



EXECUTIVE SUMMARY OF THE REGIONAL REPORT

PRIVATE UTILITY, PUBLIC DISPOSAL

Public utility and
analogous concepts
related to mining
and energy activities

Case analysis in Bolivia, Brazil, Chile, Colombia, Ecuador, Honduras, Mexico and Peru

Executive Summary of the Regional Report

Private Utility, Public Disposal

Public Utility and analogous concepts related to mining and energy activities.

Analysis in Bolivia, Brazil, Ecuador, Colombia, Honduras, Chile, Mexico and Peru.

Coordination: Dora Lucy Arias

The Public Utility Group in Latin America participated in the research and authorship of this study:

- El Centro de Documentación e Información de Bolivia (CEDIB).
- La Federação de Órgãos para Assistência Social e Educacional (FASE) –Brasil.
- El Observatorio Latinoamericano de Conflictos Ambientales (OLCA) –Chile.
- El Grupo Semillas –Colombia.
- Acción Ecológica –Ecuador.
- El Equipo de Reflexión, Investigación y Comunicación (ERIC) –Honduras.
- El Proyecto de Derechos Económicos, Sociales y Culturales (ProDESC) –México.
- El Grupo de Formación e intervención para el Desarrollo Sostenible (GRUFIDES) –Perú.

With the support of:



October, 2021

Design e layout: Difundir Ltda.

Carrera 20 N°45A-85, telf.: (60) 1 345 18 08

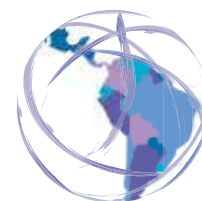
Knowledge is a good of humanity.

All human beings should have access to knowledge,
cultivating it is everyone's responsibility.

Copying of one or more complete articles of this work or of the whole edition is permitted,
in any format, mechanical or digital, as long as the content of the texts is not modified,
their authorship is respected and this note is maintained

Content

1. Introduction	4
a. What concerns us about Public Utility?	4
b. The UPYCA in International Human Rights Law	6
c. Common Good and UPYCA in Constitutional Charters	8
d. Purpose of this Study.....	8
e. Authoring organizations of this study	10
2. Methodology	11
3. Implementation of the UPYCA in the countries	13
a. Historical review: The UPYCA and its application for the promotion of extractivism	13
b. The dispute between the UPYCA and the protection of the commons in the rules and practices of countries	16
c. Economic power: the other promoter of extractivism	18
4. Impact of the application of the UPYCA in cases analyzed	19
5. Conclusions	24
6. 6. Towards the re-signification of UPYCA	26
7. Recommendations.....	28





1. Introduction

a. What concerns us about Public Utility?

The concept of “public utility” and other similar concepts (hereinafter “UPYCA”) such as “national interest”, “strategic interest” and “social interest” are legal concepts currently used by States¹ to justify the imposition of extractive and infrastructure projects, which directly determine the goods or assets subject to expropriation measures or limitations on their use, enjoyment, or disposition. At the same time, there are other concepts such as “strategic goods”, “national security”, “health protection”, “special reserves” or “military economic zones” that legitimize the use of force for the protection of such goods, with the consequent securitization or militarization of the projects. This shielding causes a large part of the human rights violations and raises a big question mark over the use of the declaration of public utility in the context of extractive mining, gas and oil exploitation or energy production projects.

Often, these projects are developed in the territories of peasant, indigenous or traditional populations, in regions with fragile ecosystems and even in protected natural areas. The application of these figures impacts community property, activating procedures such as expropriation and privatization of common or collective goods with negative impacts on local economies and exposure to environmental risks of the activity on the most vulnerable groups, given that the choice of location of the infrastructure commonly occurs in areas occupied by populations that have less political and economic power, originating situations of injustice and environmental racism.

This imposition leads to increased social conflict at a high human rights cost, ranging from the very lack of consultation with affected communities to intimidation, displacement, killings, and criminalization of actions of community resistance and opposition. Although this research does not collect data on the way in which women suffer such

¹ The legal entity of the States is the one that has the international responsibility to respect, protect and guarantee Human Rights. Although governments play a leading role in prioritizing and implementing mining-energy megaprojects over other forms of territorial management, the legislative powers also intervene in their implementation through norms, and the judiciary through sentences and decisions that make them viable. Details are explained later in this summary.

UTILITY PRIVATE, DISPOSAL PUBLIC
Public utility and analogous concepts related to mining and energy activities
Case analysis in Bolivia, Brazil, Chile, Colombia, Ecuador, Honduras, Mexico and Peru

abuses, there is sufficient evidence of the differentiated use of violence they experience, as well as the increase in sexual and gender-based violence against them, as part of a strategy to force these women to migrate from the countryside to the city, ceding their territories to extractive activities².

The way in which the public utility and interest of these projects is understood is often not public; instead of contributing to the common good, it undermines it. Common goods such as social peace, water, air, soil, biodiversity, cultural heritage, among others, are often heavily impacted. Specifically, different categories of impacts of these projects are observed: on human rights, on nature and on democracy (see chapter 4).

In most Latin American countries there is a lack of clear criteria on what is useful to the public so that it can be declared as such. Despite this, government representatives use this concept as if there were a consensus on it, defining unilaterally, without comprehensive evaluation or true democratic participation, what they consider to be of public utility. These impositions are in stark contrast to the notions of what is valuable and vital for the populations, whose interests are closely linked to the protection of common goods related to nature and respect for the human rights of present and future generations.

This context of imposition has been accentuated with the COVID-19 pandemic from the first quarter of 2020. Through the establishment of states of exception, the governments of the countries in the region on which we focus our analysis, enacted regulations that impact rights related to access to information, participation, and justice. Under the presumption that mining-energy activities are essential, strategic or of public utility, the States promote measures in favor of their continuity despite the impossibility of citizens, social and environmental oversight.

b. The UPYCA in International Human Rights Law

Public utility in International Human Rights Law (hereinafter “IHL”) is associated with the right to property. The American Convention on Human Rights (hereinafter

² IACHR. *Indigenous Women and their Human Rights in the Americas*. OEA/Ser.L/V/II. Doc. 44/17. 17 April 2017, p. 86, para. 123.



EXECUTIVE SUMMARY OF THE REGIONAL REPORT

“American Convention”) establishes that everyone has the right to the use and enjoyment of his property, but may be subordinated to social interest. According to Article 21 of this instrument, persons may be expropriated of their property: i) in the cases and according to the forms established by law, ii) guaranteeing the payment of fair compensation, and iii) for reasons of public utility or social interest.

But it is not enough for the norm to be produced by legislative bodies. It must be in harmony with IHRL, what is known as normative adequacy, that is, there must be conformity between national norms and international human rights standards. For example, it is stated that “the decision to allow massive oil pollution to promote economic development cannot be considered reasonable, given the disastrous effects on the enjoyment of the rights to life, health, food, water and a healthy environment”³. Common in matters impacting the environment is environmental racism, with the “authorization of toxic and hazardous facilities in a large number of communities predominantly composed of racial or other minorities, which disproportionately interferes with their rights, including their rights to life, health, food and water”⁴.



6

On its part, compensation operates as an element that balances “the general interest and [that] of the owner”⁵. For compensation to be fair and in accordance with the American Convention, “the commercial value of the property subject to expropriation prior to the declaration of public interest must be taken as a reference, and the fair balance between the general interest and the private interest must be considered”⁶. In the case of indigenous communities and peoples, consideration must also be given to the special relationship they have with the territory and its link to their physical and cultural survival, which means that, in certain cases, it is absolutely prohibited to limit their property.

3 Report of the Special Rapporteur on the issue of human rights obligations related to the enjoyment of a safe, clean, healthy and sustainable environment. A/73/188. 19 July 2018, p. 8, footnote number 7.

4 Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. A/HRC/37/59. 24 January 2018, para. 9.

5 I/A Court H.R., *Case of Salvador Chiriboga v. Ecuador*. Judgment of March 3, 2011, para. 60.

6 *Ibid.*, para. 62.

UTILITY PRIVATE, DISPOSAL PUBLIC
Public utility and analogous concepts related to mining and energy activities
Case analysis in Bolivia, Brazil, Chile, Colombia, Ecuador, Honduras, Mexico and Peru

Finally, the reasons of social interest refer to the common good, to the general welfare within a democratic society, which is conditioned to the promotion and protection of human rights. Public utility implies allocating certain goods to the better development of society, weighing the interests at stake within the framework of the purposes of the American Convention, which in its preamble reminds us that “the ideal of free human beings, free from fear and want, can only be achieved if conditions are created whereby everyone may enjoy [all] his rights. In this order of ideas, the best development includes the elimination of human rights violations, seen in an interdependent manner, which implies that individuals and peoples can participate in the decisions that concern their economic, social, cultural, and political well-being towards the full realization of all their rights, as established in the Declaration on the right to development of 1986.

But how to determine precisely what are the social interests that legitimize the restriction of rights or what is the democratically acceptable course for social welfare? IHRL allows us to find that measure. The Inter-American Court of Human Rights (hereinafter “IACHR Court”) has warned that the requirement that “laws must be enacted for reasons of general interest means that they must have been adopted for the common good (Article 32(2) [of the Convention]), a concept that must be interpreted as an integral element of the public order of the democratic State, whose main purpose is “the protection of the essential rights of man and the creation of circumstances that allow him to progress spiritually and materially and to attain happiness”⁷.

The “concepts of public order or the common good, derived from the general interest, insofar as they are invoked as a basis for limitations on human rights, must be interpreted strictly in accordance with the just requirements of a democratic society, taking into account the balance between the various interests at stake and the need to preserve the object and purpose of the Convention”⁸. In this sense, no project can be in the public interest if it does not respect internationally recognized rights, otherwise it can be considered an arbitrary measure, understood either as a capricious, despotic decision or one lacking in legal proportionality.

⁷ I/A Court H.R.. The Expression “Laws” in Article 30 of the American Convention on Human Rights. Advisory Opinion OC-6/86 of May 9, 1986, para. 29.

⁸ I/A Court H.R., *Case of Salvador Chiriboga v. Ecuador*. Preliminary Objection and Merits. Judgment of May 6, 2008, para. 75..



c. Common Good and UPYCA in Constitutional Charters

The constitutional charters of the countries observed in the framework of this study –Bolivia, Brazil, Ecuador, Chile, Honduras, Colombia, Mexico, and Peru⁹– contain political, social, and economic guidelines aimed at protecting the common good. As in the American Convention, here too, in its essence, the common good is understood as that which truly embodies social needs and makes the well-being of the population viable. This includes needs such as food sovereignty, protection of the environment or the biocultural heritage of nations and is related to the sovereignty and capacity to guarantee current and future populations the enjoyment of their own resources for collective well-being.

In the location of the scope of the common good in constitutional texts lies its power and controversy. Thus, while States assume that the implementation of mining-energy mega-projects is an expression of public utility and, therefore, a means to achieve the common good, there are important sectors of society that question this interpretation due to the strong impacts that these projects cause on the human rights of the surrounding populations and on nature, impacts that have been analyzed and documented in numerous studies and academic research¹⁰. They also question the dubious benefits derived from the implementation of such projects.

d. Purpose of this Study

With the present study, we intend to investigate the legal and conceptual scaffolding on which the figures of public utility and other analogous concepts, with high costs in the processes of construction of democracies, that must be based on the respect for Human Rights are sustained. We study from different disciplines how the UPYCA declarations operate in our countries and what are their consequences. We found that the implemen-

9 Chart 1 “Common Good and analogous concepts in Bolivia, Brazil, Ecuador, Chile, Honduras, Colombia, Mexico and Peru”.

10 Inter-American Court of Human Rights. Advisory Opinion 23 of 2017 (OC-23/17)https://www.corteidh.or.cr/docs/opiniones/seriea_23_esp.pdf
Publications of the Observatory on Mining Conflicts in Latin America OCMAL <https://www.ocmal.org/category/publicaciones/publicaciones-ocmal/> Among them Mining Conflicts in Latin America: Extraction, Pillage and Aggression - State of Play in 2018 - 2019 Edition, <https://www.ocmal.org/conflictos-mineros-en-america-latina-extraccion-saqueo-y-agresion-estado-de-situacion-en-2018/>



UTILITY PRIVATE, DISPOSAL PUBLIC
Public utility and analogous concepts related to mining and energy activities
Case analysis in Bolivia, Brazil, Chile, Colombia, Ecuador, Honduras, Mexico and Peru

tation of extractive megaprojects by governments and with the argument of public utility usually have very serious negative impacts on the wellbeing of the population and on nature. The communities surrounding these projects are the most affected, as they suffer directly from their social and environmental impacts. Often these are ethnic and peasant communities that face risks to their very existence, given the consequences that derive from environmental devastation and the attack on their ways of life linked to nature. At the same time, we have seen that the defense of human rights, of living spaces, of the environment and of territory entails serious risks to the life and integrity of the people and groups who defend them¹¹.

They also highlight other negative effects that impact society, such as the massive contribution of the extractive sector to global warming, the loss of socio-biodiversity, the increase in social conflicts, the destruction of ecosystems, water pollution, the dependency of the economy of these countries on the exploitation of natural resources, among others.

Extractivism puts at risk the existence of entire cultures associated with nature and with it the land, as well as water sources, soils, forests, biodiversity, and glaciers. Abundant studies have shown this to be the case¹². This analysis aims to show the use of the concept of UPYCA by Latin American States, generally incompatible with IHRL standards. It also seeks to promote a critical debate on the subject that involves the participation of affected communities, academia, and other social sectors.

This study will also serve as input for a later stage that we have called the re-signification of the UPYCA, in which we seek to stimulate the debate on what is genuinely useful and beneficial to the collective, and to the conservation of the public in an intergenerational

11 See, in this regard, *Global Witness. Defending Tomorrow. Climate Crisis and Threats to Land and Environmental Defenders*. July 2020. Accessible at: <https://www.globalwitness.org/es/defending-tomorrow-es/>

12 As, for example: IACHR. *Indigenous Peoples, Afro-descendant Communities, Extractive Industries*. OEA/Ser.L/V/II. Doc. 47/15. December 31, 2015. Accessible at: <http://www.oas.org/es/cidh/informes/pdfs/industriasextractivas2016.pdf>; Working Group on Mining and Human Rights in Latin America. *The impact of Canadian mining in Latin America and Canada's responsibility*. 22 May 2014. Accessible at: http://dplf.org/sites/default/files/informe_canada_resumen_ejecutivo.pdf; Regional Report on Transparency and Access to Information in Extractive Industries in Latin America and the Caribbean. DAR. 2018. Accessible at: http://dplf.org/sites/default/files/475_-_informe_regional_transparencia_dpfl_13_dic_d.pdf



EXECUTIVE SUMMARY OF THE REGIONAL REPORT

perspective, as well as to the protection of human rights, common goods and nature. The questions we want to raise at this stage are: What is useful and beneficial for society as a whole? What criteria must an economic activity be able to meet, in order to be declared of public utility? Who or who has the legitimacy to declare it to be of public utility? What should be the conditions for such a declaration? What should be the process for a declaration of public utility? Can the declaration of public utility be defined unilaterally by a government, or should it be the result of a process of democratic debate based on effective social participation, and not merely procedural?

e. Authoring organizations of this study

The organizations that authored this study are:

- El Centro de Documentación e Información de Bolivia (CEDIB).
- La Federação de Órgãos para Assistência Social e Educacional (FASE) –Brasil.
- El Observatorio Latinoamericano de Conflictos Ambientales (OLCA) –Chile.
- Acción Ecológica –Ecuador.
- El Equipo de Reflexión, Investigación y Comunicación (ERIC) –Honduras.
- El Grupo Semillas –Colombia.
- El Proyecto de Derechos Económicos, Sociales y Culturales (ProDESC) –México.
- El Grupo de Formación e intervención para el Desarrollo Sostenible (GRUFIDES) –Perú.

The production team for this report was coordinated by Dora Lucy Arias Giraldo.



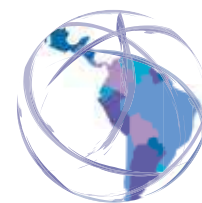
2. Methodology

In this research, the author organizations carry out an analysis that starts in the 1980s and continues up to present-day, in the context of neoliberal reforms that intensified the entry of foreign capital for mining and energy exploitation in Latin America. With the argument of seeking the “progress” and “welfare” of the population, the States gave priority to private economic interests and turned the UPYCA into an instrument to transform public goods into goods at the service of private companies and interests, and, consequently, to impose extractivism as one of their main economic strategies.

The participating organizations in this study researched the topic in their respective countries and collected information on the use of the UPYCA concept. The organizations identified concrete cases and situations and sought to answer the following questions about UPYCA:

- In what context were these concepts produced and introduced into national legislation?
- Have there been any major recent changes?
- What are the standards that deal with these concepts today and what are their normative contents?
- How are these concepts applied by the State?
- Are there relevant cases of dispute around these concepts? If so, what were the cases and disputes?
- How have the concepts been problematized?

For the execution, two data collection and qualitative analysis tools were used to collect normative, jurisprudential, and discursive elements that make the use of the UPYCA concept viable. Information was also collected on the application of legal decisions based on UPYCA figures in concrete situations. In this order of ideas, nine emblematic cases were documented in which disputes have arisen over the meaning of public utility. The results of the national research will be published soon in the following national reports:



EXECUTIVE SUMMARY OF THE REGIONAL REPORT

List of reports:

- Bolivia: “Minería o Bien Común. “Utilidad pública” en la Normativa Minera en Bolivia”.
- Brasil: “Interesse privado e despossessão pública: Contradições entre a utilidade pública e o bem comum”.
- Chile: “Utilidad pública en el Sector Minero? El caso de Minera Vizcachitas en Putaendo”.
- Colombia: “Utilidad pública, la deformación de un concepto a costa del bien común”.
- Ecuador: “Utilidad pública y Sector Estratégico, Artificios Mineros”.
- Honduras: “El concepto de “Utilidad pública” y terminología análoga como justificante para limitar y restringir derechos”.
- México: “Utilidad Privada, Despojo Público: Industria Eólica y resistencia de la comunidad indígena de Unión Hidalgo, México”.
- Perú: “Utilidad pública y Conceptos Análogos en Minería - Uso y Abuso”.



12

These national reports reflect the uses and dispute surrounding the UPYCA and give an account of the procedures applied in each country and case studied. Eight of the cases analyzed refer to mining projects of different types of minerals (gold, iron, coal, copper, silver, lead, zinc, molybdenum). An infrastructure project for wind energy production has also been analyzed (see map). The cases reflect whether the disputes have remained at the level of mobilization and social protest, or whether they have been taken to court and what decisions were obtained.

The findings obtained were compared with the IHRL standards on this issue, which led to the generation of conclusions and recommendations addressed to different actors, including the societies of the participating countries, governments, the States of origin of extractive companies and international human rights organizations. A “test of public utility”¹³ was also constructed to make available to their societies a tool that can be used for analysis in decision-making processes where UPYCA concepts are applied.

¹³ This test condenses some questions that allow us to examine each project before its implementation, in light of the social, political, and legal debates that are taking place in Latin America around the effects of the implementation of mining-energy megaprojects and the damage they cause to society, nature and bio-cultural relations. It incorporates elements of both IHRL and social demands and agendas in the continent. It includes a section on how the damage to specific territories and the populations that inhabit them also affects society as a whole. .

3. Implementation of the UPYCA in the countries

a. Historical review: The UPYCA and its application for the promotion of extractivism

With the arrival of neoliberal policies in the region from the end of the 1970s and the beginning of the 1980s, the exploitation and management of natural resources was opened to large transnational capital. In this process, the norms on expropriation and exploitation that were basically intended to apply the social function of property and make public infrastructure works possible, such as the construction of schools, hospitals, and roads, are now used to expropriate public patrimony and private individual and community lands, for concessions or to impose forced taxes in favor of mining and energy megaprojects. These neoliberal policies seek to legitimize themselves with the argument of supposed “progress” and “development”, and with it, come the promises of providing basic services and creating jobs for the population living in the territories to be exploited.

In political discourse, UPYCA's proclamation implies the protection of general interests and a search for the welfare of society, as well as development aimed at increasing the resources of the State. In other words, the UPYCA discourse implies the almost incontrovertible premise that extractive activities derive a common benefit. And it is in this sense that the concept of public utility has been incorporated in secondary norms such as in mining, hydrocarbon, energy, forestry and electricity laws and regulations, acquiring a determining role for the consolidation of extractivism. Regardless of the particular legal, political, and cultural characteristics of the countries studied, the UPYCA became an instrument for the imposition of extractivist interests, especially from the 1990s onwards, as a sense of valuation of purely economic utility prevailed based on law, discourse, and the use of public force and sometimes of parastatal troops¹⁴.

This imposition of extractivist interests and the reduction of public utility to merely economic criteria without considering the high social, cultural, and environmental costs of

¹⁴ Armed groups that not being legal operate alongside or for the benefit of the positions and statuses defended by state armed forces.



EXECUTIVE SUMMARY OF THE REGIONAL REPORT



UTILITY PRIVATE, DISPOSAL PUBLIC

Public utility and analogous concepts related to mining and energy activities

Case analysis in Bolivia, Brazil, Chile, Colombia, Ecuador, Honduras, Mexico and Peru

Impacts on civil and political human rights

- Dispossession of territory.
- Impossibility of leading a life in dignified conditions.
- Right to life violation on the cases of persons killed in the context of exploitation.
- Denial of the right to participate in public life and public oversight.
- Deprivation of liberty and judicial protection.
- Risk of forced displacement.

Socio-economic impacts

- Regressive agrarian policies that benefit the majority of those who live in the countryside.
- Disappearance of fishing and agriculture as livelihood activities.
- Loss of seed diversity.
- By tax exemptions or intervention on royalties, less redistribution of benefits.

Impacts on health and food sovereignty

- Pollution from land disposal of mass wastes.
- Contamination of water bodies (surface and underground) wastes by toxic drains.
- Soil desertification.
- Permanent risk of environmental disasters of anthropic origin.
- Deterioration of health as a result of environmental pollution.
- Precariousness of physical integrity due to illness, decreased access to food and deficits in environmental sanitation.

Cultural Impacts

- Regression of traditional forms of communal land tenure.
- Loss of cultural diversity.
- Loss/Affectation/ Ignorance/ of ancestral knowledge and sacred territories.
- Ethnic territories are more impacted by projects (environmental racism).

Impacts on nature

- Destruction, diminution, and contamination of water bodies by toxic drains.
- Loss of species.
- Loss of biodiversity.
- Loss of seed diversity.
- Depletion of natural resources.
- Elimination or reduction of protected areas.
- Expansion of environmental sacrifice zones.
- Risks of toxic liabilities due to improper identification of environmental damage.
- Deprivation of the biocultural relationship with communities harmonious with it.
- Ecosystems are deprived of their resilience, in some cases, by damage in perpetuity.

Impacts on democracy

- Corrupt state practices in favor of private corporate interests.
- The non-existence, reduction, and precariousness of spaces for public participation.
- Breach of the principle of legality and of the checks and balances for the balance of public power.
- Criminalization of social protests to guarantee the stability of extractive projects.



extractivism has deepened. Despite the evidence of the serious impacts that extractivism has on human rights and nature, governments continue to impose mining and energy projects with the argument of public utility, without adequate processes that guarantee respect for human rights and the protection of nature. There is also no democratic debate on the economic, energy and mining policies of the countries.

b. The dispute between the UPYCA and the protection of the commons in the rules and practices of countries

The UPYCA is recognized in the constitutions of the eight countries studied and its interpretation predominantly aligned with the conventional development paradigm conflicts with other constitutional provisions related to the protection of the commons.

Thus, in Ecuador and Bolivia, non-renewable natural resources are considered strategic from the point of view of “development”, but they conflict with indigenous conceptions and rights that are part of the supreme charters of these two countries, which were incorporated as a result of historical social mobilizations. The factual incompatibility of different constitutional provisions is a problem that requires public debate and clear answers. Such is the case of extractive activities, especially hydrocarbons, implemented in indigenous territories in the Ecuadorian Amazon, even though Article 57.4 of the Constitution establishes that these territories are inalienable and indivisible, as well as being unseizable and their ownership imprescriptible.

The Executive Branch

All branches of government participate in the development and application of the UPYCA, although the central role is played by the executive branch, which concentrates most of the political power, since it manages budgetary resources and administrative and management policies. It also has legislative initiative (particularly in mining), and, with the marked presidentialist regimes of the region, it tends to monopolize the legislature and subordinate the judiciary. Its regulatory power and management capacity are turned in favor of extractivist policies and specific projects. Despite the increase in regulations and formal mechanisms for popular and citizen participation, environmental agencies and



UTILITY PRIVATE, DISPOSAL PUBLIC

Public utility and analogous concepts related to mining and energy activities

Case analysis in Bolivia, Brazil, Chile, Colombia, Ecuador, Honduras, Mexico and Peru

institutions are unable to interact with full guarantees for the people and groups affected by megaprojects. Although it is obligatory to consult indigenous populations before the implementation of this type of projects that affect their territories, such consultations –if they are carried out at all– are carried out without satisfying their original purposes and are manipulated to legitimize what was previously agreed upon by companies and governments.

In the case of the Santa Ana mining project (Peru), in the absence of a “law”, prior consultation was not carried out, despite the ratification in 1995 of Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries (hereinafter “ILO Convention 169”). Citizen participation mechanisms were used that were purely informative in nature.

The legislative branch

The legislative branch and the control bodies also play an essential role in respecting legality and guaranteeing the rights of the population, but their actions do not generate the necessary counterweights to prevent the abuse of the UPYCA and the consequent imposition of mining-energy projects. This branch defines which activities can be considered of public utility and is the one that approves the laws (mining and hydrocarbon codes) that end up giving a legal basis to these activities.

The judicial branch

The judicial branch, although with many limitations and especially in cases of great impact in which there has been strong resistance from communities and social, human rights and environmental organizations, has achieved important effects by declaring some norms unconstitutional or imposing control and containment measures in certain situations. Litigation linked to the communities has allowed, for example, in Honduras, the Constitutional Chamber of the Supreme Court of Justice to declare unconstitutional and contrary to the State’s international obligations several articles of the General Mining Law for not guaranteeing prior consultation and respect for ILO Convention 169.



c. Economic power: the other promoter of extractivism

Although the analysis in the report does not focus on these actors, it is necessary to highlight that large companies, especially transnationals, arrive in the countries under study with advocacy capacities that go beyond the margins of democratic control. Often the governments of the companies' countries of origin influence the countries of destination of the investments through their embassies, chambers of commerce and other actors to promote the relaxation of norms in favor of their extractive companies¹⁵. Other actors, such as international financial institutions, also promote economic reforms that encourage extractivism as a way of supposed development in Latin America. In several cases, their capacity to interfere in the production of discourse, publicity and norms related to their interests, mainly natural resources, water, mining, electricity, and forests¹⁶, has become evident.

Tax evasion is frequent, as was revealed in Colombia with the coal company Cerrejón and a ferronickel extraction company in Cerromatoso, which both report much less income to the State than is actually received¹⁷.



¹⁵ See, for example, Working Group on Mining and Human Rights in Latin America. *The Impact of Canadian Mining in Latin America... op. cit.* pp. 25-29.

¹⁶ *Ibid.*

¹⁷ See <https://www.uniamazonia.edu.co/amazoniaypaz/de-como-las-empresas-mineras-se-llevan-todo-y-no-nos-dejan-nada/> Article: "Mining companies take everything and leave us nothing", Luis Álvaro Pardo Becerra.

4. Impact of the application of the UPYCA in cases analyzed

In the framework of the eight studies of the national reports, we identified six different categories of impacts resulting from the UPYCA declaration: i) on civil and political human rights; ii) on the socio- economic order; iii) affecting health and food sovereignty; iv) cultural impacts; v) on nature; vi) with an effect on democracy. Consequences that will be detailed as follows: clarifying that they can be in different categories but highlighting the one we consider most influential.

The national studies demonstrate in detail the impacts mentioned above. Briefly these relate to:

- **In Bolivia**, the Huanuni tin mining project generates toxic waste that impacts the water system of the Huanuni River and Lake Poopó. Both are severely affected in terms of quality and drought, affecting local agriculture, the basis of life and culture of thousands of farmers and traditional fishermen. The area is declared an environmental emergency.
- **In Brazil**, the cases of the Roseli Nunes Settlement for the extraction of iron and phosphate and the Grande Carajas Project for the exploitation of iron and other minerals have resulted in the displacement of communities (traditional populations that are beneficiaries of agrarian reform and leaders in agroecology experiences) and bring several serious impacts, especially on the environment. In addition, it affects sovereignty, food security and the rights to land and territory.
- **In Chile**, at present, the territory where the Vizcachita mining project will be installed is rural, a territory with a vital expression of many economic and cultural practices, such as basketry in vegetable fibers, transhumance, agriculture. The copper and molybdenum extraction project lacked an adequate environmental assessment prior to the start of the project, which would affect the environment, particularly water due to its commercialization.
- **In Colombia**, the Cerrejón coal project ignored the existence and rights of the indigenous and Afro- descendant populations of the region, contributing to the loss



EXECUTIVE SUMMARY OF THE REGIONAL REPORT

of necessary resources and means of subsistence of these peoples, such as hunting, agriculture, grazing, cultivation and use of medicinal plants, and fishing. Especially their water sources have been seriously affected. Being the peninsular department of La Guajira fundamentally indigenous pastoralists, with important Territorial and clan ties, its population, particularly those located in the north of the department, was seriously affected in terms of access to food, which has led to serious consequences for child malnutrition and the impoverishment of the communities, aspects that have been the subject of special attention of the Inter-American Human Rights System¹⁸.

- **In Ecuador**, the Mirador open-pit copper (and to a lesser extent silver, gold, and molybdenum) mining project has led to the displacement of rural families and the expropriation of the agricultural lands on which their occupations and economic livelihoods were based, as well as the destruction and contamination of ecosystems and rivers. The project was developed without consultation. In the context of social resistance to the megaproject, the president of one of the Shuar indigenous communities was assassinated and the criminalization of people from the communities has been a constant occurrence.
- **In Honduras**, the Guapinol mining concession for iron ore exploitation has reduced protected areas and used regressive environmental safeguards without consulting the affected communities. This megaproject is being implemented in a context of criminalization and institutional violence. At least 32 people have been criminalized, while Inversiones Los Pinares in alliance with Inversiones EKOTEC have advanced in the installation of a pelletizing plant, linked to a U.S. company. There are allegations of corruption involving public institutions.
- **In Mexico**, the case of the Gunaa Sicarú Wind Power Plant omitted prior consultation with the affected indigenous community and ignored the communal nature of their lands. The lack of participation in the corresponding environmental impact studies increased the climate of community polarization, stigmatization, and aggression against defenders. Although the project has not yet been built, it reflects from its initial stages the imposing character given to the UPYCA figure: the lack of free,



¹⁸ See <https://www.hrw.org/es/news/2020/08/13/colombia-ninos-indigenas-en-riesgo-de-desnutricion-y-muerte> Human Rights Watch “Colombia: indigenous children at risk of destruction and death”; and <https://www.oas.org/es/cidh/decisiones/pdf/2015/MC51-15-Es.pdf>. “Precautionary Measures of the Inter-American Commission on Human Rights” 51/15 Resolution 60/2015.

UTILITY PRIVATE, DISPOSAL PUBLIC
Public utility and analogous concepts related to mining and energy activities
Case analysis in Bolivia, Brazil, Chile, Colombia, Ecuador, Honduras, Mexico and Peru

prior, and informed consent, the dispossession of communal lands that particularly affects women.

- **In Peru**, the Santa Ana mining project for the exploitation of silver, lead and zinc involved the omission of prior consultation, as well as the criminalization of defenders when they exercised their right to social protest. An Aymara leader was convicted as a “non-executive co-perpetrator” of the crime of rioting. In addition, a reserve zone was subtracted, impacting the ecosystems of the area and the well-being of the Aymara communities.

For the development of all these projects, public utility, and similar concepts (UPY-CA) were used as an argument. Because of these impacts, the imposition of extractive megaprojects in Latin America has aroused significant social resistance. According to the *Atlas of Environmental Justice*¹⁹, socio-environmental conflicts associated with mining and energy activities have increased in the region (from 20 to 130 in the period examined). Likewise, the cases analyzed in this report show social agendas that advocate for the permanence and care of the territories, respect for and guarantee of human and environmental rights. These in turn denounce the imposition of development models that ignore other thoughts and forms of existence while silencing the voices involved in decision-making.

Among the impacts on human rights that were found, the focus was on those that impede the enjoyment and permanence in the territories of individuals, communities, and groups.

From the plurality of impacts it can be deduced that there is a profound relationship between the places chosen to carry out mineral exploitation and the presence of indigenous peoples, Afro- descendants, Quilombolas and peasants, which shows a marked environmental racism.

In conclusion, we can see how the impacts of exploitation are distributed unequally among classes, social groups, ethnic groups, and genders, and disproportionately impact populations with less power and economic resources. Women receive differentiated im-

¹⁹ *Environmental Justice Atlas* <https://ejatlas.org/?translate=es>



EXECUTIVE SUMMARY OF THE REGIONAL REPORT

pacts, as their patrimonial rights are not sufficiently recognized, and in many cases, they are responsible for family provisioning. The populations in the territories are the first to be affected by industrial accidents and natural disasters of anthropic origin, particularly regarding their integrity, health, and life in dignified conditions²⁰.

The integral nature of the impacts affects both humans and non-humans. In nature, damage to ecosystems that include land, water, and air, either by pollution or destruction, stands out, which prevents the care and free access to these common goods as the basis of biocultural relations.

Despite the existence of environmental impact studies that include possible mitigation measures, these do not sufficiently consider the dimension of the risks. Thus, by preventing the analysis of the true dimensions of the damage, the possibility of care, protection, control, and control of common goods through social participation is hindered. In the case of Mexico, for example, the wind farms have fenced in the lands where plants and firewood used by Zapotec women for various food and subsistence tasks –including cooking– were collected, making them more expensive and inaccessible. The project, far from benefiting them, has accentuated their condition of energy poverty.

Despite the detriment to the living conditions of the populations living in the areas where megaprojects are implemented, there are no adequate processes of integral reparation, including compensation for the damages suffered by these populations and the nature on which they usually depend.

The exploitations that are carried out without the participation of the affected communities make coexistence in the areas of intervention difficult, which is why the number social conflicts is increasing. These conflicts have led to violent scenarios in which forced disappearances, assassinations, and threats against leaders, as well as people and groups that defend human and environmental rights, are sometimes recorded. The excessive use of force to contain opposition to projects often translates into violations of personal integrity, freedom, and free expression of communities. The stigmatization of community

²⁰ Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. A/HRC/37/59. 24 January 2018.



UTILITY PRIVATE, DISPOSAL PUBLIC
Public utility and analogous concepts related to mining and energy activities
Case analysis in Bolivia, Brazil, Chile, Colombia, Ecuador, Honduras, Mexico and Peru

defenders and opponents of extractive projects as “opposed to development” is also a constant.

Another form of violence that can be observed is the criminalization of social protest, using criminal law²¹ to respond to citizen opposition to extractive mining and energy megaprojects, as seen in the cases analyzed.

With these mechanisms, the restriction of rights established in constitutions or international instruments, such as freedom of thought and expression, movement and residence, freedom, and effective social participation, among others, is noted.

Are public, popular, or ethnic consultations carried out in a timely and adequate manner, or are they developed with the aim of obtaining approval for extractive projects and not with a view to listening to the concerns, proposals and alternatives of the people and organizations seeking participation? Do they effectively seek to decide on the viability of the project?

Finally, although in the context of general interest and on the basis of a popular consultation, expropriation can be carried out for the execution of projects, it must be guaranteed that these projects contribute to the common good, and, among other things, the payment of compensation that addresses “the fair balance between the general interest and the particular interest”²². However, it is imperative to question the true public utility of extractive mining-energy megaprojects when intrinsically devastating damages have been proven, resulting in immeasurable social and environmental costs for territories and countries.

21 There has been the use of criminal offences applicable to opponents, such as sabotage, rebellion, terrorism, usurpation, arson, theft, extortion, disruption of public services or “legally authorized” works, crimes against public order such as riots, among others. The executive branch promotes the activation of punitive mechanisms from its privileged position with the consent of the justice system. .

22 I/A Court H.R., *Case of Salvador Chiriboga v. Ecuador...*, *op. cit.*, para. 98.





5. Conclusions

In the light of the above, we come to the following conclusions:

First: UPYCA is based on a colonial-extractivist pattern and assists in the imposition of a single development model. Thus, it shares with colonialism the same sense of exclusion from full citizenship of indigenous people, Afro-descendants, peasants, environmentalists, and women, and shields itself in the urgency of a development that calls for the reduction of social participation in decision-making and deepens the global social-ecological crisis. This has its manifestations in climate change, the loss of biodiversity, the extinction of species and other facets of crises that question the hegemony of a mistaken concept of development.

Second: The study reflects that the eight States examined presume the public utility of mining and energy activities. This presumption prevents clear and transparent controversy in order to distort socially and legally what is taken for granted without being proven, making the realities of tension and struggle between visions of life and development normatively invisible.

However, by legally assuming the UPYCA as a presumption, it creates a limbo that allows it to operate and have the benefits of this and at the same time escape the open debate on the true public utility of megaprojects, as well as on the damages they generate in the commons.

Third: The UPYCA is used politically as a reason of State, placing itself above international human rights instruments and the very domestic laws on which it is based. However, this logic is underpinned by an economic power that influences and instrumentalizes the content and form of national legislation to favor the interests of private companies to the detriment of the commons. This is evidenced, among other things, in the closing of channels for genuine social participation in decision-making.



UTILITY PRIVATE, DISPOSAL PUBLIC
Public utility and analogous concepts related to mining and energy activities
Case analysis in Bolivia, Brazil, Chile, Colombia, Ecuador, Honduras, Mexico and Peru

Fourth: UPYCA confronts constitutional aspirations such as the common good and good living. The increase in socio-ecological conflicts, as well as the social and political debates carried out in recent years in the continent, allow us to visualize important tensions in the determination of the priorities of society and States regarding public policy and governmental management of common goods in the perspective of current and future generations.

Fifth: The priorities deployed by the States and their respective governments at the time of establishing and defining the main lines of action in the economic field, in the models of production, the valuation of nature, the care and protection of the environment, as well as human rights, placing as a priority the unconsulted or semi-consulted exploitation of different types of mining projects, wind farms, dams and other related projects, all this without regard to what is intended by the UPYCA, make evident the disdain for making democracy something more than a noun.





6. Towards the re-signification of UPYCA

As a result of the research, it has become clear the need to re-signify and democratize the concept of Public Utility and Analogous Concepts considering diverse elements so far absent from the governmental perspective, prior to the viability of the type of megaprojects we are concerned with here.

With respect to the contradictions detected, it is important that the public utility of the projects be explicitly and thoroughly demonstrated and that they undergo effective public scrutiny. As a contribution to the reflection and re-signification of the measures that could be considered of public utility in the context of the implementation of mining-energy megaprojects in the continent, we constructed a “test” that contains guiding questions for such scrutiny. This “test” condenses questions that contribute to examining each project before its implementation, considering the social, political, and legal debates that are taking place in Latin America.

Each project should be examined on a case-by-case basis. The questions posed in a general way are not intended as a finished questionnaire, but as an opening to necessary reflections on the UPYCA of extractive megaprojects. It focuses on the following issues:

- Sumak Kawsay, good living, or life in plenitude.
- The richness of social and biological diversity.
- The concreteness of democratic processes.
- The fight against racism and environmental injustices.
- The possibility and strengthening of alternative economies.
- The enjoyment of the territory by the peoples who inhabit it.
- The extractivist history, its consequences in the territories.
- The history of the business sector concerned.
- The fight for transparent information and against corruption.

Additionally, the proposal includes providing consideration to the following elements within the proportionality judgement:

UTILITY PRIVATE, DISPOSAL PUBLIC
Public utility and analogous concepts related to mining and energy activities
Case analysis in Bolivia, Brazil, Chile, Colombia, Ecuador, Honduras, Mexico and Peru

Need: What is the imperative and compelling public interest that needs to be satisfied? (It is not enough that the purpose is useful or timely).

Proportionality: Verification that the restriction of rights is not exaggerated or disproportionate in relation to the advantages obtained with the restriction, through the judgment of proportionality.

This “test “ also provides an overview of issues relevant to such proportionality judgments, such as satisfactions and restrictions of interests, historical contexts of racial and structural discrimination, impermissible restrictions on indigenous or other peoples’ territorial rights with explicit rights in each country’s laws, limits on the use and enjoyment of property rights, established standards for the conduct of consultations, and essential features of prior environmental impact studies.

Thus, the determination of the usefulness of a megaproject should involve a proper balance from the communities and social sectors interested in delving deeper into these concepts, which allows for the integration of elements not contemplated in their declarations. In this way, aspects ranging from their own economies, social and community fabric, biodiversity, cultural diversity, human rights, democratic exercises that are constituted in the territories, as well as the guarantee of biocultural rights and other rights at risk for current and future generations, should play a fundamental role in the exercise of weighing the public utility of decisions on the territories.





7. Recommendations

This report shows that the use of UPYCA concepts makes the implementation of large-scale extractive projects on the continent viable, without the information, debate, and requirements of democratic societies. At the same time, these absences are a source of social, environmental, and legal conflict that involves the occurrence of serious damage to coexistence and the enjoyment of human rights, as well as attacks on individuals and groups working for the protection of these rights, land, and territories.

To contribute to overcoming these consequences and the webs of conflict and violence reflected in the report, we propose the following recommendations for consideration:

7.1. To the societies of Bolivia, Ecuador, Brazil, Chile, Colombia, Honduras, Mexico and Peru

Demand that the governments of the eight countries put the common good, living well or good living, of the citizenry as a whole above private interests and other partial interests through concrete policies and actions.

Open a public debate on the use and abuse of the UPYCA and insist on restricting the application of these concepts to cases that are consistent with the principles stipulated in the American Convention.

Before approving extractive projects, develop participatory processes to evaluate the social, cultural, ecological and political wealth of the territories to be intervened, in order to have a comprehensive picture of what can be gained and what can be lost.

To critically examine the historical processes of extractive intervention in the territories in order to analyze the dimension of damage, the behavior of companies and States in concrete situations of implementation of extractive projects.



UTILITY PRIVATE, DISPOSAL PUBLIC
Public utility and analogous concepts related to mining and energy activities
Case analysis in Bolivia, Brazil, Chile, Colombia, Ecuador, Honduras, Mexico and Peru

Be informed and demand the use of existing participation tools that are considered adequate for the voice of communities and social organizations to be effectively heard.

To consider with special emphasis the rights of future generations in terms of the availability of common goods such as climate, biodiversity, water, environment, soil, air, forests, and others linked to them.

7.2. To States that authorize and implement megaprojects in their territories

Transcend the focus of the economic analysis of extractive projects towards the social, political, environmental and nature dimensions in an intergenerational perspective.

Constitutionally recognize the preferential access, use and exploitation of lands and common goods of peoples and other communities that inhabit the countryside, including the recognition of criteria for correcting and rectifying structural discrimination against indigenous peoples and communities.

Provide populations with adequate and efficient tools for effective access to information, participation, and justice in the implementation of extractive projects.

Legally institute obligations and responsibilities for corporate reporting and due diligence on human rights, as well as an administrative sanctioning regime.

Establish a legal presumption of refutability of the projects declared or identified as UPYCA, which imposes the burden of proof on the companies that promote them and regulatory entities regarding the non-affectation of the environment, goods, rights, and ways of life of the peoples and communities where the mining-energy projects or activities are intended to be developed. Failure to overcome this presumption would authorize the refusal to develop such projects.

Adopt effective policies to protect land, territorial and environmental defenders, both in areas where projects operate and in areas of environmental and cultural wealth and the territories of indigenous and Afro-descendant peoples and communities.



Ensure access to shared, fair, and reasonable benefits derived from the profits generated by the projects carried out in the territories, as well as to monitoring and sanction mechanisms in the event of non-compliance, recognizing that such benefits do not replace the obligations of States in terms of economic, social, cultural, and environmental rights.

7.3. To the Governments of origin of companies interested in extractive projects

Implement legislation on corporate due diligence, incorporating binding obligations to respect human rights throughout the corporate structure and supply chain, as well as reporting and monitoring procedures, and access to justice, through public law procedures with differentiated burdens of proof.

Promote, ratify, and implement international standards on business and human rights, mandatory due diligence, the rights of indigenous peoples and communities, and citizen participation in environmental matters.

7.4. To international human rights organizations

Incorporate in their analysis of the human rights impacts of extractive activities, the use of UPYCA figures that make viable and seek to legitimize processes of dispossession of rights, territories, and common goods for the benefit of corporations and private companies in general.

To make visible the phenomena of reconfiguration of the UPYCA figures for the benefit of private interests as ways of non-compliance with the international obligations of the States in terms of guaranteeing, adapting the internal order to the conventional provisions and the progressiveness of economic, social, cultural, and environmental rights.

Promote the establishment of *prima facie* presumptions in the legislation of the party States, which recognize the harmful potential of extractive projects with the potential to be classified as public utility, in order to ascribe evidentiary burdens on the State and not



UTILITY PRIVATE, DISPOSAL PUBLIC
Public utility and analogous concepts related to mining and energy activities
Case analysis in Bolivia, Brazil, Chile, Colombia, Ecuador, Honduras, Mexico and Peru

on the victims, regarding the impact of mining-energy activities, as well as reinforced obligations to respect and guarantee the human rights of the peoples and communities concerned.



The following characters were used for the layout

Adobe Caslon y Ronnia

Octubre de 2021

Knowledge is a good of humanity.

All human beings should have access to knowledge,
cultivating it is everyone's responsibility.