

URGENT APPEAL

REQUESTS SPECIAL PROCEDURES TO URGE BRAZILIAN PUBLIC AUTHORITIES AND THE COMPANIES INVOLVED IN THE COLLAPSE OF THE FUNDÃO DAM TO REFRAIN FROM ENTERING INTO A NEW SETTLEMENT AGREEMENT WITHOUT CONSULTATIONS WITH THE AFFECTED COMMUNITIES AND CIVIL SOCIETY

***** Risk of Irreparable Harm *****

June 22, 2018

To the UN Special Procedures:

Ms. Leilani Farha

Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context

Mr. Michel Forst

Special Rapporteur on the situation of human rights defenders

Mr. Leo Heller

Special Rapporteur on the human right to safe drinking water and sanitation

Mr. John Knox

Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment

Mr. Dante Pesce

Chairperson of the UN Working Group on the issue of human rights and transnational corporations and other business enterprises

Ms. Victoria Lucia Tauli-Corpuz

Special Rapporteur on the rights of indigenous peoples

Mr. Baskut Tuncak

Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes

Contact Persons:

Juana Kweitel, Executive Director
Conectas Human Rights
juana.kweitel@conectas.org

Caio Borges, Coordinator
Conectas Human Rights
caio.borges@conectas.org

Letícia Aleixo, Supervising Attorney
Human Rights Clinic, UFMG
leticiaaleixo@gmail.com

1. Introduction

This urgent appeal provides further information and makes new requests in addition to those of the Urgent Appeal submitted in April 10, 2018, in light of recent events that require the urgent attention of the UN Special Procedures. As reported in the last submission, the Public Prosecutors' Office and the three involved companies, among other public entities, are currently negotiating a settlement agreement with the alleged purpose of changing the governance of the mechanism that was created to remedy the harm caused by the disaster. This new settlement agreement is intended to increase the participation of the affected communities in the development and implementation of the remedy programs. However, the parties are negotiating the agreement without holding meaningful consultation with the affected communities, civil society organizations and social movements. Therefore, the organizations request the UN Special Procedures to urge the Brazilian State, the Public Prosecutors' Office and the three involved companies to take urgent actions in order to guarantee the effective participation of civil society and the affected communities during the negotiation of the new settlement agreement.

2. Updates since the last submission

As reported in the Urgent Appeal transmitted on May 5, 2016, and reiterated in its respective update of April 10, 2018, a settlement agreement to remediate the violations and damages caused by the collapse of the Fundão dam was negotiated and signed between the three involved companies and the Federal Union, joined by 13 other public law entities.¹ From the outset, civil society organizations, scholars, members of the Public Prosecutor's Office and the Public Defender's Office, as well as representatives from social movements and the affected communities, identified a number of problems and issues that needed adjustment in this mechanism. Many of the identified problems at the time of the signature of the agreement have proven to be true. Among them, the weaknesses in the design of the recovery programs as a result of the lack of participation of the affected communities in the **negotiating process and in the structure of the Renova Foundation and the Interfederative Committee** – the two legal entities that are responsible, respectively, for the implementation and oversight of the programs to recover the Doce River.²

In response, the Federal Public Prosecutors Office – who was not a party to the settlement agreement – filed a lawsuit against the three companies and the Brazilian authorities who signed it seeking its annulment. The Court annulled the settlement agreement reasoning its decision on the lack of meaningful consultation to the affected communities. Following the annulment, the parties in this lawsuit initiated the negotiation of a new agreement to adjust the governance of the Renova

¹ For more information, see the urgent appeal that Conectas Human Rights, Justiça Global and other partner organizations submitted to the UN Special Procedures on May 13, 2016. Also available at: <<https://bit.ly/2Keze6o>>.

² Four internal bodies compose the Foundation: (i) the Executive Board; (ii) the Board of Trustees; (iii) the Advisory Board; and (iv) the Audit Committee. Of all these, the only one with members appointed by the affected communities is the Advisory Board, which advises the Foundation and **issues opinions on the remedy programs that are not binding**. The Advisory Board has seventeen members, of which only five are representatives of the affected communities. The Board of Trustees is the body with decision-making power to approve the remedy programs to be carried out by the Foundation. **Seven members form the Board of Trustees - six of them appointed by the three involved companies**, in the proportion of two per company, and one member appointed by the Interfederative Committee. The Committee, in turn, is exclusively composed of government representatives.

Foundation and the Interfederative Committee.³ This new agreement is intended to enhance the participation of the affected communities within the structure of the two entities, as well as to create local commissions composed by representatives of the affected communities that will discuss and make decisions at local level regarding the remedy programs.

Despite the good intentions, and ignoring the lessons learned after the first agreement, **the parties are negotiating this new agreement behind closed doors**. Although the Public Prosecutors' Office play a critical role in defending the interests of the affected communities, its participation in the negotiation process does not preclude the need of participation of the communities themselves. However, the affected communities are not participating in the design of the participatory mechanism, which may lead to serious distortions and further delays in the development and implementation of the remedy programs.

No draft version of the agreement has been made publicly available. According to information obtained by the signatory organizations, **the new settlement agreement adopts territorial divisions of the affected areas in order to establish the aforementioned local commissions**. However, in the absence of meaningful consultation with local actors, **such participatory mechanism is being conceived top-down, with a risk of not adjusting to the cultural and social dynamics of the affected communities, in violation to their rights of self-organization and collective autonomy**. The creation of a participatory mechanism without previous and meaningful participation and consultation to the affected communities is worrisome and is likely to undermine the social order of each community.

The need for participation and consultation during the negotiation of the new agreement was mentioned in a number of statements by representatives of the affected communities and by civil society organizations. The Commission of the People Affected by the Fundão Dam (CABF), emphasized that “it is necessary to discuss with the affected people the mechanisms and spaces of participation of deliberative and consultative character provided for in the agreement.”⁴ CABF also stated that “this participation must be built by the affected people, respecting their way of living, being and their own local organization.”⁵

Conectas Human Rights and the Human Rights Clinic of UFMG also submitted to the three companies and to the Public Prosecutors' Office a policy paper with recommendations for possible adjustments in the governance structure of the remedy mechanism. In the document, the organizations state that “the affected people should be given the opportunity to effectively influence the design and implementation of the remedy process and to decide which measures are most suitable for remedying the full range of damages they suffered” (see annex). Still, the negotiations of the settlement agreement keep occurring without meaningful participation and consultation.

According to international human rights law, rights holders who suffer gross human rights violations should not be treated merely as recipients of remedies. They should also actively participate in the set-up, assessment and operation of remedy mechanisms.⁶ This is particularly important in cases

³ Two other agreements were signed over the course of 2017 with the objective of (i) assessing the efficiency of the remedy programs developed thus far, (ii) conducting a complete assessment of the damages caused by the disaster, and (iii) creating technical assistance committees to advise the affected people throughout the remedy process. For more information, see the urgent appeal that the subscribing organizations submitted to the UN Special Procedures on April 10, 2018. Also available at: <<https://bit.ly/2qHAJi7>>.

⁴ Commission of the People Affected by the Fundão Dam (CABF). Official letter OF/CABF/010/2018.

⁵ *Id.*

⁶ UN General Assembly. Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises. 18 July 2017. UN Document A/72/162.

of human rights violations committed by business enterprises, given the need to level the playing field between them and the affected people.⁷ The participation should occur before the implementation of the remedy mechanism, so the parties can co-create and jointly design it.⁸ In the Doce River case, the three involved companies and the Brazilian State have been systematically failing to respect the affected communities rights to participation, consultation and information.

3. Conclusion and requests

In conclusion, the organizations request the UN Special Procedures addressed in this Urgent Appeal to urge the Brazilian State, the Public Prosecutors' Office and the three involved companies *(i)* to hold a meaningful process of participation and consultation to the affected communities on the participatory mechanism to be established by the new settlement agreement; and *(ii)* to make available all the draft versions of the settlement agreement and any other relevant records, including records of meetings between the actors that are involved in the negotiation process.

Given the relevance of the Public Prosecutors' Office to the negotiations, organizations request any communication to also be sent with copy to the coordinator of the Doce River Task Force of the Federal Public Prosecutors' Office, Mr. José Adércio Leite Sampaio, whose contact information follows:

José Adércio Leite Sampaio
joseadercio@mpf.mp.br
Procuradoria da República em Minas Gerais
Av. Brasil, n. 1877, Bairro Funcionários
Belo Horizonte/MG, Brazil. Zip 30140-007.

Finally, the organizations herewith reaffirm the requests made on the urgent appeal of April 10, 2018.

Signatures

The present urgent appeal is submitted by the following organizations:

Human Rights Clinic of the Federal University of Minas Gerais (UFMG)
Conectas Human Rights

⁷ Principle 31. UN Guiding Principles on Business and Human Rights.

⁸ Human Rights Clinic (Columbia Law School); International Human Rights Clinic (Harvard Law School). Righting Wrongs? Barrick Gold's Remedy Mechanism for Sexual Violence in Papua New Guinea. Available at: <<https://bit.ly/2thCsfA>>.