

URGENT APPEAL

COLLAPSE OF MINING TAILINGS DAM OWNED AND OPERATED BY VALE LEAVES SEVERAL KILLED AND HUNDREDS MISSING IN BRAZIL

**** Risk of irreparable harm ****

February 5th, 2019

Summary

On January 25 2019, at 12.28 pm local time, the Feijão dam, in the municipality of Brumadinho, located 60 km from the capital city of the state of Minas Gerais (Belo Horizonte), collapsed, releasing an estimated 12.7 million cubic meters of mining waste into the environment. The disaster left, so far, 134 deaths and more than 199 people missing, many of whom were Vale employees. The dam was owned and operated by Vale. The collapse of a new tailings dam three years after the Mariana dam burst is a clear indicator that Brazilian public authorities and Vale failed to take proper action to prevent new catastrophic failures and to adopt measures of non-repetition. This urgent appeal presents the actual and potential human rights violations resulting from the disaster. The organizations request the Special Procedures to take urgent actions in order to prevent further harm.

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1. INTRODUCTION

On January 25 2019, at 12.28 pm local time, the Feijão dam, in the municipality of Brumadinho, located 60 km from the capital city of the state of Minas Gerais (Belo Horizonte), collapsed, releasing 12.7 million cubic meters of mining waste into the environment.¹

Dam I of the iron mine Córrego do Feijão

- Hight: 87 meters
- Length: 720 meters
- Area: 249.5 thousand square meters
- Volume: 11.7 million m³
- Built: 1976
- Deactivated: 2015

The dam contained the tailings disposed by the iron mine Córrego do Feijão. It was located less than 2 km away from Vale's administrative center, where hundreds of employees were working and having lunch, and was also close to the neighboring villages of *Córrego do Feijão* and *Parque Vila Cachoeira*. The dam had been deactivated in 2015, meaning it had not received new waste for over three years. For this reason, the tailings were relatively dry when the dam burst. While the thickness of the mud decreases its reach, it also makes it more dangerous for individuals caught by the debri-wave, preventing people from escaping from under the mud and hindering rescue operations.

Until the moment, 134 people have been confirmed dead and 199 are missing, and at least 135 families are unsheltered. The death toll is high due to a combination of factors: the proximity of an urban center, the number of people working at the facilities, the thickness of the mud. These circumstances were aggravated because - although the mine was equipped with sirens - the emergency alarm did not sound. Just like in the Mariana disaster, people reached by the mud received no warning that it was coming, and many had never received emergency training that could have increased their likelihood of survival.

Latest information about the human toll:

- Dead: 134
- Missing: 199
- Rescued alive: 192
- Unsheltered: 135

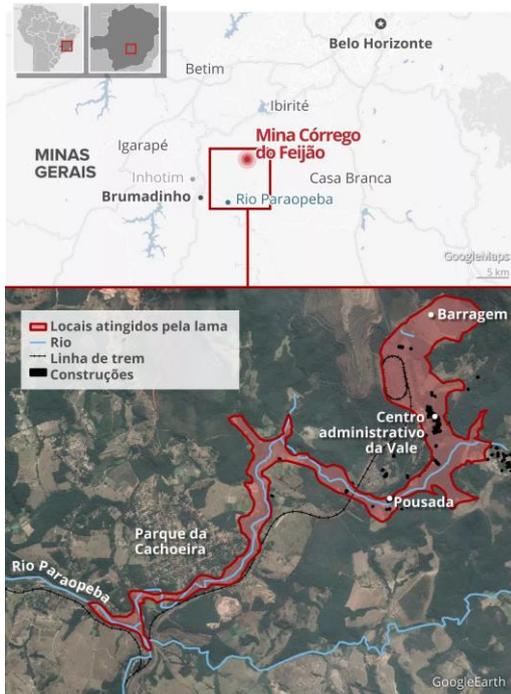
After destroying both the center and the village, the tailings have reached the Paraopeba river. So far, they have traveled more than 100 km from the point of the dam breach. There is high potential of serious and widespread environmental harm, since the Paraopeba river is an affluent of the São Francisco river, which runs through five different Brazilian states and three different biomes, connecting the Southeast

¹ The Feijão dam has the capacity to hold 12.7 million cubic meters of mining waste. Until now, it is estimated that a million has already been released.

and the Northeast regions of the country. The São Francisco river begins in Minas Gerais and flows through Bahia, Pernambuco, Alagoas, and Sergipe, where it reaches the sea.

O caminho da lama

Após rompimento de barragem em Brumadinho, rejeitos encobriram a região e atingiram rio



Source: G1.

If urgent measures are not adopted, irreparable environmental and human rights violations may occur.

2. FAILED HUMAN RIGHTS DUE DILIGENCE: THE FLAWED PROCESS OF EXPANSION AND RENEWAL OF THE LICENSE OF THE FEIJAO MINE

Human rights due diligence (HRDD) is the process through which a business enterprise's potential negative impacts are identified and addressed.² It is through HRDD that businesses develop and implement instruments, such as action plans, to prevent, mitigate, inform and remedy actual and potential human rights impacts. As in the collapse of the Fundão dam in 2015, HRDD in the Brumadinho case – if it was ever conducted – failed catastrophically.

² [1] Principle 17 of the UN Guiding Principles on Business and Human Rights provides that “In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed”.

Firstly, the phase of human rights impact assessment was marked by a series of shortcomings. The Feijão dam was built in the 1970's. Originally, the wall had 18m, but when it burst its height was 85m.³ On December 11th, 2018, the environmental agency of the state of Minas Gerais approved the renewal of the license of the Feijão mine and the expansion of its capacity in more than 70%. It also approved the decommissioning plan of the Feijão dam. Since the dam burst, the media has reported that the approval of the license was marked by fierce opposition from representatives of civil society seating in the environmental council of the state of Minas Gerais.⁴ An entity representing several environmental organizations voted against the expansion of the mine in a meeting that also discussed the “decommissioning” of the Feijão dam.

In a letter to the former Secretary of the Environment of Minas Gerais, Germano Luiz Gomes Vieira, sent in December 2018, civil society organizations (CSOs) raised numerous concerns on the licensing process. Among the inconsistencies, the most alarming was the “downgrading” of the risk category of the mine, from “6” to “4”, a move that was classified by civil society as an “insanity”.⁵ This reclassification allowed Vale to speed up the licensing process, cutting steps and reducing the necessary stages from three to one.⁶ In the deliberations within the council, the organizations complained about the tight period for analysis of the technical documents, which were made available only four days before the meeting. They also objected to the characterization of the area of the mine: in the organizations’ view, the area was underestimated, as well as wrongly described as “formerly transformed by human activities”. This mischaracterizations were intended to reduce the environmental requirements of projects. The environmental studies also lacked a comprehensive assessment of the potential impacts to the river basin.⁷

The process of renewal was approved despite a clear understanding by all parties, especially the public authorities and Vale, that any collapse would sweep the entire administrative site of the company and the community of Córrego do Feijão within just a minute. Such information is available in the Plan of Emergency Actions of April 2018, obtained by the Brazilian newspaper Folha de São Paulo.⁸ The Plan outlines the evacuation routes and the immediate actions to be taken by Vale employees, including sounding the siren. However, those who would be responsible for taking immediate action were killed by the mud, and those who took the indicated evacuation routes did not survive.⁹

Under international human rights law, states are not only under an obligation to abstain from directly violating human rights, but also under an obligation to prevent violations, as per the *due diligence* standard.¹⁰ Regardless of whether a violation was committed by the State itself or by non-state actors, the state remains bound by international obligations vis-a-vis human rights treaties.¹¹ This consolidated *jus*

³ Folha de São Paulo. “Um novo rompimento de barragem era questão de tempo, afirma pesquisador”. January 28, 2019. Available at: <<https://bit.ly/2RUWIXW>>. Last seen: January 28, 2019.

⁴ Folha de São Paulo. “Risco de rompimento foi citado na tensa reunião que aprovou licença da barragem”. January 25, 2019. Available at: <<http://bit.ly/2B8l0Oi>>. Last seen: January 28, 2019.

⁵ The Intercept Brasil. “Beira a insanidade’, alertou entidade sobre ampliação da mineração em Brumadinho”. January 25, 2019. Available at: <<http://bit.ly/2B8h2Fv>>. Last seen: January 28, 2019.

⁶ Id. *ibid*.

⁷ Estado de Minas. “Alertas de especialistas sobre barragens em Brumadinho foram ignorados”. January 27, 2019. Available at: <<http://bit.ly/2B7KFGV>>. Last seen: January 28, 2019.

⁸ Folha de São Paulo. “Vale previu inundação de refeitório e sede de barragem e desprezou o risco”. February, 01, 2019. Available at: <<http://bit.ly/2StkHb0>>. Last seen: February, 04, 2019.

⁹ Id. *ibid*.

¹⁰ IACtHR, *Case of Velazquez Rodríguez v. Honduras*. Merits. Judgment of July 29, 1988. Series C No. 4. Par. 166.

¹¹ Among many authorities: CESCR, General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, adopted on 10 August 2017. UN Doc. E/C.12/GC/24, § 22. ECtHR, “[t]he State cannot completely absolve itself of its responsibility by delegating its obligations in this sphere to private bodies or individuals”, in *Van der Mussel v. Belgium*, 23 November 1983, §§ 28-

commune goes in line with Foundational Principle I.A.1. of the Guiding Principles on Business and Human Rights, which indicates that the state must enforce existing regulation on business conduct and that corporations should comply with such regulation.

A number of industrial activities are inherently dangerous and the relevant risk of violation of rights is to be presumed imminent, requiring serious monitoring and licensing from the public authorities.¹² An important precedent is *Öneryıldız v. Turkey (2004)*, in which the Grand Chamber of the ECtHR analyzed an explosion of industrial waste that caused the death of 39 individuals. The ECtHR held:

In the context of dangerous activities in particular, States have an obligation to set in place regulations geared to the special features of the activity in question, particularly with regard to the level of risk potentially involved. They must govern the licensing, setting-up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks.¹³

Monitoring and licensing of the activities related to the Feijão dam did not meet these standards. Since the collapse of the waste dam in the region of Mariana, in 2015, **another collapse in a similar dam was largely foreseeable**. Several technical reports, parliament hearings, and media accounts presented evidence of risk. A report by the Committee on Regional Development and Tourism of the Federal Senate warned that more than 700 dams were in high risk of collapsing and only 3% of the dams in Brazil had been inspected in 2017.¹⁴ Despite knowing that another incident of similar magnitudes was at stake, the Brazilian state did not take proper preventive measures. A proposed legislative bill of 2016 that would forbid the construction of new upstream dams and tighten the safety requirements of existing ones is stalled in Minas Gerais state-level Legislative Chamber.¹⁵ And it was only after another major dam burst that Vale announced that it would speed up the decommissioning of the dams with the same structure as the Fundão (of the Mariana disaster) and Feijão, in Brumadinho. The cost of the accelerated decommissioning is estimated at 5 billion Brazilian reais, because of the required reduction of 40 million tons of iron ore in the respective mines.¹⁶ The fact that Vale took this decision only after the second disaster shows that economic considerations triumphed over environmental, social and human aspects.

30, Series A no. 70 (regulation of legal profession); *Storck v. Germany*, no. 61603/00, § 103, ECHR 2005-V (health facility); and *O’Keeffe v. Ireland [GC]*, no. 35810/09, § 150, ECHR 2014 (extracts) (private school); CATCtee, General Comment No. 2, Implementation of Article 2 by States Parties, adopted on 24 January 2008. UN Doc. CAT/C/GC/2, § 17; HRCtee, *Cabal and Pasini Bertran v. Australia*, communication no. 1020/2001.2. UN Doc. CCPR/C/78/D/1020/2000, §7; IACtHR, *Case of Ximenes Lopes v. Brazil*. Merits, Reparations and Costs. Judgment of July 4, 2006. Series C No. 149, relating to abuse of a patient at a private hospital and speaking of an obligation to supervise the performance of private parties (§ 96).

¹² From the practice of the ECtHR: e.g. *L.C.B. v. the United Kingdom*, 9 June 1998, Reports of Judgments and Decisions 1998-III (nuclear tests); *Öneryıldız v. Turkey* (waste collection site), § 71, *Iliya Petrov v. Bulgaria*, no. 19202/03, §§ 55-56, 24 April 2012 (electricity distribution facility); *Vilnes and Others v. Norway*, nos. 52806/09 and 22703/10, § 235, 5 December 2013 (professional diving); *Brincat and Others v. Malta*, nos. 60908/11 and 4 others, §§79-70, 24 July 2014 (exposure to asbestos); *Cavit Tinariouglu v. Turkey*, no. 3648/04, § 66, 2 February 2016 (maritime traffic); and *Jugheli and Others v. Georgia*, no. 38342/05, § 75, 13 July 2017 (thermal power plant).

¹³ ECtHR, *Öneryıldız v. Turkey [GC]*, no. 48939/99, § 71 ECHR 2004-XII, §§ 71 and 90.

¹⁴ Brazilian Federal Senate, “Comissão emitiu relatório em dezembro sobre situação precária e alto risco de 723 barragens no Brasil”, Committee on Regional Development and Tourism, December 2018. Available in: <<https://www12.senado.leg.br/noticias/materias/2019/01/25/comissao-emitiu-relatorio-em-dezembro-sobre-situacao-precaria-e-alto-risco-de-723-barragens-no-brasil>>.

¹⁵ BBC Brasil. “Brumadinho: Projeto de lei que endureceria regras para mineradoras está parado há mais de um ano em MG”. January, 25, 2019, Available at: <<https://bbc.in/2SoUijy>>. Last seen: February, 04, 2019.

¹⁶ G1. “Descomissionamento: entenda o processo anunciado pela Vale para acabar com barragens iguais às de Mariana e Brumadinho”. January, 29, 2019. Available at: <<https://glo.bo/2SuAtSQ>>. Last seen: February, 04, 2019.

In this context, the knowledge standard should be applied comprehensively. Vale is a world-leading transnational mining company, possessing high-end expertise and mobilization capacity to oversee the risks of fatal accidents within its operations and to prevent and mitigate any relevant harm. Brazil, for its part, is an emerging economy, whose authorities have been dealing with mining activities for over five decades, either via the Ministry of Mining and Energy or the IBAMA, its federal environmental agency. Vale was formerly a state-owned company, which also attests the state's experience in the mining business, including its capacity to foresee inherent risks of incidents that may lead to rights violations.

3. ACTUAL AND POTENTIAL HUMAN RIGHTS VIOLATIONS IN THE AFTERMATH OF THE BURST OF THE FEIJÃO DAM

a. Failure to prevent the aggravation of the harm

Exactly as happened in the case of the Doce river dam failure, the siren did not sound after the burst of the Feijão dam, which could have saved lives and allowed people to save personal belongings. Vale has argued that the “speed” of the tailings stream prevented the alarm systems from functioning and that the warning equipments were “engulfed” by the mud. Experts in dam safety have vehemently objected to such justification. For the experts, no alarm system should be prevented from functioning because of the speed of the tailings or even direct damage. Vale could have placed sensors of pressure, speed or extraordinary vibrations in the dam structure. Moreover, the system should be automatic and rely on multiples means of dissemination, including automatic phone calls and app warnings.¹⁷ Moreover, the Plan of Emergency Actions shows that the sirens were located outside the actual flooded area.¹⁸

In order to prevent the aggravation of the socio-environmental impacts stemming from the collapse of the Feijão dam, the Brazilian government and Vale must adopt a different approach to this disaster. They must provide timely and sufficient assistance to the affected people, providing them with access to safe drinking water, adequate lodging, food, and other essential supplies. It is also necessary to prevent the mining residues from entering the São Francisco river, which is one of the main sources of water and the basis of the economic development of the Northeast region of the country.

b. Failure to provide timely and accessible information

Affected people have reportedly been left in a state of despair and anxiety due to the lack of reliable information on their missing relatives. Vale is updating the list of missing workers¹⁹, but people have reported that other community members who were not Vale’s employees are not receiving the same attention. In addition, there is no reliable information on the toxicity of the mining residues that were released. It should be Vale’s priority to provide affected communities and Brazilian society as a whole with reliable information on the toxicity of the mining waste. The information should preferably be produced

¹⁷ G1. “Vale diz que sirenes não foram acionadas por 'velocidade' do deslizamento em Brumadinho”. January, 31, 2019. Available at: <<https://glo.bo/2Svbcry>>. Last seen: February, 04, 2019

¹⁸ Folha de São Paulo. “Refeitório poderia ser soterrado em um minuto, aponta plano da Vale”. February, 01, 2019. Available at: <<http://bit.ly/2SrR2u>>. Last seen: February, 04, 2019.

¹⁹ A worker is considered to be missing if he or she does not return calls and if his or her whereabouts is unknown to their relatives.

by independent experts with technical capacity to identify the presence of heavy metals and other hazardous substances.

There is an international obligation to provide citizens and the victims with the necessary information in order to prevent violations or to mitigate their effects. In the jurisdiction of ECLAC (Economic Commission for Latin America and the Caribbean), the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (4 March 2018) implements the Principle 10 of the 1992 Rio Declaration on the access to information, participation and justice regarding environmental issues. This convention provides for the obligation of the state to ensure the public's right of access to environmental information in its possession in accordance with the principle of maximum disclosure (Art. 5) and to ensure public participation in the pertinent decision-making processes (Art. 7). While the treaty has not yet entered into force, Brazil, as a signatory state since 27 September 2018, is under a duty not to defeat its object and purpose, as per the Vienna Convention on the Law of Treaties (1969), Article 18. Moreover, the state duty to ensure access to environmental information has also been affirmed by regional human rights courts. IACtHR's Advisory Opinion OC-23 (2017), related to the environment in the context of the protection of human rights, clarifies that states have an obligation to provide access to information to the public at large.²⁰ This position is in line with the Court's previous jurisprudence, as affirmed in *Claude Reyes et al v. Chile*. In Europe, the ECtHR, in *Hatton and Others*, drawing from the Aarhus Convention, held that the state is internationally bound "to consider all the procedural aspects, [and] the extent to which the views of individuals (including the applicants) were taken into account throughout the decision-making procedure".

c. Failure to guarantee participation

President Jair Bolsonaro created a committee to monitor the measures to be carried out to address the impacts of the collapse of the Feijão dam.²¹ This committee is composed by representatives of ten federal ministries and agencies:

- Office of the President (*Casa Civil*) - chair;
- Ministry of Defense;
- Ministry of Citizenship;
- Ministry of Health;
- Ministry of Mines and Energy;
- Ministry of the Environment;
- Ministry of Regional Development;
- Ministry of the Women, the Family, and Human Rights;
- Institutional Safety Department (*Gabinete de Segurança Institucional*);
- Office of the Attorney General (*Advocacia Geral da União*).

According to the decree that instituted the Committee, other individuals may be invited to participate in meetings. However, only the following individuals may be invited: a) representatives of the government of the Brumadinho municipality and of the government of Minas Gerais; b) representatives of

²⁰ IACtHR, The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity – Interpretation and Scope of Articles 4(1) and 5(1) of the American Convention on Human Rights). Advisory Opinion OC-23/17 of November 15, 2017. Series A No. 23, §§ 213-218.

²¹ Decree n° 9.691. January 25, 2019. Available at: <<http://bit.ly/2G3s5De>>. Last seen: January 28, 2019.

federal ministries and agencies that are not members to the committee; c) public prosecutors; d) public defenders; e) members of academic and research institutions; and f) specialists in technical issues related to the mandate of the committee. Invited members do not have voting power.

The decree does not provide for participation of representatives of affected communities, victims, and family members. Moreover, other than a closing report, it is unclear how or whether the public will have access to information about the activities of the Committee.

As discussed in section b, international human rights law prescribes that affected communities must be consulted and involved in all stages of the remediation process. This includes the current phase of immediate relief and emergency actions.

4. CONCERNS ABOUT ACCESS TO JUSTICE

a. Accountability of state actors

The state of Minas Gerais has initiated a lawsuit against Vale. The first interim ruling issued by the state courts of Minas Gerais has frozen Vale accounts and requested the company to adopt several measures, including: a) to prevent tailings from contaminating water springs; b) to fully cooperate with the state during rescue operations and victim support efforts; c) to start removing the mud; and d) to map damages and to report on all measures taken.

Additional lawsuits have been initiated by state-level prosecutors (*Ministério Público Estadual de Minas Gerais*). They aim to ensure that the company remediates the environmental damage and provides reparation to the victims. The federal environmental agency (*IBAMA*) and state-level authorities have also imposed administrative pecuniary sanctions on the company. Environmental sanctions carried the maximum value allowed by Federal Legislation, which establishes a cap for this type of fine.

In total, more than 11 billion reais (approximately 2,92 billion American dollars) of Vale's assets have been frozen by judicial decisions since January 25th. The first rulings may seem promising but the history of judicial decisions freezing access to accounts of companies involved in major disasters causes concern. In the case of the Mariana dam collapse, a strong mobilization by the communities was necessary to press the judiciary to maintain only 300 million reais from Samarco's accounts blocked to repay the damages.

Accountability of private actors is important and necessary, but the failure of public authorities in preventing a disaster of this extension through the environmental licensing process and regular fiscalization must also be subject to investigation and judicial analysis. This is especially relevant because the state of Minas Gerais acts as the plaintiff in the main lawsuits discussing the case. Therefore, so far the failures of the state have not been the focus of court scrutiny. Moreover, this arrangement proved to problematic in the Doce river case, with the state agreeing to settlements with the company that collided with the interests and concerns of affected communities.

b. Extrajudicial settlement agreements: barrier to access to justice

Reports have emerged that the extrajudicial avenue will be the preferred option to remediate the negative consequences of the disaster.²² The Chief Federal Prosecutor has expressed the view that the “extrajudicial” avenue will be pursued in this case, and the Labor Federal Prosecutors are to present a minute of an extrajudicial agreement to Vale on February, 6th.²³

The Doce river case shows that settlement agreements can create serious obstacles to communities in accessing justice and obtaining an effective remedy.

More than three years after the Fundão dam collapsed, the three involved companies (Samarco, Vale and BHP Billiton) and their administrators have not been subjected to any legal accountability, whether criminal, civil or administrative. The legal architecture of the Mariana disaster remediation mechanisms and programs, often heralded as a model, relies on a conception that in order to restore the ecosystems and compensate affected communities for the experienced rights violations, extrajudicial mechanisms should prevail over judicial ones. The problem with this type of governance and institutional design is that, in attempting to circumvent costs and inefficiencies of the judiciary, basic principles of social control and legal accountability are sacrificed. Decision making rests with bodies with little representation of those directly affected, there is less transparency and public motivation for decisions, and sanctions for noncompliance are not accompanied by adequate enforcement mechanisms.²⁴

It is imperative that public authorities, including the justice system (public prosecutors and public defenders), and Vale hold significant consultations with affected communities and that they are involved in all stages of design and implementation of remediation measures. As expressed by UN rights experts in a public statement post-disaster, the process of remediation should be “legitimate”, which is to be understood as one which involves the affected communities.²⁵ Any agreement should also stipulate concrete objectives and time-bound obligations, without which public control becomes seriously undermined.

5. FAILURE IN PROVIDING GUARANTEES OF NON-REPETITION

Samarco, Vale and BHP Billiton defined the Doce river disaster as a catastrophic “failure”.²⁶ Mr. Fabio Schvartsman, Vale’s president, said in 2018 that Vale’s dams are “impeccable” and that “sustainability is the company’s core business.”²⁷ Catastrophic dam failures do not occur every three years when systems are working, especially when dams are “impeccable”. The Paraopeba disaster shows that weak regulation lacking proper enforceability and favoring profit over safety is the standard of conduct followed by Vale and the Brazilian government. Public and private actors involved in both cases have failed to implement

²² O GLOBO. “Dodge defende soluções 'extrajudiciais' para tragédia de Brumadinho” January, 31, 2019. Available at: <<https://glo.bo/2StjZuf>>. Last seen: February, 03, 2019.

²³ Valor Econômico. “MPT busca acordo com Vale sobre indenização”. February, 04, 2019. Available at: <<http://bit.ly/2SpxECF>>. Last seen: February, 04, 2019

²⁴ UFMG Human Rights Clinic and Conectas. “Transparency, Participation, Accountability and Full Remediation: A proposal of governance reform to remedy the Doce River disaster”. Conectas Human Rights Policy Paper Series 1/2018. Available at: <<http://bit.ly/2IM9bQt>>. Last seen: January 28, 2019.

²⁵ UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER. “Brazil: UN experts call for probe into deadly dam collapse”. January, 30, 2019. Available at: <<http://bit.ly/2Sr22MJ>>. Last seen: February, 04, 2019.

²⁶ BHP. “Sustainability Report 2017”. May, 2017. Available at: <<http://bit.ly/2SmJz48>>. Last seen: February, 04, 2019.

²⁷ The statement was made during a public event held in São Paulo, Brazil. For more information, see: Valor Econômico. Hoje o estado das barragens é 'impecável', afirma o presidente da Vale. April 10, 2018. Available at <<https://bit.ly/2COu0YW>>. Last seen: January 28, 2019.

the recommendations made by the WG after their country visit in 2015 and to comply with their international obligation to provide society and the people affected by the Doce river disaster with guarantees of non-repetition. The lack of effective monitoring by state authorities and effective contingency measures led to the collapse of the Feijão dam, killing dozens of people and causing immeasurable environmental impact.

a. Systemic failure of the justice system in the case of Mariana's dam failure

Vale S.A. is also involved in the Doce river disaster, occurred in November 2015, in which the Fundão tailings dam (owned by Samarco, a joint venture between Vale and BHP Billiton) collapsed.²⁸ The two disasters - the Doce and the Paraopeba rivers - are inevitably linked to each other. The connection between them is clear: by deploying extensive political and financial resources to resist legal accountability for the first disaster, Vale has continued its business as usual, adopting a discourse of commitment to the highest standards of corporate social responsibility while failing to review its business model, its processes and policies, to effectively prevent the occurrence of new catastrophes.

Brazil's system of remediation for environmental-related violations has proven largely ineffective in the case of the Mariana dam disaster. More than three years after the dam collapse, not only no single member from the management of Vale, Samarco or BHP Billiton has been held criminally or civilly liable, but the three companies have successfully managed to evade all kinds of legal responsibility for their actions and omissions. Through active political lobbying, legal artifices and an overwhelming investment in shaping the public debate, Vale and the two other companies have taken control of the entire remediation process. The result is a process in which transparency, accountability and participation are far from the prescribed standards of international human rights law.²⁹

The legal architecture of the remediation process of the Mariana dam disaster is built on an approach that privileges contractual and private law-based solutions over legally binding, public law-oriented obligations. The centerpiece of the governance structure is the Renova Foundation, which was supposed to be an 'independent' implementer of the environmental and social remediation programs. However, Samarco, Vale and BHP Billiton hold considerable power over Renova Foundation's decision-making bodies, while communities are underrepresented. In the last overhaul of the governance structure, local commissions were created to reduce the asymmetry of power and voice between companies' and governmental agencies, on the one hand, and communities, on the other. However, such local commissions have only the power to recommend actions, they cannot issue binding decisions. Additionally, more than 6 months after their formal establishment, they are still not fully operational.

But establishing a dysfunctional, opaque and ineffective governance structure is not the only problem. It has been estimated that only 3.4% of the fines imposed by environmental agencies have been paid by the three companies involved in the Mariana dam disaster.³⁰ **Protracting the payment of fines**

²⁸ For more information, see: Conectas Human Rights and Justiça Global. "Urgent appeal: update after the two and a half-year anniversary of the Doce River dam disaster". April 10, 2018. Available at <<https://bit.ly/2TfFMmp>>. Last seen: January 28, 2019.

²⁹ UFMG Human Rights Clinic and Conectas. "Transparency, Participation, Accountability and Full Remediation: A proposal of governance reform to remedy the Doce River disaster". Conectas Human Rights Policy Paper Series 1/2018. Available at: <<http://bit.ly/2IM9bQt>>. Last seen: January 28, 2019.

³⁰ O Globo. "Empresas envolvidas em desastres ambientais quitaram só 3,4% de R\$ 785 milhões em multas". May 6, 2018. Available at: <<https://glo.bo/2G62PMz>>. Last seen: January 28, 2019.

and settling legal lawsuits is a key strategy of the mining sector to avoid legal accountability, to demobilize the efforts of affected communities to hold them accountable, and to minimize the financial cost of the harm it causes on the environment, on local groups, and on society as a whole.

The Brazilian judiciary is also failing to provide an effective remedy to the victims of the Mariana dam collapse. Judicial bodies have afforded a wide margin of discretion to the Public Prosecutors and the involved companies to establish the terms of the settlement agreements and have systematically failed to require the parties to involve the affected communities into the negotiations³¹ and the design of the governance mechanisms.³² In a recent controversial decision the federal courts of the state of Minas Gerais ruled that emergency payments could be deducted from any final settlement reached by the Renova Foundation and affected individuals or communities.³³ This decision ignores the fact that the two types of payments are distinct in nature: one is to cover the expenses of individuals that lost their income source due to the pollution of the river basin and other damages, while the final settlement should have punitive and restitution components. Earlier, the same courts had issued a decision placing undue restrictions on the organizations eligible for providing technical assistance to communities and individuals in accruing the economic and non-economic damages experienced after the dam collapse.³⁴

b. The dismantlement of the legal and regulatory framework

Since 2015, when Mariana's dam burst, the UN human rights experts and bodies have repeatedly expressed concern over proposed legislative and regulatory measures that, instead of strengthening the capacity of the state to oversee mining activities and prevent major catastrophes, would have exactly the opposite effect. The UN Working Group on business and human rights visited Brazil in December 2015, a few weeks after the Fundão dam collapse. In its country visit report, the WG recommended the Brazilian government to “strengthen the dam inspection activities undertaken by the National Department of Minerals Research so as to improve governmental oversight and prevent further collapses”. It also recommended the government to “apply its best efforts to seek to prevent the deletion of key environmental protections from the Mining Code and also apply its best efforts to seek to ensure that infrastructure licensing processes contain thorough social and environmental considerations”. Finally, the WG recommended that companies should “ensure greater focus on safety and contingency plans, particularly companies operating mines and infrastructure development projects”.

What happened since 2015 is exactly what civil society and UN bodies feared: the progressive weakening and dismantlement of the Brazilian legal and regulatory apparatus on environmental licensing and dam safety.

In 2017, the National Mining Agency (formerly the National Department of Minerals Research) published Ordinance No. 70,389/2017, intended to establish stricter rules on dam safety. However, the Ordinance does not provide for the monitoring of the dams by public authorities. The “self-monitoring

³¹ G1. “Acordo foi feito sem a participação dos atingidos”, diz MAB em relação a termo sobre desastre de Mariana”. June 27, 2018. Available at: <<https://glo.bo/2G31d6e>>. Last seen: January 28, 2019.

³² Clínica de Direitos Humanos da UFMG and Conectas, see note 22., pp. 10-11.

³³ G1. “Justiça autoriza que auxílio emergencial pago a atingidos por desastre de Mariana seja deduzido de indenização”. January 7, 2019. Available at: <<https://glo.bo/2G7UHi>>. Last seen: January 28, 2019.

³⁴ Conectas. “Decision hinders activity of technical advisors working with people affected by disaster”. August 13, 2018. Available at: <<http://bit.ly/2G7ouUW>>. Last seen: January 28, 2019.

principle” has been maintained, meaning that the reports on the stability of a dam are still produced by the mining companies’ employees or by external companies contracted by them. This arrangement is extremely fragile and non-reliable. A report of August 2018 by the third-party consultancy firm Tüv Süd – whose engineers have been jailed as part of the criminal probe into the disaster – raised 15 “attention points” to Vale concerning the maintenance of the dam. Comparatively, the previous reports had raised only 2 issues deserving attention by Vale. The consultants identified problems, such as erosion of the “shoulder” of the dam, silting and cracking in drainage channels and damage to the PVC pipes of drainage system exits, among other problems that should be remedied by Vale. The consultants also noted that information regarding the internal drainage or the mechanical and physical characterization of the waste was not made available for the period before 2003, when the mine was operated by another company (Ferteco).³⁵ Despite all the problems, the consultants attested the safety of the dam.

Companies’ employees and subcontractors are in charge of the main activities intended to assess the risks and determine the measures to address them. In both the Doce river and the Paraopeba river cases, external consultants had attested the stability of the mining dams, showing that self-monitoring is not sufficient to prevent dam collapses.

With regards to emergency measures, the Ordinance establishes that sirens should be placed to warn workers and neighbouring communities located in the “self-rescue zone”, which comprises the area within 10 km or 30 minutes from the dam. The companies should also provide people living and working in this area with self-rescue trainings and simulations. In the Paraopeba case, there were no sirens in place and no prior warning was given, preventing workers and people living close to the dam from saving themselves.

In addition, outside the self-rescue zone, civil defense forces are expected to give notice and to rescue the communities. In the Doce river disaster, it took many hours for the companies and civil defense forces to report the collapse of the dam. The self-rescue zone should have been larger, requiring the companies to install alarms and provide training to a larger number of people.

In other words, on the one hand, the current regulation vests the companies with too much authority when it comes to assessing the risks and defining the measures that will be undertaken to address them. On the other hand, companies have too little responsibility with regards to training, warning and rescuing people living and working in neighboring areas.

On June 12, 2018, President Michel Temer signed Decrees 9,406³⁶ and 9,407,³⁷ amending the Brazilian Mining Code of 1967 and redistributing mineral royalties. The changes include new environmental norms, in issues such as mine closure and control of tailings dams, and rules aimed to increase investments in the mineral sector, including new credit lines. According to the Brazilian government, more than 20,000 new mineral projects could be created in the coming years.³⁸

³⁵ Estadão, Estabilidade da barragem de Brumadinho estava no limite da segurança, aponta relatório de empresa. February 4 2019. <<https://brasil.estadao.com.br/noticias/geral,estabilidade-da-barragem-de-brumadinho-estava-no-limite-da-seguranca-aponta-relatorio-de-empresa,70002707645>>; Folha de S. Paulo, Laudo de estabilidade de barragem da Vale cita erosão e problemas de drenagem, 4 February 2019. <<https://www1.folha.uol.com.br/cotidiano/2019/02/laudo-de-estabilidade-de-barragem-da-vale-cita-erosao-e-problemas-de-drenagem.shtml>>.

³⁶ Decree nº 9.406. July, 12, 2018. Available at: <<http://bit.ly/2G3WSj>>. Last seen: January 28, 2019.

³⁷ Decree nº 9.407. July, 12, 2018. Available at: <<http://bit.ly/2G2II1M>>. Last seen: January 28, 2019.

³⁸ Agência Brasil. “Decretos assinados por Temer atualizam Código de Mineração” June 12, 2018. Available at: <<http://bit.ly/2G5GQp8>>. Last seen: January 28, 2019.

The Decrees have been criticized by Brazilian public administration control bodies, civil society organizations,³⁹ and social movements. In June 2018, the Federal Public Prosecutor's Office filed a lawsuit to annul parts of Decree 9,406,⁴⁰ claiming that the changes of Mining Code facilitate research and mining concessions within national reserves. This flexibility in the mineral extraction rule could cause environmental damage to reserves such as Renca (acronym in Portuguese for Copper National Reserve), a natural reserve larger than Denmark within the Brazilian Amazon.⁴¹ In 2017, the government had tried to abolish Renca, but decided to retreat after mobilization of environmentalists and the international community.⁴² For the Federal Public Prosecutor's Office, the decree amending the Mining Code is a "disguised way to reinstate the proposal" in an undue manner, without consultation with those involved.

The Renca area includes nine protected areas: the Tumucumaque Mountains National Park, the Jari Ecological Station, the Cajari River Extractive Reserve, the Iratapuru River Sustainable Development Reserve, and the indigenous territory of the Wajãpi people.⁴³

6. VALE'S FAILURE TO CONDUCT HUMAN RIGHTS DUE DILIGENCE

Human rights due diligence (HRDD) is the process through which a business enterprise's potential negative impacts are identified and addressed.⁴⁴ It is through HRDD that businesses develop and implement instruments, such as action plans, to prevent, mitigate, inform and remedy actual and potential human rights impacts. As in the collapse of the Fundão dam in 2015, HRDD in the Brumadinho case – if it was ever conducted – failed catastrophically.

Firstly, the phase of human rights impact assessment was marked by a series of shortcomings. The Feijão dam was built in the 1970's. Originally, the wall was 18m, but when it burst its height was 85m. On December 11th, 2018, the environmental agency of the state of Minas Gerais approved the renewal of the license of the Feijão mine and the expansion of its capacity by more than 70%. As discussed in section 2, during this procedure, civil society organizations raised serious concerns about the safety of the dam, which were brought to the attention of both the company and public authorities. Document presented during the renewal procedure also demonstrate that public authorities and Vale knew that a collapse would destroy the mine's administrative facilities and the community of Córrego do Feijão within just a minute. However, emergency plans addressing this risk were insufficient and flawed.⁴⁵

Emergency measures taken after the collapse were also insufficient to prevent aggravation of the situation of the affected communities. Assistance has consisted in a combination of ad hoc measures by Vale with humanitarian relief provided by government agencies and voluntary corps.

³⁹ G1. "Greenpeace avalia que decreto federal pode provocar 'corrida do ouro' na Renca". June 20, 2018. Available at: <<https://glo.bo/2G5BY3q>>. Last seen: January 28, 2019.

⁴⁰ Ministério Público Federal. "MPF quer anulação de parte do Decreto que permite exploração mineral em reservas nacionais". June 14, 2018. Available at: <<http://bit.ly/2G6JNpC>>. Last seen: January 28, 2019.

⁴¹ G1. "MPF fala em 'disfarce' e avalia que decreto federal pode abrir exploração na Renca". June 16, 2018. Available at: <<https://glo.bo/2G3rGAS>>. Last seen: January 28, 2019.

⁴² El País Brasil. "Renca: Temer revoga polêmico decreto que ameaça reservas da Amazônia". September 26, 2017. Available at: <<http://bit.ly/2G9rqAp>>. Last seen: January 28, 2019.

⁴³ O Globo. "Renca: governo planejava liberar área protegida na Amazônia". September 25, 2017. Available at: <<https://glo.bo/2G3ZYnr>>. Last seen: January 28, 2019.

⁴⁴ Principle 17 of the UN Guiding Principles on Business and Human Rights provides that "In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed".

⁴⁵ See section 2

Therefore, serious shortcomings have emerged in all stages of HRDD: the risk of collapse was not properly assessed because the licensing process was deeply flawed, the warning system utterly failed, and mitigation measures adopted in the aftermath of the disaster have been insufficient and marked by ad hoc measures. Moreover, integration of the findings of the HRDD first stage (impact assessment) did not result in appropriate, swift action to stop the destructive power of the mud.

7. URGENT NEEDS OF THE COMMUNITY

After the disaster, affected communities have started to organize and to express their urgent needs. Their most pressing demands include:

- **Provision of adequate food.** Toxic mud has halted access to food supplies, as well as to kitchens and other meal preparation facilities. Many people have also lost their means of subsistence, as the mud contaminated farmland and the river. In the immediate aftermath of the disaster, Vale provided packed lunches and dinners to the population. Nevertheless, proper nourishment also requires at least the provision of breakfast. The population also requested the provision of a community kitchen, so that affected individuals do not have to rely on packed meals indefinitely.
- **Re-establishment of electricity, water, and sanitation services.** The mud has destroyed infrastructure that provided access to basic public services, such as electricity, water, and sanitation. There is an urgent need to restore damaged equipment, including inside houses and farms.
- **Increased police presence in the area.** The forced displacement of people from their houses has left property unattended, and there are reports of a wave of thefts. Unsheltered individuals are also vulnerable to robbery and other types of violence. The community requests the government to place a police station in the area, and to adopt general public safety measures
- **Access to information about contamination.** Affected individuals and families are unsure whether they should resume their daily activities, as there is no information about the toxicity of the places where they used to live and work. The state of Minas Gerais issued an alert of contamination of the Paraopeba river. It recommended that people refrain from using the river water for any purpose, including for cattle hydration and irrigation.⁴⁶ The Rio Doce experience has demonstrated that land and water remain toxic even after the mud is removed. Therefore, the community is rightfully concerned about which places are safe to farm, fish, collect water, bathe, and generally inhabit.
- **Mud removal.** The community demands to know when and how the toxic mud will be removed. They should be involved in decision-making about priorities, schedule, and forms of removal.
- **Alternative routes to the city:** The tailings have blocked the roads that connected the Córrego do Feijão community to the center of Brumadinho. Normal travel time would take only 20 minutes before the collapse. Now, communities need to travel almost 2 hours by car to arrive in the city center to work or to access basic services, such as supermarkets and hospitals, as well as the main relief center. Community members have requested Vale

⁴⁶ Portal R7. “Governo de MG alerta que água do rio Paraopeba põe saúde em risco”. January, 31, 2019. Available at: <<http://bit.ly/2SsKEYb>>. Last seen: February, 04, 2019.

to authorize access to a private road that runs through the mines and that would reduce travel to only 15 minutes. Vale is refusing to do so on the grounds that unimpeded access is unsafe. This is no excuse for blocking access completely. Vale could offer cars to escort the drivers through the road, and also provide shuttle buses.

- **Provision of shelter.** 135 individuals have been unsheltered. They should be provided with both emergency sheltering and long-term housing options. Affected individuals must be at the center of decision-making about housing.
- **Compensation for loss of income.** All those individuals whose subsistence means have been negatively impacted by the disaster must be compensated. This includes not only farmers and direct Vale employees, but also those individuals indirectly affected by halted mine operations and contamination of the area. In addition to compensation, there must be emergency assistance to those who have been most severely affected.
- **Community participation in all decision-making processes** regarding emergency measures, compensation, and restoration. Participation may be carried out through representatives, as long as they are legitimately chosen by the community and accountable to affected individuals.
- **Provision of psychological and social support** for affected individuals. This service must be provided with guarantees of independence from company oversight and due protection for individual's privacy, ensuring that users feel safe and do not fear conflicts of interest.

8. CONCLUSION AND REQUESTS

The organizations request the UN Special Procedures addressed in this Urgent Appeal to urge the Brazilian State and Vale to:

1. Provide information on the emergency measures that have been undertaken so far and those planned in the future;
2. Adopt effective measures to stop the leakage of the mining waste and from advancing and entering the São Francisco river;
3. Be transparent and provide the affected people and the Brazilian society with all the relevant information on the case, especially with regards to the toxicity of the waste;
4. Monitor the quality of the water in different areas of the river, and publicize the findings;
5. Ensure effective participation of the affected communities throughout the entire decision-making process on the remedies they will receive, especially if an extrajudicial remedy mechanism is adopted. In such case, the negotiation and the governance of this mechanism should not follow the same pattern as the one created to remedy the Doce river disaster, in which the companies hold an unreasonable degree of power to decide who is affected, what are the losses entitled to remedies, and what remedies will be provided.
6. Engage in open and constant dialogue with civil society organizations, social movements, and the affected communities.

7. Address the immediate needs and demands of the affected community.

Signed by:

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