystem -- the biosphere --, rather than from normative categories of domination, simple exploitation, or

utility. This is a position that is particularly relevant in Colombian constitutionalism, given the principle of cultural and ethnic pluralism that supports it, as well as the knowledge, customs and ancestral customs bequeathed by indigenous and tribal peoples [91]. Thus, in the following section, an alternative vision of the collective rights of ethnic communities in relation to their natural and cultural environment (that is, biocultural rights), will be explored.

Concept and scope of biocultural rights, towards the effective protection of biodiversity and bioculture.

5.11. The first thing that must be pointed out is that so-called biocultural rights, in their simplest definition, refer to the rights that ethnic communities have to administer and exercise autonomous guardianship over their territories -- according to their own laws and customs -- and the natural resources that make up their habitat, where their culture, their traditions and their way of life are developed based on the special relationship they have with the environment and biodiversity. These rights result from the recognition of the deep and intrinsic connection that exists between nature, its resources, and the culture of the ethnic and indigenous communities that inhabit them, which are interdependent with each other and cannot be understood in isolation.

The central elements of this approach establish an intrinsic link between nature and culture, and the diversity of the human species as part of nature and manifestation of multiple life forms. From this perspective, the conservation of biodiversity necessarily leads to the preservation and protection of the ways of life and cultures that interact with it. In a country as rich in environmental aspects as Colombia, which is considered fifth among the seventeen most mega-biodiverse countries in the world, and which has natural forests and paramos in about 53% of its territory -- which provides water to 70% of the national population -- and in which there are more than 54,871 animal and plant species, 341 different types of ecosystems, and 32 terrestrial biomes [92], and including important ancestral cultures. The protection and preservation of cultural diversity is essential to the conservation and sustainable use of biological diversity and vice versa.

5.12. However, as a legal concept, biocultural rights seek to integrate in one place scattered provisions regarding rights to natural resources and the culture of ethnic communities, which in our Constitution appear in articles 7, 8, 79 , 80, 330 and 55. In other words, biocultural rights are not new rights for ethnic communities; instead, they are a special category that unifies their rights to natural resources and culture, understanding them as integrated and interrelated. In this sense, the Indian author Sanjay Kabir Bavikatte, one of the most important world theorists in this field, has highlighted that "the concept of biocultural rights is old. It has been widely used to indicate a way of life that develops within a holistic relationship between nature and culture. Biocultural rights reaffirm the deep link between indigenous, ethnic, tribal and other communities, with the resources that comprise their territory, including flora and fauna"[93].

5.13. For its part, the philosophical foundation of biocultural rights is configured in a holistic vision [94], characterized by three approaches: (i) first, combining nature and culture, where biodiversity -- understood as a broad catalog of biological resources-- and cultural diversity -- understood as the set of traditions, uses and cultural and spiritual customs of the peoples -- are considered as inseparable and interdependent elements; (ii) second, analyzing the concrete experiences over time of ethnic communities, from a perspective that values the past and the

present and that projects towards the future in order to establish an analysis of the current system, oriented exclusively to prioritizing the concepts of development and sustainable development, with the aim of helping them to preserve their biocultural diversity for future generations; and , (iii) third, highlighting the singularity and at the same time the universality that represents the existence of ethnic peoples for humanity [95].

5.14. As we have seen, a central element within the paradigm of biocultural rights is the concept of community -- a term that includes indigenous, ethnic, tribal and traditional communities whose ways of life are predominantly "Based on the territory and those who have strong cultural and spiritual ties, with their traditional lands and resources. While communities are qualified by various categories including ethnicity, shared resources, common interests and political structure, the term community here is used to denote groups of people whose way of life is determined by their ecosystem"[96].

In this sense, for example, the local, ethnic and indigenous communities that assert their biocultural rights, are based on the following precepts: "1.- the conservation and sustainable use of the biological diversity of the communities based on a way of life, and biocultural rights must protect this way of living; 2 .- The way of life relevant to the conservation and sustainable use of biological diversity is linked to land tenure and use, and also, rights to culture, knowledge and different practices. Biocultural rights establish the link between the community or what is called 'peoplehood' and ecosystems" [97].

In effect, these rights imply that communities must maintain their distinctive cultural heritage, which is essential for the maintenance of the planet's biological diversity and cultural diversity; these rights "are not simply property claims in the typical sense of the economy or the market, in which they can be an alienable, commensurable and tradable resource; rather (...) biocultural rights are the collective rights of communities that carry out roles of traditional administration according with nature, as conceived by indigenous" [98] or traditional ontologies.

5.15. In addition, biocultural rights have also had a historical-social origin, as they arose, mainly, as a consequence of the implementation of western models of development and sustainable development, and their social, cultural and ecological effects on ethnic communities in different parts of the world.

In this regard, Professor Arturo Escobar, for example, has pointed out that although the main purpose of the "global strategy for sustainable development" focused since its launch in 1987 on the eradication of poverty and the protection of the environment, its effects have not been what was hoped for. Specifically, he estimates that "the concept of development was - and continues to be in great part - a centralist, hierarchical, ethnocentric and technocratic political approach that understands populations and culture as abstract objects and as statistical figures that must be accommodated according to the progress priorities. This model of development has been conceived not as a cultural process but, on the contrary, as a universal system of technical interventions whose purpose is to deliver resources, goods and services to the peoples (judged within this criterion) with the greatest needs. That is why it is not surprising that development has become such a destructive force for the cultures of the so-called Third World, ironically, in the name of the best interests of the people"[99].

To this, he adds that sustainable development as a global strategy "(...) is the last attempt to articulate modernity and capitalism. It implies the redefinition of nature as an environment, the re-inscription of the Earth as capital from the perspective of science, the reinterpretation of poverty as an effect of the destruction of the environment; and the development of new models of administration and planning contracts in charge of the States that serve as arbiters between nature and peoples. (...) This development discourse has been the most effective operator of representation and identity policies in a large part of Asia, Africa and Latin America since the post-war period" [100].

Further developing this argument, Escobar concludes that in the face of what - in his opinion - has characterized the failure of the development model, there are other alternatives: "diverse experiences worldwide have shown that the Western development model (based on the conception of economic growth) is the worst option for ethnic communities. To access alternative models such as post-development, communities need to experiment with alternative production strategies, and simultaneously develop a semiotics of resistance to the modern restructuring of nature and society"[101].

5.16. On the other hand, theorists such as Bavikatte, Bennett and Robinson [102] affirm that there were four specific circumstances that allowed the advent of biocultural rights: (i) the questioning of the strictly vertical development paradigm, that is, that conceived from centers of power towards the periphery [103]; (ii) the advent of research work within the framework of the "movement of the commons" [104]; (iii) the evolution, understanding, development and dimensioning of third generation rights [105]; and finally, (iv) the development of a specific category of rights for minorities whose purpose has been the protection of the claims of indigenous, black and farm communities. [106]

5.17. In summary, it can be concluded that the central premise on which the conception of bioculturalism and biocultural rights is based on a relationship of profound unity between nature and the human species. This relationship is expressed in other complementary elements such as: (i) the multiple ways of life expressed as cultural diversity that are intimately linked to the diversity of ecosystems and territories; (ii) the richness expressed in the diversity of cultures, practices, beliefs and languages is the product of the coevolutionary interrelation of human communities with their environments and constitutes an adaptive response to environmental changes; (iii) the relationships of different ancestral cultures with plants, animals, microorganisms and the environment actively contribute to biodiversity; (iv) the spiritual and cultural meanings that indigenous peoples and local communities give to nature are an integral part of biocultural diversity; and (v) the conservation of cultural diversity leads to the conservation of biological diversity, so that the design of policy, legislation and jurisprudence must be focused on the conservation of bioculturalism [107].

5.18. Consequently, public policies for the conservation of biodiversity must adapt and focus on the preservation of life, of its various manifestations, but mainly on the preservation of conditions needed for biodiversity to continue deploying its evolutionary potential in a stable and indefinite manner, as the Court has indicated in its abundant jurisprudence [108]. Similarly, the obligations of the State concerning the protection and conservation of the lifestyles of indigenous peoples, black

and farm communities, means guaranteeing the conditions for these forms of being, perceiving, and apprehending the world to survive.

a. Some juridical and jurisprudential foundations for the protection of bioculturalism and biodiversity.

International Instruments

5.19. Currently, the concept and scope of biocultural rights is widely recognized not only in the framework of environmental law but also international law. In fact, a series of international instruments that are integrated into the Colombian legal system as part of the block of constitutionality contribute to a constitutional foundation, and the legally recognized intrinsic relationship that exists between biological and cultural diversity, which gives rise to bioculturalism and biocultural rights.

The first of the conventions ratified by Colombia in this matter is ILO Convention 169 on Indigenous and Tribal Peoples (1989) [109]. This convention establishes a biocultural approach by recognizing the special linkage of the ways of life of indigenous and tribal peoples with the territories and their resources. In particular, article 13 requires States to respect the special importance and spiritual values that indigenous peoples have with their lands and territories, the agreement contains several provisions that cover not only the indigenous peoples but also the black communities, a fact that has been recognized and implemented by this Constitutional Court in its jurisprudence, as will be seen below. Additionally, this agreement recognizes an integral link between the way of life of indigenous and tribal peoples, their cultural identity and spiritual conception with their territories, and the different forms of life or biodiversity present in those habitats.

A second instrument is the Convention on Biological Diversity(1992) [110], ratified by Law 165 of 1994. Without a doubt, this is an agreement that par excellence has addressed biocultural rights, not only from a scientific perspective of biological diversity, but also in relation to the populations that interact with it. In fact, it develops this latter aspect by recognizing the fundamental role that the ways of life of indigenous and ethnic communities play in the conservation of biodiversity. Likewise, the agreement seeks to consolidate the conservation and sustainable use of biological diversity, and the fair and equitable participation of communities in the benefits derived from research and development of biodiversity [111].

A third instrument is the United Nations Declaration on the Rights of Indigenous Peoples (2007) which Colombia adopted with some clarifications. In general terms, the declaration recognizes the right of indigenous peoples to their cultural identity, to be different and to be respected as such. Among its provisions, it also recognizes that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable, equitable development and to the proper management of the environment. The recognition made by the declaration on cultural identity and integrality underscores the importance of indigenous peoples having control over their lands, territories and resources to maintain and strengthen their institutions, cultures and traditions. Although this declaration is not a binding instrument, it is not only a reference but an

additional criterion of interpretation within our legal system since it comes from the General Assembly of the United Nations.

In the same sense, the recently approved American Declaration on the Rights of Indigenous Peoples (2016) (DADPI) recognizes the right of these peoples to self-identification, to self-determination, to autonomy, organization and self-government, to the protection of their identity, integrity and cultural heritage, and control over their lands, territories and resources, among others. These rights strengthens the guarantee of their collective rights in the hemisphere and the recognition of other rights, including biocultural rights. In the same sense as the Universal Declaration, the DADPI, although it is not a binding treaty, constitutes a valid reference point within our system.

Finally, the UNESCO Convention for the Safeguarding of Intangible Cultural Heritage (2003), ratified by Colombia through Law 1037 of 2006, should also be reviewed, according to which the parties must adopt measures to protect -- and safeguard -- intangible cultural heritage in areas such as, for example, oral traditions and expressions, including language as a vehicle of heritage; social uses, rituals and festive acts; knowledge and uses related to nature and space; and the traditional artisanal techniques of ethnic communities, all closely related to biocultural rights. In short, this convention gives rise to important protection and safeguarding of obligations that States have in relation to intangible cultural heritage. [112]

5.20. In the development and application of some of the international instruments previously mentioned, such as the CBD, strategies have been implemented in various parts of the world to build biocultural practices that allow protecting and shaping the rights of ethnic communities for the conservation of their cultural diversity in relation to biological diversity, the territory, and the natural resources that surround them (and of those natural resources that are considered part of the territory). In this sense, States, populations and local communities that have adopted the concept of biocultural rights, have achieved a significant change in the protection of their ecosystems, resources, natural species and ancestral cultures, as a result of the establishment of legal rules called Biocultural Communities Protocols. The main objective is to provide the necessary legal and administrative tools to ethnic communities to defend their rights against third parties (companies, multinationals, etc.), promoting interaction and strategic dialogue between the different actors (state, private or local) that can have an impact on a specific ethnic territory, generally, through large development projects.

5.21. The international instruments, along with the cases and the regional and global experiences here reviewed show the growing recognition of the need to protect the intrinsic and interdependent relationships of indigenous peoples and ethnic communities with their natural habitat, their territories, its resources and with biodiversity. The relationships and particular meanings of plants, animals, mountains, rivers and other constituent elements of the territory in each culture are recognized as part of the distinctive ways of life of ethnic communities.

In this regard, international law has established some of Colombia's obligations to protect the various forms of relationships that ethnic communities have with their lands, territories and biological organisms, and the knowledge associated with their use. And, on the other hand, it evidences the need to develop an approach that brings together in one place the biocultural

diversity of the nation -- that is, the integration of cultural diversity with biological diversity-- as the cardinal criterion of public policy and national legislation.

Jurisprudence of the Constitutional Court

5.22. The jurisprudence of this Court, from its first judgments, in developing the founding pillars of our SRL formulation, has recognized the importance of the constitutional principle of the ethnic and cultural diversity of the nation, from different approaches laying the foundation for the protection of cultural diversity. The cases and issues that the jurisprudence has considered in this regard have been varied but, in all, the importance of this principle has been invariably recognized, granting it a predominant place in the determination of multiple issues of the interests of peoples and ethnic communities that live in Colombia [113]. A brief recount will be presented.

5.23. From the outset, the Court's work focused on building the foundations of the theoretical and conceptual framework that would later allow establishing the scope of the principle of ethnic and cultural diversity of the nation in its different dimensions. In this context, a broad series of decisions [114] have been made in which it has been established -in general terms- that within a plural and democratic society such as the dimension of the 1991 Charter, indigenous peoples and ethnic communities must be recognized as collective subjects of fundamental rights. This is because they represent ancestral ethnic and cultural values, as well as forms of life closely linked to the special relationship that their traditions, uses and customs have -- as cultural manifestations, with their territories and natural resources. Along these lines, judgment T-188 of 1993 stated:

> "The collective property right exercised over indigenous territories is of essential importance to the cultures and spiritual values of the aboriginal peoples. The special relationship of the indigenous communities with the territories they occupy is highlighted, not only because they are their main means of subsistence but also because they constitute an integral element of the worldview and religiosity of the aboriginal peoples.The fundamental right to collective property of ethnic groups implies, given the constitutional protection of the principle of ethnic and cultural diversity, a right to constitutional protection that is in the hands of the indigenous communities." (Bold not in original text)

5.24. Similarly, judgment T-380 of 1993, reiterating some arguments of T-428 of 1992, reaffirmed that ethnic communities are collective subjects, and in this sense, also holders of fundamental rights. On this occasion, the Court specified that:

> "The fundamental rights of indigenous communities should not be confused with the collective rights of other human groups. The indigenous community is a collective subject and not a simple summation of individual subjects who share the same diffuse or collective rights or interests. In the first case, the ownership of fundamental rights is indisputable, while in the second, those affected may proceed to defend their rights or collective interests through the exercise of the corresponding popular actions."

5.25. Likewise, in judgment T-257 of 1993, the Court protected the right of some ethnic communities of the Vaupés, as collective holders of fundamental rights, to be consulted on the construction of an airstrip within their territory in order to allow the realization of religious

proselytizing activities in the region, clarifying that: "a resguardo is not a territorial entity but a form of collective property of the land. The collective property that arises from the resguardo is the development of several articles of ILO Convention 169, through which indigenous peoples have the right to participate in the use, administration and conservation of the natural resources existing on their lands."

5.26. In a judgment of constitutionality of the same year, the C-027 of 1993, the Court had the opportunity to examine another dimension of the principle of ethnic and cultural diversity; this time, in view of Law 20 of 1974, by which the Concordat between the Catholic Church and the Colombian State was approved. This law was declared unenforceable because it was contrary to the principle of ethnic and cultural diversity of the nation, to the extent that the norm at issue was not only "integrationist or homogenizing" with respect to a particular religion, but also ignored the dignity and autonomy of the members of the indigenous and ethnic communities, and therefore their diversity in religious and spiritual matters.

5.27. A short time later, in judgment T-342 of 1994, the Court upheld the fundamental right to the ethnic and cultural integrity and diversity of several nomadic ethnic communities of Guaviare with respect to a private association that sought to continue developing a process of assimilation and integration to the majority society in the same territories of their area of influence. On that occasion, the Court extended the scope of protection of the asserted fundamental right by stating that: "It would not be risky to affirm that the recognition of the ethnic and cultural diversity of the indigenous population is in harmony with the different provisions of the National Constitution regarding conservation, preservation and restoration of the environment and the natural resources that make it up. If we consider that indigenous communities are also a natural human resource that is considered an integral part of the environment, especially when the indigenous population usually occupies territories with exceptional ecosystems, characteristics, and ecological values that must be conserved as an integral part of the natural and cultural heritage of the Nation. In this way, the indigenous population and the natural environment constitute a system or universe that deserves the integral protection of the State. "

5.28. Subsequently, the Court examined in C-519 of 1994 the constitutionality of Law 165 of 1994 approving the Convention on Biological Diversity subscribed to by Colombia and by declaring it complaint, concluded that intellectual property in the matter of biological diversity cannot threaten nor ignore the traditional knowledge of ethnic communities. In this regard, it was pointed out that "considering the enormous ecological capital of our country, it is of the utmost importance that the National Government give its full attention when deliberating in international forums, regarding the convenience of establishing an intellectual property regime. in the field of biological diversity, since the traditional knowledge of the indigenous communities must enjoy special protection, which, in addition, is backed by the duty of the State to protect the natural and ecological heritage of the Nation (articles 8 and 27 CP)".

5.29. In another ruling, the C-139 of 1996 examined the constitutionality of the law 89 of 1890 that in some of its articles referred to the indigenous as "savages" and object of "civilization". In this judgment, the Court considered that the integrationist policy of assimilation with respect to the ethnic communities in law 89 of 1890 openly contradicted the ethnic and cultural diversity established in the 1991 Constitution, in as much as:

> "The terminology used in the text, which when referring to" savages" and "reduction to civilization", ignores both the dignity of the members of indigenous communities and the fundamental value of ethnic and cultural diversity. A pluralist conception of intercultural relations, such as that adopted by the 1991 Constitution, rejects the idea of implicit domination in integrationist tendencies."

5.30. In judgment SU-510 of 1998, the Court synthesized the principle of ethnic and cultural diversity indicating that it is a consequence of the democratic, participatory and pluralistic character [of Colombia], and obeys the acceptance of the multiplicity of life forms, races, languages, traditions and systems of understanding the world different from those of Western culture. In that sense, the Court pointed out that "for the Court, the principle of diversity and personal integrity is not simply a rhetorical declaration, but constitutes a projection, on a legal level, of the democratic, participatory and pluralistic character of the Colombian republic and obeys 'the acceptance of otherness linked to the acceptance of the multiplicity of life forms and systems of understanding of the world different from those of Western culture'" [115].

5.31. However, in judgment T-652 of 1998, which reiterated SU-039 of 1997, the Court had the opportunity to examine the relationship between extractive and development projects and the duty of prior consultation with ethnic communities. In effect, the Court found that the exploitation of natural resources in territories traditionally inhabited by indigenous communities has a strong impact on their way of life and, for this reason, it ratified the constitutional doctrine of unification relative to the protection that the State owes to such peoples, and in a very special way considered that in those cases, their right to be previously consulted is fundamental:

> "The exploitation of natural resources in indigenous territories makes it necessary to harmonize two conflicting interests: the need to plan the management and use of natural resources in the aforementioned territories to ensure their sustainable development, conservation, restoration or replacement (Article 80) CP), and that of ensuring the protection of the ethnic, cultural, social and economic integrity of the indigenous communities that occupy those territories, that is, of the basic elements that constitute their cohesion as a social group and that, therefore, are the substrate for their subsistence. That is to say, that an equilibrium or balance must be sought between the economic development of the country that demands the exploitation of said resources and the preservation of said integrity that is a condition for the subsistence of the indigenous human group."

5.32. On another occasion, in judgment T-955 of 2003, the Court protected the rights of the black communities of Cacarica (Chocó) to diversity and ethnic and cultural integrity, to participation and subsistence in the actions of logging by Darien Company, which deforested their ancestral territory. The Court interpreted ILO Convention 169 broadly, extending its interpretation to black communities, thereby consolidating a biocultural approach to recognize the links of the ways of life of indigenous peoples, tribal, and ethnic group communities with the territories and the use, conservation and administration of their natural resources [116].

5.33. Similarly, the Court has progressed in the interpretation of the principle of cultural integrity, linking it to the guarantee of rights over the territory, which denotes the establishment of a clear

biocultural approach in its jurisprudence regarding the rights of the ethnic communities. For example, in judgment T-433 of 2011, to resolve a tutela filed to protect the integrity, identity, autonomy and collective property of an Embera-Dobida community based in Chocó, the Court reiterated a series of jurisprudential rules that are to protect the special relationship that indigenous peoples have with their territories; the recognition and respect of ethnic and cultural diversity as a principle that allows the subsistence of ethnic communities, the preservation of the spiritual value that for all ethnic groups entails their relationship with the land and its territory, and its right to have a legally recognized territory [117].

5.34. On the other hand, the Court has also protected the identity and cultural integrity of ethnic communities by specifying their theoretical-conceptual scope, for example, to prevent the improper use or abuse of proper and distinctive names of indigenous or ethnic identity in Western products with commercial purposes. In judgment T-477 of 2012, this Court pointed out that cultural identity "is a set of characteristic features (notion of identity) of a society or a social group related to their way of life, their traditions and beliefs in the spiritual, material, intellectual and emotional fields that generates in its members a sense of belonging to this social group, and that is a product of their interaction in a given social space (notion of culture)".

5.35. In judgment C-1051 of 2012[118], the Court considered that the rules of the International Convention for the Protection of Plant Varieties in regulating matters related to natural resources and the collective territory of ancestral peoples may end up affecting Colombian ethnic communities by preventing them from participating in decision-making about the management of their uses, customs and agricultural activities, which is contrary to the provisions of the Constitution in terms of ethnic and cultural diversity. In a broader sense, this Court established that ethnic groups require territory to survive and to develop their culture in which they are settled. To this, it was added that "from this point of view, the use of the natural resources found in such territories, through the development of common activities such as hunting, fishing and agriculture, is a transcendental issue for the definition of the particular and diverse identity of these peoples', which entails, then, the right of communities to participate and intervene in decisions related to such activities" [119].

5.36. Finally, in judgment T-576 of 2014, the Court protected the fundamental right to prior consultation of several black communities of San Andrés and Providencia, excluded from a government summons for not accrediting collective title over their territories. In this case, the right to cultural identity and recognition of the ancestral culture of the black communities as distinct from the national majority was protected, pointing out in this regard that "what is at issue is to guarantee that the indigenous and tribal groups have the opportunity to pronounce on those projects or decisions that may alter their ways of life, affect their own development process or impact, in any way, their customs, traditions and institutions".

5.37. In conclusion, it should be noted that both the constitutional jurisprudence and the instruments of international law that have been ratified by Colombia, as well as other non-binding additional instruments on the rights of the ethnic communities outlined here, have consolidated the development of a comprehensive approach that has helped to protect both the biological diversity and the cultural diversity of the nation, recognizing the deep interrelations of indigenous peoples, black and local communities with the territory and natural resources.

Special protection of rivers, forests, food sources, the environment and biodiversity. The fundamental right to water, the protection of nature, and food security

The protection of the environment and biodiversity is a priority and represents a higher interest not only in the international treaties signed by Colombia and the Political Constitution, but also in the jurisprudence of the Court -- which, in this sense, has presented important advances in the protection of the rights of the ethnic communities from an integral perspective -- that is, biocultural. Thus, this section will present the constitutional principles of our SRL model that protects two constituent elements of the environment that, due to their relevance to the case under examination, should be studied individually: (i) the fundamental right to water (water resources); and (ii) forest protection and food security.

a. The fundamental right to water. Normative and jurisprudential evolution.

5.38. Water is of special importance in the matter under review by the Constitutional Court, since it constitutes the central element for the preservation of the life of the ethnic communities of Chocó, from two complementary perspectives as a fundamental right -- protection of the Atrato River and its tributaries -- and as a public service -- guarantee of drinking water supply by the Colombian State.

From a global perspective, it is understood that water occupies 71% of the surface of the planet and chemically is present in the three states of matter (solid, liquid and gas). The continental waters that are in liquid state such as rivers, lakes, lagoons, streams, creeks and groundwater only constitute 1%, those that are in solid state as polar ice caps and glaciers occupy 2%, while the water of the oceans is estimated at 97% [120].

5.39. Such is the importance of water on planet Earth that, without its presence, life would not be possible as we know it. In fact, all peoples, cultures and traditions from the most remote antiquity in their different cultural, mystical or religious conceptions settled on the shores of large water sources, mainly rivers, and discovered in them a founding or creation myth: Sumerians, Egyptians, Hebrews, Indians, Chinese and even Vikings. It is enough to begin with the civilizations that settled in Mesopotamia, on the banks of the Tigris and Euphrates rivers, who imagined the universe -- in the Epic of Gilgamesh, the oldest literary work of the human species found so far -- as "a closed dome surrounded by a sea of primordial salt water" which was nothing other than the very origin of creation.

For the Egyptians who developed, thanks to the Nile River, "in the beginning of time there were only immense masses of turbid waters covered by absolute darkness" that constituted an infinite ocean known to them as the primordial ocean Nun, which contained all the elements of the cosmos.

The Hebrews wrote in the book of Genesis, the oldest in the Bible, that the moments prior to creation occurred when "the earth was without form and void, and the darkness was on the face of the deep, and the Spirit of God was moved on the face of the waters. " Likewise, the Indians, who

dispersed along the Ganges and Indus rivers, and the Chinese through the Yellow River (Huang-He), also sang their creation myths and their deeds in relation to them.

For their part, the Vikings -- or Nordic tribes, considered barbarians by the Romans -- explain the origin of the world in a tree called "Yggdrasil, the great ash of the world" that springs from a well of water where all the wisdom of the cosmos is concentrated. Finally, most foundational cosmogonies of our aboriginal tribes explain the origin of the universe through an intimate relationship between lagoons and rivers, vegetation and animals with a mystical being that procreates humanity.

5.40. Now, coming down to a national perspective and to the specific case submitted to the Court, it is necessary to refer to one of the most important rivers in the country: the Atrato. This river, considered one of the most abundant in the world, begins in the Altos de la Concordia and the Farallones de Citará at an altitude of 3,900 meters above sea level, on the hill of Caramanta, jurisdiction of the municipality of Carmen de Atrato, in the district of Chocó. The Atrato River, the main waterway of the Chocó due to the great flow of its waters, has 150 tributaries, some of which are navigable. The river has 8 ports, the main one being Quibdó. Navigable throughout the year in 500 kilometers for boats up to 200 tons, it serves as a route for the district's trade, some municipalities of Antioquia, and the port of Cartagena. This river has not only allowed regional integration and fulfills functions of provision of livelihoods and trade for Chocó, but has also served as a reference of cultural identity for the black, mestizo and indigenous communities that have made it and its tributaries their natural habitat.

With an approximate area of 40,000 km^2 (24,855mi^2), the Atrato River Basin is limited by the Western Cordillera, the Serranía del Baudó and the prominences of the Isthmus of San Pablo. Its hydrographic basin is not so big in relation to the volume of water that it transports, but being in the zone of great precipitation in America, nominated the biogeographic Chocó, it has immense volume. This territory, of extraordinary richness and complexity, is considered one of the places with the greatest biodiversity on the planet. Its flora and fauna are immense and for the most part they are still known and valued. It is rich in mineral resources such as gold, platinum, copper, salt, phosphate rock and forest assets. The ethnic communities that inhabit it since ancestral times, mostly black, mestizo and indigenous, have made this basin, as well as the entire Pacific, their territory: the place where life is reproduced, and its culture is recreated.

5.41. With this introductory framework, the Court will review some national and international normative and jurisprudential precedents that have modeled and reformulated the paradigms that determine the way in which our SRL conceives nature and, in particular, water.

In this context, it is necessary to indicate that although the Colombian legislation contemplated from the Civil Code of 1887 several provisions related to the "domain of waters", it was not until the issuance of the Decree of Law 2811 of 1974 or "National Code of the renewable resources, natural resources, and protection of the environment" that there was, for the first time in the country, environmental-specific legislation. Consequently, the issuance of this decree represented, at least, a significant normative advance with respect to the understanding and consideration of the environment and natural resources from the State. With this objective, the orientation of the law was broadened in order to better regulate the relations of society with nature

in order to take into consideration the implications of social dynamics on biodiversity and the ecosystems that comprise it, as well as the implications of the environment in social life.

In general terms, the Decree of Law 2811 of 1974 established a series of obligations at the head of the State in order to regulate, manage, conserve, protect, order, and manage water from three perspectives: as common heritage, renewable natural resource, and good for public use.

Later, with the advent of the new Bill of Rights of 1991, which gave water a fundamental role, laws 99 of 1993 were issued, by which the Ministry of Environment and the National Environmental System (SINA) was created. One of its main functions is the special protection of water sources (article 1), and law 142 of 1994 establishes the regime of public domiciliary services, and establishes that the public services of aqueduct, sewerage, cleaning, electric power, distribution of combustible fuel, telephone services (landline and cellular) in the rural sector are essential (articles 1 and 4). In addition to other scattered regulations, it has been the custom of the State to include new provisions regarding water protection in the organic laws of development, such as for example, in Law 1450 of 2011, by which the National Development Plan 2010-2014 was issued, and in Law 1753 of 2015, by which the National Development Plan 2014-2018 was issued.

5.42. In contrast to the national level, the international arena contains numerous instruments (in the global and inter-American systems for the protection of human rights) that establish the State's obligation to protect and conserve water and that constitute an international standard. For example, from the global system, in Resolution AG / 10967 of the UN General Assembly, States and international organizations are urged to provide the necessary financial resources, improve capacities and transfer of technology especially in developing countries and intensify efforts to provide clean, pure, potable, accessible and affordable water and sanitation for all.

5.43. Similarly, General Comment No. 15 issued by the Committee on Economic, Social and Cultural Rights of the United Nations (ECOSOC), a body responsible for the interpretation of the International Covenant on Economic, Social and Cultural Rights (PIDESC), is one of the greatest advances in the recognition of the right to water as a human right [121]. In this, the Committee held that access to clean (potable) water is undoubtedly one of the essential guarantees to ensure an adequate standard of living, as an indispensable condition to avoid death by dehydration, to reduce the risk of diseases related to water, and to meet the needs of consumption, cooking, personal hygiene and domestic hygiene.

Additionally, it is pointed out that the right to water is a sine qua non requirement for the exercise of other rights, while "water is necessary to produce food (right to food); to ensure environmental hygiene (right to health); to procure life (right to work) and to enjoy certain cultural practices (right to participate in cultural life)".

5.44. This right has also been recognized in other instruments including declarations, resolutions or plans of action, which are adopted in International Conferences of the United Nations or that are elaborated by organizations that are part of this international organization such as the United Nations Development Program (UNDP) or by the Special Rapporteurs.

This international corpus iuris is including in, among others: (i) the Declaration of Mar del Plata (1977), which was the first call to the States to carry out national assessments of their water resources and develop national plans and policies aimed at satisfying the drinking water needs of the entire population. It also recognized that all people and towns have the right to have quality drinking water in sufficient quantity to satisfy their basic needs; (ii) the Dublin Declaration (1992), in which it was reiterated that the right to water is a fundamental right and warned about the threat posed by the scarcity and abusive use of "fresh water" for sustainable development, for the protection of the environment and ecosystems, for industrial development, food security, health and human well-being; (iii) the Declaration of Rio de Janeiro (1992), which was prepared in parallel to the Agenda 21 Action Plan, at the United Nations Conference on Environment and Development, is one of the main international instruments that regulate the right to water. This highlighted the importance of water for life and the need for its preservation. Chapter 18 establishes as a general objective to ensure that a sufficient supply of good quality water is maintained for the entire population of the planet, and at the same time preserve the hydrological, biological and chemical functions of ecosystems, adapting human activities to the limits of the capacity of nature and combating the vectors of water-related diseases; (iv) the Program of Action of the United Nations International Conference on Population and Development (1994), also makes a clear reference to the right to water in Principle No. 2, which states that: "human beings [...] have the right to an adequate standard of living for themselves and their families, including adequate food, clothing, shelter, water and sanitation"; and, (v) the New Agenda for Sustainable Development (2015), in which universal access to water and sanitation is among one of the 17 Global Objectives. The reference regarding access to water (Number 6) mandates that the States must unify efforts and adopt the necessary measures to guarantee universal access to safe and affordable drinking water, provide sanitary facilities, and promote hygiene practices at all levels for everyone by the year 2030.

5.45. On the other hand, in the inter-American system, composed normatively by the American Convention (CADH) and the Protocol of "San Salvador", among other instruments, there is no express mention of the right to water. Arguably, a systematic interpretation of these instruments would suggest that this is implicit in Article 4 of the ACHR, because the lack of access to water prevents the achievement of a decent existence or conditions of well-being. And Article 11 of the Protocol of San Salvador states that, "Everyone has the right to live in a healthy environment and to have basic public services" and the provision of drinking water is one of the main essential public services. Consequently, regional systems for the protection of human rights, through interpretation, have developed in their jurisprudence a set of standards related to this right [122].

Specifically, in the judgments of the Inter-American Court of Human Rights, the right to water has not been protected on its own, but in connection with the right to life, to health, and in respect of ethnic communities, their right to property has been protected. In this context, the most relevant cases refer to three Paraguayan indigenous communities that were displaced from their ancestral territories and removed to lands with uncertain natural resources for their subsistence and in a situation of complete abandonment by the State.

In the first case, the case of the Yakye Axa Community against Paraguay in 2005, the Inter-American Court, after recognizing that the right to life, "includes not only the right of every human being not to be arbitrarily deprived of life, but also the right to not generate conditions that prevent

or hinder access to a existence" noted that the inability to access water affects the right of the ethnic community to a dignified existence, as well as other rights such as education and cultural identity. In this regard, the court stated that: "the special effects of the right to health, and intimately linked to it, the right to food and access to clean water impact acutely the right to a dignified existence and the basic conditions for the exercise of other human rights, such as the right to education or the right to cultural identity. In the case of indigenous peoples, access to their ancestral lands and the use and enjoyment of the natural resources found in them is directly linked to obtaining food and access to water" [123]. (Bold not in original text)

In the case of the Sawhoyamaxa Community against Paraguay in 2006, the Inter-American Court once again linked access to water with the right to life. In its considerations, the court indicated that: "in the present case, together with the lack of land, the lives of the members of the Sawhoyamaxa Indigenous Community are characterized by the [...] precarious conditions of their homes and environment, and the limitations of access to and use of health services and drinking water, as well as marginalization due to economic, geographical and cultural causes" [124]. (Bold not in original text)

In the last case, that of the Xákmok Kásek Community against Paraguay of 2010, the Inter-American Court considered that the State had not taken the necessary measures to provide the ethnic community with the essential conditions for a dignified life, since it had not guaranteed the provision of water, food, health and education, among other human and fundamental rights. It also assessed that the lack of access to water fit for human consumption, together with the lack of access to food, health and education, which are considered basic provisions to protect the right to a dignified life, analyzed as a whole, led to the violation of the right to life in the aforementioned judgment [125].

However, this is not the only aspect with respect to which the right to water has been protected. The Inter-American Commission on Human Rights (IACHR) has issued a series of preparatory reports and investigations on the contamination of water sources in the territories of ethnic communities as a result of the development of extractive activities.

In its report on the "Situation of Human Rights in Ecuador" (1997), the IACHR referred to the case of approximately 500 thousand people from several thousand-year-old indigenous ethnic groups -- Quichuas, Shuar, Huaoranis, Secoyas, Siona, Shiwiar, Cofán and Achuar, all of whom lived in sectors of oil and extractive development -- and deemed their life and health to be at risk, given that the exploitation activities in their communities or nearby areas had contaminated the water they used to drink, cook and bathe in, the soil they cultivated to produce their food, and the air they breathed.

Also, in its report on "Access to Justice and Social Inclusion in Bolivia" (2007), the IACHR referred to the contamination of the waters of the Pilcomayo River in the districts of Potosí and Tarija. The report indicated that the contamination affected both indigenous peoples and other ethnic and farm communities whose agricultural activities and/or subsistence activities such as fishing, had been seriously diminished given the amount of toxic waste from metals and other elements produced as a result of extractive activities.

In both cases, the IACHR reminded the States that the right to life in dignified conditions is included in the American Convention, and that people are living in areas bordering rivers and polluted streams are suffering from grave situations. As a result of the projects of resource exploitation, it said it was the State's duty to adopt all the measures available to them to mitigate the harms that are taking place within the framework of the concessions granted by them, as well as to impose sanctions that may arise due to the non-compliance with the respective environmental and/or criminal regulations [126].

5.46. Now, we come to the constitutional jurisprudence in the matter, with consideration of the fact that one of the central problems of the present case comprises the fundamental right to water of the ethnic communities of Chocó. The main jurisprudential criteria that have been discussed above will be briefly reiterated. This main jurisprudential criteria has been established by the Constitutional Court in relation to this fundamental right since the T-570 of 1992 and the T-740 of 2011 until the C-035 of 2016, following the categorization of access to water established by the Committee DESC, that is, in accordance with the obligations of availability, accessibility and quality.

5.47. In fact, in line with the aforementioned precedents, the jurisprudence of this Court has also recognized that water is a vital resource for the exercise of fundamental rights for human beings and for the preservation of the environment.[127] In this way, it has established that (i) water in any of its states is an irreplaceable natural resource for the maintenance of health and to ensure the life of human beings [128]; (ii) water is the heritage of the nation, a good for public use and a fundamental right [129]; (iii) it is an essential element of the environment, and therefore its preservation, conservation, use and management are linked to the right of all people to enjoy a healthy environment [130]; (iv) the right to potable water for human consumption is a fundamental right, as its limitation seriously damages fundamental guarantees, among others, to a dignified life, health and the environment [131].

5.48. In the same way, this Court has indicated that the right to water derives from a series of correlative duties that are the responsibility of the State, among which the following stand out: (i) guaranteeing the availability, accessibility and quality of the resource [132]; (ii) issuing laws aimed at the realization of fundamental rights to water and to a healthy environment in all areas - social, economic, political, cultural, etc. - not only in the context of subjective controversies submitted to the jurisdiction of a court [133]; (iii) exerting extremely rigorous control over the economic activities that develop in sources of water [134].

5.49. Thus, the Chamber considers that the fundamental right to water is made effective through compliance with the State's obligations to guarantee the protection and sustenance of water sources, as well as the availability, accessibility and quality of the resource. Likewise, in order for the State to comply with these obligations, it is necessary that special protection be provided to the ecosystems that produce such a resource, such as natural forests, moors, and wetlands, since the latter are one of the main sources of water supply in the country, especially in large and medium-sized cities. The foregoing is of greater relevance when we consider that Colombia has not guaranteed the permanent and continuous supply of water resources for all the municipalities of the country [135].

5.50. In sum, the jurisprudence outlined here leads to the conclusion that although the right to water is not provided for in the Constitution as a fundamental right, the Constitutional Court does consider it as such. It is part of the essential core of the right to life in decent conditions, not only for when it is intended for human consumption, but as an essential part of the environment. Water is necessary for the life of the multiple organisms and species that inhabit the planet and, of course, for the human communities that develop around it, as we have seen. In this regard, the Chamber reiterates that the right to water has a double dimension as a fundamental right and as an essential public service. In particular, this is of special relevance for ethnic groups insofar as the preservation of water sources and the supply of water in decent conditions is essential for the survival of indigenous and tribal cultures, from a biocultural perspective.

b. The protection of forests and food security of ethnic communities.

5.51. Regarding the protection of water, forests, and food security and sovereignty, as has been mentioned, from its early jurisprudence, the Court has indicated that these are intimately related and interdependent, which is why the preservation of the environment, the protection of marine and terrestrial ecosystems, the protection of flora and fauna, the environmental defense of animal and plant species, and the guarantee of food sovereignty are imperative mandates for the authorities and the inhabitants of the entire national territory. In this sense, as already stated at the beginning of section 5, these rights are protected by the general clause of the right to a healthy environment and by the so-called Ecological Constitution that has had broad jurisprudential development. For this reason, first some considerations will be made about the general clause protecting the rights of ethnic communities to their territory and to existing natural resources, and later, the sovereignty and food security of ethnic communities that has been recently developed, which will be examined in greater detail.

5.52. In general terms, it was this concern for the protection of the environment and its resources, which led to the 1991 Constitution to elevate the right to a healthy environment to a constitutional level. The aforementioned environmental protection duty sought to provide the judges of the Republic with the necessary tools to safeguard the environments that form the necessary foundation to guarantee life as we know it, through the preservation and restoration of natural resources that still survive [136].

An example of such interpretation is in judgment C-431 of 2000. Regarding the right to a healthy environment, the judgment explained that "the environmental issue was, without a doubt, a serious concern for the National Constituent Assembly, because no modern Constitution can withhold from its authority the handling of a vital problem, not only for the national community, but for all humanity; for this reason, it has been rightly affirmed that the environment is a common heritage of humanity and that its protection ensures the survival of present and future generations" [137].

Thus, it is clear that the Constitution provides a catalog of duties contiguous to the recognition of rights, which should progress, so that in the shortest possible time a substantial transformation of relations with nature is achieved. This can be achieved if the understanding that man has of the ecosystems that surround him from an economic and legal perspective is reconsidered. In this context, the Court has stated the following:

> "From an economic perspective, the productive system can no longer extract resources or produce waste unlimitedly, subject only to the social interest, the environment and the cultural heritage of the Nation. It should also be limited by the common good and the general policies of the State. On the juridical plane, the Law and the State not only must protect the dignity and the freedom of man in front of other men, but also must protect against the threat that is represented by the exploitation and the exhaustion of natural resources; for which new values, norms, legal techniques and principles must be articulated, whereby the protection of collective values prevails over individual values"[138].

5.53. In this regard, the Chamber must point out that recent constitutional jurisprudence [139] has established that the right to food is a fundamental right recognized by various international human rights instruments. [140] Among the main ones is the International Pact on Economic, Social and Cultural Rights (PIDESC) which establishes in Article 11.1, the duty of the States to recognize the right of all people to an adequate quality of life, including a healthy diet and the fundamental right of every person to be protected against hunger.

For its part, the Committee of the PIDESC, as the competent body for the interpretation of said instrument, in its General Comment No. 12, established that the right to adequate food is exercised "when every man, woman or child, whether alone or in common with others, has physical and economic access, at all times, to adequate food or means to obtain it." This General Comment recognizes that in order to eradicate the problem of hunger and malnutrition, it is not enough to increase food production; it is also necessary to guarantee that the most vulnerable population has availability and access to food. Therefore, the Committee specified that the right to food has four components: a) availability, b) accessibility, c) stability and d) the use of food [141].

In general terms, in relation to the right to food at the global level, the communities that are devoted to the traditional subsistence economies, mostly indigenous, ethnic and rural, have faced, on the one hand, a great growth and technification of the food production industry, and on the other hand, the exploration and exploitation of natural resources for the development of mega-projects that have endangered their subsistence either by displacement of their territories or by contamination of natural sources. Consequently, the two situations have caused a detriment in the traditional practices of agriculture and/or aquaculture, causing the isolation of the trade and production of traditional food market communities, and with this, an adverse impact on their traditional subsistence economies.

Thus, the so-called sustainable development must go hand in hand not only with efficient planning relating to the exploitation of natural resources to preserve them for the future generations, but it must also have a social, ecological function in accordance with community interests and the preservation of historical and cultural values of the most vulnerable populations.

It is precisely in the context of the above considerations that the jurisprudence of the Constitutional Court regarding the right to food has been developed. As mentioned at the beginning of this section, the right to a healthy environment, biocultural rights and sustainable development are tied to the recognition and special protection of the rights of agricultural communities -- whether indigenous, ethnic or farmer -- to work and subsist on the resources provided by the

environment where they are located, and on which they guarantee their right to food. The practices and activities that they traditionally develop are part of their life development and, in some way, that relationship between the trade, the traditions and the space in which they develop and subsist, constitutes them as communities with the same cultural identity [142].

The Court has examined this issue in some judgments of which a brief recount will be presented.

5.54. In judgment C-262 of 1996, the Constitutional Court revised Law 243 of 1995 "By means of which the International Agreement for the Protection of Plant Varieties is approved". In this ruling, the Court considered that it was necessary to protect the traditional production practices of ethnic communities, such as indigenous, black and farm communities, because of the special relationship that exists between them and the natural resources with which they exercise their trade -- with particular attention to the imperative constitutional duty to safeguard and preserve the cultural and biological diversity of the Nation.

Additionally, the Court established, as an important criterion, the subsistence relationship that ethnic and farm communities have with natural resources, and in that regard, the Court drew attention for the need for projects or decisions on sustainable development to take place and for attention to be paid to the interests of these communities when their food depends on the resources they traditionally exploit and produce.

5.55. Another decision that has a special relevance is judgment T-574 of 1996, in which was recognized a acción de tutela filed by an Afro-Colombian community of fishermen from Salahonda (Nariño). The fishermen alleged the violation of their rights to freedom of trade and the marine ecology, due to the harmful consequences that were generated by the dumping of oil in the waters where they developed their fishing trade. The dumping of oil was caused by the lack of maintenance of underwater hoses owned by the company Ecopetrol S.A. In this case, the Court indicated that the State should guarantee the participation of the community in decisions that may affect the environment in order to protect the ecological and social diversity and integrity, and to plan the management and use of natural resources, guarantee their sustainable development, and their conservation, restoration or replacement.

To that extent, the Court concluded that sustainable development is a process to improve economic and social conditions and maintain natural resources and diversity and that it should strive to ensure social sustainability which "aims to raise the development of the control that people have over their lives and to maintain the identity of the community" and cultural sustainability, which"requires that development be compatible with the culture and values of the affected peoples".

5.56. Finally, in judgments T-348 of 2012 [143] and T-606 of 2015 [144], the concept of food sovereignty was protected in vulnerable communities, from the perspective of the ethnic, indigenous and rural communities that subsist on cultivation, production and distribution of food obtained from nature, and in particular, that: "food sovereignty includes, not only the free will of States and peoples to determine their food production processes; it also implies that these production processes guarantee the respect and preservation of artisanal and small-scale

production communities, in accordance with their own cultures and the diversity of the farm and fishing modes".

5.57. On the other hand, it should be noted that both constitutional jurisprudence and that of the Inter-American System have established that the right of ethnic communities over their ancestral territories goes beyond demarcation and includes the right they have to the use and respect natural resources, such as forests, animals, rivers, lakes and lagoons. In this way, access to their ancestral lands and the use and enjoyment of the resources found in them is directly linked to obtaining food and access to clean water [145].

In particular, the Inter-American Court has found that natural water sources are often the only places where indigenous peoples can access this element and even obtain many of their foods. In effect, this Court recognized in the case of the Saramaka People against Suriname (2007) the importance of clean water so that indigenous and tribal peoples can carry out essential activities such as fishing. Thus, it is the duty of the States to protect the indigenous territory from extractive activities that damage their right to property and subsistence. Although this does not mean that these activities cannot be carried out, it must be borne in mind that the property of the ethnic communities and their resources warrant special protection, which certainly includes the right to water, the protection of forests and food.

In this regard, the Inter-American Court has indicated that extractive activities, such as logging, can seriously affect sources of water for consumption such as rivers or streams. As a result, States have an obligation to ensure that these activities do not damage drinking water sources so that members of ethnic communities have access to water necessary for drinking, cooking, bathing, washing, irrigating, watering and fishing. [146].

5.58. As a brief conclusion of this section, it should be pointed out that both the constitutional jurisprudence and the instruments of international law that have been ratified by Colombia, as well as other non-binding additional instruments on the rights of indigenous peoples and ethnic communities, have consolidated the development of a comprehensive approach to protection that has helped to protect both the biological diversity and the cultural diversity of the nation, recognizing the deep interrelations of indigenous peoples and black communities with the territory and natural resources.

In this same sense, biocultural diversity is based in an ecocentric perspective which implies that policies, norms and interpretations about biodiversity conservation recognize the link and interrelation that exists between culture and nature. The policies, norms, and interpretations imply the participation of ethnic communities in the definition of public policies and regulatory frameworks, and guarantee the conditions conducive to the generation, conservation, and renewal of their knowledge systems, within the framework of a SRL.

In sum, the importance of the biological and cultural diversity of the nation for the next generations and the survival of the planet, imposes on the States the need to adopt comprehensive public policies on conservation, preservation and compensation that reflect the interdependence between biological and cultural diversity. In this way, biocultural diversity represents the most

integral and comprehensive approach to ethnic and cultural diversity in the face of effective protection.

6. Right to physical, cultural and spiritual survival of ethnic communities. Territorial and cultural rights.

6.1. Before continuing with the analysis, the Chamber considers it pertinent to refer in a brief historical note to the way in which the ethnic communities settled in the region that is the subject of the present case. The historical note is pursuant to the report of facts made by the communities themselves in the judicial inspection, which was carried out in Quibdó and the Department of Anthropology of the Universidad de Los Andes. Subsequently, the Chamber will continue with the proposed analysis regarding the territorial and cultural rights of the ethnic communities.

6.2. In the case of Chocó, the settlement of rural areas, mainly during the nineteenth century, was dispersed along the rivers that flow throughout the region. The settlements make the river a central space in all the economic, domestic and socio-cultural activities of the local inhabitants. "Even the river is the main factor of cultural identity in this region"[147].

According to the aforementioned report, the houses have been built on stilts along the rivers. All transport is based on mobility by these means. While fishing is one of the most important productive practices for local food, it is also a source of income. The women wash the clothes and the kitchen utensils in the river and from there they collect the water to consume. For children, it is the main place for recreation and socialization: "the river becomes the social space of everyday human interactions insofar as it constitutes the symbolic reference of identity of the individuals and of the groups that live on its shores"[148]. Likewise, the river is the most important of the geographical references. The origin of each person is indicated by the river from which one lives. More than referring to a town or village, what is mentioned is the river. In effect, there is a close and intimate relationship between the individual and the river, which is observed in expressions such as "he does not like to leave his river" or "when I return to my river" [149]. In this configuration the river represents a notion of home, a strong feeling of belonging full of symbolic, territorial and cultural values.

6.3. As a complement to the foregoing, it should be added that the Constitutional Court, in repeated jurisprudence, has recognized that indigenous, tribal and Afro-Colombian peoples have a concept of territory and nature that is alien to the legal canons of Western culture [150]. For these communities, as we have seen, the territory -- and its resources -- is intimately linked to its existence and survival from the religious, political, social, economic and even ludic perspectives. Therefore, it is not an object of dominion but an essential element of the ecosystems and biodiversity with which they interact on a daily basis (eg, rivers and forests). That is why, for the ethnic communities, the territory does not fall on a single individual -- as it is understood in the classical conception of private law-- but above all the human group that inhabits it, so that it acquires an eminently collective character.

On the other hand, it cannot be overlooked that for the ethnic communities, the territories -- particularly, those that have settled ancestrally -- and the natural resources present in them, do not have a value in economic or market terms. On the contrary, they are closely linked to their existence

and survival as culturally differentiated groups, from religious, political, social and economic perspectives. For this reason, the recognition of the rights to property, possession, and use of lands and territories occupied ancestrally and collectively is essential for their permanence and survival.

6.4. For example, in judgment SU-383 of 2003, the Court reiterated the importance of the special relationship that ethnic communities have with their territories. The Court indicated that the territorial conception of indigenous and tribal peoples does not agree with the vision of spatial ordering that operates in the rest of the Colombian nation, "because for the indigenous, territoriality is not limited only to an occupation and appropriation of the forest and its resources. Since the history of social relations transcends the empirical level and leads to techniques and strategies of environmental management, it cannot be understood without the symbolic aspects to which they are linked, and which are articulated in other dimensions that Western science does not recognize"[151].

6.5. Similarly, in the ruling T-955 of 2003, this Court indicated that the concept of "collective territory", including the natural resources that make it up, is also applicable to the black communities. This is because the right of these communities over their collective territory is based on the Political Charter and ILO Convention 169, without prejudice to the delimitation of their lands referred to in Law 70 of 1993, *"insofar as it is definitive and indispensable for these communities to be able to exercise their civil actions to which the constitutional recognition gives rise"*.

To this, the Court added that the collective property right in question includes, "the ability of black communities to use, enjoy, and dispose of the renewable natural resources existing in their territories, with the criteria of sustainability. That is to say that, since 1967, under the terms of Law 31, the national black communities, as tribal peoples, were recognized as having the right to collective ownership of the territories they occupy ancestrally and, therefore, the faculties of use and exploitation of their lands and forests. The exploitation of land and forests, by ministry of the law or prior authorization of the environmental authority, can be done by the black communities under the terms of the Natural Resources Code" [152].

6.6. Additionally, the Inter-American Court in relation to the collective concept of the ownership of the territories of ethnic communities, in the case of the Mayagna (Sumo) Awas Tingni Community (2001), determined that the communal concept of the land -- including as a spiritual place -- and its natural resources are part of its customary law. The communities' connection with the territory, even if it is not written, integrates their daily life, and the very right to communal property has a cultural dimension. In short, the habitat is an integral part of their culture, transmitted from generation to generation [153].

6.7. Thus, having described the deep and special relationship between ethnic communities, natural resources, territory and culture, we will make some observations about what Colombian constitutionalism has called the Cultural Constitution.

The obligation of protection and defense of the nation's cultural heritage is an imperative for public authorities and even for individuals. In this regard, this Court has argued that cultural identity is the manifestation of the diversity of communities and the expression of human and social

wealth, which is an instrument of construction and consolidation of organized societies, aimed at improving their relationships.

6.8. Culture was recognized by the 1991 Constituent as a pillar that requires special protection, promotion and dissemination of the State. The set of constitutional norms that protects cultural diversity as a fundamental value of the Colombian nation is broad, thus establishing the so-called axis of the "Cultural Constitution", which, like the ecological part of a systematic, axiological and finalist interpretation, comprises the various provisions to which the Court referred in judgment C-742 of 2006[154].

The *corpus iuris* of provisions that integrate the concept of the *Cultural Constitution* shows that, indeed, the protection of the nation's cultural heritage has special relevance in the Constitution. Insofar as it, the nation's cultural heritage, constitutes a sign or expression of human culture, of a time, of circumstances or life patterns that are reflected in the territory, but that exceed its limits and dimensions of its time. Then, the state safeguarding of the nation's cultural heritage makes sense because, after a process of formation, transformation and appropriation, it expresses the identity of a social group in a historical moment.

Similarly, although Articles 8 and 70 Superior, enshrined the duty of the State to protect the cultural wealth of the Nation and promote and encourage access to the culture of all citizens, there are no precise formulas to reach that goal. Thus, it must be understood that the Constituent Assembly left the legislator or the executive in charge of that regulation.

6.9. From these references, we can see how the model implemented in the 1991 Charter favors the recognition of the *Cultural Constitution* --that includes ideas, beliefs, behaviors, myths, feelings, attitudes, acts, customs, institutions, codes, goods, artistic forms and languages of all the members of society; in other words, the nation's cultural wealth. In this sense, it is convenient to reiterate what was expressed by this Court in the judgment C-639 of 2009, in which it stated the following:

"The term cultural rights refers to the subclass of human rights in the field of Economic, Social and Cultural Rights, which includes fundamental rights and freedoms, rights of benefit and constitutional determinations of the State's aims in cultural matters; whose pretense is the search for one's personal and collective identity that places the person in their existential environment in terms of their past (tradition and conservation of their historical and artistic heritage), present (admiration, creation and cultural communication) and future (education and cultural progress, scientific and technical research, and the protection and restoration of the environment)".

In connection with this, , it is appropriate to affirm that the step towards a Social Rule of Law axiomatically implies the recognition and implementation of the so-called Economic, Social and Cultural Rights (ESCR).

6.10. Prerogatives that find support in international tools, which constitute relevant interpretive criteria for the determination of content of the right to culture. Such a tool like the Universal Declaration on Cultural Diversity (2001), which recognizes that culture is composed of different forms through time and space, and that this cultural diversity is the common heritage of humanity. These cultural rights are reflected in and in turn reflect universal and inseparable human rights.

In this regard, the Court in judgment C-434 of 2010 stated that General Comment No. 21 of the Committee on Economic, Social and Cultural Rights (CESCR), concerning the right of all persons to take part in cultural life, recognizes that the full promotion and respect of cultural rights is essential for the maintenance of human dignity and for social interaction between individuals and communities in a diverse and multicultural world. This document also clarifies that the following obligations of the State derive from the right to participate in cultural life - Article 15 of the International Covenant on Economic, Social and Cultural Rights (PIDESC):

> "(i)not obstruct participation, (ii) ensure conditions for participation, (iii) facilitate such participation, and (iv) promote cultural life, access and protection of cultural property. To this it adds that the right to participate in cultural life includes (a) the right to participate in cultural life, (b) the right to access it, and (c) the right to contribute to its development. In conclusion, the Committee indicates several conditions necessary for the realization of the right in an equitable manner and without discrimination: availability, accessibility, acceptability, adaptability and suitability (cultural)."

From these provisions and documents, we can deduce the constitutional recognition of the right to culture, which imposes on the State, among others, the obligations to respect, protect, promote and guarantee the equal access, participation and contribution of all to culture; all of which is to be done in the framework of recognition and respect for ethnic and cultural diversity. These obligations have also been called cultural rights.

In this sense, for the Court it is clear that the concept of a Cultural Constitution is a substantial part of the configuration of the Social Rule of Law. The Cultural Constitution entails the mandate to protect the right to culture as a guarantee that determines values and references not only for those who belong to the present, but as a mechanism of constant dialogue with the past and the future generations, and their history.

6.11. In conclusion, it is important to highlight that in the constitutional protection of culture includes all the Colombian ethnic communities, their ways of life, their customs, languages and ancestral traditions, as well as their cultural and territorial rights and the deep relationship that these communities have with nature. In the case under review, these communities are allegedly being threatened by the intensive activities of illegal mining with toxic chemical substances and heavy machinery in the Atrato River Basin, tributaries, and forests and in the territories of black and indigenous communities. If so, this mineral exploitation would put in imminent risk not only their physical existence, the perpetuation and reproduction of the ancestral traditions and culture, but also the habitat and the natural resources of the place where the identity of the communities is built, strengthened and developed acting as ethnic groups.

7. Mining and its effects on water, the environment and human populations: precautionary principle in environmental and health matters. The case of the ethnic communities of Chocó that inhabit the Basin of the Atrato River.

After having examined in the previous section the constitutional relevance of the protection of rivers, forests, food sources, the environment and biodiversity in relation to the territory and

culture of ethnic communities, this section will address mining activity, first, as a state development strategy (as a mining-energy policy) and subsequently, in a concrete manner with respect to its execution in the district of Chocó. Thus, the proposed analysis will focus on (i) the historical panorama of mining in Colombia; (ii) mining in Chocó; and (iii) the application of the precautionary principle in environmental and health matters.

Historical panorama of mining activity in Colombia.
Background.

7.1. Within the framework of this analysis, where the Chamber has specified the special scope of protection that our Constitution grants to the environment, natural resources, and ethnic communities, it is also necessary to examine, pursuant to the case under review, the constitutional standards under which the social, historical, and environmental impact of the execution of the extractive legal and illegal mining activities will be analyzed and evaluated.

Indeed, mining activity - legal and illegal - raises important questions not only at the national level but also at the international level due to the deep constitutional tension that it poses inn general terms, between the right to development of States and respect for the fundamental rights of communities where such projects are developed. In this regard, and from a global perspective, Professor Julio Fierro Morales has indicated that in this kind of analysis the following reflection should be considered:

> "Mining in Colombia must be analyzed from the geostrategic perspective, in which the world can be divided in terms of the global market into two types of countries: a Global North which includes countries with high growth rates and immediate needs for raw materials to be transformed and used in highly specialized internal markets and exported with high added value. And a Global South to which poor countries belong, generally with high rates of inequality in the distribution of income, which supply raw materials in markets predominantly managed by companies belonging to the first group of countries." [155]

7.2. In this sense, it should be noted that if there is a process that is rooted in the developmental history of Colombia, it is that of mining, which began with the establishment of the Spanish mining colonies on the mainland in America. The first of these was in the gold mines of Veraguas (Panama, 1507), and the second, which was called Santa María de la Antigua del Darién in the north of Chocó, in 1510 [156], which was followed by the construction of some additional ports to facilitate the traffic of slaves and gold in Cumaná (1520), Santa Marta (1525) and Coro (1527). From this moment, the Spaniards began to organize the most diverse expeditions from Europe [157], first with the mystical goal of finding "El Dorado", founded on the imaginary medieval gold cities of the northern Andes, and later, with the purpose of exploiting all possible natural and mineral resources, especially gold and platinum found in the mines, and reducing the indigenous populations to European interests, and introducing slavery through trafficking African peoples and cultures. In this quest, they also found emeralds and salt, as well as gold deposits which, although they did not correspond with that source of infinite wealth that the Spaniards so longed for, were still sufficient to establish an extractive industry that defines part of the socio-cultural configuration of our country based on black labor [158].

In this context, New Granada was the largest producer of gold in the Spanish Empire and was the first in the world until the discovery of Minas de Gerais (Brazil) at the end of the 16th century. Mining production in the colony was dominated by New Spain (Mexico) and Peru, with their immeasurable silver mines, and by New Granada and its large production of gold and to a lesser extent, silver [159]. Such was the mining importance that our country had, that it was recorded along with present day Ecuador and Peru in the first printed map of the region, of 1584, that is known as the Peruviae Auriferae Regionis Typus, which continues to be a revealing record of Colombia's deep gold identity -- a country rich in natural resources and minerals, which from the earliest stage of the colony, already had mines throughout its territory. In fact, the mines of New Granada -- both vein and alluvium -- were located especially in the reefs of the Central and Western Cordilleras, in the banks of the rivers that flow towards the Pacific (the Atrato and San Juan rivers), Cauca (the Cauca river basin) and Magdalena (the high and middle regions of the Magdalena River) [160].

Of these New Granada territories, one in particular acquired great notoriety as a source of gold and wealth: Chocó. So, it was inevitable that stories were told, and myths passed down from generation to generation that sang the fabulous treasures that this territory hid in her land, in her trees, in her mountains and in her waters (rivers), which made it extremely attractive for multiple interests of the time and in the centuries to come. Since then, this district has been linked to mining, as if both were part of the same indissoluble union. Various aspects of this will be explained in the section below dedicated to mining in Chocó.

However, the spectacular development of mining in the colonial era was purely extractive and did not generate any added value for the country or its territories. Within the colonial economic scheme, precious metals were exported directly to Spain. Several chronicles of the time, such as those of Antonio Manso (1729), field marshal and president of the Audiencia de Bogotá, confirmed this: "Over these long days, [I have worked to describe]how much wealth and abundance [has come from] the land where almost all its inhabitants and neighbors are beggars (...) And, although it seems a contradiction to have said that the gold is taken out of Chocó and that people are very poor, there is [no contradiction], because the gold that [has been] taken out of Chocó belongs to the owners of the mines (...) who send the gold to be [styled]at the Casa de la Moneda to then have it sent to be coined in Spain" [161].

Thus, most of the important mining regions of New Granada were discovered and developed during the sixteenth century. Gold production, however, declined in some areas during the second half of the seventeenth century. On the other hand, other mining districts, such as Chocó, saw their greatest exploitation in the latter part of the colonial period.

Since colonial times, gold was the main factor of colonization in the Pacific [and regions that did not have gold] escaped colonial rule. During the colonial period, mining rested on the exploitation of black slave labor and depended on the control of the elites that inhabited the Andean region. This first great cycle of gold ended in the mid-nineteenth century, with independence and the abolition of slavery. From different processes of manumission, free blacks settled and dispersed away from all mining activity of the colonizing system. Following the courses of the rivers, the coastal line and some indigenous roads, the black community began occupying the territory. Thus, the Atrato River and its tributaries were populated gradually by Afro-descendants,

beyond the real mines settled in the colony. From then on, "a territorial appropriation model was developed, characterized by the dispersed settlement of parental groups along the rivers that has been accompanied by a slow nucleation process. In the middle and lower zones, the free ones dedicated themselves to fishing and farming. Parallel to this colonization the natives withdrew towards the high areas of the rivers"[162].

Context of mining in Colombia.

7.3. After almost 400 years of continuous exploitation, mining activity has not lost its value in Colombia. Recent figures provided by the National Association of Industrialists (ANDI) and the Colombian Mining Association (ACM) [163], (which in turn are supported by the information of the ANM and the DIAN) on the behavior of mining activity, indicate that it is an important sector of the Colombian economy. They point out that for 2012 the Colombian gross domestic product [from mining] represented 2.3% of the total national GDP, which means that mining produced $10.9 billion and constituted 20% of the total exports of that year; for 2013, 1.9%, for 2014, 2.1%, that is, $10.8 billion and constituted 16.8% of exports; for 2015, 2.0% ($8.1 billion), which represented 17.1% of exports; finally, they estimate that for 2016 it will be 2.1%.

7.4. Consistent with the article, "The Paradox of Mining and Development"of the researchers of the Comptroller General of the Republic, Guillermo Rudas and Jorge Espitia, the production of both hydrocarbons and the main mining export products in the country-- coal, gold and nickel -- is highly concentrated in 7 of 32 districts. From this regional distribution of the production of the main minerals and hydrocarbons, the following particular characteristics are highlighted: (i) Oil is concentrated in Casanare, with a share between 2006 and 2012 of 26% of national production, and in Meta, with 21% of the total in the same period. The remaining 53% is distributed in 17 districts, among which the most important are Santander and Huila, each with around ten percent of the total production during the period, and which does not reach, between the two, overcoming the production of Meta; (ii) Coal originates mainly in the districts of Cesar and La Guajira, with 48% and 42%, respectively, of the national production during the mentioned period. The remaining 10% comes from 9 districts and is mainly used for domestic consumption; (iii) in the period under consideration, gold was produced primarily in Antioquia. However, starting in 2009, Chocó began to increase its production in an accelerated manner, reaching 39% of national production from 2009 until 2012 -- very close to the 42% that continues to be concentrated in Antioquia. The remaining 19% is distributed in almost the entire country, covering a total of 27 additional municipalities; finally, (iv) all ferronickel is produced only in the district of Córdoba and by a single company, Cerromatoso S.A. This high concentration of the extraction of each of the minerals and hydrocarbons in a few districts allows us to have a differentiated view of the role they play in each of the regional economies [164].

7.5. Now, regarding gold mining, Colombia continues as it did as a colony, as one of the main producers worldwide: it is the sixth in Latin America and ranks 20th as the largest worldwide with 65 tons per year. In 2012, exports reached US $2.5 billion, making gold the third largest Colombian export product after oil and coal, just above coffee. At present, it is estimated that some 350,000 Colombians live from economies linked or derived from the gold trade in 10 districts: Antioquia, Chocó, Bolívar, Cauca, Caldas, Córdoba, Nariño, Tolima, Valle del Cauca and Santander [165].

In terms of production, Antioquia and Chocó represent more than 80% of the national total (equivalent to about 5% of mining production), concentrated in areas with a strong presence of illegal armed actors, both guerrilla and post-demobilized armed groups called "BACRIM". Another factor that stands out is that important ethnic communities -- either indigenous or Afro-Colombian -- live in the great regions of gold exploration and exploitation , and while some of these populations are opposed to the exploitation of gold in their territories, others live or subsist thanks to the mining activity, and this generates additional social conflict.

According to figures from the National Mining Agency (ACM), of the 10,061 mining titles issued in Colombia, representing 5.4 million hectares, 7,533 are from Colombian companies and individuals, 1,028 are from multinational companies, 577 from indigenous reserves, 113 of mining associations, 40 mining unions and 870 of temporary authorizations. In this context, the most exploited type of mineral is that used for construction with 53%, followed by precious metals with 39%.

In contrast, according to the last departmental mining census carried out in 2011 by the ACM, of the Mining Production Units (MPUs) - registered at the national level, 63% have no mining title and 37% have a mining title. The case of Chocó is notorious, [166], where 99.2% of the 527 MPU registered have no title, occupying first place in illegal mining activity, while in the rest of the country, 10 districts with mining operations exceed 80% of MPU without title: Antioquia, Atlántico, Bolívar, Caldas, Cauca, Córdoba, La Guajira, Magdalena, Valle and Risaralda.

Legal development of mining in Colombia [167].

7.6. The development of a legal framework for regulating mining and to protect the environment in Colombia, in terms of establishing a regime of authorizations, controls, and sanctions, has not been consistent.. Apart from a few special colonial regulations on mines (Cuadernos de la Nueva España, 1584) and of the Republic (Code of Mines of the Gran Colombia in 1827 and the Decree of Mines of Simón Bolívar in 1829), legislation to regulate mining in the twentieth century would only be consolidated in 1988, when a Code of Mines was issued for the first time in the Republic of Colombia. Subsequently, with the issuance of the Constitution of 1991, the Laws 99 of 1993, the Law 388 of 1997 and finally a new Mining Code was adopted in Law 685 of 2001. This, in addition to Law 1382 of 2010, which reformed the Code of 2001, but was declared unenforceable by this Court. The following will briefly review some of the main aspects of the legislation.

The Mining Code of 1988, Decree 2655 of 1988, established four cardinal points for its development: (i) that all the non-renewable natural resources of the soil and subsoil belonged to the Nation; (ii) that mining activity such as prospecting, exploration, exploitation and benefit would be regulated; (iii) that different classes of mining titles such as concession contracts, exploration licenses and mining exploitation would be issued; and, (iv) that the State would be an entrepreneur through the contribution system. Additionally, it declared the public utility and social interest of the mining industry in its branches of prospecting, exploration, exploitation, etc.

In environmental aspects, this decree timidly picked up some considerations of the Natural Resources Code (1974) regarding ecological protection, landscape, and environmental impact. In relation to the territorial scope, mention is made of the establishment of restricted zones for mining

activities within urban boundaries. Finally, in relation to the ethnic component of the nation, indigenous mining areas with right of priority were established. However, nothing was said about the black communities since there was no legal framework that established the right to the territory of Afro-Colombian communities.

The revolution of the rights that promoted the Constitution of 1991 enabled the passage of Laws 99 of 1993 (Ministry of the environment), 70 of 1993 (Black Communities) and 388 of 1997 (Territorial Organization). The new Political Charter promoted the concept of an "Ecological Constitution", the protection of the nation's cultural and natural riches, the primacy of the general interest, the social and ecological function of property, and the right to a healthy environment.

Thus, Law 99 of 1993 included the concept of "sustainable development" and also established a series of general environmental principles. These principles include fundamental elements for the protection of communities that are affected by social and environmental conflicts related to extractive activities such as the protection of biodiversity and the precautionary principle, among others. It also incorporates the need for environmental licensing for activities that threaten to endanger the environment.

Law 388 of 1997 focuses on the instruments of territorial order in relation to the use of land, the preservation of environmental heritage and the prevention of disasters; it is supported in the social function of property, the constitutional prevalence of the general interest on the subject and in the defense of the public space, and defines the obligatory nature of the territorial approach of the municipalities in development of the constitutional authority of the municipal authorities to manage the use of the soil. Three points are essential in territorial management plans: the conservation and protection of the environment, the preservation of cultural heritage, and the location and basic infrastructures.

Finally, Law 685 of 2001, produced a substantial change in the policies regarding mining by establishing system that would promote and control mining, but without the possibility of mining companies with public or mixed capital. In return, domestic and foreign individuals pay economic consideration for the cost of non-renewable natural resources called royalties, which are assessed according to the type of material as a percentage of the market value. Likewise, the law makes rules more flexible in order to facilitate private investment and establishes the priority of those who first apply for the mining title, under the principle *"first in time, first in right"*[169].

Subsequently, the State issued Law 1382 of 2010, as a reform and updating of Law 685 of 2001, incorporating new provisions that aimed, among others, to (i) formalize the activity of traditional small-scale miners, (ii) improve the technical and environmental supervision of mining operations; and (iii) restore the right of the State to reserve certain areas or to offer them to the most suitable operator. However, this Court, in its judgment C-366 of 2011, declared the reform unconstitutional, mainly because the *prior consultation* with the ethnic communities that could be affected was omitted. In any case, the effects of the ruling were deferred to two years in order to preserve the validity of norms that protected the environment, and consequently the Government was ordered to consult in the same term [170].

Similarly, the national government, at the level of public policy, that is, the National Development Plans (NDP), both in Law 1450 of 2011[171] (PND 2010-2014) and Law 1753 of 2015[172] (PND 2014-2018) has established as a priority the construction of a "mining locomotive" as part of its mining-energy policy; in order to consolidate the mining sector as a driver of the country's sustainable development, with social and environmental responsibility.

Finally, the Ministry of Mines and Energy recently issued Resolution 40391 of April 20, 2016, "Whereby the national mining policy is adopted."This document unified the institutional vision regarding the current mining situation of the country and the challenges to be overcome in the coming decades in order to turn Colombia into a power in the extraction of minerals. The Resolution roughly explains: (i) the challenges of mining activity at a global and national level, (ii) the institutional vision to take Colombia along the mining path and (iii) the economic and social benefits of that activity.

Constitutional jurisprudence in mining matters.

7.7. At this point, it is appropriate for the Chamber to review the constitutional jurisprudence that has established the general parameters of interpretation of legal and illegal mining activity, and its legislation. All of this must be considered in relation to the extraction of renewable and non-renewable natural resources, the protection of the environment, of biodiversity, and, of course, of the ethnic communities that inhabit territories that may be affected by the development of said activities.

7.8. Thus, in judgment C-983 of 2010 the Court made a complete jurisprudential account in relation to the *mining property and exploitation in Colombia*, [identifying] jurisprudential rules that will be outlined below according to their relationship with the present case.

In this regard, the Court has indicated that articles 332, 334, 360 and 80 of the Political Constitution enshrine: (a) the State ownership of the subsoil and non-renewable natural resources, without detriment to the rights acquired in accordance with pre-existing laws; (b) the power of State intervention in the exploitation of natural resources and land use, as well as the planning, management and use of natural resources; (c) the duty of the State to conserve non-renewable natural resources, and the right over the economic resources or royalties derived from its exploitation, as well as the power to grant special rights of use over those resources, through concessions [173]; (d) the concept of the State as the owner of non-renewable natural resources, which includes all public authorities, all Colombians and all territorial entities [174]; (e) the broad freedom in the legislature to determine, pursuant to the Charter, the conditions for the exploitation of non-renewable natural resources, as well as the rights of territorial entities over them [175].

7.9. With respect to the exploitation of non-renewable natural resources, this Court has made broad and repeated statements regarding the environmental impact of this exploitation, the protection of the environment and biodiversity, the areas excluded from mining and restricted from mining, and the constitutional protection of ethnic communities. On this latter issue, constitutional jurisprudence has spoken in relation to (i) the natural resources existing in its territories, in accordance with articles 7, 70 and 330 above, (ii) the right of these communities to ensure the preservation of natural resources; (iii) the mining areas of the ethnic communities [176]; (iv) the

right of participation of these communities in decisions regarding the exploitation of natural resources in ethnic territories, through prior consultation mechanisms, in accordance with ILO Convention 169 of 1989 adopted by the General Conference of that organization, and approved by Colombia through Law 21 of 1991; and (v) the importance of the recognition and protection of traditional or artisanal mining, as well as the processes of legalization of it.

7.10. In light of the fact that the case under examination is related to the development of mining activities (legal and illegal) on a large scale in territories of ethnic communities in Chocó, the Chamber considers it necessary to recall the rules that link the exploitation of natural mineral resources in territories of ethnic communities, and the protection of the differentiated identity that has been granted to them.

7.11. One of the most important rulings in this matter is judgment SU-039 of 1997, in which the Court decided on the review of the decision of *tutela* that could promote the Ombudsman's Office, in favor of the members of the indigenous community U'wa. On that occasion, an oil company requested the corresponding state authorities to issue an environmental license to carry out exploration work in a large area of territory, part of which was inhabited by members of the aforementioned community. The environmental license was issued without first having verified the effective participation of the indigenous community. In the result, the license was nullified in order that the consultation procedure could be carried out, subject to the rules that apply to them.

On that occasion, the Court determined that, according to the Constitution, mining exploitation activities carried out in areas where traditional communities are located should be pursuant to prior consultation in order to guarantee compliance with the participation mandate foreseen both in article 330 of the Charter and in ILO Convention 169. It is understood that (i) there is a specific constitutional clause that requires the Government to encourage such participation; and, in any case, (ii) oil exploitation in the territories of the communities is a matter that undoubtedly directly affects them, which justifies the previous consultation..

The Court also determined that this duty to guarantee the participation of the differentiated communities was based on the need, evidenced in the Constitution, to balance the economic exploitation of mining resources, the protection of the environment, the achievement of sustainable development and the ethnic and cultural identity of the aforementioned communities. This balancing is only possible if the position and interests of the affected indigenous and Afro-descendant peoples are integrated into the debate on the corresponding public policy. Otherwise, the state activity would ignore their constitutional right to recognition as a minority object of special protection of the State.

7.12. In a similar sense, the jurisprudential rules previously expressed were reiterated in judgment T-769/09. In this case, the Ministry of Mines and Energy had signed a mining concession contract in favor of an exploration and exploitation company. This was done in order to develop the project called *Mandé Norte*, which was located partially in the territory of the indigenous reservation of the Embera community of Uradá Jiguamiandó (Chocó). The activists, belonging to that ethnic group, filed an *acción de tutela* against different ministries, arguing that the mining exploitation project had not been subject to consultation with representative authorities of the indigenous community.

In this case, the Court concluded that (i) since it was an advanced mining project in the territory of the indigenous community, it had to submit to the prior consultation procedure; (ii) that this consultation should comply with the conditions described by constitutional jurisprudence, including the representativeness of the communities; and (iii) that these requirements had not been met in the specific case and thus that the concession contract would be suspended until the consultation was verified, with the fulfillment of the requirements noted [177].

7.13. Throughout its jurisprudence, the Court has also identified how legal and illegal mining activities can be configured as factors of "transversal risk" [cross-cutting] for indigenous and Afro-descendant communities. This is especially true when it comes to work carried out under an industrial concept that on a large scale, by their own characteristics, affect important portions of the territory. This can even lead to especially serious situations in terms of protection and guarantee of fundamental rights, such as internal forced displacement [178].

7.14. Additionally, in the judgment C-366 of 2011-- reiterated in C-331 of 2012 -- several decisions were adopted by both bodies of justice of the inter-American system, as well as in other documents of the global system, which insist on the link between the protection of the differentiated identity and exploitation of existing natural resources in the territories of the ethnic communities. For example, the Special Rapporteur of the United Nations on the situation of human rights and fundamental freedoms of indigenous people, has pointed out how development projects in the territories, which are carried out without consultation with the traditional communities affected, have a direct impact on the enjoyment and guarantee of their human rights [179].

In this sense, the participation of traditional communities in the projects that affect them is explained, in the same way, by the potential harmful effects of large-scale projects (legal and illegal), including mining, to the interests of the traditional communities. These effects, in turn, must be looked at not only from the perspective of the specific commitment with ethnic peoples' territories, but also with respect to any development activity that directly affects their interests.

7.15. However, in recent years the Court has continued to develop a set of principles relevant to the understanding of the multiple problems associated with mining, in particular, related to (i) the participation of territorial entities, citizens and ethnic communities in the context of legal and illegal mining exploitation that may affect them; and (ii) the definition of strategic mining reserve areas, which are the last strategy of the Colombian State to exploit its natural resources.

For example, in judgments C-123 of 2014[180] and C-035 of 2016[181], this Court examined standards that referred in general terms to an eventual tension between the state ownership of the subsoil, the regulation of the excluded mining zones, and the attributions of the territorial entities to regulate the use of the ground from, the standpoint of territorial governance.

In both judgments, the Court raised the need to establish consultation spaces between the local level (municipalities) and the central level (national government) to make these decisions. Given that the management of the subsoil necessarily has an impact on the possibility of establishing plans and programs on land use, principles of concurrency, coordination and subsidiarity should define the relationship between territorial entities and the nation.

Subsequently, in judgment T-766 of 2015, the Court annulled two resolutions that established the delimitation of the so-called "strategic mining areas" on 20 million hectares of the national territory; in regions with a notable presence of ethnic communities, for violation of the fundamental right to prior consultation.

In a similar way, in judgment C-221 of 2016, the Court held unconstitutional the withholding of previous geological information, generated in the definition of strategic mining areas. This is because the Legislature did not constitutionally justify the restriction on the fundamental right to access to information.

In judgment C-273 of 2016, the Court declared unenforceable the reservation of organic law article 37 of the mining code according to which no territorial entity could exclude, temporarily or permanently, areas of its territory for carrying out mining activities. This prohibition, the Court held, can only be given in an organic law and not an ordinary law such as the mining code.

Finally, in judgment C-298 of 2016, among other decisions, the Constitutional Court declared unenforceable Article 20 of the National Development Plan 2014-2018. Article 20 stipulated the possibility of establishing reserve areas for mining exploitation *for an indefinite time.* The Court held that such provision violated the principle of sustainable development and had a disproportionate impact on the fundamental right to a healthy environment.

The gold mining in Chocó. Past and present.

7.16. Before proceeding to examine the development of what has been gold mining in Chocó in recent decades, the Chamber considers it necessary to present some geographical, historical and socioeconomic background that will allow a better understanding of the context of the matter under review.

In effect, mining in Chocó, as anticipated at the beginning of this section, dates back to pre-Hispanic times when the aboriginal tribes who settled there found that streams and interfluvial rapids from the Pacific lowlands produced large quantities of gold; thanks to this, they developed important skills as goldsmiths. Already at the time of Spanish domination and, in particular, at the end of the 18th century, Chocó produced more gold than all the other mining districts of New Granada [182], and consequently, it became the main producer of the continental viceroyalties.

Since the establishment of the colony on the mainland, the Spaniards -- who knew the pre-Hispanic legend of "El Dorado" -- soon discovered that one of the most notable sources of gold in Latin America has been in the warm, humid rainforests of the lowlands of the Pacific, and more specifically in the basins of the San Juan and Atrato rivers. In this regard, Professor Robert C. West, who studied the region in the 1950s, explains why this area is so rich in gold:

> "The northern region of the plains - Chocó - consists of a structural depression between the Western Cordillera and the coastal mountain range of Baudó. This depression is drained by the Atrato River in the north and in the south by the San Juan River. The most important

> tributaries of the two rivers are rapid streams that drain the western slope of the Western Cordillera. These tributaries from the east, together with other interfluvial areas, make up the main gold zone of Chocó. In the southern part, the Pacific plains form a coastal plain formed by alluvial deposits left by the currents that descend from the western slope of the Western Cordillera. (...) The upper and middle courses of almost all the currents that drain the western side of the Western Cordillera are auriferous. Even more important in this role of gold bearers are the old gravel pits that form the interfluves of modern rivers.
>
> (...) The portion of gold-rich sands, long buried, lies near the bottoms of river, whose pattern does not bear any relation to the current drainage (...) In Choco only the eastern tributaries and the upper courses of the San Juan and the Atrato are auriferous" [183].

With regard to the processes of Spanish exploration during the colonial period, some chronicles of the period present a brief chronology of the development of gold mining in Chocó:

> "Chocó was the first area of the Pacific Coast exploited by the Spanish. As early as 1536, Pascual de Andagoya, one of the landowners of Pizarro, established a port in Buenaventura, from which a path led through the dense rainforest to the newly founded city of Cali in the Valle del Cauca. Vague reports about gold in the San Juan-Atrato basin prompted several Spaniards to request real permission to explore the lowlands, but little was done until the 1550s. In 1557 an expedition departed from Caramanta in the middle Cauca area and it penetrated the Atrato, but hostile Indians and hunger forced them to retreat without positive results. Ten years of punitive expeditions sent from Cali returned with reports of rich deposits of gold in some of the eastern tributaries of the San Juan River. Finally, in 1573, an expedition led by Melchor Velásquez left Anserma, crossed the Western Cordillera through the Cairo Pass and founded the city of Toro at the headwaters of the Ingará River, a tributary of Tamaná. Located in the cold highlands in an area of high indigenous density, this population became the center from which the riches of Chocó were initially exploited" [184].

The inheritance of this first colonial and republican period has been the historical conformation of the District of Chocó -- as an area of extraction of natural resources [185]--, in the form of large economic and social urban centers: for example, in the colony, all the production was directed to Spain and, in the Republic, to the central State.

7.17. On the other hand, from a socio-economic perspective, social exclusion in Chocó has deep historical roots due to the fact that after independence, no inclusive political institutions were built; instead, the administrative institutions had very few controls, which has favored corruption since colonial times. This contrasts with the figures for extraction of mineral resources in the district [186]: according to the Mining Information System, Chocó ranked first in platinum production in Colombia, with 98% of national production and is the second gold and silver supplier in the country with 24,438kg (53,876.5lbs.), corresponding to 37% of national production. Thus, mining has been highlighted as one of the main engines of economic growth in the District of Chocó. For example, in 2011, it received $7,939,600 in royalties.

Similarly, according to figures from the National Planning Department, the District of Chocó has received the following in approximate resources for the General Royalty System: (i) 2012: $178,281 million; (ii) 2013: $342,469; (iii) 2014: $401,050; (iv) 2015: $391,081 and (v) 2016: $280,050.

7.18. Paradoxically, it is characteristic that the main cities of the leading district in the production of gold do not have a robust institutional infrastructure for the provision of administrative services, nor of essential public services. [187] Specifically, the District of Chocó has population rates according to which 48.7% live in extreme poverty and 78.5% live in poverty. [188] According to the Index of Unsatisfied Basic Needs (NBI) [189] which measures whether the basic needs of the population are covered according to minimum criteria in the different regions of the country, Chocó ranks highest in the country, with 82.8% of the population, including 79% of the inhabitants of Chocó who have at least one NBI. Thus, they have the lowest indicator of quality of life in the country with 58% (the national average is 79%). Life expectancy is 58.3 years compared to the national average of 70.3 years.

7.19. In this context, the precarious living conditions of the Chocoanos are based on low coverage of administrative services (institutional presence) and essential public services (aqueduct, sewerage and sanitation) which have a direct impact on the health conditions of the population; which only covers 22.5% and 15.9% respectively, compared to the central country where both coverages exceed 80%. In this sense, the vast majority of the population of the region does not have access to potable water in conditions of quality and supply to meet the most basic needs. In relation to the sanitation service, the district's coverage is 32%, while the rural coverage reaches only 6%. For its part, 65% of households have electricity and 19.1% have telephone service [190].

7.20. In contrast to the situation of the Chocoano population, the intervention presented by the "Terrae" Group [191] offers important data and context on the current situation of gold mining in Chocó. In their report they point out that "the Atrato river basin has around 3,993,225 hectares, of which 490,771 are titled for mining gold and other metals and 15,250 for construction materials and limestone, for a total of 506,021 hectares titled. This corresponds to approximately 13% of the total area of the basin, which highlights the mining pressure to which this area is being subjected." To the above, it adds that some of the main mining actors, taking into account the number of hectares titled are:

"Anglogold Ashanti with 120,791 ha (55 titles), Exploraciones Chocó with 156,303 ha (50 titles), Sociedad Exploraciones Northern Colombia SAS with 28,117 ha (12 titles), Mónica María Uribe Pérez with 19,135 ha (6 titles), La Muriel Mining Corporation with 16,028 ha (9 titles). Allen Group with 15,546 ha (8 titles), Anglo American Colombia Exploration S.A. with 12,533 ha (7 titles) and Proyecto Coco Hondo S.A.S with 9,010 ha (6 titles). Among these 8 actors, they total 377,554 hectares, which corresponds to 75% of the total area titled".

To this, the same report adds that for 2015, 372 applications for gold mining have been made to the mining authority, which represent an area of 645,937 hectares.

7.21. Similarly, it states that within the Atrato River Basin, there is the Pacific Forest Reserve created by Law 02 of 1959; the protective forest reserves of El Darién, Río León, Zona Musinga

Caratua and Páramo de Urrao; the national parks Los Katíos, Las Orquídeas and Utría; and the Páramo Frontino-Urrao. Considering the mining assessment of July 2015, it says: "377,662 hectares of the Pacific Forest Reserve are titled for mining while 312,604 hectares are requested. In the case of the National Protective Forest Reserves, there are 621 hectares that are titled, and 17,037 hectares applied for. Finally, there are titled for mining 227 hectares on National Natural Parks and 539 hectares on the paramos of Frotino-Urrao. In total, there are 708,690 hectares of protected areas that are affected or under mining pressure, which is approximately 62% of titles and mining applications that are found within the Atrato River Basin."

It is in these conditions where legal and illegal mining have been developed by various civil, economic interests and more recently by armed actors for nearly 400 years in Chocó. But although it is a traditionally mining district rich in natural resources, paradoxically, it has the most dramatic poverty rates in the country.

The mining classes that take place in Chocó. Inputs and substances for their use.

7.22. The forms and typologies of gold mining (legal and illegal) that takes place in the Chocó are very varied, both alluvium [192] rio, and vein [193] in the land, but essentially comprise four categories of execution: (i) artisanal or ancestral mining; (ii) semi-mechanized mining; (iii) mechanized mining and (iv) industrialized mining or mega-mining. In general, the first three classes are conducted without mining titles or environmental licenses, the fourth category is developed complying with the legal requirements.

In the first place, it is understood by artisanal, ancestral or bare-mining, in the most general sense, consists in the exploitation of mineral deposits on a small scale. Manual methods are used - transmitted from generation to generation- or with the help of very simple equipment, usually made by the same miners, for the extraction of metals. This is the kind of mining - subsistence mining - carried out by ethnic communities and farmers for centuries [194].

Second, semi-mechanized mining is considered a kind of "modernization or technical form" of artisanal mining, which includes adaptations of small equipment such as motor pumps, hydraulic elevators and small suction dredges that improve working conditions and performance in the removal of alluvial material. This type of mining allows workers to perform their tasks in a shorter time and with greater efficiency [195].

Third, mechanized mining is carried out with backhoes, dredges, bulldozers, high-capacity motor pumps, hoses, dump trucks and chemical substances such as mercury and cyanide. This kind of mining began to be carried out in the eighties. First by foreign actors and then by armed groups outside the law, who are today operating in the region subject to the facts of the present case, displacing the traditional miners and imposing new ways of mining illegally, in mass and indiscriminately [196].

Finally, industrialized mining or mega-mining is a large-scale industry and scope that is developed based on studies of engineering and ecology, large human and technical resources, which in the case of open-pit mining makes it necessary to remove tons of land, thereby consuming large amounts of water and electricity, and altering completely and irreversibly the characteristics of the

area where it is implemented. The classic example of this form of exploitation is coal mining, which in Colombia takes place in the open pit mines of "El Cerrejón" in La Guajira. In general, it is the large multinational mining companies that have the resources to carry out this type of exploitation in a legal manner. According to data provided by the National Mining Agency, this type of organization has the most mining titles available in Chocó [197].

7.23. In this section, the Chamber will concentrate, in particular, on examining the way in which the so-called mechanized mining is conducted. Which, according to what was proposed by the petitioners, is the one that causes the most damage to the environment and to the ethnic communities of the Atrato River Basin due to its realization in a framework of complete illegality and with the use of toxic chemical substances such as mercury, cyanide, among others.

7.24. According to the information provided to the file and what was indicated by the plaintiffs, illegal (mechanized) mining entered Chocó in the 1980s. It first appeared with the suction mini-dredges at the beginning of the eighties and with them "semi-mechanized" mining; Then the backhoes arrived, giving rise to mechanized mining.

In the same sense, several of the community leaders of the Atrato River, argue that the process accelerated in the nineties and that it occurred in this way: "historically the mining model with dredges and dragons, that is to say, mechanized, was brought by Víctor Mosquera in 1997 (Chocoano, miner of Bajo Cauca), the year in which this kind of exploitation began. He explains that before mechanized mining, the river was crystalline, healthy, with clear waters, and that the populations were dedicated to fishing, agriculture and artisanal mining and these activities emanated subsistence and cultural life. He adds that Mr. Mosquera and his foreign partners discovered the mining potential of the Quito River and thereafter began a massive illegal mining process and the dredgers populated the river in search of gold. Remember that the exploitation started in the Canton of San Pablo. Today the majority of mechanized or suction mining is carried out in the Quito River and the San Pablo Canton, displacing all agricultural and fishing activities."[198]

The plaintiffs also add that this kind of mining operates in all types of exploitation: formal or legal, illegal, traditional, small-scale mining, informal or de facto. Depending on the area and the miner, mechanized mining uses mercury, which is the substance accused of causing serious social and environmental impacts in Chocó. Illegal (mechanized) mining has little by little displaced artisanal mining as the communities worked ancestrally from the colony. The inhabitants are increasingly dependent on the miners present in the territory, and above all, the permission of their owners to work in the large holes caused by the backhoes, which are very unsafe working conditions and that are limited to a day a week when they are lucky. The size of the business is so great that there are various sources that state that "in the district of Chocó there are currently some 800 dredges in operation."

The exercise of mechanized mining has produced significant cultural changes in the communities and many of them have lost their customs and their forms of coexistence that are sometimes characterized by conflicts between neighbors over the usufruct or ownership of land. As in the case of families that want to rent their land to foreign miners without consulting their

neighbors, and sometimes even invading nearby lands, although intrafamilial conflicts linked to this type of mining are also generated. [199]

Almost none of the actors that exercises this kind of mining has obtained the corresponding mining titles or has the necessary environmental licenses. In fact, much of the mining activity occurs in forest reserve areas - as indicated above - where precisely these activities are prohibited [200].

7.25. According to the Ombudsman, among the main impacts generated by this type of mining are:

> "i) The destruction of water sources: due to the action of dredging and due to the approximate average contribution of 3,100 tons/year of sediment per tailing. The navigable channel of the same is reduced and the water and food supply is put at risk, as well as fluvial communication. Additionally, as observed by the Ombudsman's office, stone mountains in the middle of a river can be found, which is affecting the speed of the river and the oxygenation of the water.
>
> ii) The rivers in which mining is developed constitute a risk to human health and the environment. Mining has changed the river's coloration, due to sedimentation, the presence of solid materials suspended in water, such as fats, oils, fuel residues and mercury, as the result of the gold mining processes. Each mine contributes approximately 36 kilos/year (79 lbs) of mercury. Additionally, mining in the bodies of water generates the formation of gullies, in which mosquitoes are nested, causing public health problems. As well as the migration and destruction of species of fish, avifauna and terrestrial fauna.
>
> iii) Loss of biodiversity and genetic erosion through intervention and destruction of fragile ecosystems.At the same time, this activity accompanied by deforestation and the stripping of land, causes the rapid degradation of the ecosystem, the reduction of forest populations, the extinction of endemic species and the displacement of populations, thereby negatively impacting food security of the communities settled in the basins of the rivers." (Bold not in original text)

7.26. Some general considerations will be discussed below regarding the toxic chemical substances used in gold mining in Chocó. Mercury is a polluting toxic substance, which is the most densely used in mechanized gold mining.

Mercury (Hg, 80) [201] is a chemical element that has the distinction of being the only metal in the earth that is liquid at laboratory or ambient temperature. Among other aspects, it is characterized by being bright, silver-white, odorless, insoluble and much heavier than water and highly toxic. Although it has different uses, it is used mainly in mining activities to separate and extract gold from the rocks in which it is found, thanks to the fact that it is very easily alloyed with gold and silver. In general terms, its use in mining consists of adding mercury to the material where the gold is found, forming an amalgam that, after being heated, facilitates the separation of the different minerals, resulting in the evaporation of the mercury during the process [202].

7.27. One of the most contaminating techniques for the use of mercury in mining is called "amalgamation of all the mineral", which consists of adding mercury to the mineral during the crushing, milling and washing. Usually only 10% of the mercury added to a barrel is combined with the gold to form the amalgam. The remaining 90% is left over and is discarded in water sources. Another quite harmful process is the "amalgam burn", a process in which the amalgam is placed directly on the fire, in the open, which causes mercury vaporization, and which are highly taxic and harmful to people. According to a report of UNEP (2007) - United Nations Environment Program - this practice produces atmospheric emissions of mercury of around 300 metric tons per year worldwide [203].

7.28. The effects of mercury are not only reduced to the events described above. According to the article, "The use of mercury in artisanal gold mining in Colombia",by Professors Claudia Rojas and Carolina Montes of the Universidad Externado de Colombia, this practice affects the miners, the environment (animal and plant species) and human populations. For example, mine workers are, in principle, the most exposed, especially when inhaling the mercury vapor released during the burning of amalgams. The process is as follows: when the amalgamation is done manually, part of the mercury is absorbed directly through the skin. Mercury vapor is usually deposited on food preparation surfaces in homes, on clothing, or on the ground and falls to water bodies in the respective areas where it is sedimented. Studies conducted with the World Health Organization, in different parts of the world, indicate high levels of mercury in miners; in some cases, reaching levels 50 times higher than the maximum acceptable limit of exposure set by WHO [204]. According to these studies, a large number of miners suffer involuntary tremors, which represents - without a doubt - a classic symptom of nervous system damage induced by mercury [205].

7.29. The consequences for the use of mercury are so serious that several international reports in the matter, compiled by the same article commented above, warn that the long-term consequences are so serious for the environment and the population living in the environment of the mines and deposits, downstream or in the direction of the wind. The abusive use of mercury as well as its combination with cyanide, causes extensive environmental degradation due to contamination of ecosystems. This combined use exacerbates methylation of mercury: "Once methylated, mercury can move rapidly through the food chain, causing downstream impacts on fish and wild fauna and flora, with consequent effects on life of thousands of people, both those who participate directly in mining activities and those who live nearby or consume products from these areas elsewhere. In general, tailings containing mercury are discharged into or near bodies of water and, as a result, soil, rivers, streams, ponds and lakes are contaminated for long periods of time. These negative effects may persist for several decades, even after the cessation of mining activities."[206]

To this, they add that in human health, exposure to mercury causes harmful effects mainly in the central nervous system and in the renal, cardiovascular, cutaneous and respiratory levels. Women of childbearing age and children are the most vulnerable. To give an example, "the WHO has calculated that the incidence rate of mild mental retardation amounts to 17.4 per 1,000 children born among the population of subsistence fishermen living near gold mining activities in the Amazon."[207]

Globally, the highest levels of mercury consumption are recorded in China (between 200 and 250 tons freed), followed by Indonesia (between 100 and 150 tons freed), and between 10 and

30 tons in Brazil, Bolivia, Colombia, Ecuador, Ghana, Peru, the Philippines, Venezuela, Tanzania and Zimbabwe. Within this context, it is considered that Colombia is the country with the most mercury contamination in America. According to studies by the organization Mercury Watch, it is estimated that Colombia emits 180 tons of mercury per year derived from the extraction of gold. [208]

In this sense Professors Rojas and Montes, have pointed out that "various factors aggravate the problem in Colombia, and make the illegal exploitation of gold through mercury become an alternative for vulnerable communities, including Afro-descendants and indigenous people. Among such factors are the large areas of the national territory that have difficult access, such as jungle areas, many of which have been under the control of insurgent groups or outlaws; the prevailing poverty in many regions of the territory and the scarce presence of the State; the high and rising price of gold; and the lack of regulation for the acquisition, storage, transportation, purchase-sale and commercialization of mercury, among others."

7.30. Precisely, regarding the dangerous effects of mercury in the mining activity, Professor Jesus Olivero, toxicology researcher at the University of Cartagena, in the judicial inspection conducted by the Constitutional Court in January 2016 in Chocó, stated the following:

> "In the first place, the professor explains that mercury is the most toxic non-radioactive element known in nature, and that this is precisely the substance that is used in mining to extract gold. He points out that mercury, when mixed with water (in rivers and in swamps), becomes a much more toxic chemical species called "methylmercury", which ends up being lodged in the flesh of fish, and in this way comes into direct contact with human populations that end up consuming chemicals that are poured into rivers (as a consequence of mining) hundreds of kilometers away. He cites as an example a case in the Amazon, particularly in the Caquetá River, where direct mining activity is minimal and exceptional, and even so mercury concentrations in infants have been found in magnitudes of 17 parts per million. The estimated average per person by the WHO to have a health free of risks associated with exposure to mercury should not exceed the level of 1 part per million. Professor Olivero argues that the problem of mining is much more serious than estimated, especially to the extent that this activity, even when carried out hundreds of kilometers away from where the exploitation occurs - either in open-pit mines, or in rivers, ends up affecting communities throughout the region.
>
> In the specific case, it states that regardless of where the mercury contamination process occurs, the entire Atrato River Basin, as well as the Caribbean basin, will be affected by this process since mercury, which has great mobility - travels in its currents. It affirms that it is a cross-border problem, not only of Quibdó or of the Atrato River or of Chocó; it is a problem that will continue in the Atlantic Ocean (in the north of Chocó) or on the side of the San Juan River (in the south of Chocó), in the Pacific Ocean" [209].

7.31. For the reasons mentioned above, international consensus has been developed to achieve the elimination of mercury from any activity that may affect the environment and human health. To that end, a series of international treaties have been issued to regulate trade in toxic chemicals and pesticides or unwanted hazardous wastes such as: (i) the Geneva Convention on "Long-range Transboundary Air Pollution" of 1979 and its Aarhus Protocol of 1998; (ii) the Basel Convention of

1989; (iii) the Convention on the Protection of the Marine Environment of the Northeast Atlantic of 1992; (iv) the Rotterdam Convention of 1998; (v) the Helsinki Convention of 2000; (vi) the 2006 Dubai Guidelines; and finally (vii) the Minamata Convention of 2013.

Regarding the latter, the Minamata Convention on mercury of 2013 was signed by Colombia that same year and its purpose, according to Article 1, is "to protect human health and the environment from the anthropogenic releases of mercury and compounds of mercury ". This particular provision highlights that, unlike other international conventions related to chemicals, the Minamata Convention revolves around the need to protect human health. Additionally, it contemplates the possibility that in case a State needs support for the process of elimination of its mercury industry, the option of requesting technical assistance and financial assistance is provided (Articles 13 and 14).

7.32. In the national legislation, the current Mining Code, Law 685 of 2001 does not contemplate any measure to control the use of mercury in mining. In response to this and due to the signing of the Minamata Agreement by Colombia, Law 1658 of 2013 was passed, which established a series of provisions for the commercialization and use of mercury in the different industrial activities of the country, and established several requirements for its reduction and progressive elimination [210]. Although this instrument has important tools to control the use of mercury in Colombia, most of its provisions are not directly applicable and require regulation, a task that is still pending [211].

Principle of precaution in environmental and health matters. Guiding principles of environmental law.

7.33. After examining the way mining is developed in Colombia, the applicable legal regime and the relevant jurisprudence, the Chamber considers it necessary to specify the guiding principles of environmental law to which the mining activity must submit in order to achieve effective protection of the mining industry, the environment, and the ethnic communities where the activity is carried out.

As it has been noted, the constitutional and international norms outlined above extract fundamental principles to advance the protection and assurance of the environment, biodiversity and the ethnic communities associated with them, which in this contemporary world are the result of the obligatory application due to the use, contamination, and the environmental damage that is generated. The Court will come to conceptualize them under a compatible approach with the new realities and the imperative need to strive for an increasingly rigorous and progressive defense of nature and its environment, in the face of the damages that are constantly caused to it. It is clear that such principles must guide the use of the atmosphere, water, forests, the environment, natural resources and soil, aiming at an adequate, rational and responsible exercise of our biodiversity [212].

The situation explained about the use, pollution and environmental damage, involves for humanity a serious process of reflection and challenges for the States in order to strengthen the fundamental principles that support it in the achievement of a healthy ecological environment. Environmental law is based on a dynamic and evolutionary concept, since it is in a permanent process of updating and democratic deliberation, responding to scientific advances and seeking to

be part of a framework order that is just and equitable [213]. Among the principles that govern environmental policy, the Court will then bring to mind those that directly affect the scope of this decision.

Principle of Prevention.

7.34. In the international order it has been understood that this principle seeks that the actions of the States are aimed at avoiding or minimizing environmental damage, as an objective in itself, regardless of the repercussions that may be caused in the territories of other nations. It requires therefore actions and measures -regulatory, administrative or otherwise- that are undertaken at an early stage, before the damage occurs or becomes aggravated.

It constitutes a postulate of maximum importance for environmental law, as it turns the emphasis of all public policy and the legal framework towards a model that prepares and organizes the necessary tasks to prevent damage from occurring, rather than a healing model, pending on the sanction and the repair. This approach has been supported by various international instruments such as the 1972 Stockholm Declaration[214], the 1982 World Charter for Nature and the Rio Declaration of 1992, which requires States to enact "effective laws on the environment"[215].

This principle has been developed by other international instruments concentrated in particular areas such as the extinction of flora and fauna species [216], the pollution of oceans by hydrocarbons [217], radioactive waste [218], hazardous waste and other substances [219], loss of fish [220] and other organisms [221], damage to health and the environment, which comes from chemical substances. [222]

The practical effectiveness of preventive action requires a harmonization with the precautionary principle, which, as will be seen below, relaxes the scientific rigor required for the State to make a determination. Thus, the principle of prevention is applied in cases where it is possible to know the consequences that the development of a certain project, work or activity will have on the environment. This way the competent authority can make decisions before the risk or damage occurs, in order to reduce their impact or avoid them, while the precautionary principle operates in the absence of absolute scientific certainty [223].

Principle of Precaution.

7.35. In the international arena, principle No. 15 of the Rio de Janeiro Declaration of June 1992, on Environment and Development, refers to the precautionary principle as follows:

> "Principle 15. In order to protect the environment, States should widely apply the precautionary approach according to their capabilities. When there is a danger of serious or irreversible damage, the lack of absolute scientific certainty should not be used as a reason to postpone the adoption of cost-effective measures to prevent environmental degradation."

This idea, in turn, was expressly included in the first article of Law 99 of 1993, which holds that the process of economic and social development of the country will be guided by the global / international principles as well as sustainable development contained in the Rio de Janeiro Declaration. In fact, this law confers great importance on the precautionary principle, stating that

the formulation of environmental policies, while considering the results of the scientific research process, must prevail in an orientation aimed at precaution and avoiding the degradation of the environment [224].

Its constituent elements have been addressed by constitutional jurisprudence in the following terms:

> "For this purpose, it must be verified that the following elements are met: 1. That there is a danger of harm; 2. That it be serious and irreversible; 3. That there is a principle of scientific certainty, even if it is not absolute; 4. That the decision that the authority adopts is aimed at preventing the degradation of the environment. 5. That the act in which the decision is adopted is motivated.
>
> That is, the administrative act by which the environmental authority adopts decisions, without absolute scientific certainty, in use of the precautionary principle, must be exceptional and motivated. And, like any administrative act, it can be sued before the Judicial Power Contentious Administrative Jurisdiction. This means that the decision of the authority is framed within the Rule of Law, in which there can be no arbitrary or capricious decisions, and that, in the event that this happens, the citizen has at his disposal all the tools that his own State grants upon him. In this sense there is no violation of due process, guaranteed in article 29 of the Constitution" [225].

7.36. The precautionary principle stands as a legal tool of great importance, as it responds to the technical and scientific uncertainty that often hangs over environmental issues; due to the incommensurability of some contaminating factors, the lack of adequate measurement systems or by the fading of the damage over time [226]. However, based on the fact that certain effects are irreversible, this principle points out a course of action that "not only deals with the consequences of acts in its exercise, but mainly requires an active position of anticipation, with an objective of forecasting the future environmental situation in order to optimize the natural environment" [227].

In the international order, the application of the precautionary principle continues to generate conflicting positions. Within certain sectors, it is considered an effective tool to achieve a timely legal action that addresses crucial ecological challenges such as climate change and the reduction of the ozone layer. While opponents of the measure mistrust the potential to generate excessive regulations that would end up limiting human activity. There still is no consensus in the international community regarding its understanding and scope. The central point of the discrepancy is to establish what level of scientific evidence should be required to execute a project. In this sense, even a more extensive interpretation has been proposed, whereby the burden of proof is transferred on the potentially contaminating agent (be it a State, a company or a citizen), who must demonstrate that their activity or residues that occur will not significantly affect the environment [228].

In a similar sense, for example, Professor Cass Sunstein, has reflected on the serious problems related to the concept of irreversibility of environmental damage and the measures that have been designed and implemented internationally to try to avoid it, as in the case of the precautionary principle. In this regard, he pointed out that "many environmental problems have

important elements of irreversibility. If, for example, a species disappears, it will most likely be lost forever. The same concept applies and is true for pristine areas. Genetically modified organisms could also produce irreversible ecological damage; transgenic seeds could impose irreversible losses due to increased resistance to pests. Recently, the problem of climate change has aroused the most serious concerns about the concept of irreversibility. Some greenhouse gases remain in the atmosphere for centuries, and for that simple reason climate change threatens to be irreversible ", to the foregoing, he adds that: "global concern about the problem of climate change has led nations to consider the adoption of an international principle that allows combating this kind of danger: the precautionary principle that alludes specifically to avoid irreparable damage" [229].

At the local level, both constitutional and administrative jurisprudence have embraced this principle as a crucial provision of environmental law. Its impact is such that it implies a change in classical legal logic. In contrast to the true and verifiable theory of damage, adopted from the Roman tradition, precaution operates on the risk of development, the risk of delay, and produces an inversion of the burden of proof [230]. With good reason, the Court has asserted that this postulate materializes "to a large extent" the duties of protection with nature [231].

7.37. In constitutional jurisprudence there are several examples of its application. In the judgment T-397 of 2014 the complaint of residents of an apartment in the city of Bogotá was analyzed, including several adults and a minor of 20 months of age. All of whom denounced the excessive noise and health hazards that they consider originated in a "monopole antenna"installed by a telecommunications company one meter away from the property.

In this scenario, the Court satisfied the jurisprudential requirements to apply the precautionary principle, not only for the protection of the environment but specifically for the child's health [232]. In view of the above, the Court ordered the dismantling of the antenna. Likewise, the Ministry of Information and Communications Technologies was ordered to regulate, within the framework of its functions and in accordance with the precautionary principle, the prudent distance between mobile telephone towers and homes, educational institutions, hospitals and geriatric homes.

7.38. On the other hand, judgment T-154 of 2013 addressed the claim of a rural worker. The rural worker indicated that the"Los Cerros"farm in which he resided with his family, located in the village of La Loma, was approximately 300 meters in distance of the coal mine "Pribbenow". The coal mine is property of the company Drummond Ltda., which exploited "indiscriminately and without any environmental control", since mining was carried out 24 hours a day. The mine caused, according to his testimony, (i) "unbearable" noise, by the operation of the machines; (ii) "dust and particulate matter" dispersed into the air, produced by the operation; (iii) health conditions, especially "cough, irritated eyes and discomfort in their ears" and, in some cases, fever and difficulty breathing. The Court invoked the precautionary principle to grant the protection and pointed out that, even in case of evidentiary insufficiency,"reference has already been made to the precautionary principle, of transnational and internal empire, which leads to the lack of scientific certainty cannot be adduced as a reason to postpone the adoption of effective measures to prevent environmental degradation and the generation of health risks" [233].

As a result, the defendant company was ordered to install state-of-the-art technical machinery within a maximum period of three months, as well as dampers, washers, covers and recuperators of coal and its particles, to counteract noise and dispersion of residual dust.

Additionally, in judgments T-1077 of 2012 and T-672 of 2014, it was reiterated that the precautionary principle can be used to protect the right to health. The aforementioned decisions show that both Colombian legislation and constitutional jurisprudence recognize the possibility of applying the precautionary principle to protect the health of people.

7.39. In summary, for the Court, there is no doubt that the paradigm shift has been operating with the passing time, and has implied a re-dimensioning of the guiding principles of environmental protection, as its strengthening and more rigorous application under the superior criterion of *in dubio pro ambiente or in dubio pro natura*, consisting of the fact that in the face of tension between principles and conflicting rights, the authority must favor the interpretation that is most consistent with the guarantee and enjoyment of a healthy environment, with respect to the one that suspends, limits, or restricts it [234].

7.40. In the face of the environmental deterioration facing the planet, of which the human being is part, largely due to the development of extractive industries such as mining, it is necessary to continue implementing measures that seek to preserve nature, under regulations and public policies that are serious and more stringent for their guarantee and protection; encouraging real commitment and the participation of all - including the communities - in order to move towards a world that respects others. Therefore, a greater awareness, effectiveness and drasticity in the policy of defending the environment is imposed in the face of the potential threats posed by extractive and development projects in general.

It is, then, to establish legal instruments that recognize progressivity in rights, safeguard the pluralist principle and offer greater justice and equity. Setting aside a concession of simple benevolence for one collective recognition of our species that we share the planet with other living beings at a level of interdependence. Justice with nature must be applied beyond the human scenario, since society is capable of worrying about and dealing with the near and the distant, of questioning ourselves about environmental deterioration -beyond the benefits that are procured for us- and of recognizing a value to the natural world. The Constitutive Treaty of the European Community (Article 174), has advanced in the establishment of other principles that govern the European environmental policy, from those principles the one that stands out is the, "correction in the source of the attacks to the environment", whose scope is given in that environmental policy must fight against the damage to nature avoiding its emergence.

7.41. In this way and after reviewing some of the main characteristics of the Colombian mining-energy policy and the constitutional provisions that guarantee the protection of the environment, as a superior interest, for the Court it is clear that mining is an activity that has the potential to affect the environment and the sustainability of natural resources. Which is why the State must take strict measures to regulate and control its legal exercise -from the local to the national level. While the 1991 Political Charter, which has been called by the Court's jurisprudence an Ecological Constitution, protects the best interest of the environment and its enjoyment by human communities. This judgment has even greater relevance regarding the so-called illegal mining,

which without greater state control, as a consequence of a mining-energy policy that has been shown to be ineffective, has developed in the country and must be treated as a priority and in a comprehensive manner.

8. Effects of judgments proffered by the Constitutional Court in review. Effects intercommunis.

8.1. As a general rule, the effects of the orders issued by the Constitutional Court in its work of review of judicial decisions related to the *acción de tutela* are *inter partes*, that is, that they only affect particular situations of those involved in the review process.

However, in the terms defined by the jurisprudence of this Court, the Court, with strict adherence to the Constitution, can also determine or modulate the effects of its decisions. By deciding on a concrete case which effect best protects the fundamental constitutional rights and guarantees its full effectiveness.

Using this power, this Court has issued numerous judgments of *tutela* to which it has endowed effects that have a much greater scope than the *inter partes*. When it warns in a certain matter that to exclusively protect the rights invoked by the one who promotes the action, without considering the effects that such a decision would have on those who, in common circumstances, did not resort to said mechanism, could imply ignorance of other fundamental guarantees. For these purposes they have been called *inter communis* (between commons).

In this regard, in judgment SU-1023 of 2001, it was pointed out that there are very special circumstances in which the *acción de tutela* is not limited to being a subsidiary judicial mechanism to avoid the violation or threat of fundamental rights only by the plaintiffs. This assumption occurs when the protection of fundamental rights of the petitioners violates the fundamental rights of non-custodians. Since the *tutela* cannot contradict its nature and *raison d'être*and transform itself into a mechanism for the violation of rights, it also has sufficient binding force to protect equally fundamental rights of those who have not come directly to this judicial environment, and as long as that the defendant is found in common conditions with those who used the *tutela* when the protection order was given by the judge, that has a direct and immediate impact on the violation of fundamental rights of those who are not custodians.

In other words, there are exceptional events in which the limits of the violation must be set in consideration of both the fundamental right of the plaintiff and the fundamental right of those who do not have the *tutela.*As long as there is evidence of the need to prevent the protection of the fundamental rights of the plaintiff is paradoxically carried out to the detriment of equally fundamental rights of third parties who are in common conditions to that of an authority or a particular plaintiff.

From this point of view, the effects *inter communis* can be defined as those effects of a *tutela* ruling that exceptionally extends to specific situations of people who, even when they did not promote constitutional protection, are also affected by the *de hecho o de derecho* that motivated it. As a result, the action of a single authority or individual is justified in the need to give all members

of the same community equal and uniform treatment that ensures the effective enjoyment of their fundamental rights.

9. Analysis of the concrete case.

Introduction.

9.1. In the case submitted to the Court, the plaintiffs filed a writ of *acción de tutela*to stop the intensive and large-scale use of various methods of illegal mining and logging, including heavy machinery -dredges and backhoes- and highly toxic substances -like mercury- in the Atrato River (Chocó), its basins, swamps, wetlands and tributaries. Which, in this court's opinion, have been intensifying for several years and which are having harmful and irreversible consequences on the environment, affecting with it the fundamental rights of ethnic communities and the natural balance of the territories they inhabit.

To this, they add that the mechanized mining exploitation - which has been developing on a large scale illegally since the end of the nineties by different actors - mainly affects the upper and middle basin of the Atrato River and even its mouth in the gulf of Urabá, as well as its main tributaries, in particular, the Quito River, the Andágueda River (Cocomopoca territory), the Bebará River and the Bebaramá River (Cocomacia territory); concretely, through the use of heavy machinery such as suction dredgers -also called by the local "dragons" -, hydraulic elevators and backhoes, which in turn destroy the riverbed and perform indiscriminate dumping of mercury and other substances and supplies required (such as cyanide, gasoline and fats, etc.) for the development of these activities in the Atrato and its tributaries, in addition to the dispersion of vapors that mercury treatment throws in the mining entanglements.

In this sense, the plaintiffs consider that state-run entities (both at the local level and at the national level) are responsible for the violation of their fundamental rights to life, human dignity, health, water, and security. food, the healthy environment, the culture and the territory due to its omission to not take effective actions to stop the development of such illegal mining activities, which have generated the configuration of a serious humanitarian and environmental crisis in the region.

Methodology of resolution of the case.

9.2. Due to the complexity of the matter that is submitted to review by the Constitutional Court due to the variety of problems that allegedly affect the fundamental rights of the plaintiffs, the Chamber will: (i) resolve the legal issues raised; and (ii) it will issue a series of orders and urgent measures that will enable it to deal effectively with the crisis caused by the illegal mining of the ethnic communities of Chocó.

Resolution of the legal problem raised.

9.3. In a preliminary manner, the Court considers that in order to resolve the legal problem, it must: (i) outline some reference reports that describe the grave situation of illegal mining in the Department of Chocó; (ii) present the effects observed in the judicial inspection carried out in

Chocó in January 2016; (iii) raise a series of conclusions on the legal matters submitted for its consideration, and finally, (iv) make some considerations about public policy regarding illegal mining.

9.4. By way of illustration, the Chamber must begin by pointing out that the serious humanitarian, socio-cultural and environmental situation in which the Department of Chocó is immersed, is historic. The origins of the humanitarian crisis in the region are old, deep and structural. Some of the factors that have been identified in the literature that has studied the subject in detail suggest that poverty in Chocó is the result of: (i) a colonial legacy of weak or non-existent political-administrative institutions; (ii) difficult geographic and climatic conditions that increase the costs of production and "isolate" the district from the rest of the country and, at the same time, favor the settlement of illegal armed groups; (iii) an extractive economic structure focused exclusively on the exploitation of natural resources, in particular, the mining of gold, silver and platinum; and (iv) the isolation of the district from national economic activity. [235]

9.5 To this historical situation of poverty, marginalization, institutional isolation and the accumulation of a large number of unsatisfied basic needs - in a region of the country that has been historically affected by violence, displacement and internal armed conflict - has been added in the last decades the incursion of new illegal armed groups and the exponential increase of illegal mining, which, in the words of the Ombudsman's Office, "has generated an unprecedented humanitarian crisis in Chocó that demands the joint action of the entire State, its institutionalism and territorial entities at all levels to give attention and final solution to the serious crisis that this Department is experiencing." [236]

9.6. Based on multiple complaints about the situation described above, and in compliance with its constitutional functions, the Ombudsman's Office has documented extensively the development of illegal mining and the violation of fundamental rights that it produces in the country, especially in the Department of the Chocó. In 2010, it published the report "***La minería de hecho en Colombia***", in which the Ombudsman reported alarming increases in this activity in riverside municipalities of the Atrato, such as Carmen del Atrato, Bagadó, Condoto, Itsmina, Sipí and Tadó; and also warned about the massive arrival of foreigners with large machinery destined for illegal extractive activities, therefore what is recommended is greater presence of ministerial levels to address the problem.

In this regard, the referred report pointed out the following: "It is pertinent to note that both in this Mining District and in the other mining areas of the Colombian Pacific, since the mid-1980s until today, a significant group of foreign actors has come aggressively, in an un-consulted manner and without institutional control of the competent authorities. They have developed mining extractive activities in an indiscriminate and irrational manner, which has caused a massive alteration and degradation of the collective territories of the black communities of the Pacific; in this way there are acute and complex mining-environmental impacts of various kinds in the macro region."

9.7. In the same year, the Ombudsman presented the risk report No. 015 of 2010 issued for the sub-region of the Atrato in the Department of Chocó (Early Warning System - SAT) that highlighted

illegal mining projects and illicit crops began to consolidate in 2010 as an important factor of dispute between illegal armed actors present in Chocó [237].

9.8. Subsequently, in December 2012, the Ombudsman presented its follow-up report to the publication*"Mineria de hecho en Colombia"*. In this document the Ombudsman deepened the characterization of the social conflicts generated by legal and illegal mining in areas where artisanal mining has been a source of historical sustenance. In particular, the Ombudsman highlighted the increase in conflicts with ethnic groups due to the concession of mining titles to foreigners without carrying out prior consultation processes. Additionally, the recommendations made in the 2010 publication were reiterated, emphasizing that "in territories where ethnic communities exist (indigenous or Afro-Colombian peoples), which have traditionally carried out artisanal mining activities, mining titles are awarded to foreigners, without carrying out the respective process of prior consultation or guarantee the right of priority in favor of the ethnic communities contemplated in the Code of Mines."

9.9. Finally, in 2014 through two new publications [238] the Ombudsman's Office expressed its conclusions on the serious crisis facing the Department of Chocó. First, "Humanitarian Crisis in El Chocó: Diagnosis, Evaluation and Actions of the Ombudsman's Office", the entity reported the existence of pressure from illegal armed groups to civil and ethnic authorities to access the profits left by the mining and logging resource in Chocó, as well as the entrance of urban militias to protect illegal miners' encampments. In the same way, it characterized the effect to the territorial autonomy of the indigenous towns by the pressure of mining projects in areas historically inhabited by ethnic groups. He also warned of the economic dependence that exists around the gold market in the Department, and the concern that the vast majority of mining projects operated without mining title and/or an environmental license, in other words, illegally. In addition, the environmental impacts deepened by mining include lack of access to drinking water, destruction of water sources, sedimentation and diversion of rivers, loss of biodiversity, among others [239].

9.10. The second publication, in particular, draws the attention of the Court: it is the Ombudsman Resolution 064 (September 2014), which detailed the main problems encountered in guaranteeing a wide range of fundamental rights and conditions of life, and provides a series of urgent recommendations for national government to take concrete measures that, until now, have not been effectively addressed according to the follow-up report - Joint Directorate 005- prepared by the Ombudsman's Office and the Attorney General's Office [240].

In the aforementioned resolution, a global diagnosis was made of the situation of the Department District and 10 general recommendations were presented with specific commands for affected issues and rights for each of the State entities involved. The conclusions of this document, in turn, include the main guidelines of a complete previous report of the same entity entitled, "Humanitarian crisis in Chocó: diagnosis, assessment and actions of the Ombudsman's Office" [241].

9.11. The worsening of the problems described, due to the overflow of illegal mining in recent years, has meant that the vigilance and control bodies, without exception, have repeatedly called the national government's attention to the critical situation that affects the Department of Chocó, especially with respect to mining that takes place illegally. From the series of investigations on

mining and the environment published by the Comptroller General of the Republic (2013) [242], through the general reports on the situation of mining in the country and in Chocó presented annually by the Attorney General's Office [243], up to the reports and resolutions of the Ombudsman's Office, especially No. 064 of 2014, which declared a state of humanitarian and social emergency in Chocó, which have been mostly reviewed in this judgment.
By virtue of the phenomenon of illegal mining. The State entities have had the possibility of knowing the dimension of the effects on fundamental rights that occurs in this region of the country where the plaintiffs live.

9.12. However, the situation of illegal mining in Chocó is so alarming that recently, international organizations such as the United Nations Office on Drugs and Crime -UNODC- have issued specific reports on the exploitation of gold in Chocó confirming the serious situation that the region is experiencing, due to illegal mining [244]. This report states that "there is concern among citizens in general about the recent boom in the exploitation of alluvial gold in Colombian territory, which is not framed by the regulations in force for the development of this activity and which in many cases involves the creation of a productive chain that finances and strengthens organized crime."[245]

Considering the general panorama presented by the reports of several entities d in the last six years (2010-2016), the Court will review the damages observed in the judicial inspection carried out in January 2016 in some sectors of the basin of the Atrato River (Chocó) and several of its tributaries and surrounding territories.

9.13. The Chamber must begin by noting that both the plaintiff communities and various state entities, the Diocese of Quibdó, Codechocó, Corpourabá, the Ombudsman's Office, the Attorney General's Office, the Office of the Comptroller General of the Republic, the experts of the Universities of Cartagena and Chocó, international organizations such as the UN and non-governmental organizations such as Dejusticia and WWF Colombia, among others, confirmed *in situ* the intensive use of heavy machinery and toxic substances such as mercury in the process of gold extraction in the Atrato River in the tour that the judicial inspection made of the river and its tributaries [246]. The Ombudsman's Office (folios 1871-1989) and the Attorney General's Office (folios 1988-2007) stated this in their respective reports accompanying the judicial inspection.

Then the Chamber will refer to the main reported damages within the judicial inspection carried out in Quibdó (Chocó) and the tour that took place in several territories surrounding the Atrato river basin and some of its tributaries. Some sections of the main interventions made by institutes, universities and experts will also be related to the Court in the process of reviewing the file for reference.

9.14. **In terms of health effects**, the Plaintiffs [247] stated that as a consequence of the use of mercury in illegal mining activities, "the most serious damage to communities - in terms of health and environmental degradation of rivers and forests - occur in the areas surrounding the Atrato River and its tributaries, in the territories of Río Quito, Soledad, Villa Conto, San Isidro and Paimadó, among others; damages that they estimate occurred in about 84% of the collective territory of the communities. They explain that, according to studies from the Pacific Environmental Research Institute -IIAP-, there have been reports of spontaneous abortions, vaginal, skin and

fungal diseases caused by the presence of mercury, methylmercury and cyanide in the river waters."

In the same way, they indicated that "as a consequence of the presence of mercury and other toxic chemical substances in the waters of the Atrato River there is a proliferation of new vaginal and cutaneous diseases. For these communities, the river is the center of their social and cultural life: it is there where they identify themselves as a people, where they wash their clothes, bath, play, swim, fish and share cultural and recreational activities."

They indicated that "the level of mercury found by the IIAP in the populations is alarming and refers to a study that was carried out on 160 people in the basin of the Atrato River and its tributaries (Quito River). According to which, the level of mercury found in the blood is 60 points per million, when the minimum world average, what is considered acceptable, is 0.5 points per million, and in Colombia it is 1.0 per person."

They also reported that, "recent studies conducted by WWF Colombia and the University of Cartagena (Toxicology Group) on 80 inhabitants of Quibdó to determine the presence of heavy metals in the population, found that in two cases the percentage of mercury in the blood is of 116 points per million. To the above it adds that it is necessary to practice the same type of studies in the black communities that inhabit the basins of the Bebará and Bebaramá Rivers (in Cocomacia territory) and in the Neguá River, all of which are tributaries of the Atrato." However, they conclude that in the face of this serious problem, "it is necessary to carry out epidemiological and eco-toxicological studies to clearly determine a baseline that allows understanding the seriousness of the problem and the associated effects of mercury, which have not yet been realized."

In the same sense, Professor Jesus Olivero of the University of Cartagena [248], international specialist in toxicology and who has conducted numerous investigations in the matter of contamination by mercury and other toxic substances, indicated in the judicial inspection carried out in Quibdó the following considerations on the situation of the ethnic communities affected by illegal mining.

In general terms, the professor explained the effects produced by mercury when it enters living beings: "he points out that there are many reports that document it. It affirms that the organisms suffer important side-effects; one of them is related to the loss of biodiversity; and in humans, mercury has harmful effects in different areas, the most serious of which is the teratogenic effect, which causes malformations in children. He points out that although there is no definitive evidence, there is evidence that something is happening in the Atrato River in relation to the contamination of its waters with mercury (methylmercury) and cyanide."In this regard, he cited the example of Minamata (Japan), a population whose bay was contaminated with methylmercury more than 60 years ago, causing malformations and brain damage in children, which forced the Japanese Government to create a hospital only for these cases that still exists and treats patients.

In the specific case of the Atrato River, "the professor states that in a recent study conducted with WWF Colombia, random samples were taken from 80 people, inhabitants of Quibdó, and that this analysis showed that on average these people have a mercury level of 13 parts per million. This alarming level comes from the consumption of fish contaminated with mercury. It

clarifies that the mining activity not carried out in Quibdó, but rather several kilometers away, its harmful effects are present in the inhabitants of the entire region, whose main source of food is the fish from the river."[249]

At this point he recommends that the Court not wait any longer but act now, given that the harmful effects of mercury are already known and that there are international instruments that restrict its use in mining activities such as the Minamata Convention. In that sense, he suggested that: "although the use of mercury must be prohibited in mining activities, the substance is not the only problem. He explains that in the development of mining, which destroys forests, one can find other substances as harmful and as toxic as mercury and are heavy metals: thorium, uranium, lead, cadmium. It draws attention to the urgency of conducting serious studies of toxicology and epidemiology throughout the region to determine the presence of these substances and to understand the extent of the problem and how to respond effectively to it."[250]

Finally, he reiterated that the lack of resources and local, regional and national institutional capacity cannot be an excuse to allow "impunity" against the environment and that the controls ordered by the law are not carried out. In this regard, he said that,"the problem generated by mining is so serious that treatment differences should not be established between whether the mining is done legally or illegally, because both do not have effective controls by the authorities and still contaminate the environment regardless of having title and environmental license, not only in Chocó but throughout the country.It affirms that we must make decisions now, and not wait 5 or 10 years to act, because we are not facing just any area of the country. We are in one of the most biodiverse regions of the world that is under great threat as a result of mining and of an extractive model that in exchange for royalties, destroys the environment and does not reinvest socially. It warns about the presence of HIV in the encampments of miners - suggests that the study of the Ministry of Health is requested - and about how mining is transforming the traditional ways of life of ethnic communities."

In a complementary sense, the Alexander Von Humboldt Research Institute for Biological Resources [251], conceptualized the following on the implications of the use of mercury in the life, nature and human populations of illegal mining processes that take place in Chocó: "The contamination of cyanide and mercury is a determining factor on the loss of biodiversity and on the health of aquatic ecosystems. Cyanide has a very intense but local effect on the species of a community of aquatic organisms. Mercury has a more widespread effect on rivers and communities of associated organisms. Mercury remains deposited in the sediments of the rivers, and having a residual character, it passes from one organism to another, it accumulates and becomes fixed in the trophic chain. In this sense, it ends up being accumulated by fish and plants that are consumed by humans and have direct effects on human health."

During the judicial inspection, the Ombudsman's Office [252] documented different kinds of human health effects as a consequence of mercury exposure, noting that,"in the upper Atrato River and the Andágueda River (municipalities of Lloró and Bagadó) diseases such as malaria and dengue have increased considerably due to the impoverishment of water generated by illegal mining, which attracts transmitting mosquitoes. Urinary tract infections and diarrhea are common (...). In addition, outbreaks of dermatological infections apparently caused by direct contact with mercury have led to the abandonment of traditional practices such as bathing in the river, which threatens

the relationship of ethnic communities with the Atrato River. These diseases particularly affect pregnant women and children, for which it is necessary to diagnose with scientific studies if the various cases of fetal malformation are a direct consequence of the mercury present in the water of rivers and fish."

In a complementary sense, the Attorney General's Office [253] noted that within the judicial inspection, it was able to evidence and record numerous complaints from ethnic communities regarding diseases related to mercury contamination that is used in illegal mining activities in the Atrato River Basin. In this regard they point out in their accompanying report to the inspection, that the most common diseases are "serious vaginal infections, skin allergies, memory loss, tremors and neurological affections."

Finally, one of the major concerns that the Court encountered in its visit to Chocó is related to the lack of studies that can confirm or disprove the presence of mercury or other toxic substances in ethnic communities due to fish consumption or due to circumstances related to the environmental pollution that can guide an appropriate and effective institutional response in the matter. [254]

9.15. In terms of effects on the environment (rivers, swamps and forests), representatives of the plaintiff ethnic communities argued that the harmful effects of mercury used in illegal mining activities, which is specified as follows: "(i) by direct contact with the skin; (ii) by contamination of the atmosphere when the substance is burned (by generating steam and then acid rain precipitation); (iii) contamination of water sources when mercury is poured into rivers accumulates in water, plants and fish, which are the basis of the way of life and food practices of ethnic communities. It is added that the ethnic communities that inhabit the banks of the Atrato River (high, medium and low zones) suffer directly from the effects of mercury and cyanide pollution, as all their hygienic, nutritional, social and cultural activities are carried out in the river, in the absence of basic infrastructure of aqueduct and basic sanitation."[255]

In this regard, it is added that "the contamination by chemical substances also affects the forests and added to this the forestry exploitation that has been carried out for years in the zone -in particular in the region of the Bajo Atrato- without effective state control."[256]

To this it is also added that, "this environmental degradation not only responds to a problem of collective rights but also to a systematic violation of fundamental rights such as a dignified life, health, freedom of movement, territory, and autonomy. It warns of a profound transformation of the traditional ways of life of the communities (agriculture, fishing, hunting) due to mining."[257]

Regarding the main effects of illegal mining activities in the Atrato River Basin and neighboring territories, the Institute of Natural Sciences of the National University [258], in its intervention before the Court, confirmed the kinds of damages that occur as a consequence of the development of such activities in aquatic [259] and terrestrial [260] ecosystems. It is concluded that as a consequence of the activities of dredging and deforestation, alterations could be caused "such as clogging and/or diversion of watercourses, desiccation of swamps, losses in the connectivity of aquatic ecosystems with serious effects for the biodiversity of the region."As well as,

"loss of vegetal cover, alterations of the landscape and loss of habitat"; more than"soil contamination and inadequate disposal of chemical substances."

Additionally, the Alexander Von Humboldt Biological Resources Research Institute [261], considered that the illegal mining that takes place in the Atrato River Basin not only affects the environment by producing large removals of vegetation layer (native trees, endemic species, jungle), as well as the sedimentation of the fluvial bed, but it ends abruptly altering the course of the rivers. Thereby threatening with it the valuable biodiversity of the region, which as it was seen in the background and in the foundation 5.3 of this providence, it is one of the most important on the planet.

The Ombudsman said that due to the great devastation of the Chocoan forests caused by illegal mining activity, the entity has made several tours to the region, which have been referred to in reports and publications. Some of them already previously described (sections 9.6 to 9.12) also indicated in the judicial inspection that the most serious damage to the environment in the Atrato River is caused by, "the load of chemical pollutants that are used for the processing of gold, mercury, cyanide, fats and oils and fuels that produce high degrees of turbidity and material that is in suspension."[262]

Additionally, in its intervention in the judicial inspection procedure in Quibdó (Chocó), the Ombudsman's Office concluded by ratifying and reiterating its observations on violations of the right to health and the environment due to degradation of the ecosystems and contamination of water sources, which he asserted, "is already a very worrying environmental damage."[263]

Finally, the Ombudsman's Office referred in its accompanying report to the inspection that, "the illegal mining activity that takes place in the basin of the Atrato River and the San Juan River in Chocó, is alarmingly destroying forests, rivers, ecosystems, affecting the natural dynamics of the region and putting at risk the biogeographic Chocó, one of the most biodiverse regions in the world. The use of dredges, large and small, and backhoes within the same river channels, as well as in peripheral areas of the basins has affected the hydraulic dynamics of the Atrato, Andágueda and Quito rivers and their tributaries, has destroyed the riverbed, generated the disappearance of most of the aquatic and terrestrial fauna, has altered the natural dynamics and caused an environmental chaos in the whole region." [264]

The Attorney General's office, in the same sense, pointed out that illegal mining, which is carried out with dredges and toxic chemical substances, is accelerating without precedent, "the rate of habitat destruction in a limited geographical area, which does not offer a promising future for wildlife. Significant investments are required to carry out conservation work, declare new parks and protected reserves. Finally, it is important to undertake basic biological studies that allow maintaining the flora and fauna that are disappearing faster than the ability to know them."[265]

Finally, the Humboldt Institute made some estimates about what it considers to be the process to follow to achieve the recovery of the Atrato River, its species and aquatic ecosystems. The Institute concluded that, "the recovery of the Atrato River Basin and its tributaries could take decades."[266] It also said that the times for the recovery of a body of water and its native forest, "depends on the level of affectation of it and of course the scope of what we call rehabilitation,

under mining scenarios we must take into account that degradation it reaches strategic components of ecosystems where not only biota (living organisms), but components such as water and soil are affected or lost altogether." [267]

To this, the Institute added that in some cases it has been identified that many forest systems in tropical zones "initiate recovery processes after 30 years. This has been done to restore the typical species of the area and has worked on the remediation of the soil, which is usually strongly affected by heavy metals. If a complete recovery of the system is expected, the times of recovery can even triple."In the specific case of contamination by toxic substances such as mercury, the Institute concluded that"some authors estimate a permanence greater than 70 years if there are no activities to remediate said metal. However, studies on recovery times for the affected region are still scarce and should be considered the maximum precaution against any mining activity. To this end, studies of ecology research applied to the restoration of aquatic ecosystems in the restoration of tropical rainforests and research in post-mining scenarios must be followed, they are empty of scientific research that must be covered urgently."(Underlined and bold not in original text)

9.16. With respect to the violations of the fundamental right to food security, the coordinator of the Chocoano Women's Network [268] indicated in the judicial inspection carried out by the Court in Quibdó, that traditionally all farming was conducted by the populations through the river and that this situation began to change, "with the arrival of the armed conflict - in its different actors - to the ethnic territories and with the beginning of the disputes for the territorial control that has been aggravated with the development of illegal mining and logging."It concluded that these activities are the origin of the displacement and food crisis that the region is experiencing.

The Vicar General of the Diocese of Quibdó - who also participated in the judicial inspection - affirmed that in 2006 FISCH, the Dioceses of the Pacific and 10 other ethnic organizations, “advanced an investigation on the food sovereignty of the ethnic communities of the region and found that illegal mining and logging are seriously affecting ancestral practices and traditional ways of life.” [269]. For example, he pointed out that as a consequence of carrying out these activities "the cultivation of chontaduro and bananilla has disappeared",in the territories of the Atrato River Basin.

Additionally, the representative of the plaintiff communities referred in the judicial inspection to a study [270] carried out by the Humboldt Institute, WWF Colombia, the Javeriana University and the Colombian Association of Ichthyology (fish specialists), in the so-called biogeographical Chocó, which also includes Chocó to Cauca and Nariño (Pacific coastal area), "where it was demonstrated that 15 endemic species have disappeared from the basins and that the river with the greatest loss of species is the Atrato River."It is added that" of these 15 species 6 inhabit the Quito river and cannot be consumed due to high levels of mercury contamination, which is very serious because these fish are an important source food for the communities of the region." It is concluded that the consequences in terms of food security and subsistence are worrisome because,"there is no more fisheries or commerce". [271]

On the other hand, during the inspection of the Atrato River and several of its tributaries, including the Quito River, a leader of the Community Council of "La Soledad" (Chocó), denounced that their community (one of the first to be seen at the start of the trip from Quibdó), "is one of the

most affected by illegal mining, because this activity - and the pollution produced by it - has ended traditional , fisheries, causing serious problems of food security."[272]

Another leader of the Community Council of "Paimadó, Río Quito" (Chocó), added that the communities of "La Soledad", "Guayabalito" and "Barranca" traditionally lived on fishing, but that the pollution of the illegal mining activity (chemical substances, waste, oils) and municipalities (garbage), has ceased these activities. To this it is added that, "the area that was crossed many years ago was an area of fishing and agriculture: the leaders remember the river being full of canoes and fish."[273] Finally, the leader pointed out that, in the absence of employment and productive activities, the ways of life of the communities are changing and prostitution has taken force in the region as a subsistence activity.

To this, another community leader added that, "traditional species of fish such as 'Dentón' no longer rise to the river because of pollution and that this has generated displacement in the communities."[274] It is argued that as a consequence of the development of illegal mining activities today only abandoned traps are observed.

Finally, the coordinator of the UN Office for Ethnic Affairs, who accompanied the judicial inspection and the tour of the Atrato River and its tributaries, reiterated the point made by several community leaders regarding the disappearance of the fish and the traditional subsistence model of communities because of mining. The coordinator added that the contamination conditions of the river have contributed to the low rate of fish reproduction and, with time, to its disappearance.

9.17. About the damages to the rights, to the culture, and the territory, one of the community leaders of Paimadó (Chocó) affirmed, during the visit to that region that, "it is very sad to walk today along the Quito river -which is drying up- from Atrato to Paimadó or Manacruz because illegal mining has not only changed the course of the river but has also ended up with traditional forms of subsistence based on agriculture and the crops of yam, yucca and plantain. The ancestral trees such as borojó, chontaduro, the 'bread tree', the 'pato' and the banana tree are no longer available and cannot be transported due to the way in which mining has destroyed the river. "

In a complementary sense, the Ombudsman's Office indicated that the illegal mining activity in the Atrato River Basin and its tributaries has caused the decrease of agricultural work, as a traditional form of subsistence, "to the point that all the food consumed is taken from populated centers like Quibdó and Beté". The Office added that this situation has also affected the social and ecological function of the collective territory, "because its use for the traditional practice of agriculture was suspended."This is how the foods that were ancestrally cultivated for consumption such as chontaduro, borojó, cacao, banana, among others, their basic foods, are no longer cultivated in the areas most impacted by illegal mining, also because these activities generate infertility on earth.

Likewise, the Ombudsman in his report pointed out that the food impacts are intimately linked to the culture and territory of the affected ethnic communities. In this regard, he stated that, "the environmental impact on rivers that illegal mining has generated has transformed cultural practices around water sources. An example of the effects on the social function of the territory and therefore on cultural integrity is related to the fact that communities cannot carry out their own

activities on the river bank. Taking into account that the river serves as a traditional space for dialogue and the transmission of one's own knowledge through oral tradition, now the use of this space has lost its sense of a meeting place, directly impacting the cultural integrity of these communities."

Similarly, the Humboldt Institute, from a biological and anthropological perspective, presented a series of reflections on the need to assess not only the environmental impacts of water and land pollution but also how these circumstances end up affecting, including socio-cultural, territorial, cultural, economic and political rights (in terms of authority and power) of the ethnic communities that inhabit the Atrato River Basin [275].

Considering the foregoing, and in accordance with the evidence of the Court in the judicial inspection carried out in Choco in January 2016 [276], development of illegal mining activities contribute to a serious violation of fundamental rights in the ethnic communities that inhabit the basin of the Atrato River, its tributaries and surrounding territories.

Indeed, the Court was able to verify that along the route through the Quito River (tributary of the Atrato), which included the sectors of Quibdó, Soledad, Guayabalito, Loma de Barranca, San Isidro, Bocas de Paimadó, Lomas Pueblo Nuevo, river Pató, Villa Conto and Paimadó, the activity deployed by the mining machines (dredgers, dragons and backhoes) is seriously affecting the environment and the neighboring communities [277].

In particular, this Court observed the deviation and serious deterioration of the riverbed by sand banks, artificial arms and entrances. In them the permanent presence of dredges and dragons was confirmed. Likewise, the destruction of the vegetation layer, destruction of banks, diversion of channels, blockage of tributaries, removal of soil (sand and rocks), as well as the construction of artificial islands with backhoes (sandbanks), that after the exploitation were abandoned. Additionally, no evidence was found of the development of fishing or farming activities [278], in the middle of what it seems, as the locals call it, "the mining desert".

In summary, the declarations, reports and quoted concepts confirm that the polluting activities produced by illegal mining may have direct impacts on the health of the people and, in addition, another kind of indirect impacts on human well-being, such as the reduction of forest products that affects food and medicinal balance, and can produce changes in the traditional practices, uses and customs of the ethnic communities associated with biodiversity.

9.18. *Responses from the defendant entities*. With respect to the specific case, the Court has been able to verify in the judicial inspection carried out in Choco in January 2016 [279], that one of the most serious elements of the described crisis has, as an essential component, a great difficulty with the state entities. This difficulty ranges from the local to the national level, to articulate policies, plans and programs aimed at effectively tackling the complex challenge implied by illegal mining activity that in most cases is in the hands of illegal armed groups.

Thus, the vast majority of responses that different public entities made to the Court have a common denominator, and that is to show a notable lack of information, coordination and articulation of functions, jurisdictions and competences between the same, something that in other

cases the Court has metaphorically called "institutional marasmus"[280]. Another aspect to be examined and one of great concern to the Chamber is that a significant number of institutional responses insisted that the situation of illegal mining in the Atrato River Basin is not under their power or responsibility.

Thus, for example, the Presidency of the Republic [281] limited itself to saying that,"by legal definition, it cannot be a defendant within the acción de tutela, because within its functions there is no relation to the subject matter of the action, what is translated in a lack of legitimation."Likewise, it indicated, "that it lacks information that allows it to answer the questions of the Court and requests that it be dissociated or declared inadmissible from the tutela against the entity."

The Ministry of the Interior (folios 72-79 / 522-527), the Ministry of Environment (folios 1007-1012), the Ministry of Mines and Energy (folios 289-348 / 2027-2037), the National Agency of Mining (folios 104-179), the Ministry of Health (folios 2008-2036), the Ministry of Agriculture (folios 28-33 of the main Notebook), the Ministry of Housing (folios 501-521), the Ministry of Education (folios 349 to 359), the Ministry of Defense (folios 389-400 / 1014-1263), the Ministry of Finance and the UIAF (folios 2498-2557), the National Planning Department -DNP- (folios 80-103), the Department for Social Prosperity -DPS- (folios 1264-1265), the Government of Antioquia (folios 360-388), the National Agency of Environmental Licenses -ANLA- (folios 1266-1278), the National Institute of Health -INS - (folios 180-207), the Regional Autonomous Corporation for the Sustainable Development of Chocó -Codechocó- (folios 2095-2131), to the Corporation for the Sustainable Development of l Urabá -Corpourabá- (folios 224-230), most of them presented lists of independent and eventual actions that account for the lack of articulation and coordination of some state entities to comprehensively address the multiple needs that demand to address the serious threat that it represents illegal mining activity for the protesting ethnic communities [282].

In particular, it is noted that the District of Chocó and the defendant municipalities (which include 3 of Antioquia) [283] did not respond to any of the information requests made by the Court, which raised concerns to the Ombudsman's Office and the Attorney General's Office in their "Joint Directive 005" of 2015.

Specifically, regarding the Mining Bureau "Mesa Minera", the only space designed for the state articulation in response to the illegal mining crisis, actors, e specialists and control agencies that participated in the judicial inspection that the Court carried out in Quibdó, said that it has not achieved its objective. For example, the Center for Studies "Tierra Digna", legal representative of the plaintiff ethnic communities, said that, "the Mining Bureau, made up of regional authorities, whose purpose is to address the problem that is causing mining, has not worked nor has it provided concrete solutions to the serious humanitarian and environmental crisis." [284]

To this, it is added that, "(...) the national government has made logistical and financial efforts in the last 3 years to achieve a space of inter-institutional articulation, which they have called the 'Mining-Environmental Bureau, with the participation of communities, local entities and of the mining guild. Similarly, it points out that the Ministry of Health ordered an epidemiological study to determine the extent of the health effects in Chocó, but after one year it has not yet been done. In summary, it expresses that the actions planned and derived from the Mining are not being fulfilled."[285]

For his part, the representative of the Inter-ethnic Forum Solidarity Chocó -FISCH-, denounced in the same diligence, "a long inactivity of the Mining Bureau in its three years of existence."And reiterated that, "the measures to be taken must guarantee the restoration of the traditional ways of life, health, protection of the environment, food sovereignty and territorial recovery, from an ethnic perspective that strengthens and empowers ethnic authority to face all these challenges." [286]

In the same sense, the Vicar General of the Diocese of Quibdó expressed his concern about, "the resignation of the leaders of the communities to continue attending the Mining Bureau that has generated threats against its members."[287]

In a broader sense, the Judicial and Agrarian Procurator of Quibdó, estimated that, "the State must structurally reorient its policy against Chocó and with respect to mining. He adds that the State has left alone the district and the institutions in charge of the fight against illegal mining that is developed mostly by illegal armed groups; it affirms that they are the ones who 'control' the mining business and 'replace the State in its functions'." [288]

To this, he added that, "the mayors do not have the tools to effectively control mining, that there is no State presence in the region and that there is a great problem of unsatisfied basic needs. He also points out that most of the mining concessions in Chocó are delivered without studies, without adequate information and without complying with legal requirements or carrying out prior consultation with the communities."[289]

Finally, he concluded by noting that, "the mining authority systematically refuses to carry out prior consultation processes in the region with ethnic communities. As a result, there is no record that clarifies where mining can be done and where it cannot be done. It suggests designing, from the State and from the central level, a serious, structural and long-term policy on mining."[290]

Additionally, the Ombudsman's Office reiterated what the Regional Prosecutor said, "in the sense that the institutional inability of the authorities to control illegal mining and its serious consequences on the population and the environment is evident. It clarifies that the problem is not limited to illegal mining but to the state mining model that does not control and has no record of the development of the activity and if it respects the current environmental and mining regulations." [291]

Finally, Codechocó, the environmental authority of the region reaffirmed what was expressed both by the Attorney General's Office and the Ombudsman's Office, stating that,"Codechocó does not ignore the serious environmental problems that arise in the department as a result of mining activities and forest exploitation. It affirms that it shares the views of the Attorney General's Office and the Ombudsman's Office in the sense that the magnitude of the situation is so great and so serious that Codechocó - which reports to the Ministry of the Environment - cannot do much to address this problem, due to its institutional deficiencies characterized by insufficient resources and logistic capacity. It indicates that despite the foregoing,

they permanently request accompaniment from the Public Force and the Prosecutor's Office in its operations."[292]

In a complementary manner, both the Ombudsman's Office (folios 423-500 and 1871-1989), the Attorney General's Office (folios 286-288 and 1988-2007), the Office of the Comptroller General of the Republic (folios 255-285) and the General Prosecutor Office (folios 2603-2697) have issued numerous warnings about the serious situation faced by the Department of Chocó, as well as the ethnic communities that inhabit the Atrato River Basin and the threat to their fundamental rights as a result of the intensive development of illegal mining activities; without that until now local and national authorities have taken sufficient measures to address or solve the problem reported.

9.19. Once the main impacts reported by the plaintiff communities involved and the responses of the defendant entities are described, the Chamber then presents a brief photographic account of the judicial inspection carried out in Quibdó (Chocó), in January 2016, which gives an account of the serious situation of the Atrato River Basin, its tributaries and surrounding territories.

[IMAGE]

Folio 2110 of the Book of evidence No. 5. In the graph you can see an encampment or illegal mining camp with the presence of dredgers and backhoes. January 29, 2016.

[IMAGE]

Folio 2114 of the Book of evidence No. 5. Dredge or "dragon" - as the local communities call it - carrying out sand removal activities in the bed of the Quito River (affluent of the Atrato). January 29, 2016.

[IMAGE]

Folio 2116 of the Evidence Book No. 5. Activities of dredging, processing and illegal extraction of gold in the Quito River. January 29, 2016.

[IMAGE]

Folio 2118 of the Book of evidence No. 5. "Dragon" carrying out sand removal activities in the bed of the Quito River (affluent of the Atrato). January 29, 2016.

[IMAGE]

Folio 2124 of the Book of evidence No. 5. Image of virgin forest, free of mining and forest exploitation. January 29, 2016.

[IMAGE]

Folio 2126 of the Evidence Book No. 5. Image of the transformation that

the mining activities produce in the Chocoan jungle. January 29, 2016.

[IMAGE]

Folio 2129 of the Book of evidence No. 5. Destruction of the bed of the Quito River (affluent of the Atrato). January 29, 2016.

[IMAGE]

Folio 2129 of the Book of evidence No. 5. Flooding of native forest caused by dredges in the Atrato River. You can also see mountains or "islands" of sand in the river that are the result of illegal mining. January 29, 2016.
Folio 2130 of the Evidence Book No. 5. Overview of the effects of illegal mining with heavy machinery and toxic chemicals in the Atrato River. January 29 of 2016. January 29 of 2016.

[IMAGE]

Folio 2131 of the Book of evidence No. 5. Destruction of the Atrato river bed. January 29, 2016.
Conclusion. The defendant state authorities are responsible for the violation of the fundamental rights to life, to health, to water, to food security, to the healthy environment, to the culture and to the territory of the plaintiff ethnic communities for their omission to not take effective actions to stop the development of illegal mining activities. Such activities which have generated the configuration of a serious humanitarian and environmental crisis in the Atrato River Basin (Chocó), its tributaries and surrounding territories.

a.- Regarding the dumping of mercury and other toxic chemical substances necessary for carrying out illegal mining activities in the Atrato River, its tributaries and surrounding territories.

9.20. Violation of the fundamental rights to life, health and the healthy environment of the Plaintiff ethnic communities.The Court must begin by pointing out that from the different reports, responses, concepts and interventions included in the review process [293], it has found that Choco's main economic activity is currently illegal mining.And that this mechanized exploitation, in spite of the State's efforts to combat it, is carried out in an intensive and indiscriminate manner, with the use of dredgers, dragons, backhoes and toxic chemical substances such as mercury and cyanide to obtain the separation of the ore from gold of impurities [294]. Thereby generating a significant environmental pollution that affects, as a whole, the rights to life, human dignity, health, water, food security, the health of the environment, to the culture and territory of the ethnic communities that inhabit the basin of the Atrato River.

In this way, both the Chamber and the plaintiff communities, various State entities, the Diocese of Quibdó, Codechocó, Corpourabá, the Ombudsman's Office, the Attorney General of the Nation, the General Comptroller of the Republic, the experts of the Universities of Cartagena and Chocó, international organizations such as the UN and non-governmental organizations such as Dejusticia and WWF Colombia, among others, were able to confirm in situ the intensive use of heavy machinery and toxic substances such as mercury in the gold extraction process in the Atrato River in line with the judicial inspection that was made of the river and its tributaries[295]. The

Ombudsman's Office (folios 1871-1989) and the Attorney General's Office (folios 1988-2007) stated this in their respective reports accompanying the judicial inspection, as has already been outlined.

9.21. However, according to the evidence of the Court in the judicial inspection carried out in Chocó in January 2016 [296], it is necessary that in the case of the development of illegal mining activities, they contribute to a serious violation of fundamental rights in the ethnic communities that inhabit the basin of the Atrato River, its tributaries and surrounding territories.

Indeed, the Court was able to verify that along the route through the Quito River (tributary of the Atrato), which included the sectors of Quibdó, Soledad, Guayabalito, Loma de Barranca, San Isidro, Bocas de Paimadó, Lomas Pueblo Nuevo, river Pató, Villa Conto and Paimadó, the activity deployed by the machines used in mining (dredgers, dragons and backhoes) is seriously affecting the environment and the neighboring communities [297].

In particular, this Court was able to observe the deviation and serious deterioration of the riverbed by sandbars, artificial arms and entrances. In them the permanent presence of dredges and dragons was confirmed. In the same way, the destruction of the vegetal layer and of the riverbanks, deviation of channels, blockage of tributaries, removal of earth (sand and rocks), as well as the construction of artificial islands with backhoes (sandbars) were left abandoned after the exploitation. Additionally, no evidence was found of the development of fishing or farming activities [298], in the midst of what it seems, as the locals call it, "the mining desert".

In relation to the above, what has been observed in the images reviewed in section 9.19 [299] is the conspicuous contrast between a virgin jungle region and the zones dedicated to illegal mining, both on land and water, with great impact on the forests, and as in the Atrato River and its tributaries, with great impact on water sources. The impact of illegal mining on the river is so strong that today it is practically impossible to determine the original channel that river once had, its arms and its tributaries. Along with what can be seen a considerable growth of deforested areas, given that illegal mining takes place both in rivers - alluvial mining - and in land - open-air mining -, exploitations that together produce serious deforestation processes [300].

9.22. Likewise, the destruction of the environment and the threat to biodiversity in the region subject to the facts of this action was corroborated not only by the Chamber but also by all the accompanying entities [301], as referred in sections 9.14 to 9.17. For the Court, there is no doubt that illegal mining is seriously affecting the fundamental rights to life, health and a healthy environment of the ethnic communities that inhabit the Atrato River Basin and its tributaries. And that this violation has impacts direct and indirect on the Chocoano ethnic communities, as has been documented in numerous reports of the Ombudsman's Office, the Attorney General's Office and the General Comptroller of the Republic, among others, which were already mentioned in this judgment.

9.23. An important reason to affirm the above is that the activities of illegal mining, apart from using heavy machinery -which completely transforms and destroys everything in its path-, also indiscriminately uses highly toxic chemical substances such as mercury. Which, as we have seen in the reports reviewed throughout this resolution (chapter 7, section 7.26 to 7.31, and section 9.14),

have the potential to affect the life and health of human populations, as well as the environment and its biodiversity.

In this regard, the Chamber should reiterate that, as discussed in chapter 5, sections 5.1 to 5.58, the protection of rivers, forests, food sources and biodiversity (healthy environment) has a direct and interdependent relationship with the guarantee of the rights to life and health, (as well as culture and territory), within what has been called biocultural rights. Precisely, the central elements of this approach establish an intrinsic link between nature and culture, and the diversity of the human species as part of nature and manifestation of multiple forms of life. From this perspective, the conservation of biodiversity necessarily leads to the preservation and protection of the ways of life and cultures that interact with it.

Consequently, public policies on the conservation of biodiversity must adapt and focus on the preservation of life, its various manifestations, but mainly in the preservation of the conditions for that biodiversity to continue deploying its evolutionary potential in a stable and indefinite manner, as the Court has indicated in abundant jurisprudence [302]. Similarly, the obligations of the State to protect and conserve the lifestyles of indigenous peoples, black and farmer, mean guaranteeing their conditions of being, perceiving and apprehending the world.

9.24. In open contrast to the above, the public entities investigated on the actions taken to confront this complex situation that threatens the rights to life, health and a healthy environment of the plaintiff ethnic communities, such as the Ministry of Health, the National Institute of Health, the Ministry of Environment and Codechocó indicated that they are in the process of designing plans and studies that allow the elaboration of joint research and action projects to respond to the crisis. [303] However, although the Court values these intentions as positive, to date it has not heard of any toxicology or epidemiological research in the region.

9.25. In consideration of the aforementioned, for the Court it is necessary to conclude that the illegal mining activity, having the potential to cause harm to health and to the environment, as has been seen in the case of the ethnic communities that inhabit the basin of the Atrato River, it is subject to the application of the precautionary principle. This applies when - although there is a principle of technical certainty - there is scientific uncertainty regarding the harmful effects of a measure or activity. In that case, the solution that avoids the damage must be preferred and not the one that can allow it. This principle is not only designed to protect the right to the environment but also the right to health when there is a threat of violation. In this way, as was seen in chapter 7 (section 7.33 to 7.41) of the present ruling, when due to the development of illegal mining activities, in case there is reasonable doubt as to whether they affect the natural environment or health of the people, as it has been evidenced in the matter *sub examine*, measures must be taken that anticipate and avoid any damage, and in case that it is caused, the corresponding compensation measures.

In this order of ideas, given the evidence of the potential harmful effects that the use of mercury and other toxic substances in the illegal mining activity that takes place in the Atrato River Basin, which can endanger not only the communities but to the environment as a whole, even if there is no scientific certainty, the Chamber considers that in this case the requirements are met to apply the precautionary principle in environmental matters and to protect the right to health of the people [304]. As indicated in the respective section, the precautionary principle implies in very

simple terms, that in case of scientific doubt, it does not abstain and, on the contrary, protects the right to a healthy environment and health in connection with life.

Specifically, the application of the precautionary principle in the present case will have as objectives, (i) to prohibit the use of toxic substances such as mercury in mining activities, whether legal or illegal; and (ii) declare that the Atrato River is subject to rights that imply its protection, conservation, maintenance and, in the specific case, restoration, as will be seen later in section 9.32.

9.26. By way of conclusion and with respect to this particular point, the Court finds that the Defendant entities have violated the rights to life, health and a healthy environment of the Plaintiff communities by allowing the indiscriminate dumping of mercury and other toxic chemical substances necessary for the realization of illegal mining activities in the Atrato River, its tributaries and surrounding territories by not taking concrete and articulated measures to avoid it, having full knowledge of the situation, that is, by omission in the fulfillment of its legal and constitutional duties. As a result, the responsible entities will be ordered to adopt a series of emergency measures to deal with this serious violation of the fundamental rights to life, health and a healthy environment, which will be indicated in the relative section to the orders.

b.- About the pollution of the Atrato River, its tributaries, forests and food sources produced by the development of illegal mining activities in the region.

9.27. Violation of the right to water as a water source. At this point, it is clear to the Court that, as proven by the evidence in the case file and in the judicial inspection - which were outlined in sections 9.14 to 9.17 -, the illegal mining that takes place in the Atrato River Basin and its tributaries challenges any idea of rational use of water and forest resources, and constitutes an open violation of the fundamental right to water (as a consequence of its serious contamination) that threatens not only ethnic communities, the Department of Chocó or the environment, but also one of the most important water and biodiversity sources in the world, and thus, present and future generations [305].

In this way, for the Chamber it is pertinent to reiterate that, as was seen in sections 5.41 to 5.50 of the present order, in accordance with various International Treaties [306], the Political Charter (Ecological Constitution), the Inter-American jurisprudence [307] and that of this Court [308], access to safe water, the preservation of natural sources and water resources constitutes one of the essential guarantees to ensure an adequate standard of living, as an indispensable condition to avoid death by dehydration, to reduce risk of diseases related to water (contaminated) and to meet the needs of consumption, cooking, personal hygiene and domestic hygiene. This also guarantees preservation of the hydrological, biological and chemical functions of ecosystems, adaptation of human activities to the limits of nature's capacity and to combat the vectors of water-related diseases.

Additionally, it cannot be overlooked that the right to water is a sine qua non requirement for the exercise of other rights, while "water is necessary to produce food (right to food); to ensure environmental hygiene (right to health); to procure life (right to work) and to enjoy certain cultural practices (right to participate in cultural life)."Therefore, pollution -especially with mercury and cyanide [309]- and carrying out illegal mining activities in the Atrato River Basin and its tributaries

not only violates the right to water and other components of the right to a healthy environment (as has already been stated), but also violates the essential standards of availability, accessibility and water quality established in General Comment No. 15, because this type of mining is harmful, the production of food (trees, crops and fish), the health conditions, the traditional ways of life and the cultural practices of the Plaintiff ethnic communities.

Precisely, the biggest challenge of contemporary constitutionalism on environmental matters, is to achieve the safeguard and effective protection of nature, associated cultures, ways of life, and biodiversity, not just for the simple material, genetic or productive utility that these can represent to humans, but because being a living entity composed of other multiple forms of life and cultural representations, are subjects of individual rights, which makes them a new imperative of integral protection and respect on the part of States and societies. In short, only from an attitude of deep respect and humility with nature, its members and its culture, it is possible to enter into relationships with them in fair and equitable terms, leaving aside any concept that is limited to the simply utilitarian, economic, or efficient [310].

In effect, nature and the environment are a transversal element of the Colombian constitutional order. Its importance lies, of course, in attention to the human beings that inhabit it and the need to have a healthy environment to live a dignified life and in well being conditions, but also in relation to the other living organisms with whom the planet is shared, *understood as stocks worthy of protection in themselves*. It is about being aware of the interdependence that connects us to all living beings on earth; that is, recognizing ourselves as integral parts of the global ecosystem -biosphere-, rather than from normative categories of domination, simple exploitation or utility. A position that takes on special relevance in Colombian constitutionalism, taking into account the principle of cultural and ethnic pluralism that supports it, as well as the knowledge, uses, and ancestral customs bequeathed by indigenous and tribal peoples. [311]

Precisely, in relation to the natural and cultural wealth of the nation, Article 8 of the Political Charter establishes as a fundamental obligation of the State and of society to watch over the care of our natural and cultural riches. Additionally, in the chapter on collective rights (Articles 79 and 80) and specific obligations (Article 95-8), the general parameters that guide the relationship between the human being and his living environment are established: natural, environmental and biodiverse. In this sense, as a consequence of the attributions consecrated at the head of the State, society and individuals in the above-mentioned articles, the obligation to protect the environment is established in order to prevent and control the environmental deterioration factors, procuring its conservation, restoration and sustainable development. In simpler words: the defense of the environment is not only a prime objective within the structure of our SRL but it also integrates, in an essential way, the spirit that informs the entire Political Constitution. [312]

9.28. In this context, it is necessary for the Chamber to advance in the interpretation of the applicable law and in the forms of protection of fundamental rights and their subjects, due to the great degree of degradation and threat in which it found the Atrato River Basin. Fortunately, at the international level (as seen from section 5.11) a new legal approach called biocultural rights is being developed, whose central premise is the relationship of profound unity and interdependence between nature and human species, and that has as a consequence a new socio-legal understanding in which nature should be taken seriously and with full rights. That is, as a subject of rights.

9.29. In this order of ideas, the issue that is considered in this order by the Court - on the serious effects produced by the intensive development of activities of illegal mining exploitation with damage to multiple fundamental rights in the Atrato River Basin (Chocó) -, has clearly evidenced that human populations are those that are interdependent of the natural world - and not the other way around - and that they must assume the consequences of their actions and omissions with nature. It is about understanding this new socio-political reality with the aim of achieving a respectful transformation with the natural world, as it has happened before with civil and political rights (first generation); the economic, social and cultural (second generation), and environmental rights (third generation). Now is the time to begin taking the first steps to effectively protect the planet and its resources before it is too late, or the damage is irreversible, not only for future generations but for the human species.

9.30. In this way, respect for nature must start from the reflection on the meaning of existence, the evolutionary process, the universe and the cosmos. That is, a system of thought based on a conception of the human being as an integral part, and not as a simple dominator, would allow a process of self-regulation of the human species and their impact on the environment, recognizing their role within the circle of life and evolution from an *ecocentric* perspective. It is from this consideration, for example, that respect for animal rights has been cemented. In this way, it is a matter of establishing a legal instrument that offers greater justice to nature and its relations with human beings, based on the collective recognition of our species, as suggested by biocultural rights.

In this same sense, biocultural diversity as an approach, based, as has been seen, in an ecocentric perspective, implies that policies, norms and interpretations about biodiversity conservation recognize the link and interrelation that exists between culture and nature. It extends the participation of ethnic communities in the definition of public policies and regulatory frameworks, and guarantees the conditions conducive to the generation, conservation and renewal of their knowledge systems, within the framework of a SRL.

The importance of the biological and cultural diversity of the nation for the next generations and the survival of our natural and cultural wealth poses to the Colombian State the need to adopt comprehensive public policies on conservation, preservation and compensation that consider the interdependence between biological and cultural diversity. In this way, biocultural diversity represents the most integral and comprehensive approach to ethnic and cultural diversity in the face of effective protection.

9.31. In other words, justice for nature must be applied beyond the human scenario and must allow nature to be subject to rights. Under this understanding, the Chamber considers it necessary to take a step forward in the jurisprudence towards the constitutional protection of one of our most important sources of biodiversity: the Atrato River. This interpretation finds full justification in the best interests of the environment that has been widely developed by constitutional jurisprudence and that is made up of numerous constitutional clauses that constitute what has been called the "Ecological Constitution" or "Green Constitution". This set of provisions makes it possible to affirm the transcendence of the healthy environment and the interdependent link with human beings and the State. [313]

From the above, a series of obligations of protection and guarantee of the environment are derived from the State, who is first in responsibility for its protection, maintenance and conservation, which must materialize through responsible environmental public policies (sustainable governance), issuance of CONPES documents, legislation and National Development Plans, among others; without prejudice to the duty of protection and care that also assists civil society and the communities themselves to take care of natural resources and biodiversity. In this sense, the Chamber considers it pertinent to call attention to the ethnic communities that inhabit the Atrato River Basin so that they protect, within the exercise of their customs, uses and traditions, the environment of which they are its first guardians and responsible for it.

However, the actions taken by the competent state entities, both at the local level and at the national level, have mostly been welfare and isolated. Without much coordination in terms of guaranteeing the care, maintenance or recovery of the Atrato River Basin and its tributaries, as evidenced by the lack of response to these concerns by the Government of Chocó, or in the recognition of lack of personnel and administrative capacity of Codechocó; as was confirmed by the Regional Office of Chocó, the Ombudsman and the Comptroller General in judicial inspection in the area of occurrence of the events in which the Court was able to observe, as already mentioned in sections 9.14 to 9.17, that all these assertions are true and that the Atrato River Basin is under serious threat due to the performance of illegal mining activities.

However, according to what has been seen up to now, particularly in chapter 5, sections 5.3 and 5.19 to 5.37, the national regulation on biodiversity and the use of genetic resources is inappropriate and registers important gaps that affect the effective protection of fundamental rights of ethnic communities. These deficiencies have their origin in a problem of understanding biodiversity on the part of the Government and of the entities in charge of the planning and development of the Colombian State. The prevailing vision is an economic one, where biodiversity, genetic material and associated traditional knowledge are seen as susceptible to appropriation, industrial use and source of economic gains. In this way, policies and legislation have emphasized access for economic use and exploitation to the detriment of the protection of the rights of the environment and of the communities.

In this sense, and in response to such an approach to the management of biological and cultural diversity by the State, it is necessary to adopt holistic approaches to conservation that consider the profound relationship between biological and cultural diversity.

9.32. To that extent, considering the scope of protection of international treaties signed by Colombia in the field of environmental protection, the *Ecological Constitution* and biocultural rights [314] (sections 5.11 to 5.18), which preach the joint and interdependent protection be human with nature and its resources, is that the Court will declare that the Atrato River is subject to rights that imply its protection, conservation, maintenance and, in the specific case, restoration. For the effective fulfillment of this declaration, the Court will arrange for the Colombian State to exercise legal guardianship and representation of the rights of the river in conjunction with the ethnic communities that inhabit the Atrato River Basin in Chocó; in this way, the Atrato River and its basin - henceforth - will be represented by a member of the plaintiff communities and a delegate of the Colombian State. [315] Additionally, and with the purpose of ensuring the protection, recovery and due conservation of the river, both parties must design and set up a commission of Atrato River

guards whose integration and members will be developed in the section of orders to proffer in this ruling.

As a complement to the above, it is necessary to remember that the central premise on which the conception of bioculturality and biocultural rights is based, is the relation of profound unity between nature and human species.This relationship is expressed in other complementary elements such as: (i) the multiple ways of life expressed as cultural diversity are inextricably linked to the diversity of ecosystems and territories; (ii) the richness expressed in the diversity of cultures, practices, beliefs and languages is the product of the coevolutionary interrelation of human communities with their environments and constitutes an adaptive response to environmental changes; (iii) the relationships of different ancestral cultures with plants, animals, microorganisms and the environment actively contribute to biodiversity; (iv) the spiritual and cultural meanings of indigenous peoples and local communities about nature are an integral part of biocultural diversity; and (v) the preservation of cultural diversity leads to the conservation of biological diversity, so that the design of policy, legislation and jurisprudence should be focused on the conservation of bioculturality [316]. These elements, from now on, should be considered as parameters for the protection of the rights of the environment and nature, from a biocultural perspective.

9.33. Violation of the right to food security. In a complementary sense, the Chamber considers that illegal mining activities, as they pollute and seriously threaten water sources and forests, directly violate the availability, access and sustainability of food and the traditional forms of food production of ethnic communities of the Basin of the Atrato River (sections 9.14 to 9.17); which implies an affectation of all the components of the right to food and the different stages of the food process. At this point it is necessary to remember that illegal mining activities have completely displaced the traditional forms of food production of ethnic communities - which today represent only an isolated activity - and instead, have imposed a model of life and development that it is not compatible with the ancestral practices and that is seriously affecting the social fabric and the customs of the same.

Inquired about this situation, and regarding the guarantee of basic conditions of food security, the Ministries of Environment, Agriculture and the Department of Social Prosperity (DPS) indicated that they have implemented some agricultural programs, but none together, when they could do it around the Food and Nutrition Policy, and to the National Plan of Food and Nutrition Security [317].

9.34. Thus, the Court finds that the entities sued are responsible for the violation of the fundamental rights to water and food security of the ethnic communities involved and for the pollution of the Atrato River and its tributaries caused by the development of illegal mining activities in the region, and for its omission to provide an appropriate and effective institutional response to address and solve the problem reported. Consequently, a series of measures will be ordered to face this serious violation of the fundamental rights to water and food security and sovereignty, which will be indicated in the section of orders.

c.- About the violation of the fundamental rights to the territory and to the culture of the active ethnic communities.

9.35. The Chamber must point out that it has found that in the region under this *tutela*, the Basin of the Atrato River and its tributaries, the rise of illegal mining of gold and other precious metals has opened up alarmingly - as a financier of the armed conflict - which is generating worrying socio-environmental conflicts that materialize in an indiscriminate struggle for the control of territories and natural resources. Thus, has the consequence of forced displacement, the degradation of ecosystems, the reduction of forests, extinction of endemic species and pollution of rivers, among other factors that place the natural and cultural heritage of the country at high risk. [318]

This situation has multiple harmful effects since, for example, it threatens the food security of the ethnic communities - as was just described in the previous section - and violates the fundamental rights to a healthy environment, to life, to human dignity, to health, water, territory and culture, among others, as denounced by the petitioners of the case *under examination*. Similarly, illegal mining activities have a strong impact on ethnic communities to the extent that they generate displacement, increase in school desertion, high rates of prostitution and generally undermine the traditional ways of life of the communities; not respecting or allowing the development of ancestral subsistence activities such as agriculture (plantain farming and pancoger) and artisanal mining (barequeo), and on the contrary imposing a single mode of sustenance: mechanized mining [319].

In this regard, it should be noted that, as stated in section 6.3, the Constitutional Court, has repeatedly recognized that indigenous, tribal and Afro-Colombian peoples have a concept of territory and nature that is alien to the legal canons of Western culture [320]. For these communities, as we have seen, the territory -and its resources- is intimately linked to its existence and survival from the religious, political, social, economic and even ludic playful point of view; therefore, it is not an object of dominion but an essential element of the ecosystems and biodiversity with which they interact on a daily basis (eg, rivers and forests). That is why for the ethnic communities the territory does not fall on a single individual -as it is understood under the classical conception of private law- but above all the human group that inhabits it, so that it acquires an eminently collective character.

9.36. Another consequence of the intensive development of illegal mining activities is the establishment of a single economic model -which excludes others- for the Department of Chocó led by armed groups of outlaws, foreigners and drug traffickers, it has been indicated by the reports that the Ombudsman's Office and that the Office of the Attorney General of the Nation have contributed to the file for reference. This "model of development of illegal mining" brought - principally- by foreigners and armed actors has worsened in the last 20 years and directly attacks ethnic communities, since it runs in their collective territories and is eroding their customs, uses and ancestral traditions, which implies an affectation to their right to physical, cultural and spiritual survival. The impact of illegal mining is so strong that, as the Plaintiffs have pointed out, it has managed to separate families, increase violence and encourage the loss of the ancestral beliefs and traditions of the black communities that inhabit the Atrato River Basin in Chocó. [321]

This implies an imminent risk not only for the physical existence, the perpetuation and reproduction of traditions and ancestral culture, but also for the habitat and natural resources of the place where the identity of the plaintiff communities as ethnic groups is built, strengthened and developed [322]. At this point, the Chamber considers it necessary to warn that this threat not only

comes from the so-called illegal mining, but also legal mining, which when not done complying with the legal requirements or with adequate control of the State, produces effects on the territory, the environment and the ethnic communities that inhabit the areas where mining is developed.

9.37. Regarding the above, although it is not part of the object of the *tutela* studied, for the Chamber it is important to reiterate that regarding the legal mining activity, the right to prior consultation is a fundamental right that cannot be overlooked. Indeed, since its first sentences, the Court has given it the treatment of a fundamental right to prior consultation, of which all the ethnic groups of the country are holders. In related jurisprudence, the Court, except for reasons of immediacy or in the circumstance of finding elements of judgment that allow to elucidate that prior consultation was made, has ordered mostly to the seriousness of the problems studied the suspension of projects or works that have the potential to affect or have affected territories of ethnic communities until the right to prior consultation is guaranteed. In the same way, the search for free, prior and informed consent has recently been ordered. In addition, other measures have been adopted such as compensation, reparation or compensation of the affected communities when the damage has been caused or when the potentiality of the same is noticed.

The Court considers it important to reiterate the importance of respecting the right to prior consultation since, at present, the mining situation in Chocó is as follows: according to figures from the Ministry of Mines and Energy and the ANM, in the Department of Chocó there are 242 mining titles in force, of which the municipalities of Quibdó and Riosucio have the highest percentage (20% and 10.7% respectively); followed by the municipalities of El Carmen (11.5%), Bagadó and Condoto (10%), and Tadó (6%). On the other hand, according to the Mining Census carried out by the Ministry of Mines and Energy between 2010 and 2011, 527 mining production units were counted in the Department of Chocó, of which 99.2% did not have a mining permit registered in the national mining registry, which implies that they work in illegality. However, as there are no updated or precise data, this information can simply be an approximation that does not allow us to verify what kind of mining is done, whether it is legal or illegal, and where it is being executed, not only in the Department of Chocó but also at the national level.

9.38. In this order of ideas, the Court considers that it is the responsibility of the national government and the mining and environmental authorities to carry out integral processes of eradication of illegal mining, and in the cases where legal mining projects are developed, to prior consultation to ethnic communities when these activities are carried out in their collective territories or when these directly affect their territories and their traditional ways of life. For the Chamber, it is clear, according to what was analyzed in the evidence in the file and in the judicial inspection [323], that there has been a violation of the rights to territory and culture (understood as all the manifestations that define its way of life) of the ethnic communities of the Atrato River Basin as a consequence of the execution of illegal mining activities. Likewise, the Chamber is concerned about the denunciation of several organizations and experts, as already outlined in chapter 7, sections 7.20 and 7.21 of this ruling, before the realization of legal and illegal mining activities in protected areas and in national parks, practices that are forbidden and should they occur, they should be suspended immediately.

Regarding the foregoing, this Court finds that the defendant entities have violated the fundamental rights to the territory and culture of the ethnic communities of the Atrato River Basin

(Chocó), due to their omission to allow the development of activities in their collective territories of illegal mining that end up threatening and completely transforming their traditional ways of life. As a result, a series of measures will be ordered to deal with this serious violation of the fundamental rights to culture and territory, which will be indicated in the section of orders.

9.39. In conclusion, after having *(i)* reviewed and verified each one of the affectations to the fundamental rights invoked by the plaintiff communities in the present *acción de tutela*, *(ii)*of having valued the evidence attached to the file (reports, answers, concepts , interventions) and the judicial inspection carried out by the office of the Substantiation Magistrate, the Chamber concludes that in the case submitted to its study, there is a serious violation of the rights to *life, health, water, food security, a healthy environment, the culture and the territory* of the ethnic communities that inhabit the Atrato River Basin, its tributaries and surrounding territories within the framework of what has been called *"the biogeographic Chocó"*, attributable to state entity defendants (both local and national) by omission in the fulfillment of their legal and constitutional duties, by not taking effective, concrete and articulated measures to face and give solution to the execution realization of intensive activities of illegal mining in the area of the facts.

Thus, the Court must reiterate that the serious situation analyzed in this ruling also has its origin in a lack of state presence in the Department of Chocó that is translated into the design, construction and implementation of strong institutions and comprehensive public policies that allow the construction of an SRL in the region, where minimum conditions (or essential points of departure) are guaranteed, allowing the development of a dignified life, full in the exercise of rights and welfare conditions for all Chocoanos.

9.40. Finally, the Chamber considers that the ethnic communities that inhabit the Atrato River Basin have the right to guarantee their fundamental rights to the state entities sued and the Colombian State. And to do so with plans and programs aimed at improving their quality of life and comprehensive protection of their fundamental rights, as outlined in chapter 4, sections 4.5 to 4.21. The ethnic communities of Chocó, as special subjects protected by the Constitution and our SRL formula, have the right to live in full conditions of *social justice, human dignity and general well-being* as in any other society that aspires to the achievement of well-being and also to the attainment of happiness. In this way, the ultimate goal of the constitutional judge, in any instance, is the realization of material justice; consequently, this Court will grant the *acción de tutel*a and the rights invoked by the ethnic communities that are active in life, health, water, food security, a healthy environment, culture and territory, for which purpose it will give a series of concrete orders that allow addressing the difficult situation that the illegal mining exploitation has generated in the basin of the Atrato River.

9.41. ***On the inter-communis effects of the present order***. One final aspect to be highlighted is that the violation of fundamental rights in the case under examination has occurred on a large population. As has already been outlined in this providence, among the active communities is the Greater Community Council of the Popular Farmer Organization of the Alto Atrato (Cocomopoca) which is composed of 3,200 families, the Greater Community Council of the Farmer Association Integral del Atrato (Cocomacia) integrated by 120 communities and the Inter-ethnic Solidarity Forum Chocó (Fisch) by 47 organizations.

Thus, the Chamber must note that the listed populations are just some of the plaintiff groups, whose number may increase if we take into account that the potentially affected communities are all those that inhabit the Atrato River Basin and its tributaries, which involves a good part of the population of the Department of Chocó, and therefore, this ruling will have exceptional effects *inter-communis*. It must be noted in order to protect the rights of ethnic communities that even when they have not promoted this constitutional action are also affected by the facts denounced, in order to give all the members of the same community equal and uniform treatment that ensures the effective enjoyment of their fundamental rights.

For the above reasons, the Court will protect the fundamental rights of the community councils acting with *inter-communis* effects for any person or community that inhabits the basin of the Atrato River, its tributaries and surrounding territories, insofar as the population affected by the facts denounced in this action could be much higher than that represented by the plaintiffs.

d.- Some considerations regarding public mining-energy policy.

9.42. In view of the above, the Chamber must point out that the entities involved (both local and national), although they have deployed some budgetary and administrative efforts to avert the causes and consequences of illegal mining activity in populated areas and in the environment, these have been insufficient for various reasons, as has already been explained with sufficiency in this provision.

9.43. The Court has detected that the recommendations made by the different control bodies such as the Ombudsman's Office, the Attorney General's Office and the Office of the Comptroller General of the Republic on the grave situation of illegal mining in Chocó have not been met due to the high complexity of the same and that, in many cases, exceed the institutional, budgetary and articulation capacity of the entities in charge, from the local to the national level, as was seen in the section 9.18 of the present Order.

9.44. This Court does not ignore that illegal mining activity is extremely complex in that it combines several factors at the same time: poverty, lack of opportunities, inequality, prostitution, illegality, violence, armed actors, post-conflict, to name just a few. However, this Court understands that the subject under study has its origin in a series of structural problems in the Department of Chocó (which, due to its size, exceeds the purpose of the present *acción de tutela*), to which they are added, already in the concrete case, some aspects related to the Colombian mining-energy policy that should be evaluated especially in what has to do with its design and implementation. In this regard, the Chamber will present some considerations below.

9.45. In the first place, for the Chamber it is important to point out that, before a national mining policy that is aimed at stimulating in the present and in the years to come a greater consumption of natural resources, it is indispensable that the Colombian State, in equal measure, build sustainable governance and strengthen its institutions-especially at the municipal and department levels- so that they can respond effectively and responsibly to the great challenges that this industry represents, especially in relation to its costs and benefits, and also, with the growing phenomenon of illegal mining. In effect, if the State neglects its responsibility to grant the greatest possible protection to our natural resources, it ends up transferring the responsibility it to the citizens and

local communities, which, consequently, would have - if such a situation occurs - to face the same administration, businessmen, multinationals and mining workers.

Of course, the Court does not intend to ignore the efforts of the Government or the legal provisions that favor the protection and preservation of a healthy environment and even for the sustainable development of mining, but has verified that these in reality (in the regions, in fact) they have lost their binding effect and have become what the doctrine has described as "the symbolic efficacy of the law"[324]. In this order of ideas, in the opinion of the Chamber, to face this phenomenon, for example, it would be necessary for the national Government to build a public mining-energy policy that considers the environmental and social realities of the nation, which go through climate change, the biodiversity crisis and the increase in environmental devastation as a result of the development of extractive industries.

Additionally, the Chamber considers that it would be convenient for the competent entities - such as the Presidency of the Republic, the Ministry of the Interior, the Ministry of the Environment, the Ministry of Finance and the National Planning Department and even with the support of the Ministry of Justice - develop a plan for institutional strengthening in order to provide regional entities with sufficient tools - in terms of institutional capacity, financial resources and staffing - to effectively deal with all illegal mining activities [325], with special emphasis on *(i)*the environmental authorities of the region -Codechocó and Corpourabá-; *(ii)*the municipal administrations of Chocó as well as the department; and *(iii)*the judicial offices and dependencies of the Attorney General's Office and the entities that are part of the Public Prosecutor's Office (Attorney General's Office, Ombudsman's Office and Personhood Personerías) and control bodies (Comptroller General of the Republic) that develop activities in the region.

Finally, another aspect to consider is the insufficient environmental culture due to the lack of a global vision and in the long term promotes the unsustainable use of natural resources, which derives in conflicts due to the dominance of profit [326]. There is, then, a co-responsibility in its protection and conservation, rooted in citizenship, business and the State. In this sense, Colombia must move towards environmental consciousness and sensibility, starting from the communities who also have the responsibility of preserving and caring for the environment. For this purpose, it is imperative/ to strengthen a constitutional pedagogy that favors the values of biological diversity and cultural heterogeneity, with the aim of mobilizing towards a new human rationality based on the protection and respect of nature as an expression of evolution and civilization. [327]

In this way, it is important to strengthen the scope and application of school environmental projects or "PRAE" [328] that are part of the "national environmental education policy" complemented by Law 1549 of 2012, so that PRAE with emphasis on the regions are a reality, especially in rural areas and of great biodiversity such as the Amazonian and Pacific regions, for example.

9.46. Secondly, it should be noted that the current Mining Code - Law 681 of 2001 - as this Court has found in recent rulings (such as the T-766 of 2015, the C-035 of 2016 and the C-273 of 2016) reflects inconsistencies with the current constitutional order. These problems to regulate the mining activity in the country have already been evidenced by the Corporation in the

aforementioned measures, in which, respectively, the mining strategic areas were suspended, the mining was banned in the paramos and the prohibition to the territorial entities to oppose the carrying out of mining activities in their jurisdictions was also ruled as unconstitutional.

In this regard, the Court's attention is drawn to the fact that, in view of this scenario, there may be a deficit of protection in mining and environmental matters regarding the lack of updating of the Mining Code. In this regard, it should be remembered that after the decision to declare Law 1382 of 2010 unconstitutional (or reform to the Mining Code of 2001) by means of the C-366 of 2011, the Colombian State has not complied so far with the obligation to issue a new mining regulation that follows the guidelines that at the time was indicated by the Constitutional Court. This fact becomes even more important when in the National Development Plan 2014-2018 the Colombian State imposes itself as an obligation "to attend as a priority the issuance of the necessary legal regulation in order to organize the existing mining activity (...) from a vision that is territorially and environmentally responsible"[329].

In this regard, although the National Development Plan 2014-2018 states that, "the mining authority will continue its process of strengthening and consolidation through the implementation of the cadastre and mining registry, the agility in the response times, the audit and the regional presence"[330] according to evidence and documents sent by the Ministry of Mines and Energy and the National Mining Agency in the review process. These propositions have not been implemented, to the extent in which a complete information system and complete and updated mining cadastre has not been established.

However, regarding the state public policy to deal with illegal mining, the government has decided that: "it should consolidate an inter-institutional group specialized in preventing and controlling the illegal extraction of minerals and the necessary regulations will be issued to establish administrative and economic sanctions for these conducts, the prosecution of those responsible, and the disposition of the goods used and products of this activity" [331].

As it has been possible to demonstrate in the analysis of the concrete case, in spite of the measures that the Colombian State has taken to face this situation (at the level of the National Development Plan and of a series of legal and regulatory dispositions), there has been a lack of capacity of concretion, articulation and execution so that the designed measures are effective and allow to solve the phenomenon of illegal mining.

Currently, both recent jurisprudence in mining matters, as well as the evaluation of the evidence attached to the file and the inspection made by the Court to the Department of Chocó [332] allow us to conclude that it is necessary to evaluate the mining-energy model in force with the object of achieving greater control of illegal mining activity, which, in turn, has important repercussions on mining that is done legally.

9.47. Third, there is a concerning lack of information on the regional mining reality in Chocó, which translates into the absence of censuses, documents or updated research and reference to identify the main places where this activity takes place and what kind of impact it has. In this regard, the Court considers that the mining authorities should conduct as soon as possible a regional mining census that allows us to know with certainty where legal and illegal mining

processes are carried out, so that coherent public policy decisions can be made that have vocation to be fulfilled. This census should be designed with a differentiated character so that it can be known what kind of mining is being done, whether it is traditional, small, medium or large, which is of vital importance to be able to develop formalization processes. In this regard, the Chamber urges the competent authorities to conduct a regional mining census in the Department of Chocó.

9.48. Fourth, without accurate and reliable information, the State cannot design, much less execute a long-term public policy on mining in general or to combat efficiently, for example, the worrying phenomenon of illegal mining. Regarding the latter, the Chamber assesses the actions and operations (which have included some arrests, seizures and captures) made by the competent entities such as the Ministry of Defense or General Prosecutor's Office [333] to combat illegal mining. Nevertheless, the Chamber considers that it is necessary that these actions are developed more frequently, with due planning and coordination; but above all with a vocation for permanence over time, that is, with a periodicity, monitoring and indicators that make it possible to accurately establish the impact of its results and the eradication of such illegal activity.

The implementation of a unified strategy based on current and accurate information would allow the strengthening of legal mining exploitation and an integral confrontation of illegal mining as an activity that not only violates the rights of communities and the environment but is key to the construction of peace and post-conflict in regions of the country that have been historically affected by violence such as Chocó.

9.49. Fifth, the Court's attention is drawn to the lack of public regulation of the gold trade. As can be seen from the probative analysis, this mineral is the new strategy for financing the armed conflict and drug trafficking. Since this trade is not regulated, nor its relation to money laundering, as evidenced in the responses of the Ministry of Finance and the Financial Information and Analysis Unit [334], this activity continues in impunity, being extremely profitable for the actors of conflict, drug trafficking and organized crime, but also with an even more worrisome consequence: stimulating illegal gold mining. Today it is not possible to determine the source of the gold, whether it is legal or not, what activities are being financed and it is also not possible to persecute those who are behind this illegal enterprise. In this regard, the Court will urge the Ministry of Finance and the Financial Information and Analysis Unit to establish a national regulation for gold trade, which allows the corresponding entities to investigate, identify and follow the path of trade of this mineral until it reaches its origin in connection with related mining.

9.50. Finally, in view of the serious violation of fundamental rights that illegal mining and other structural problems are causing in the Department of Chocó, the Court allows itself to remind the Colombian State, as a whole, at the national level at the head of Government and in the regional level at the head of the department and municipal authorities, which according to the Political Constitution has a series of inalienable constitutional obligations with the sole purpose of guaranteeing the full validity of the fundamental rights of the Colombian people.That according to the Preamble, they consist of "assuring their members life, coexistence, work, justice, equality, knowledge, freedom and peace, within a legal, democratic and participatory framework that guarantees a political, economic and social justice order". Objectives that are going to be developed and reiterated in articles 1 (Social Rule of Law), 2nd (End of State), 5th (Supremacy of the rights of the person), 7th (Protection of ethnic and cultural diversity), 8th (Protection of the nation's cultural

and natural wealth) 11(Inviolability of the right to life), 12 (Personal integrity), 13 (Right to equality), 16 (Right to free development of personality), 22 (Right to Peace), 44 (Right of children), 48 (Right to social security), 49 (Right to health and basic sanitation), 63 (Protection of public property), 64 (Guarantee of progressive access to property of land), 65 (Right to food security), 67 (Right to education), 70 (Right to culture), 72 (Protection of cultural heritage), 79(Right to the healthy environment), 80 (Protection of natural resources), 188 and 189 (Functions and obligations of the President of the Republic), 288 (Territorial ordering), 298 (Departmental Regime), 311 (Municipal Regime), 339 (National Development Plans), 356 and 357(General Participation System), 365 (Efficient Public Services) and 366 (General Welfare Guarantee).

Equally important is to reiterate that the State and its authorities have, by constitutional creation, a series of tools to address all kinds of economic, social and ecological emergencies that massively and systematically threaten the fundamental rights of its citizens. Article 215 [335] of the Constitution states that the Government has the power to use the position of states of emergency, "when events occur other than those provided for in Articles 212 and 213 that disturb or threaten to seriously and imminently disturb the economic, social and ecological order of the country, or that constitute serious public calamity". In this way, it is clear to the Court that the Colombian State, at the national, regional and local levels, has a series of legal tools to deal with the serious humanitarian, social and environmental crisis that is occurring in the Department of Chocó.

9.51. In a complementary sense and in relation to the serious structural problems reported by the Chocoan ethnic communities (which far exceed the scope of this constitutional action) in matters of forced displacement, human rights violations and ESCR, gaps in education, coverage in aqueduct, sewage and basic sanitation, and another class of unsatisfied basic needs, the Chamber will urge the national government to effectively comply with the recommendations contained in resolution 64 of 2014 (issued by the Ombudsman's Office); and proceed to conform in as little time as possible, to the "Inter-institutional Commission for Chocó", which is the instance designed by the resolution in question, whose purpose is to achieve a verification and follow-up on the execution of the proposed measures and actions suggested by the aforementioned document.

10.- Orders.

10.1. This Corporation has issued several types of orders, depending on the magnitude of the problem generated by the violation of the rights subject to protection. This Corporation has issued *simple execution orders*, generally referring to orders of abstention or action that can be carried out by an authority without the assistance of others. It has also dictated *complex orders and structural mandates*, which require processes of complex articulation and execution, involving several authorities and require coordinated actions.

In the present case, due to its complexity and the enormous challenges it represents in terms of compliance, the Sixth Review Chamber will issue both simple execution orders and complex orders aimed at guaranteeing the fundamental rights of the ethnic communities of the Atrato River Basin. This is regardless of whether or not they have filed for an *acción de tutela* for the protection of their rights, for this reason, the effect of the judgment will be *inter-comunis* [336].

The purpose of these orders is that the entities in charge of dealing with the problems described establish, within a reasonable period of time, and within the scope of their powers, the measures, actions and corrective measures that are necessary to overcome the serious crisis in the matter of illegal mining that affects the populations involved in the Department of Chocó.

These orders are aimed -in general terms- at adopting effective and concrete decisions that allow progressively and permanently to overcome both the insufficiency of resources and the shortcomings in institutional capacity, based on the constitutional principle of harmonious collaboration between public powers to ensure the effective protection of fundamental rights and the full validity of the Political Constitution in the Department of Chocó.

10.2. Next, the orders to proffer in the present sentence are outlined:

1.- The Atrato River, its basin and tributaries will be recognized as an entity subject to rights of protection, conservation, maintenance and restoration by the State and ethnic communities, as indicated in the motivating part of this provision in the Sections 9.27 to 9.32.

Consequently, the Court will order the national government to exercise legal guardianship and representation of the rights of the river (through the institution designated by the President of the Republic, which could be the Ministry of the Environment) together with the ethnic communities that inhabit the basin of the Atrato River in Chocó; in this way, the Atrato River and its basin - henceforth - will be represented by a member of the (plaintiffs) and a delegate of the Colombian Government, who will be the guardians of the river. For this purpose, the Government, headed by the President of the Republic, must make the appointment of its representative within the month following the notification of this ruling. In that same period of time, the active communities must choose their representative.

Additionally, and with the purpose of ensuring the protection, recovery and due conservation of the river, the legal representatives of the same shall design and conform, within three (3) months following the notification of this order, a commission of guardians of the Atrato River, integrated by the two appointed guardians and an *advisory team* integrated by invitation of the Humboldt Institute and WWF Colombia, who have developed the Bita River protection project in Vichada [337] who therefore, have the necessary experience to guide the actions to take. This advisory team can be formed and receive support from all public and private entities, universities (regional and national), research centers on natural resources and environmental organizations (national and international), community and civil society wishing to join the protection project of the Atrato River and its basin.

Notwithstanding the foregoing, the panel of experts that will be responsible for verifying compliance with the orders of this Judgement (number 8) may also supervise, accompany and advise the work of the Atrato river guardians.

2.- The Ministry of the Environment, the Ministry of Finance, the Ministry of Defense, Codechoco and Corpourabá, the Governments of Chocó and Antioquia, and the defendant municipalities will be ordered [338] -with the technical support of the Humboldt Institute, the Universities of Antioquia and Cartagena, the Pacific Environmental Research Institute, WWF Colombia and other national

and international organizations determined by the Attorney General's Office - and in conjunction with the Plaintiffs , within a year after the notification of the sentence is designed and put in place a plan to decontaminate the water sources of Chocó, beginning with the basin of the Atrato River and its tributaries, the riverine territories, recovering their ecosystems and avoiding additional damages to the environment in the region. This plan will include measures such as: (i) the reestablishment of the Atrato riverbed, (ii) the elimination of a banks formed by mining activities and (iii) the reforestation of areas affected by legal and illegal mining.

Additionally, this plan will include a series of clear indicators to measure its effectiveness and should be designed and executed in a concerted manner with the inhabitants of the area, as well as ensuring the participation of the ethnic communities that are settled there under the Convention 169 of the OIT.

3.- Likewise, the Ministry of Defense, the National Police - Unit against Illegal Mining, the National Army of Colombia, the General Prosecutor's Office of the Nation, the governors of Chocó and Antioquia and the defendant municipalities will be ordered [339], in conjunction with the Plaintiff ethnic communities and with the support of the Ministry of Foreign Affairs, to design and implement, within six (6) months after notification of this ruling, a joint action plan to neutralize and eradicate definitely illegal mining activities that are carried out not only in the Atrato River and its tributaries, but also in the Department of Chocó. In this regard, the Court reiterates that it is the obligation of the Colombian State to prosecute and eradicate definitively any illegal mining activity that takes place in the country.

The aforementioned actions must include the seizure and neutralization of dredges -and in general of the machinery used in these tasks-, the restriction and prohibition of the transit of inputs such as fuel and associated chemical substances (mercury, cyanide) and the judicialization of responsible persons and organizations. Also, this process will be accompanied by the Ministry of Foreign Affairs in what has to do with the situation of foreigners who engage in illegal mining activities.

Finally, these measures should include clear and precise indicators that allow an effective evaluation and monitoring of the measures adopted.

4.- In addition to the foregoing, the Ministry of Agriculture, the Ministry of the Interior, the Ministry of Finance, the Department of National Planning, the Department for Social Prosperity, the Governors of Chocó and Antioquia and the municipalities will be ordered [340] that in a concerted manner with the plaintiff ethnic communities, design and implement within the six (6) months following the notification of this ruling an integral plan of action [341] that allows the recovery of traditional forms of subsistence and food. This plan of action will be in the framework of the concept of ethno-development that ensures minimum food safety in the area, which has ceased to be realized by the contamination of the waters of the Atrato River and by the intensive development of illegal mining activity.

This plan should also be *aimed at restoring the rights of the ethnic communities that inhabit the Atrato River Basin*, especially in relation to the recovery of their culture, participation, territory, identity, way of life and productive activities, including fishing, hunting, agriculture, fruit harvesting

and artisanal mining. In this sense, the measures taken must be focused on guaranteeing: (*i*) the food sovereignty of the communities and (*ii*) preventing their involuntary displacement of the area due to illegal mining activities and environmental damage.

These measures should include clear and precise indicators that allow an effective evaluation and monitoring of the measures adopted.

5.- Likewise, the Ministry of Environment, the Ministry of Health and the National Health Institute, Codechocó and Corpourabá will be ordered - with the support and supervision of the Humboldt Institute, the Universities of Antioquia and Cartagena, the Institute of Environmental Research of the Pacific and WWF Colombia- to carry out toxicological and epidemiological studies of the Atrato River, its tributaries and communities, which cannot take more than three (3) months to start or exceed nine (9) months for its completion, starting of the notification of the present order. After the notification of this order, the degree of pollution by mercury and other toxic substances is determined, and the possible damage towards human health of the populations, consequence of the activities of mining that use these substances.

Additionally, these entities must structure a baseline of environmental indicators in order to have measurement instruments that allow affirming the improvement or deterioration of the conditions of the Atrato River Basin in the future.

6.- The Office of the Attorney General of the Nation, the Office of the Ombudsman and the Office of the Comptroller General of the Republic will be ordered, in accordance with their legal and constitutional competences, to carry out a process of monitoring and follow-up on compliance and execution of all orders issued in the above numerals, in the short, medium and long term at the notification of this judgment. This process will be led and coordinated by the Attorney General of the Nation who will report and be under the general supervision of the Administrative Court of Cundinamarca (first instance judge in the process of guardianship) and the Constitutional Court, who in any case, reserves the competence to verify the fulfillment of the orders proffered in this ruling.

For this purpose, the Office of the Attorney General of the Nation will have to convene within three (3) months after the notification of this ruling a panel of experts [342] to advise on the follow-up and execution process -according to its experience in the specific topics-, always with the participation of the plaintiff communities, in order to establish timelines, goals and indicators of compliance necessary for the effective implementation of the orders here stated.

In the exercise of such functions, the Office of the Attorney General of the Nation, as coordinator of the follow-up and execution of this judgment, with the support of the Ombudsman's Office, the Office of the Comptroller General of the Republic, and the panel of experts convened for this purpose, will be in charge of: (i) directing, coordinating and promoting all compliance and execution of the orders issued here; (ii) design and implement the general and specific indicators that allow evaluating compliance with the orders issued in this case by the entities involved and the national government; (iii) evaluate and analyze the reports, programs and plans submitted by the State entities that are involved in the process of compliance with these orders; (iv) investigate and document complaints about possible non-compliance with the measures established in this ruling;

and (v) make recommendations and observations to the entities involved and to the national government regarding compliance with the orders issued here and in general with respect to the guarantee and respect of the fundamental rights violated of the ethnic communities of Chocó.

Additionally, the Office of the Attorney General of the Nation, together with the Ombudsman's Office and the Office of the Comptroller General of the Republic, must submit semiannual reports of their management with indicators of compliance with the orders issued, both to the Administrative Court of Cundinamarca and the Constitutional Court to ensure its completion.

7.- Finally, the National Government, headed by the President of the Republic, is urged to give effective compliance to the recommendations contained in Resolution 64 of 2014 and proceed to conform in a period not exceeding one (1) month from the notification of this ruling. The "Inter-institutional Commission for Chocó", which is the body designed by the resolution in question, whose purpose is to achieve a verification and follow-up of the implementation of the recommendations contained therein to address and resolve the serious humanitarian, social and environmental crisis facing the Department of Chocó.

IV. DECISION

In merit of the above, the Sixth Chamber of Review of the Constitutional Court, administering justice in the name of the people and by mandate of the Constitution,

RESOLVES:

FIRST - LIFT the suspension of terms decreed to decide the present matter.

SECOND - REVOCATE the decision handed down on the twenty-first (21) April 2015 by the State Council -Section Two, Subsection A-, which denied the protection in the *acción de tutela* instituted by the Center of Studies for Social Justice "Tierra Digna "on behalf of several ethnic communities against the Ministry of Environment and others, which in turn confirmed the decision of eleven (11) of February 2015 of the Administrative Tribunal of Cundinamarca -Section Four, Subsection B-. Instead, **GRANT** the actors the protection of their fundamental rights to life, health, water, food security, a healthy environment, culture and territory.

THIRD - DECLARE the existence of a serious violation of the fundamental rights to life, health, water, food security, a healthy environment, culture and the territory of the ethnic communities that inhabit the basin of the Atrato River and its tributaries, attributable to the entities of the Colombian State that are active (Presidency of the Republic, Ministry of the Interior, Ministry of Environment and Sustainable Development, Ministry of Mines and Energy, Ministry of National Defense, Ministry of Health and Social Protection, Ministry of Agriculture, Department for Social Prosperity, National Planning Department, National Mining Agency, National Agency of Environmental Licenses, National Institute of Health, Departments of Chocó and Antioquia, Regional Autonomous Corporation for the Sustainable Development of Chocó-Codechocó, Corporation for the Sustainable Development of Urabá -Corpourabá-, National Police - Unity against Illegal Mining, and the municipalities of Acandí, Bojayá, Lloró, Medio Atrato, Riosucio, Quibdó, Río

Quito, Unguía, Carmen del Darién, Bagadó, Carmen de Atrato and Yuto -Chocó-, and Murindó, Vigía del Fuerte and Turbo -Antioquia -), due to their omission to provide an adequate, articulated, coordinated and effective institutional response to face the multiple historical, socio-cultural, environmental and humanitarian problems that afflict the region and that in recent years have been aggravated by the realization of intensive activities of illegal mining.

FOURTH - RECOGNIZE the Atrato River, its basin and tributaries as an entity subject to rights of protection, conservation, maintenance and restoration by the State and ethnic communities, as indicated in the motivating part of this provision in the sections 9.27 to 9.32.

Consequently, the Court will order the national government to exercise legal guardianship and representation of the rights of the river (through the institution designated by the President of the Republic, which could be the Ministry of the Environment) together with the ethnic communities that inhabit the basin of the Atrato River in Chocó; in this way, the Atrato River and its basin - henceforth - will be represented by a member of the plaintiff communities and a delegate of the Colombian Government, who will be the guardians of the river. For this purpose, the Government, headed by the President of the Republic, must make the appointment of its representative within the month following the notification of this ruling. In that same period of time, the plaintiff communities must choose their representative.

Additionally and with the purpose of ensuring the protection, recovery and due conservation of the river, the legal representatives of the same shall design and conform, within three (3) months following the notification of this order, a commission of guardians of the Atrato River, integrated by the two appointed guardians and an advisory team integrated by invitation of the Humboldt Institute and WWF Colombia, who have developed the Bita River protection project in Vichada, [343] and therefore have the necessary experience to guide the actions to take. This advisory team may be formed and receive support from all public and private entities, universities (regional and national), academic centers and research in natural resources and environmental organizations (national and international), community and civil societies wishing to link to the protection project of the Atrato River and its basin.

Notwithstanding the foregoing, the panel of experts who will be responsible for verifying compliance with the orders of this judgment (tenth order) may also supervise, accompany and advise the work of the Atrato River guardians.

FIFTH - TO ORDER the Ministry of Environment, the Ministry of Finance, the Ministry of Defense, Codechoco and Corpourabá, the Governors of Chocó and Antioquia, and the defendant municipalities [344] -with the support of the Humboldt Institute, the Universities of Antioquia and Cartagena, the Pacific Environmental Research Institute, WWF Colombia and other national and international organizations determined by the Attorney General's Office - and in conjunction with the plaintiff ethnic communities, within a year after the notification of the judgment, design and implement a plan to decontaminate the Atrato River Basin and its tributaries, the riverine territories, recover their ecosystems and avoid additional damage to the environment in the region. This plan will include measures such as: (*i*) the reestablishment of the Atrato riverbed, (*ii*) the elimination of area banks formed by mining activities and (*iii*) the reforestation of areas affected by legal and illegal mining.

Additionally, this plan will include a series of clear indicators to measure its effectiveness and should be designed and executed in a concerted manner with the inhabitants of the area, as well as ensuring the participation of the ethnic communities that are settled there under the Convention 169 of the OIT.

SIXTH – TO ORDER the Ministry of Defense, the National Police - Unit against Illegal Mining, the National Army of Colombia, the Attorney General's Office, the governors of Chocó and Antioquia and the defendant municipalities [345], together with the plaintiff ethnic communities and with the support of the Ministry of Foreign Affairs, to design and implement, within six (6) months after notification of this judgment, a joint action plan to neutralize and definitively eradicate mining activities illegally carried out not only on the Atrato River and its tributaries, but also in the Department of Chocó. In this regard, the Court reiterates that it is the obligation of the Colombian State to prosecute and eradicate definitively any illegal mining activity that takes place in the country.

The aforementioned actions must include the seizure and neutralization of dredges -and in general of the machinery used in these tasks-, the restriction and prohibition of the transit of inputs such as fuel and associated chemical substances (mercury, cyanide) and the judicialization of responsible people and organizations. Also, this process will be accompanied by the Ministry of Foreign Affairs in what has to do with the situation of foreigners who engage in illegal mining activities.

Finally, these measures should include clear and precise indicators that allow for an effective evaluation and monitoring of the measures adopted.

SEVENTH - TO ORDER the Ministry of Agriculture, the Ministry of the Interior, the Ministry of Finance, the Department of National Planning, the Department for Social Prosperity, the Governments of Chocó and Antioquia, and the municipalities [346] that in a concerted manner with the plaintiff ethnic communities, design and implement within the six (6) months following the notification of this judgment a comprehensive action plan [347] that allows the recovery of traditional forms of subsistence and food within the framework of the concept of ethno-development that ensure minimum food safety in the area, which have ceased to be made by the pollution of the waters of the Atrato River and the intensive development of illegal mining activity.

This plan should also be aimed at *restoring the rights of the ethnic communities that inhabit the Atrato River Basin*, especially in relation to the recovery of their culture, participation, territory, identity, way of life and productive activities, including fishing, hunting, agriculture, fruit harvesting and artisanal mining. In this sense, the measures taken must be focused on guaranteeing: (*i*) the food sovereignty of the communities and (*ii*) preventing their involuntary displacement of the area due to illegal mining activities and environmental damage.

These measures should include clear and precise indicators that allow for an effective evaluation and monitoring of the measures adopted.

EIGHT - TO ORDER the Ministry of Environment, the Ministry of Health and the National Health Institute, Codechocó and Corpourabá -with the support and supervision of the Humboldt Institute,

the Universities of Antioquia and Cartagena, the Institute of Environmental Research of the Pacific, and WWF Colombia - to carry out toxicological and epidemiological studies of the Atrato River, its tributaries and communities, which may not take more than three (3) months to commence or exceed nine (9) months for its completion, as of notification of the present ruling, in which the degree of contamination by mercury and other toxic substances is determined, and the impact on human health of the populations, as a consequence of the mining activities that use these substances.

Additionally, these entities must structure a baseline of environmental indicators in order to have a measuring instrument that allows affirming the improvement or deterioration of the conditions of the Atrato River Basin in the future.

NINTH - TO ORDER the National Attorney General's Office, the Office of the Ombudsman and the Office of the Comptroller General of the Republic, which, in accordance with its legal and constitutional powers, carry out a process of monitoring and following-up on compliance with and execution of all orders issued in the previous numerals, in the short, medium and long term, from the notification of this judgment. This process will be led and coordinated by the Attorney General of the Nation who will report and be under the general supervision of the Administrative Court of Cundinamarca (first instance judge in the process of guardianship) and the Constitutional Court, who in any case, reserves the competence to verify the fulfillment of the orders proffered in this ruling.

For this purpose, the Attorney General's Office will have to convene within three (3) months following the notification of this ruling, a panel of experts [348] to advise on the follow-up and execution process -according to its experience in the specific topics-, always with the participation of the plaintiff communities, in order to establish timelines, goals and indicators of compliance necessary for the effective implementation of the orders here proffered, according to the stipulations in sections 10.2 number 8.

Additionally, the Office of the Attorney General of the Nation, together with the Ombudsman's Office and the Office of the Comptroller General of the Republic, must submit semiannual reports on its management with indicators of compliance with orders issued, both to the Administrative Court of Cundinamarca and the Constitutional Court for its jurisdiction.

TENTH - EXHORT the national Government, headed by the President of the Republic, to give effective compliance to the recommendations contained in resolution 64 of 2014 and proceed to conform in a period not exceeding one (1) month from the notification of this ruling, the "Inter-institutional Commission for Chocó", which is the body designed by the resolution in question, whose purpose is to achieve verification and follow-up on the implementation of the recommendations contained therein to address and solve the serious humanitarian crisis, social and environmental issues facing the Department of Chocó.

ELEVENTH -The National Government, through the President of the Republic, the Ministry of Finance and the National Department of Planning, must ADOPT adequate and necessary measures to ensure sufficient and timely resources that allow the sustainability and progressivity of all measures to implement to comply with what is ordered in this ruling. For this purpose, the

budgetary items of the case must be provided annually, in accordance with the high complexity and structural nature of the measures ordered.

TWELF – GRANT *inter communis* effects to the present decision for those ethnic communities of Chocó that are in the same factual and juridical situation as the actors.

THIRTEENTH -The communication provided for in Article 36 of Decree 2591 of 1991 is published by the General Secretariat.

Notify yourself, communicate, publish and comply.

JORGE IVÁN PALACIO PALACIO
Magistrate

AQUILES ARRIETA GÓMEZ
Magistrate (e.)
With clarification of vote

ALBERTO ROJAS RÍOS
Magistrate

MARTHA VICTORIA SÁCHICA MÉNDEZ
General Secretary

[End]