

# THE COLLAPSE OF THE RIVER DOCE DAM

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- *The use of international strategies as a way of reducing asymmetric distribution of power between human rights and business interests*

## ABSTRACT

*The destruction of the Rio Doce basin in 2015, when the mining waste dam owned by the company Samarco collapsed, is emblematic of the tense relationship between ensuring human rights within international standards with particular attention to transnational, business activity in the countries of the Global South. As the situation unfolded the fragility of the state, and its various institutions, in ensuring the rights of the communities affected, in the face of the economic power of those companies involved, became clear. In effect, the companies responsible for the violations are the ones that are reconstructing life in the regions, as they see fit. The work of civil society and international bodies has focused on seeking to break state inertia and violatory practices, such as curtailing debate on ensuring access to legal processes and social participation. This article recounts a part of the efforts to gain international visibility for the case, using it as the basis to propose reflection on the deepening scenario of social environmental setbacks and violations of human rights, the result of the implementation of the current mineral extraction model in Brazil.*

## KEYWORDS

Mining | Technological disaster | Rio Doce | International Strategies | Business and Human Rights

## 1 • Introduction

*“It rained drops of mud”.*

This was how a resident of Bento Rodrigues described the moment when he realised that the Fundão dam had burst, in the municipality of Mariana in Minas Gerais. The “rainfall of mud” was caused by a wave of waste material from the breached dam hitting a rocky bulkhead, before flowing down the valley. En route, it ran into other rock formations, causing whirlpools, backflow and currents that swept away trees, objects and people, which increased its destructive force.<sup>1</sup>

That moment, at around 4pm on 5 November 2015, marked the start of a long, difficult path for the affected communities, civil society organisations and for the supervisory bodies for diffuse and collective rights (Public Prosecution and the Public Defenders Office), to hold the public authorities and the companies involved, Samarco, Vale and BHP Billiton, accountable for their actions and omissions, as well as for full redress and compensation for the violation of rights and for the environmental impact of the disaster.

Almost two years after the fateful event there is still no light at the end of the tunnel. There are thousands of claims for individual damages, collective claims and a number of judicial and extrajudicial agreements, as well as inquiries and criminal proceedings to establish penal responsibility for what happened. In addition to all this, the set of measures taken by the authorities and the companies represents a collection of palliative actions, insufficient to deal with a disaster of this magnitude.<sup>2</sup>

The size and gravity of the collapse of the Fundão dam meant that the scope of the damage went far beyond the 850 km stretch of the Rio Doce river between Mariana and its mouth at the Atlantic Ocean. This section of the river was contaminated with over 40 million cubic metres of mud that spilled from the dam. The collapse of the dam in Mariana/Rio Doce, considered to be the worst socio-environmental tragedy in Brazilian history and the most serious case of a technological disaster involving a mining waste dam in the last two centuries,<sup>3</sup> immediately drew intense attention from press around the world and there were repercussions on the international financial markets. BHP Billiton shares dropped on the New York exchange following the event.<sup>4</sup>

Even under the scrutiny of the international community, local public and private players initially adopted a “defensive attitude”<sup>5</sup> either for the sake of convenience or because of an incapacity to deal with the consequences of the disaster. Among the actions that best demonstrate a reactive spirit and a lack of empathy towards the victims of the disaster immediately following the breach include the attitude of the Minas Gerais state governor who gave his first press conference at the Samarco headquarters; the Minas Gerais State Secretary for Economic Development’s statement that the company had been the victim of the collapse and the seven-day delay before President Dilma Rousseff flew over the affected area (and only in Minas Gerais, not in Espírito Santo).

From the outset it was clear to civil society organisations and to those representing the people who had been affected that full redress of damages and the revitalisation of the area and of the Rio Doce Basin would only possibly happen at the national level under international pressure. This article recounts a part of the effort to gain international visibility for the case and considers human rights violations, the origins of which are found in the implementation of the current mineral extraction model in Brazil.

This article is divided into three sections, in addition to this introduction. The following section places the collapse of the Fundão dam in context within the framework of the responsibility of the companies in terms of human rights, with attention to systemic repercussions. Next, some of the strategies and actions adopted to gain greater international visibility for the case are presented. The following section discusses the importance that this approach had on the demarcation of some of the more serious hurdles observed during the process of remediating violations. The final considerations point to possible future paths bearing in mind the current scenario, almost two years after the collapse.

## 2 • The emblematic case of Rio Doce

Samarco Mineração S.A is a closed capital company, founded in 1973 and has always been a joint venture, with Vale S.A and BHP Billiton Brasil Ltda each holding 50% of capital. It is an icon of the subordinate insertion of Brazil into the global market, being a mine-pipeline-pelletizing-port complex, ensuring extraction of natural resources, semi-transformation and total exportation as a commodity on the international market.<sup>6</sup>

The Fundão dam is part of the operations complex, Alegria, in Mariana, Minas Gerais, composed of two dikes, one for sand and one for slime, with a capacity for 79.6 million m<sup>3</sup> and 32.2 million m<sup>3</sup> respectively<sup>7</sup> (According to the Minas Gerais Civil Police report the cause of the collapse was the liquefaction of the sandy waste that supported the dam. According to the inquiry, the factors that led to the collapse were the following (i) increased saturation of sandy waste deposited in the Fundão dam; (ii) failures in the continuous monitoring of the water level and of the pore water pressure of waste products; (iii) several pieces of monitoring equipment were not working properly, so the readings needed for the dam's safety report were not carried out; a high annual level raising at the dam, because of the large volume of slime inside, not reaching full; (iv) sedimentation of dike 02 which meant water could get in; (v) insufficient water drainage. In addition, the emergency plan of action in the event of a breach, presented to environmental control groups was never put into practice.<sup>8</sup>

Summing up, researchers have underlined the relationship between the failure of safety control systems at the dam and maintaining company profit margins, which meant a reduction in investment in these areas. The price of iron mining fell after 2013. In a ploy to meet profit expectations the companies stopped investing in more advanced technology

and safety methods. They pinpoint the direct relationship between the companies' responsibility in the risk activity of mining and the disaster caused, in addition to state inertia in its role of carrying out inspections to meet environmental constraints.<sup>9</sup>

In terms of efforts in the region following the disaster, relations between those affected and the companies are strained. Initially, the companies attempted to exempt themselves from liability, leaving many communities in degrading conditions for days, homeless, without food or information about their family members. No preventative measures were taken to stop the mud from reaching the sea on 16 November, nor were there any bulletins or alerts to warn communities. Later, when the families had been placed in hotels, attempts were made to preclude the organisation of those affected into movements, associations and commissions to construct collective claims.

The central dispute of the conflict involves recognition of those affected and to this effect the company has offered compensation according to its own criteria, without any publicity, randomly, without the consultation or participation of the victims. Socioeconomic records in which recognition was, or was not given, to the families were utterly abusive. In some cases elderly people and victims who had been unable to retrieve anything were expected to provide proof.

This situation was reported to the Inter-American Commission for Human Rights (IACHR) in a hearing during the 158th period of extraordinary sessions, in which civil society bodies and those affected explained that records of the families were controlled exclusively by Samarco and that those who were not registered had no access to emergency aid.

Control of conflict management by the companies, without the participation of those affected, along with the Brazilian state's inertia, compose a scenario of a profound imbalance in power relations between the companies and the victims, with the latter taking the brunt of the risks and damages of the whole disaster. This meant that conflict, rather than being seen from the angle of human rights standards, was seen as a problem of recovering economic activity.

In this sense, the *Acordão* (big agreement)<sup>10</sup> signed by states and governments with the companies in March 2016 is emblematic of a lack of respect for the central importance of the victims in the reconstruction of their lives, in that: they were not consulted about the development and negotiation of the agreement; private foundations of companies were created with whom victims are obliged to negotiate directly, without the presence of public officials to mitigate the imbalance of power between the parties, exposing those affected to adjudication meetings without the necessary technical assistance; contractual mechanisms were put in place that exclude victims from access to legal recourse and from the chance to bring the subject back to the table in the event of supervening factors, such as evidence of contamination affecting long term health.

Even though the *Acordão* is not valid in the eyes of the Brazilian legal system, it is being wholly implemented by the companies and is recognised by the government. In these regions the *Fundação Renova* (Renewal Foundation) has taken full control of the management of redress and impact mitigation policies, bringing numerous private and technical consultancy companies into the area. These are not equipped with the social skills needed to deal with the communities, which has caused even more discomfort and psychological violence to the affected families.

The Federal Public Ministry proposed a Public Civil Action in June 2016, estimating compensation costs at an average 155 billion real, firmly based on the participation of the communities. However, in January 2017 the Federal Public Ministry signed a Preliminary Agreement with the companies in which they would finance diagnostic research to quantify demand. This proposal, however, was not previously discussed with those affected and they did not have the opportunity to suggest organisations in which they trusted to carry out this research. This occurrence was a warning to civil society regarding the difficulties of effective participation even with the main body that defends the collective and diffuse interests that were impacted by the disaster.

Almost two years after the disaster the families affected still do not know which rights and demands will be met, even more so given that no integral restructuring plan for the Rio Doce Basin has been put together. Nor is there any reliable forecast of the impact on the health of the families, given that the water carries heavy metals. There is also no estimate of when the productive capacity and income of groups of fishermen, indigenous people, traditional people and communities will be restored.

On the committees of the decision-making spaces of the conflict, in other words, the numerous negotiating groups created for this issue, such as *Fundação Renova*, The Interfederal Council (CIF), the mediated compensation programme (PIM) and public hearings, there is a notable absence of the priority of human rights as the central driver of conflict resolution. In the light of this fact, we found all the measures being taken to resolve the problems to be completely ineffective, as they disregard the central importance of the victim in his/her restitution, marked by the absence of active participation. In this sense mitigating actions do not meet the expectations and needs of those affected and become merely uncertain obligatory actions that could cause impoverishment and increased vulnerability among diverse social groups.

This scenario demonstrates the Brazilian state's inability to ensure human rights in the face of transnational companies. Although there is clear underpinning environmental legislation, providing that accountability should be pursued in a case like this, the mechanisms of flexibility for environmental licences, inspection controls, in carrying out measures, the relationship between the funding of these companies for government candidates and the absence of mechanisms providing victims with swift access to justice, all lead to the perpetuation of a system that favours corporate impunity for human rights abuses.

### 3 • International action and strategies: the case of Rio Doce, a prime example of corporate irresponsibility

Immediately after the dam collapsed, those responsible failed to react.<sup>11</sup> Humanitarian emergency assistance was mostly carried out by civil society itself, with the support and mobilisation of people all over the country who sent food and essential items. While Samarco clung to the theory that the collapse had been an unpredictable, exceptional event caused by factors entirely beyond its control, Vale and BHP Billiton maintained the approach that they were legally distinct from their subsidiary, in order to shun their own responsibility.

In the second phase after the collapse of the Fundão, governments and companies signed commitments for the recuperation of the Rio Doce Basin and for the compensation of victims, who were not brought to the negotiating table. This agreement, later deemed null by the Federal Court, was signed by the states of Minas Gerais, Espírito Santo and the Federal Government on the one hand and Samarco, Vale and BHP Billiton on the other, is a prime example of failure to fulfil basic rights to effective redress in procedural and substantive terms. Indeed this is a practice described by the UN Working Group on Companies and Human Rights as endemic in Brazil in cases of violations of human rights by companies.

Given the inertia or refusal of government authorities and private companies in respecting the principle of the central importance of victims in processes of remediation and the impossibility of awaiting the final decisions of legal actions, civil society and those affected were forced to take the case to international mechanisms of protection of human rights. Some of the actions put together since the collapse of the dam in November 2015 are presented here, with a view to recounting part of the efforts carried out by victims and civil society to gain international visibility for this case and thus to raise levels of accountability among national institutions.

The international strategy adopted by the organisations and movements had two primary objectives. Firstly, it aimed to push the local players, responsible for the tragedy, out of the “comfort zone”, thus reducing the imbalance between the parties, notably between victims and the involved companies. As exposed earlier the latter have, in practice, wielded considerable power over the design and implementation of recovery measures for environmental and socioeconomic damages, within a well known framework of abandonment of conflict mediation by the State in mining projects and, more widely, in economic development.

The other objective was to draw the attention of external observers to the human cost of the tragedy. The collapse of the Fundão was widely seen as primarily an environmental disaster rather than a textbook case of the violation of human rights by businesses. If it is true that the environmental devastation caused by the wave of tailings waste

caused irreversible damage to the Rio Doce Basin, the harm caused to the traditional communities that depended on the river water for their subsistence and to the entire population of millions of people living in the towns along the Rio Doce, exposed to heavy metals and other health hazards, are also enormous.

The evaluation of which international channels would be approached took a number of factors into consideration, among them the chances of successfully obtaining public notifications strongly condemning failures in emergency assistance and redress for the victims, as well as causing public discomfort for the public and private players involved.

Regional and international channels for the protection of human rights were used. The first was the request for a public hearing at the Inter-American Commission on Human rights (IACHR) which took place at the 158<sup>th</sup> period of sessions in Santiago, Chile, in June 2016. The hearing addressed the human rights violations resulting from the Brazilian mining model. Civil society organisations presented emblematic cases showing environmental and socioeconomic impacts of mining extraction in Brazil. Among them the case of Piquiá de Baixo, in Maranhão, where air, water and soil are contaminated by the extraction of pig-iron and coal; and the Minas-Rio Project in Conceição do Mato Dentro, where environmental licensing was split into three separate processes, mining, pipeline and the Açú Port. This practice, according to the organisations, was a deliberate attempt to mask the cumulative impact of the whole complex, if regarded as a set of parts that fit together, in order to enable an economic project with a high potential for environmental degradation and violations of rights.

The document sent to the IHRC<sup>12</sup> recounted the process of making communities and local economies financially and socially dependent on mining. This is carried out through the centralisation of activities (products and services) in meeting direct and indirect demands for the functioning of mineral extraction. Towns and villages where the mining companies set up business, quickly become dependent on this economic activity, with dependency being taken as normal and it being considered a privilege to count on the resources gained through the presence of this sector in the region, undermining the existence of other sources of income. This is the actual effect of the presence of the mining companies. This characterises the relationship of local economic dependence and the pattern of impoverishment in the mineral extraction regions.<sup>13</sup> Concerning the dependency of the communities in mining regions on this economic sector, the document highlights that patterns of poverty and social inequality are the principal facilitators for the companies' actions, as populations tend to accept the negative consequences of mining activities more easily in these circumstances.<sup>14</sup>

With regards to political and economic support from the state for mining activity, the document lists policies of financial and tax incentives, as well as flexibility in environmental licensing and socio-environmental legislation. According to the document sent to the IHRC,<sup>15</sup>

*The Brazilian State performed a crucial role in this scenario. The option to prioritise the exportation of raw material led to the central position that the Banco Nacional de Desenvolvimento Econômico e Social (BNDES) held in financing these projects and also the infrastructure that is essential for this to work; exemption from taxes for mining companies; environmental licensing norms that have become more flexible in the last few years; as well as the undermining and scrapping of licensing and inspection bodies for mining activities.*

At the UN-level the first measure taken was to trigger Human Rights Council protective mechanisms (HRC) of the intergovernmental body. The HRC is the main UN human rights body and its headquarters are in Geneva, Switzerland. It is made up of 47 member states, elected by the General Assembly for a mandate of three years, according to criteria of geographical representation and distribution. In order to assist the Council in its mission to strengthen protection, to promote human rights and to confront real issues of violations of rights, the body nominates independent specialists who issue recommendations and advice to the States, either from the perspective of a given theme or of a country. These specialists, also known as Special Procedures, are able to make official visits to member countries and to send “communications” to States (in some cases to companies too) questioning actions taken in the light of actual allegations of human rights violations. There are currently a total of 43 thematic specialists and 13 whose mandates are country-related.

The first Special Rapporteur called upon was the Rapporteur on Toxic Wastes. Baskut Tuncak is the current holder of the mandate. Representatives from civil society informed the Rapporteur of the lack of reliable information about the composition of the “toxic mud” that formed after the collapse of the dam and the absence of emergency measures. Along with another five Special Rapporteurs, the Rapporteur for toxic waste sent a communication to the Brazilian government less than ten days after the disaster. In the communication –that is transmitted confidentially under UN regulations and is only disclosed after a certain period of time<sup>16</sup> – the experts displayed concerns over health, safety and the well-being of those affected by the wave of mud and of those exposed to toxic waste contained in it. The experts requested the Brazilian state to provide information on the chemical composition and the heavy metals in the waste that leaked from Fundão. The Brazilian state was also questioned about plans to ensure the right of victims and the affected communities to an effective remedy.

The day after the confidential communication was sent, the Rapporteurs on Toxic Waste and on Human Rights and the Environment issued a public press release condemning the “defensive attitude” taken and the insufficient measures to contain damages adopted by the companies and by the Brazilian state. Against a backdrop of a total absence of trustworthy information from the authorities and the companies, the experts recalled that, under international human rights standards “the State has an obligation to generate, evaluate, update and divulge information about impacts on the environment and about dangerous

substances and waste products, and the companies are responsible for respecting human rights, including conducting the necessary due diligence on human rights.<sup>17</sup>

A second public notice came from the Rapporteur on the Human Right to Safe Drinking Water and Sanitation.<sup>18</sup> The press release sent out just over one month after the disaster drew attention to the disorganised and insufficient distribution of bottled water at distribution points in the towns where the mains supply had been cut off due to the contamination of the Rio Doce. The Rapporteur, the Brazilian Leo Heller, urged authorities to provide clear information to the population and to monitor the quality of the river water and treated water supplies to homes in the affected areas.

In the month after the disaster, the Working Group on Companies and Human Rights included the towns of Mariana and Belo Horizonte on the itinerary of their official visit to Brazil, the first to a Latin American country. The Group's visit to the region happened after a formal request from dozens of Brazilian civil society organisations, as it had not been included on the original WG agenda. In Mariana the UN working group met with Samarco, with public authorities and with affected communities. In a public hearing with representatives from the worst hit districts – Bento Rodrigues, Paracatu, Barra Longa and Gesteira – the two members of the WG who were present, Dante Pesce and Pavel Sulyandzigaque, heard inhabitants' testimonies reiterating the allegations that had been sent to the UN. Among them the story of a person who lived in Barra Longa and who, on hearing of the collapse of the dam had questioned Samarco employees about the possibility of the mud reaching his town. He was told by the company that there was no danger of it going that far. Sadly, a few hours later the mud reached homes, devastating them, leaving no time for people to save their personal belongings.

In his official report on the visit to the country,<sup>19</sup> presented to the HRC of the UN in June 2016, the WG on Business and Human Rights regretted the absence of any contingency plan and the failure to alert communities other than Bento Rodrigues. The Group concluded that, given the scale of the disaster, the Federal authorities should have taken better action straight after the collapse. The WG emphasised the need to restore confidence to improve inquiry procedures and to guarantee access to essential information and services, as well as recommending the creation of grievance channels so that communities and employees could freely express their opinions without fear of suffering reprisals.

The second phase of interaction between civil society and the UN system took place after the *Termo de Transação e Ajustamento de Conduta* (TTAC), or *Acordão*, which was signed by the Federal and State Public Prosecution and the three companies, and ratified by the Federal courts in May 2016. Immediately after its ratification by the Federal Regional Court of the 1<sup>st</sup> District, located in Brasília, eight civil society organizations sent an urgent appeal to the four UN Special Rapporteurs<sup>20</sup> and the Chair of the WG on Business and Human Rights. In the document, the entities labelled the agreement “illegitimate and illegal”, and stated that it aggravated the human rights violations caused by the collapse

of the dam. After this urgent appeal, the Minister for the Environment in Brazil, Sarney Filho, publically stated that he would propose a review of the agreement to ensure that the companies would do more to take the demands of the victims into account.

According to the appeal, the agreement aimed to limit the obligation of the Brazilian state to protect citizens' human rights within its territory from violations committed by corporations. One of the items considered to be most problematic was the preambular clause that listed as one of the purposes of the document, the termination of all legal action related to the disaster, as well as a clause that explicitly discharged the three companies from any responsibility for adverse consequences of the collapse of the dam.

In July 2016, the Superior Justice Court (STJ according to its Portuguese acronym) issued an injunction suspending approval of the agreement. The STJ held that the failure to consult with the people who had been affected as defined in the terms of the agreement made it illegal and illegitimate. The court concluded that the extent of the damage caused by the catastrophe warranted a wider debate on the negotiation of a solution of the conflict. According to this decision, the public authorities and the companies should have conducted public hearings with the participation of citizens, civil society, the scientific community and other bodies representing local interests, such as the municipal authorities.<sup>21</sup>

The suspension of the agreement was welcomed by the UN experts on human rights who were following the case.<sup>22</sup> In a new public notice, harsh criticisms of the agreement were laid down. Stating something that had already been widely criticised by the Human Rights Commission of the Chamber of Deputies and by the judicial authorities, UN mechanisms noted that the "The Executive powers and companies appeared to have, in their haste, ignored the rights of the victims to information, participation and an effective remedy, and to provide assurance of accountability". The experts demonstrated particular concern with the institutional governance created by the agreement and with the exclusion of the affected communities at decisive moments. On this, they stated:

*If put in place, the mining company would have the power to take decisions about compensations to be given to the affected population without any possibility for these decisions to be questioned or appealed. In addition, the agreement does not plan for sufficient mechanisms to ensure the participation of all the communities affected by the implementation of the foundation.*<sup>23</sup>

Activities paying tribute to the victims and to the memory of the first year of the disaster involved local events articulated with international advocacy. At a local level, the Movement of those Affected by Dams (MAB) organised a march that started at the mouth of the Rio Doce in Espírito Santo and reached Bento Rodrigues on 5 November 2016, exactly one year after the collapse of the dam. Bento Rodrigues was the district most devastated by the force of the wave of tailings and its reconstruction is not forecast until the year 2019.

At an international level a number of actions were carried out, starting with the denouncement of the disaster at the World Social Forum, in August 2016, in Montreal in Canada.

Following a strategy already used by the Movement of those Affected by Vale, affected people participated in a BHP Billiton shareholders' meeting in October 2016. MAB delivered the four principal demands of the families affected in the whole Basin to the company and to shareholders: (i) to not build the S4 dike and the removal of the mud deposited on the river bank; (ii) recognition of all the families affected; (iii) to restructure the agreement and the foundation so that those affected can participate in decisions and (iv) to speed up actions to redress damage, especially house building, health care and the return of the production work of the agricultural population.<sup>24</sup>

At the level of the UN, based on updated information about the unsatisfactory progress of the reparation processes, five Special Rapporteurs<sup>25</sup> issued a public communication criticising the measures taken by the State and by the companies as “not being sufficient to deal with the huge dimension of the human and environmental costs resulting from the collapse”.<sup>26</sup> According to the experts, after one year, the current situation of the tragedy is a lack in access to safe drinking water, the pollution of the rivers and uncertainty about the futures of communities forced to leave their homes. They believe the human rights of the six million people affected were disrespected.

The first year of the disaster was also the focus of an action during the 5th Forum of the United Nations on Business and Human Rights, the world's most important event on this theme, bringing together 2,000 representatives from governments, companies and civil society at the Palace of Nations, in Geneva. In memory of the disaster Conectas held an advocacy action at the Forum, distributing flyers with basic information about the disaster, such as the number of victims, the estimated economic cost of damages and the number of people directly and indirectly affected. It was noted that many of the participants were unaware of the precise scale of the tragedy and its ranking as the biggest disaster of this type in mining history.

Still focusing on events in the first year, an online platform was launched “Rio Doce Vivo” –, to which anybody can send reports, research, technical documents, photos, videos, legal cases and other public data that may help people and organisations to (re)build a living memory and monitor accountability of the companies and organisations whose acts and omissions caused the tragedy of the Rio Doce.<sup>27</sup>

#### 4 • The international arena: untying domestic knots

The collapse of the Samarco/Vale/BHP Billiton dam in the Rio Doce is an emblematic case of business' social irresponsibility and of corporate-related human rights abuse. One of the main lessons learnt from this episode is that even in cases of grave violations of human

rights and environmental impact, the accountability of the perpetrators depends on an extremely well orchestrated articulation between the affected communities, organised civil society, the press (above all agencies of investigative journalism) and the bodies for the defence of rights and collective interests (in the case of Brazil, public defence and the State and Federal Public Prosecutor).

Once again the fragility of market mechanisms was made evident along with the tools of Corporate Social Responsibility (CSR) as drivers of respectful behaviour in terms of human rights by corporations. In its own market Samarco was even considered a benchmark by what were previously considered the CSR's high standards.<sup>28</sup>

Even more sophisticated tools of benchmarking with regards to corporate policies and practices on human rights were not capable of ensuring appropriate penalisation of companies for the Rio Doce disaster. The Corporate Human Rights Benchmark, a multi-stakeholder initiative led by respected organisations such as the Business and Human Rights Resource Centre, presented BHP Billiton in the group of companies that scored highest in their ranking, in their first set of results in 2017. This result demonstrates that the methodology of ranking, indexes and benchmarks measuring business performance in terms of human rights is still suffering from a degree of insensitivity towards the plight of victims. Contrary to good sense and reasonableness, BHP Billiton is ranked as a top performer in human rights, among almost one hundred global business enterprises, flying in the face of the clear evidence that the processes to redress violations and the recuperation of the Rio Doce Basin fall far short of those demanded by international standards. Ultimately, these tools may pay a disservice to the efforts of the victims and their representatives to promote state and corporate accountability.

In the face of this state inertia combined with the inability of the CSR tools (and of businesses and human rights mechanisms) to force perpetrator companies to observe international standards on the right to effective remediation, the declarations of international mechanisms of human rights brought international visibility to a case that would perhaps otherwise have remained a local incident. International attention provoked a fall in BHP Billiton shares, thus ensuring the attention and scrutiny of private international players.

More importantly, the declarations of international mechanisms were crucial to creating counter-narratives on the causes of tragedy and the responsibilities of public bodies and private companies. In the immediate aftermath, they shifted the focus of the debate, which failed to focus on the occurrence or absence of a seismic shock to bring to the forefront the lack of reliable information and insecurity of the population of the Rio Doce basin. It was also through the communications that took place between the international mechanisms, the Brazilian state and the companies that it was established one of the only lines of reporting and accountability, given the fragility of domestic dialogue processes and lack of confidence on the part of those affected.

Almost two years on, civil society has returned to the Rio Doce tragedy to alert the population about the risks of weakening environmental regulations in Brazil. Sadly, contrary to what

would be expected, Brazilian socio-environmental regulations and the inspection bodies for dams have not been strengthened, as highlighted by the UN Working Group for Business and Human Rights in its report on the visit to the country. In fact an attack on the rights of traditional communities and on environmental rights is underway, as denounced by three independent HRC specialists and a ICHR rapporteur in a joint communication of 8 June 2017.<sup>29</sup> According to the experts, proposals to weaken the legal regulations are being wielded “by members of a rural lobby group, a coalition that represents associations of rural producers.”

The meme *#Fábrica de Marianas* (*#MarianaFactory*, in its original Portuguese meaning), that has been used in campaigns against the approval of a new general law on environmental licensing in Brazil which includes serious setbacks in relation to the current system, alludes to the real possibility that changes intended by groups of interest in the Legal and Executive powers could result in other disasters.<sup>30</sup>

Among the main threats to licensing in Brazil are the substitutes to the PL (draft bill) 3.729/2004, which is being passed urgently through the National Congress and aims to establish a new General Law on Environmental Licences in Brazil. Should it be approved in its current format, the project would create a series of exemptions to the environmental licensing process, including for potentially damaging activities, including mineral research and the expansion of highways. The project also eliminates the location aspect of the licence, removing geographical, territorial and human criteria that influence in the licensing process. This would mean that a project such as the mineral extraction and waste deposit of Samarco in Mariana, located close to a community, would undergo the same licensing process as another location in an area that presented a lower risk to the environment, to health and human lives. Instead of standardising procedures and the licensing process, the project would also open up the possibility for an “environmental war” between the states of the federation, whereupon they would have increased power to waive rules and individual regulations for their own jurisdiction.

The scenario of weakened socio-environmental legislation in Brazil merely reflects the force of certain small organized segments that benefit from the dismantling of the State’s monitoring and sanctioning powers, in order to carry out high risk activities without taking due precautions and to commit violations without being held accountable for their respective responsibilities. It is clear that, apart from these limited groups, such measures would not be at all beneficial. They would only generate legal uncertainty, increasing the risk of further disasters such as that in Mariana. They would also violate principles set out in international treaties, such as non-retrogression, precaution and effective and full remediation for human rights violations.

## 5 • Conclusions

The history of the Rio Doce Basin overarches the contradictory and patchy history of the colonisation and emancipation of Brazil. Over 300 years of mining in the region has led to serious environmental degradation; a break with means of traditional means of production and

reproduction in the region; deep-rooted dependency of communities on external elements to ensure their survival; the systematic loss of their autonomy and sovereignty and the extraction of resources from the region for exportation, without generating local development. There have been centuries of exploitation and oppression, characterised by the ethnic/racial classification that determines specific roles and places for the social and daily existence of representativity.

Socio-environmental disputes represent a conflict of interests between individual and collective levels with regards to the use of land and the relationship between production and nature. As a rule, the solution presented for this problem is the institutionalisation of the issue as environmental and, therefore, a problem of state public policies, through which pragmatic solutions for conflicts are sought using a measure of administrative reasoning, in other words, between that which is politically acceptable and economically feasible.

This situation is exacerbated when the nation-state's control of the territory, its sovereignty, are relativized because of the arrival of social players who are beyond the territoriality of their own control, for example transnational companies.<sup>31</sup> This makes the mechanisms of enforcement difficult. States take on the role of stimulating the promotion of investments in the region, through the provision of tax incentives, flexible environmental legislation, reduced inspections and the possible weakening of oversight bodies. And for communities they present weak mechanisms of mitigation and remediation for impacts, without properly ensuring information and participation in the decision-making process about projects in their regions.

The collapse of the waste tailings dam of the Fundão is an emblematic example of the meeting of the past, present and future of mining in Brazil, in that it shows us a model of production of secular wealth in the region, that led to a technological disaster of as yet immeasurable proportions and forces us to ponder about the future of thousands of other waste dams in the country.

Despite the legal complexity surrounding the Rio Doce case, it is noticeable that the domestic channels to ensure justice to the affected communities are *en route* to become exhausted. Only some of the communities' rights have been recognised and this only by means of an intense struggle, in which the presence of international players and mobilisation has been fundamental in guaranteeing that their voices are heard by decision makers. In the institutional arena these voices are still absent.

There is still much to be done to fully understand how the companies responsible are working towards the reconstruction of the region, the causes that led to the collapse, the impacts generated and the participation of those affected in the process. In the same way, it is fundamental to understand this case also in terms of what it represents for the formation and consolidation of alliances, the creation of networks of solidarity and mutual support between civil society and international mechanisms for the protection of human dignity.

For its harshness and its simplicity, the Rio Doce case teaches valuable lessons about how to avoid and overcome injustices in mining in Brazil and in the world.

## NOTES

- 1 • Marcos Cristiano Zucarelli, "Efeitos Institucionais e Políticos dos Processos de Mediação de Conflitos," in *Desastre no Vale do Rio Doce: Antecedentes, Impactos e Ações sobre a Destruição*, orgs. Bruno Milanez e Cristiana Losekann (Rio de Janeiro: Folio Digital: Letra e Imagem, 2016): 311-35.
- 2 • "Especialistas em Direitos Humanos da ONU Apelam para Ação Urgente no Aniversário do Colapso Devastador de Barragem no Brasil," OHCHR, 14 November 2016, accessed June 25, 2017, [http://www.ohchr.org/Documents/Press/PRBrazil4Nov2016\\_Portuguese.docx](http://www.ohchr.org/Documents/Press/PRBrazil4Nov2016_Portuguese.docx); in English: "UN Experts Launch Urgent Call for Action on Anniversary of Devastating Brazil Dam Collapse," OHCHR, 4 November 2016 accessed June 25, 2017, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20829&LangID=E>.
- 3 • See: Lindsay Newland Bowker, "Samarco Dam Failure Largest by Far in Recorded History." Bowker Associates, Science & Research In The Public Interest, 12 December 2015, accessed June 25, 2017, <https://lindsaynewlandbowker.wordpress.com/2015/12/12/samarco-dam-failure-largest-by-far-in-recorded-history/>.
- 4 • James Wilson, "BHP Billiton Shares Fall After UN Accusations on Dam Spill." Financial Times, 26 November 2015, acesso em 25 junho 2017, <http://www.ft.com/cms/s/0/9f6e7c4c-9430-11e5-b190-291e94b77c8f.html#axzz3sRz4snck>.
- 5 • "Brazilian Mine Disaster: This Is Not the Time for Defensive Posturing"– UN Rights Experts," Office of the United Nations High Commissioner for Human Rights (OHCHR), 25 November 2015, accessed June 25, 2017, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16803&LangID=E>.
- 6 • Bruno Milanez e Cristiana Losekann, *Desastre no Vale do Rio Doce: Antecedentes, Impactos e Ações sobre a Destruição* (Rio de Janeiro: Folio Digital: Letra e Imagem, 2016): 43-4.
- 7 • "Parecer Único Supram CM N° 79/2008 Protocolo N° 259470/2008," Governo do Estado de Minas Gerais, 7 May 2008, accessed June 25, 2017, <http://www.meioambiente.mg.gov.br/images/stories/riodasvelhas/4reuniaio/6-1%20samarco%20pu.pdf>.
- 8 • *Desastre no Vale do Rio Doce*, 2016, 55.
- 9 • *Ibid.*
- 10 • *Acordão* is the nickname given to the Transaction and Adjustment of Conduct Term (TTAC) signed by the Federal and state Executive Authorities, represented by the Federal Union, the states of Minas Gerais and Espírito Santo and by relevant environmental authorities and Samarco, Vale and BHP Billiton. The TTAC states that recovery of the Rio Doce Basin and compensation to those affected will be carried out via 17 socio-environmental programmes and 22 socioeconomic programmes. In addition the *Acordão* states that Samarco must pay 500 million real in compensatory measures aimed at improving sanitation infrastructure in the towns located along the Rio Doce river. Management of resources allocated to compensation for damages and the implementation of environmental, social and economic programmes was to be the responsibility of a private foundation set up solely for this purpose, funding of which would come from contributions made by Samarco and its holding companies. This entity is now the *Fundação Renova* (Renewal Foundation), that carries out programmes for compensation and revitalisation, even though the TTAC has been deemed null by the Brazilian Federal court.
- 11 • Consuelo Dieguez, "A Onda." Piauí, July 2016, accessed June 25, 2017, <http://piaui.folha.uol.com.br/materia/a-onda-de-mariana/>.
- 12 • "Ref: Solicitação de Audiência Temática – Afetações aos Direitos Humanos devido à Mineração no Brasil," Conectas, 27 May 2016,

accessed June 25, 2017, [http://www.conectas.org/arquivos/editor/files/informe\\_audie%CC%82ncia-minerac%CC%A7a%CC%83o%20revisado.pdf](http://www.conectas.org/arquivos/editor/files/informe_audie%CC%82ncia-minerac%CC%A7a%CC%83o%20revisado.pdf).

13 • *Ibid.*

14 • See: Andréa Zhouri e Klemens Laschefski, "Desenvolvimento e Conflitos Ambientais: Um Novo Campo de Investigação," in *Desenvolvimento e Conflitos Ambientais*, orgs. Andréa Zhouri e Klemens Laschefski (Belo Horizonte: Editora UFMG, 2010): 11-34.

15 • *Ibid.*, 2.

16 • These communications are considered public after a period of time, when the Human Rights Council itself prepares a report compiled of all the communications sent by the Special Rapporteurs, and responses sent by governments are also made available (when there are any) Communications are made available between one and two sessions after reports are sent. State responses are divulged depending on the how they respond to the issues raised by the mechanisms.

17 • "Brazilian Mine Disaster: This Is Not the Time for Defensive Posturing"– UN Rights Experts," 2015.

18 • "Brazil Mine Disaster: UN Human Rights Expert Calls for Urgent Access to Safe Drinking Water," OHCHR, 8 December 2015, accessed June 25, 2017, <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16855&LangID=E>.

19 • "Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises on its Mission to Brazil," OHCHR, A/HRC/32/45/Add.1, 12 May 2016, accessed June 25, 2017, [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/32/45/Add.1#sthash.c18zU8Vc.dpuf](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/32/45/Add.1#sthash.c18zU8Vc.dpuf).

20 • Report on Toxic Waste, Report on Human Rights and the Environment, Rapporteurship on Indigenous Peoples and Rapporteur on the Right to Water and Sanitation.

21 • "Reclamação N° 31.935 – MG (2016/0167729-7). Rel. Min. Diva Malerbi," STJ, 30 June 2016, accessed June 25, 2017, <https://www.jusbrasil.com.br/diarios/documentos/356533966/andamento->

[do-processo-n-2016-0167729-7-reclamacao-01-07-2016-do-stj](http://do-processo-n-2016-0167729-7-reclamacao-01-07-2016-do-stj).

22 • The rapporteurs who signed the note calling for the suspension of the agreement were: Water and Sanitation, Toxic Waste, Indigenous People and Business and Human Rights. Available at "Brazilian Mine Disaster – UN Experts Call for a Timely Resolution After the Settlement Suspension," OHCHR, 5 July 2016, accessed June 25, 2017, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20242&LangID=E>.

23 • *Ibid.*

24 • "Em Londres, Atingidos Participam de Assembleia de Acionistas da BHP Billiton," Movimento dos Atingidos por Barragens (MAB), 21 October 2016, accessed June 25, 2017, <http://www.mabnacional.org.br/noticia/em-londres-atingidos-participam-assembleia-acionistas-da-bhp-billiton>.

25 • Reports on Toxic Waste, Report on Human Rights and the Environment, Rapporteurship on Indigenous Peoples and Rapporteur on the Right to Water and Sanitation.

26 • "Especialistas em Direitos Humanos da ONU Apela para Ação Urgente no Aniversário do Colapso Devastador de Barragem no Brasil," 2016.

27 • The file can be accessed: Rio Doce Vivo, accessed June 25, 2017, <http://riodocevivo.omeka.net/>.

28 • Álvaro Almeida, "O Caso Samarco e o Desmoronamento da Responsabilidade Social Corporativa." IstoÉ Dinheiro, 9 November 2015, accessed June 25, 2017, <http://www.istoedinheiro.com.br/blogs-e-colunas/post/20151109/caso-samarco-desmoronamento-responsabilidade-social-corporativa/7737>.

29 • Indigenous and Environmental Rights Under Attack in Brazil, UN and Inter-American Experts Warn," OHCHR, 8 June 2017, accessed June 25, 2017, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21704&LangID=E>.

30 • See: "ISA e Mais 250 Organizações, Redes e Pesquisadores Condenam 'Fábrica de Marianas,'" Instituto Socioambiental, 13 December 2016, accessed June 25, 2017, <https://www.socioambiental.org/pt-br/noticias/2016/12/13/isa-e-mais-250-organizacoes-redes-e-pesquisadores-condenam-fabrica-de-marianas>.

org/pt-br/noticias-socioambientais/isa-e-mais-250-organizacoes-redes-e-pesquisadores-condenam-fabrica-de-marianas.

31 • See: Gabriela Scotto, “Estados Nacionais,

Conflitos Ambientais e Mineração na América Latina,” in Seminário de Pesquisa do Instituto de Ciências da Sociedade e Desenvolvimento Regional (Rio de Janeiro: Universidade Federal Fluminense, 2011).



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Received in April 2017.

Original in Portuguese. Translated by Jane do Carmo.



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