



CLÍNICA DE DIREITOS
HUMANOS DA UFMG

**CONTRIBUTIONS TO THE PROCESS OF
NEGOTIATION OF THE BINDING
INSTRUMENT ON BUSINESS AND HUMAN
RIGHTS AT THE UNITED NATIONS**

human rights violations in mine tailing
dams in Minas Gerais / Brazil

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Contributions to the process of negotiation of the Binding Instrument on Business and Human Rights at the United Nations: human rights violations in mine tailings dams in Minas Gerais/Brazil

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INTRODUCTION

Companies' operations have a significant impact on human rights in many aspects and dimensions. Studies point out that some groups, such as women, children, riverside dwellers, fishermen, indigenous communities, and people living in extreme poverty are particularly vulnerable in this context.¹

Despite the impacts of these operations on children - and their rights - they are often disregarded as *stakeholders* in the decision-making process. However, according to the United Nations Human Rights Council, the increasing tension with regard to natural resources (specially water resources), and extreme weather events are the main causes of child morbidity and mortality.² In addition, many children are engaged in labor in the formal or informal sector or belong to families whose members are employed by companies, being thus affected by the working conditions. They also belong to communities that live in places impacted by business enterprises, thus being affected also by interventions in the environment, in daily life and in the local culture.

The United Nations has developed some measures to better address the impacts of such activities on human rights. In 2011, the Human Rights Council approved the *Guiding Principles on Business and Human Rights*. In 2013, the Committee on the Rights of the Child adopted General Comment No. 16 (2013) on state obligations regarding the impact of the business sector on children's rights. And, since 2014, a new binding treaty has been the subject of discussions by an *Open-ended Intergovernmental Working Group - IGWG*,³ to regulate the activities of transnational corporations and other business enterprises from the perspective of the international human rights law.

¹ UNITED NATIONS (UN). Climate change and poverty: Report of the Special Rapporteur on extreme poverty and human rights. Human Rights Council. 44th session, June 2019, A/HRC/41/3; UNITED NATIONS (UN). Informe del Relator Especial sobre la cuestión de las obligaciones de derechos humanos relacionadas con el disfrute de un medio ambiente sin riesgos, limpio, saludable y sostenible. Consejo de Derechos Humanos (HRC), 1 February 2016, Doc. ONU A/HRC/31/52.

² UNITED NATIONS (UN). Informe de la Oficina del Alto Comisionado de las Naciones Unidas para los Derechos Humanos sobre la relación entre el cambio climático y los derechos humanos. Consejo de Derechos Humanos (HRC), 15 January 2009, Doc. ONU A/HRC/10/61.

³ This Working Group was established by Resolution nº 26/9, adopted by the United Nations Human Rights Council.

The sixth session of the Working Group will be held this year (2020) from 26 to 30 October and will address the second revised version of the draft binding treaty, which was disclosed in August. Therefore, supervision should be made to ensure that the instrument will be effective in protecting human rights and will be able to prevent and remedy violations by States and companies.

This *paper is presented in such context*. The purpose of this document is to point out the importance of a binding treaty on human rights and business, through the analysis of some provisions from the second revised version of the draft binding treaty and of two of the world's major disasters in the mine industry, which occurred recently in Brazil, resulting in social, environmental and technological impacts.

The first part of this document describes the facts of the Fundão dam collapse, in Mariana/MG, in 2015, and of the Córrego do Feijão dam collapse, in Brumadinho, in 2019. Then, it analyses some of the provisions from the draft treaty 2020 version, and their relationship with cases such as the ones described. Throughout our work, special attention was given to the rights of children, taking into account the suggestions presented by DKA Austria. Finally, we present our conclusions as to how a binding instrument like the one proposed can protect and help develop human rights.

PART I: A brief description of the facts of the case

1.1 The Fundão mine tailings dam collapse in Mariana/MG

In 2020, Brazilian families are still dealing with the consequences of one of the most serious environmental crimes in the world: the collapse of the Fundão dam, located in the city of Mariana/MG. The dam collapse released 48.3 million cubic meters of mine tailings into the Rio Doce Basin, killing 19 people, displacing hundreds of families in the cities of Mariana and Barra Longa, and leaving thousands of people with no water supply and no source of income in more than 40 affected cities in the states of Minas Gerais and Espírito Santo.⁴ The crime devastated the flora and fauna, and the region's historic heritage,

⁴ RAMBOLL DO BRASIL. Avaliação do programa de reparação integral da bacia do Rio Doce. Available on: <https://bit.ly/3jmulRg>.

besides affecting the victims' work, mental and physical health, housing, social environment, dreams and life projects, and violating the memory and the history of the affected people.

My life came to a complete halt. Dream, projects, expectations of what tomorrow would bring... Now that I see that I'm not so young anymore, I ask myself: what do I really want for my life? What do I want to do now? Is it worthwhile to think about the future? When all this happened, my life was all planned. My projects were all scheduled. Then all this happened and turned my head upside down. Today I can no longer dream or plan...- **Luzia Queiroz, affected individual from the Paracatu de Baixo district, in Mariana/MG.**⁵

Almost five years after the Fundão collapse, which took place on 05 November 2015, the affected families still complain that too little was made to compensate them for their losses. In 2016, an agreement between Samarco Mineração S.A, the company responsible for the dam,⁶ its parent companies, Vale S.A. and BHP Billiton Brasil Ltda.,⁷ the Federal Government and the states of Minas Gerais and Espírito Santo was signed. It provided that social, economic and environmental damage reparation would be conducted by a private foundation, formed and operated by the three mining companies. Even though the agreement was judicially questioned, since the middle of 2016 Renova Foundation has controlled the reparation programs, the "eligibility criteria" to assess who the affected people are, and the parameters for damage reparation.

According to accounts given by the affected communities, by social organizations and by bodies from the judiciary, such as the Public Prosecutor Office and the Public Defenders' Office,⁸ the reparation programs conducted by Renova Foundation do not ensure effective participation nor

⁵ DRUMMOND, Rafael. Tragédia de Mariana: Crime completa dois anos neste 5 de novembro. *Brasil de fato*, 3 Nov. 2017. Available on: <https://bit.ly/3l77i2K>.

⁶ UNIÃO et al. Consent Decree (TTAC), signed in March, 2016. Available on <https://bit.ly/2GfZPQI>.

⁷ According to a study by Mining Global, on 25 March 2020, Vale and BHP are among the top 10 mining companies in the world, with Vale occupying the 3rd place and a market value of \$68.92 billion and BHP the world leader and a market value of \$146.93 billion. See WOODS, Andrew, Top 10 Global Mining Companies. *Mining Global*. Available on: <https://bit.ly/3ilfFpQ>.

⁸ According to Article 127 of CR/88, The Public Prosecutor Office is a permanent institution that acts in the defense of the legal order, and of the social and individual interests, and may bring charges for human rights violations, at the request of the society or on its own initiative, by instituting public criminal action, civil investigation and civil action for protection of the public interest. The Public Defenders' Office, for its turn, is an institution that allows greater access to justice, helping to promote human rights and representing and providing free legal assistance to low-income people.

focus on the victims, rather disregard the real needs of the affected people and their way of life and does not give serious consideration to the non-material damages caused by the disaster.⁹

I think Renova Foundation has a simple purpose: to perpetuate the crime. The companies and Fundação have the say on the issue of compensation, and we fight everyday against them. [...] It makes us ask 'will I live to see the end of it?' [...] We got to a situation where we have nowhere else to go [...] We fight, think about the pictures that were lost, tell the story, blurt it out, because we know we won't be compensated. Your hope is gone, who can you turn to? The divine justice?" -**Mônica Santos, affected individual from Bento Rodrigues district, Mariana/MG.**¹⁰

Although Renova Foundation claims to have already spent 9.2 billion reais in reparation measures,¹¹ resettlement is far from being completed and most of the families either have not received compensation or have complaints regarding the amounts received. The environmental situation is also serious: Rio Doce still presents high levels of contamination by heavy metals,¹² what brings uncertainties with regard to the quality of water supply and fishing in the area and to the impacts on the local flora and fauna, on people's health and on children's physical and neurological development.¹³

⁹ For further information on the flaws of the recovery programs and on the violations perpetrated by Renova Foundation, refer to:

CdH/UFMG; CONECTAS. Transparência, participação, responsabilização e reparação: uma proposta de reforma de governança para remediação do desastre do Rio Doce. Série Policy Papers Conectas Direitos Humanos. Available on: <https://bit.ly/3cNBLQx>; MINISTÉRIOS Públicos e Defensorias da União, MG e ES expedem Recomendação à Renova Foundation. MPMG, 05 April 2018. Available on: <https://bit.ly/3jm2ZjJ>. And MINISTÉRIO Público e Defensoria Pública recorrem da decisão que permitiu Samarco a descontar auxílio financeiro dos atingidos pela barragem de Fundão. MPMG, 31 January 2019. Available on: <https://bit.ly/2EPnOVM>.

MITOS e Incertezas, O caos da (não) reparação dos crimes cometidos por mineradoras no Brasil. Projeto de Incidência na Pauta da Mineração (PIPAM/Cáritas Brasileira Regional Minas Gerais), November 2019. Available on: <https://bit.ly/2GxnHhX>.

¹⁰ Interview by CdH/UFMG on 22 September 2020.

¹¹ RENOVA, Dados da Reparação. Available on: <https://bit.ly/3l5px96>.

¹² Water contamination by mine tailings along Rio Doce remain affecting the fish population, which still is improper for consumption see GABRIEL, Fabrício Ângelo et al. Metal contamination and oxidative stress biomarkers in estuarine fish following a mine tailing disaster. Available on: <https://bit.ly/3cQ66Ok>.

¹³ Research conducted by UFMG shows the impact on the mental health of the families and children affected by the dam collapse in Mariana. See ROQUE, Marco; FREITAS, André; GARCIA, Frederico. (2018). Pesquisa sobre a Saúde Mental das Famílias Atingidas pelo Rompimento da Barragem do Fundão em Mariana.

Many people fell into deep depression, had to be medicated[...] We hardly sleep anymore, we don't sleep well, there's so much anxiety [...] My mom used to be healthy, and now she has high blood pressure, she can't sleep, she can't go to the meetings because her blood pressure goes up. **Mônica Santos, affected individual from Bento Rodrigues.**¹⁴

In this regard, a report presented at the 45th session of the United Nations Human Rights Council by the Special Rapporteur on the implications of hazardous substances and wastes on human rights, pointed out that

low-income families, including Afro-Brazilians, suffered disproportionate exposure to dust and heavy metals in mud heaped in Barra Longa following the Mariana dam collapse by agents of the companies and the Renova foundation. These communities reported various respiratory and other diseases, compounding the pre-existing inequity and environmental injustice.¹⁵

The document also notes the "inability to provide an effective remedy to the victims of the Mariana disaster"¹⁶, the impunity of the mining companies' officers¹⁷ and the need to "reform the governance structure of the Renova Foundation" to replace all influence of the mining companies.¹⁸

Throughout the years, violations of rights continued, and families were not fully compensated. The environmental devastation, the deaths and the lives affected in the Rio Doce Basin did not bring about any change in the companies' attitude. They did not change their protocols, nor did they fully reconsider the security reports on the dams in the state of Minas Gerais. Such conduct resulted in a new dam collapse roughly 3 years after the occurrence in Mariana, this time in the city of Brumadinho, leading to further human rights violations and to a significant number of deaths and affected families.

¹⁴Interview by CdH/UFMG on 22 September 2020.

¹⁵ Human Rights Council. Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes. A/HRC/45/12/Add 2, §46.

¹⁶ Ibid., §87.

¹⁷ Ibid., §85.

¹⁸ Ibid., §100, (m), (iv).

1.2 Córrego do Feijão mine tailings dam collapse in Brumadinho/MG

Such a large number of deaths cannot be in vain, and we are fighting so that they are not - **Josiana Resende, dweller of Brumadinho/MG**¹⁹

Josiana's speech refers to another tragedy that resulted from poor management of mine tailings in the state of Minas Gerais. On 25 January 2019, less than 4 years after the Mariana disaster, the Córrego do Feijão dams in Brumadinho collapsed, releasing roughly 11.7 million cubic meters of mud and mine tailings.²⁰ This technological disaster was deemed one of the biggest work accident yet to be seen in the Brazilian history,²¹ having caused the death of 271 people,²² devastated whole communities, displaced families, and destroyed crops, forests, water supplies, ways of life and of integration with nature. Besides the communities located near the dam, the mud flow reached the Paraopeba river and affected 18 cities covered by the hydrographic basin, making its water improper for consumption and disrupting the lives of the population that depended on such water source.

The local sirens, intended to warn the region's workers and dwellers in case of dam abnormalities, did not ring on the day of the collapse. Since the cafeteria was located right below the collapsed structure, most of the fatal victims were company's employees. Those people's relatives faced uncertainty, fear and despair throughout the searches, thinking of their loved ones dragged by the mud flow.

At first, we asked for them to be alive, and after one week, 15 days with no news, we realized that the odds were dropping, we thought he might be in the woods, then just hoped that at least he hadn't suffered, that it had happened fast enough for him not to see or feel anything. Then you hope that at least a tiny piece is found, and you want to receive that sad call, the worst call someone that loves can receive, and that we have all been expecting. –

¹⁹ FREITAS, Raquel; ALMEIDA, Fabiana. Um ano após tragédia da Vale, dor e luta por justiça unem famílias de 259 mortos e 11 desaparecidos. G1. Available on: <https://glo.bo/2SfhNEO>.

²⁰ Brumadinho. Vale.com. Available on: <https://bit.ly/3jh0Zt4>.

²¹ SOUZA, Felipe; FELLETT, João. Brumadinho é maior acidente de trabalho já registrado no Brasil. *BBC News Brasil*. 29 January 2019. Available on: <https://bbc.in/2GgTi82>.

²² SILVA, Mariano Andrade da; FREITAS, Carlos Machado de; XAVIER, Diego Ricardo; ROMÃO, Anselmo Rocha. Sobreposição de riscos e impactos no desastre da Vale em Brumadinho. 2019. Available on: <https://bit.ly/2GkkbrJ>.

Anonymous person who was still waiting for information on missing people 6 months after the collapse.²³

The collapsed dams were under the responsibility of Vale S. A., one of the companies that formed the *joint venture Samarco S. A.* (which is liable for the dam collapse in Mariana/MG). The collapsed structure at Córrego do Feijão, in Brumadinho, was used to store the region's mine tailings and was inactive at the time of the accident.

The damages, which affected not only the environmental and financial, but several others, are still felt in the region. Dwellers frequently develop health problems due to contact with the toxic mud, as well as symptoms of depression and anxiety.²⁴ Many families still live in "temporary" houses offered by Vale in compliance with the agreement signed with the Federal Public Prosecutor Office, the Public Prosecutor Office of the state of Minas Gerais and the Federal Public Defenders Office. There is still no prospect of the agreed permanent housing and the affected people find themselves in endless negotiation for a place to live that remotely resembles the ones they used to live in.

We have nothing. Just this yard you can see here. We can't even go to the river because we risk getting an incurable disease - **Maria Aparecida Rocha, dweller of Pires, in Brumadinho/MG²⁵**

1.3 The context after Brumadinho: threats of "dam terrorism"

There were 160 families. There are stories of parents running and carrying their kids up the hill in the middle of the night, risking being bitten by snakes or stung by scorpions and spiders, at dawn. - **Nicolson Pedro de Rezende, community leader at Barão de Cocais/MG²⁶**

Sirens warned the communities in the rural area of Barão de Cocais, Minas Gerais, at 1 A.M., on 08 February 2019. *"Attention. This is a real dam collapse emergency situation. Leave your houses immediately."* Without any

²³ Seis meses depois, famílias ainda esperam por notícias dos desaparecidos na tragédia da Vale em Brumadinho. *G1*, 25 July 2019. Available on: <https://glo.bo/36BI9cS>

²⁴ Brumadinho: um ano e meio após o crime, como está a vida dos atingidos - Movimento dos Atingidos por Barragens. *Movimento dos Atingidos por Barragens*, 31 July 2020. Available on: <https://bit.ly/2EW6peg/>.

²⁵ see FREITAS; ALMEIDA. Op cit. See FREITAS; ALMEIDA. Op cit.

²⁶ Interview by CdH/UFMG, on 14 September 2020.

training, around 500 people were hurriedly displaced from their homes, in the middle of the night. Family albums, documents and personal belongings: all those things were left behind so that we could guarantee our own safety in case the Mina de Gongo dam collapsed. Just 13 days before, a dam owned by the same company, Vale S.A., built with the same upstream method and located less than 160 kilometers away had collapsed. Since then, there has been panic in the region.

The population of the region feared Vale, which never did anything for them. The company was here for 20 years and created jobs for only 5 people, in a community with 400 members. No one here liked Vale. Vale didn't help anyone. It wouldn't even create jobs, which was the least it could do. No one liked to attend its meetings, because they were just useless. When it came to create jobs and help to sponsor community events, it did nothing. It happened in Brumadinho, I believed it could happen to us, but I asked my wife: *"Really, could it happen to us? If it does happen, we will die, over there no one had time to run away, although it happened during the day, imagine if it happens at night."* [...] We are now in the city, and we can hear all the time ambulance sirens. My 5-year-old son says *'dad, a dam is falling, it's good they are running away during the day, because we had to run away at night.'* - **Amauri Gustavo, dweller of the rural community of Socorro, in Barão de Cocais/MG**²⁷

Today, more than one year after those sirens went off, the structure hasn't collapsed. Even so, the members of the displaced communities were not allowed to return to their homes or gather the belongings they left behind. The same situation of Barão de Cocais happened in many other communities in the state of Minas Gerais, such as São Sebastião das Águas Claras²⁸, Itatiaiuçu²⁹, Nova Lima,³⁰ and

²⁷ Interview by CdH/UFMG, on 15 September 2020.

²⁸ District in the city of Macacos/MG, when the sirens went off in February 2019, 125 families were removed from their homes, for being located in a high-risk zone.

²⁹ In 2019, 58 families were removed from their homes in the city of Itatiaiuçu/MG, due to the spread of the flood stain in the case of Serra Azul tailings dam collapse. The dam is under the responsibility of Arcelor Mittal, a multinational conglomerate in the steel industry, headquartered in Luxemburg. Learn more on: DEFESA Civil diz que 10 famílias de Itatiaiuçu não serão mais evacuadas, mas terão casas cercadas. *Hoje em Dia*, 10 July 2019. Available on: <https://bit.ly/2Gpz0ZF>.

³⁰ In February 2019, Vale S.A. dislodged around 200 people from an area near Mina Mar Azul, in the city of Nova Lima/MG. In April 2020, the company announced the adoption of an emergency protocol after having registered abnormalities on the dam structures, but did not remove the remaining dwellers. Learn more at: <https://bit.ly/3n6zDbn>.

Antônio Pereira³¹. The chaotic situation of the communities living in areas facing risks of dam collapse have been reported by the organized civil society:

People were suddenly removed from their homes and had their economic activities suspended, their daily activities compromised, children's access to school was impaired; the population was subjected to stress and health problems and everything they had built along the years depreciated. In this chaos, what you see is that Vale alone is conducting the situation and does whatever it wants, however it wants. Therefore, people are having several of their rights violated-
Marcus Vinícius Polignano, coordinator of Projeto Manuelzão/UFMG.³²

It was a total panic, a terror, because we've been following both Mariana and Brumadinho tragedies. [...] Being already apprehensive, at 3 A.M. we receive the news [that the dam would collapse]; so we panicked, everyone, we thought the pond had burst. So far no one has explained why we had to flee, we followed the press conference, they talked, talked, talked and did not say what's really happened to the pond, if it has a crack, if its level has gone up. So, we are really in the dark and in panic, everyone is in fear, no one has any information. For me, it was not about physical tragedy, but mental tragedy. Because, you imagine, how are we gonna go back to our homes, even if we are free to do so in one month? How can we go back and sleep? Knowing that the dam can collapse at any time. So, for me, what has to be done is to do away with the tailings ponds. It's no use, anymore. I don't trust mining. What they told us here, I do not trust, it's over. -
Romer Soares, city councillor of Itatiaiuçu/MG³³

The panic caused on the affected communities is even more serious due to the uncertainty and the lack of training on how to proceed in case the sirens go off and the dams really collapse.

Many people are getting sick. Anything, a loud noise, a car horn, makes us think it's a siren. It was in February all this started. My granddaughter said: "Grandma, it seems a dam in Gongo is gonna collapse". Some days later, I was cooking lunch and thinking: "If this mud comes this way now, these pans will end up far away". I keep thinking: "Oh, my God, what if it bursts now?" The case is too serious, I won't be able to run. I'm almost 80 years old. We wanted a more definite answer in order to have a little peace.

³¹ District in the city of Ouro Preto/MG. While part of the local population was removed by Vale S.A. from their homes in January 2020, the remaining 61 families were forced to leave their homes 4 months later, in April 2020, during the new coronavirus pandemic (Covid-19). COTA, Ana Clara de Carvalho; RAMOS, Patrícia Ferreira; ARCANGELO, Widge. Protesto silenciado. *Jornal A Sirene*, 2020. Available on: <https://bit.ly/3in8MV4>

³² SOCIEDADE Civil denuncia "terrorismo" de barragens e violação de direitos. *Manuelzão*, 12 April 2019. Available on: <https://bit.ly/2Gsdsfo>.

³³ EUSTÁQUIO, Alisson. "The siren didn't go off," says a city councillor from Itatiaiuçu. *Santana FM*, 8 February 2019. Available on: <https://bit.ly/30pAES5>.

Gercina dos Santos Silva (China), resident of Barão de Cocais/MG³⁴

In addition, some of the affected communities complain of not being invited to actively participate in the drafting of the Municipal Contingency Plans, a document that outlines escape routes and sets forth the actions of public officials in emergency cases.

More than a year and a half after leaving their homes, many of the affected families have not received any type of compensation. Mining companies have adopted various mitigation measures ordered by the Courts depending on the affected community, which include renting temporary housing for families expelled from their homes and paying emergency financial aid of different values. According to Amauri Gustavo, a resident of the rural area of Barão de Cocais/MG, Vale S.A. has been threatening to cease paying rents and aid to affected families if they do not accept the amounts offered by the company in the final compensation agreements.³⁵

These final agreements are allegedly harmful to those affected, as they make arbitrary distinctions between residents with land registry records and those who did not have them, in order to reduce the amount due to the latter, they are unclear in relation to the parameters for assessing pecuniary and emotional distress losses suffered by the affected families,³⁶ disregard the fact that many of the affected families lost their livelihood, which came from the work done on the land, and do not provide for a large enough amount to purchase property equivalent to those lost by the families in their region of origin, as the price of real estate has been inflated by the displacement of those affected. The pressure to accept the agreements comes amid the global pandemic of the new coronavirus, which makes it even more difficult for affected families to generate income.

³⁴ ATINGIDOS(AS) antes do rompimento. *Jornal A Sirene*, 3 June 2019. Available on: <https://bit.ly/34jdWMz>.

³⁵ This information was received in an interview conducted by CdH/UFMG on 15 September 2020. On the same day, Vale S.A. sought to stay payments to displaced families in the rural area of Barão de Cocais due to the need of full compensation and the end of the state of emergency that affected displaced persons. Although the company declared the end of the state of emergency, the Gongo Soco mine dam is still considered a level 3 emergency, with a serious and imminent risk of collapse. GONÇALVES, Anna. Vale pede à justiça suspensão dos benefícios pagos em Barão. Available on: <https://bit.ly/34k1TyP>.

³⁶ Interview by CdH/UFMG on 15 September 2020.

They sent an offer: it [Vale S.A.] will pay only one more year of rent to those who do not accept to close the deal. I will have to survive on the street, with no minimum income, if I don't close the deal. I will have to go back to work earning much less than I did and pay rent, water, electricity, gas. There we had water. We paid for gas, but we had a wood stove, coil, rural electricity, and the water flowed from the springs. It was another way of life. I am still young, I will be able to support myself, but I wonder if I am able to pay a rent of 2 or 3 thousand reais. It [the company] inflated rent in the city because of the demands of the community. Rents that were 500 reais are now up to 2 or 3 thousand reais. [...]. People knew how to weed, brush, take care of the land and the animals, do manual labor. To do this kind of hard work, you don't need to know how to read or write. These people have been doing this their whole lives. How will these people live in Barão if they are unable to work? - **Amauri Gustavo, resident of the rural community of Socorro, in Barão de Cocais/MG**

Their whole way of life, their contact with neighbors and friends and their jobs in the old community were lost. That is also what Débora Marotti Drummond reports. She is a member of one of the 125 families removed from their homes in the district of São Sebastião das Águas Claras in February 2019:

To begin with, we received no training in case the alarm goes off. We left in despair. There was no compensation to buy another house. There are people thinking that Vale is nice to pay the bill for this inn. Is that a favor? I think not. I want to raise my son in the middle of nature, and I had that right interrupted - **Débora Drummond, resident of São Sebastião das Águas Claras/MG**³⁷

The lack of social participation and information aggravate the state of panic in communities in risk areas, characterizing what organized civil society has called “dam terrorism”. With the memories of the recent and tragic episodes that occurred in Mariana and Brumadinho, residents are very suspicious about the credibility of the information provided by the mining companies.³⁸

In addition, prosecutors in Minas Gerais have already pointed out that the withdrawal of families and the execution of individual agreements for the acquisition of properties in

³⁷ Macacos, um ano após a sirene: como estão e o que pensam famílias expulsas de casa. Estado de Minas. Available on: <https://bit.ly/2Sh1fMP>.

³⁸ This is reported by Amarair Paulo de Moraes, a resident of the Socorro community in Barão de Cocais (MG), who was evacuated from his home and reports that he does not believe there is a real risk of the dam collapsing and that the population withdrawal projects are allegedly economic projects for expansion of the mining area. Available on: <https://bit.ly/2Gruzxs>.

risk areas are attitudes related to the mining companies' desire to expand their economic activities to the areas where the houses of the communities are located.³⁹

In the context of the new coronavirus pandemic, residents of areas at high risk of death are affected by a double risk, as staying at home represents, at the same time, protection against the disease and risk to their safety due to the possibility of collapse of the dams. Those displaced by the mud, in turn, are forced to face the pandemic in a space that they do not recognize as home, away from friends and family ties and, even, to overcome the challenges of social distancing.⁴⁰ Finally, the continuation of mining operations during the pandemic, after the activity was considered essential by the Brazilian government,⁴¹ may be disseminating and spreading the pandemic in cities with mining activity, as workers in the mining sector have high rates of contamination of the disease.⁴²

1.4 The political and economic context of dam safety in Brazil

The environmental disasters of Mariana and Brumadinho are part of a greater context of insecurity in the exploitation of mining activities and lack of inspection of the economic sector by the government. Currently, one in four projects included in the National Dam Safety Policy (PNSB) does not have guaranteed stability, with a total of 156 dams identified in critical condition in 22 states.⁴³ Among them, 19 dams were classified as high risk of collapse, 12 of which are in the state of Minas Gerais. In turn, 19,388 of Brazilian dams do not

³⁹ This situation was made public by the prosecutor André Sperling Prado in an interview about the situation in the municipality of Barão de Cocais. Available on: <https://bit.ly/33kXbld>. (1m50s).

⁴⁰ ASSIS, Mariana; ARCÂNGELO, Widge. CORONAVÍRUS é novo golpe para atingidos pela barragem em Mariana (MG). *UOL Tab*, 12 April 2020. Available on: <https://bit.ly/3im31a7>.

⁴¹ CERQUEIRA, Daniel; ALEIXO, Letícia; BASTOS, Sophia. Comportamento das empresas de mineração durante a pandemia do COVID-19 no Brasil: entre a benevolência midiática e o descumprimento de obrigações de remediar danos socioambientais. In: GUANIPA, Henry Jiménez; HERNÁNDEZ, Marisol Anglés (Coords.). *La emergencia sanitaria COVID-19 a la luz de la emergencia climática: Retos y oportunidades*. Fundación Heinrich Böll: Bogotá, D.C., 2020.

⁴² FOCO de Covid-19 no Pará, área da maior mina de ferro do mundo terá teste em massa. *Reuters*, 29 May 2020. Available on: <https://bit.ly/2Si2xHC>.

⁴³ AGÊNCIA NACIONAL DE ÁGUAS E SANEAMENTO BÁSICO. Relatório de segurança de barragens 2019. Available on: <https://bit.ly/3im2Xan>.

have basic information recorded to guarantee safety, such as the height of the project and the type of authorization or licensing granted for its operation.⁴⁴

The non-decommissioning of all tailings dams represents many armed bombs for future generations - **Júlio Grillo, environmental engineer**⁴⁵

In this scenario, more than 400 mines⁴⁶ were abandoned or deactivated in Brazil without any guarantee of safety on the part of the companies that profit from the projects. Many of these dams belong to Vale S.A.⁴⁷ As for the others, in several cases the companies responsible for the projects no longer operate in Brazil.⁴⁸ In addition, the complexity of the business configuration of mining companies, often with the dissolution of the service provider company after the end of the exploration and with the sale of products through subsidiaries, it is difficult to hold the company responsible for the damages caused.⁴⁹

⁴⁴ CAMPOLINA, Daniela. Educação e formação de professores: a urgência do tema barragens no ensino. *Revista Manuelzão*, n. 84, March 2019. p. 23. Available on: <https://bit.ly/33lyDsk>.

⁴⁵ An engineer, an environmentalist, he has worked for more than thirty years with the representation of environmental protection NGOs in Brazilian Environment Councils. GRILLO, Julio. O que deveria mudar no Direito Ambiental no Estado de Minas Gerais?

⁴⁶ To consult the interactive map with the location and risk classification of paralyzed and abandoned mines in Brazil, prepared by the journalism agency Agência Pública, visit: <https://bit.ly/3iquaIN>.

⁴⁷ CADASTRO reúne informações sobre 400 minas abandonadas e paralisadas em Minas. Fundação Estadual do Meio Ambiente (Feam), 2016. Available on: <https://bit.ly/34dVzcc>.

⁴⁸ An example is the case of Mundo Minerals, a multinational with Australian headquarters, which stopped the economic exploitation of Mina do Engenho, in the state of Minas Gerais, and simply abandoned the area, with no worries about the environmental damage caused by the project or the risks of dam collapse under their responsibility. The abandonment and closure of the mine occurred with the “disappearance” of the company’s representatives from the Brazilian territory since 2011. The Engenho Mine was classified, in 2016, among the five Brazilian mines with “very high” environmental risk. To learn more, see: DOMENICI, Thiago. Minas abandonadas ameaçam comunidades e o meio ambiente. *Pública*, 28 March 2016. Available on: <https://bit.ly/30o0OES>.

⁴⁹ “Transnational companies are, in fact, a large number of limited liability companies organized in a plurality of jurisdictions. The complex structures adopted by transnational companies make up one of the central factors in the architecture of impunity. This is because the transnational companies use this fragmentation and the supposed autonomy of each entity to exempt themselves from responsibilities for human rights violations, alleging that each company that is part of the group is independent, and, for example, the controlling company cannot answer for damages caused by one of its subsidiaries.” NOVOS elementos para o Tratado de Empresas e Direitos Humanos da ONU. *HOMA - Centro de Direitos Humanos e Empresas*. August 2017. Available on: <https://bit.ly/2GiSwas>.

In addition, the National Mining Agency (ANM), responsible for the regulation of the mining sector in Brazil, has been suffering from the scrapping of its structure. The last exam to fill office vacancies at the agency took place in 2010, which causes a huge shortage of personnel in all Brazilian states. According to data from the ANM itself, in Minas Gerais, the personnel responsible for carrying out the inspection of the mining activity operates with personnel capacity seven times less than that necessary to meet the state's demand.⁵⁰

It is important to note that mining companies have great influence in the Brazilian public sector, mainly in Minas Gerais, since they influence the regulation of their own activities and are responsible for the presentation of stability reports made by subcontractors of their own (self-monitoring). Notable examples are: holding meetings between representatives of mining companies and officers of the Minas Gerais Secretariat for Environment and Sustainable Development (Semad)⁵¹ to consider requests for flexibility in the process of granting environmental licenses, a proceeding done in complete violation of internal rules, which provides that the discussion of the licensing process should be carried out exclusively by public officials;⁵² the fact that the proposal for a new Mining Code (Bill No. 37/2011) was written on the computer of the lawyer who represents the mining companies⁵³ and the use of the “revolving door”, that is, “the migration of representatives of the mineral sector to decision-making positions within public agencies [and] the hiring of senior managers to work in the mining companies” .⁵⁴

⁵⁰ POTTER, Hyury. Fiscalização do setor de mineração sofre com sucateamento e falta de pessoal. *G1*, 17 October 2019. Available on: <https://glo.bo/3n9w4kL>.

⁵¹ ANGELO, Maurício. Vale ditou regras para simplificar licenciamento ambiental em MG. *Repórter Brasil*, 22 February 2019. Available on: <https://bit.ly/36p1jm4>.

⁵² Executive Order No. 9,406, of 12 June 2018. Available on: <https://bit.ly/33lnc3O>.

⁵³ SENRA, Ricardo. Novo código da mineração é escrito em computador de advogado de mineradoras. *BBC Brasil*, 7 December 2015. Available on: <https://bbc.in/36qpQqD>.

⁵⁴ MILANEZ, Bruno; MAGNO, Lucas; PINTO, Raquel Giffoni. Da política fraca à política privada: o papel do setor mineral nas mudanças da política ambiental em Minas Gerais, Brasil. *Cad. Saúde Pública*, Rio de Janeiro, v. 35 n. 5. 2019. Available on: <https://bit.ly/2SuUfME>.

1.5 Violations of children's rights in the context of collapsed dams and the risk of collapse

Children and adolescents in communities affected by mining are forced to live with a common feeling: loss. Loss of childhood, freedom, affective bonds, contact with nature and, above all, the loss of the sense of security necessary for the good development of childhood. The trauma caused by the collapse of the dams generated a state of constant panic and insecurity in children and adolescents from affected communities or in areas at risk.

In the case of Mariana, faced with the traumatic situation that led to major changes in school life and socialization, some data and preliminary studies already indicate psychological damage to teachers and students in schools. The deficiency of remedial actions is also clear with regard to the emerging need for Psycho-pedagogical follow-up.⁵⁵ A study by the UFMG, with the support of Caritas Minas Gerais, indicates that the condition has a great impact on the mental health of children and adolescents.

With regard to the events that followed the collapse of the Fundão dam, [...] Screening was positive for depression in 39.1% of respondents. Anhedonia was present in 8.7% of respondents and depressed mood and irritability in 13%. Regarding variables related to current or lifelong suicidal behavior, 26.1% had thoughts of death, 13% had suicidal ideation and another 13% committed non-suicidal acts. [...] Regarding the presence of psychotic symptoms, 8.9% of the respondents had hallucinations and 6.5% had delusions. Also, 39.1% of respondents were positively screened for some anxiety disorder. Unrealistic concern with predicted events was present in 21.7% of them, 15.2% described somatic anxiety complaints, 10.9% had exaggerated self-awareness and 13% declared excessive tension or were unable to relax.⁵⁶

This information reflects, as the report itself concludes, "high rates of positive screening for psychiatric diagnoses in the child-youth population affected

⁵⁵ The report indicates that, even after 12 months from the date set for the beginning of the measures, the psycho-pedagogical support is restricted to the municipal schools of Mariana, which does not include the municipal schools of Barra Longa and the state schools of the two municipalities See RAMBOLL DO BRASIL. Relatório de monitoramento mensal dos programas socioeconômicos e socioambientais para a restauração da Bacia do Rio Doce com os indicadores propostos. April 2020.

⁵⁶ ROQUE, Marco; FREITAS, André; GARCIA, Frederico. (2018). Pesquisa sobre a Saúde Mental das Famílias Atingidas pelo Rompimento da Barragem do Fundão em Mariana. p. 65-67

by the dam disaster" in view of the average numbers of the general population.⁵⁷ The study also points to a high percentage (82%) of people who fit the criteria of post-traumatic stress disorder (PTSD), highlighting the proximity of this number when compared to the PTSD index in children who experienced nuclear disasters.⁵⁸

In addition, data systematized and anonymized by Caritas/MG⁵⁹ on some of the losses suffered by members of the affected communities of Mariana/MG who were less than 18 years old at the date of the collapse of the Fundão dam indicate:⁶⁰ 77% declare to have suffered losses on local knowledge, ways of doing things and ways of life; 66.8% declare damage to relations with the community, friends and neighbors; 55.9% declare damage caused by actions or omissions of Samarco/Renova Foundation; 61.2% declare damage related to cultural and religious events, celebrations, festivals and fun; and 77.8% declare damage to biodiversity and loss of access to natural resources.⁶¹

These data are absolutely alarming and make us better understand the urgency of implementing measures to ensure redress for these children and adolescents. The special vulnerability of this group, which involves individuals in psychic, physical and social development, requires the effective protection of their rights and specialized treatment so that the learning and socialization of these subjects is not compromised.⁶²

In turn, it is important to emphasize that there is no public data of this nature on the situation of children and adolescents in the other municipalities affected by dams, either

⁵⁷ Ibid., p. 67.

⁵⁸ Ibid., p. 67 and 68.

⁵⁹ Caritas/MG was the entity chosen by the affected communities in Mariana/MG for the execution of a technical, multidisciplinary and independent advisory project. This arrangement was made possible in an agreement approved under public interest litigation No. 0400.15.004335-6, filed by the prosecutor of the Mariana District.

⁶⁰ According to the data collected so far, 1,128 people affected in Mariana/MG were up to 18 years of age at the time of the collapse and, among these, 66 had not yet completed a year of life. The consolidated data consider nonpecuniary damages reported by 922 children and adolescents, and the process of accounting for the remaining data and families still to be registered is ongoing.

⁶¹ Non-exhaustive categories.

⁶² According to CRC (Committee on the Rights of the Child) General Comment No. 16, §31, children may be more vulnerable to the effects of abuse of their rights than adults, effects that may be irreversible or cause lifelong harm. In addition to providing that States must ensure medical and psychological assistance to those children who have suffered violations by companies. See UN Committee on the Rights of the Child (CRC), General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights, 17 April 2013, CRC/C/GC/16, Available on: <https://bit.ly/2Shj6TU>.

referring to children belonging to communities removed from their homes or children living in life-threatening areas.⁶³

After the collapse of the dam, there was a strong feeling of mourning in Bento Rodrigues, a Mariana district destroyed by the mud of tailings, and there were common reports that adolescents experienced significant changes in behavior, became more aggressive, less empathetic. The feeling of revolt was frequently and easily observed, and the psychosocial manifestations of the mourning process were clear.

At first, at the end of 2015 to 2016 I felt a lot of rebellion. A lot. A lack of care for things, feeling kind of entitled due to what they had gone through. I don't have to take care of it because they didn't take care of my house, they didn't take care of my things. They destroyed what was mine and now I can destroy what is not. I saw a lot of this in them, a lack of zeal, of care, of even caring for others. -
Professional report of education⁶⁴

Reports and testimonials show that the fear of a new collapse as occurred in the Fundão dam or the Córrego do Feijão mine dam is the new "bogeyman of those who live in risk areas."⁶⁵ Everyday loud noises, such as the ringing of school bells or the siren of ambulances have been causing dread in young people in areas affected by the dams, who interpret the sounds as sirens that announce the imminent collapse of structures.

He [his 8-year-old son] has had psychological disorders both at home and at school. I was called at school to talk about his development

⁶³ Even without specific data on those affected by dam collapses, several studies focus on the impact that disasters in general have on children's mental health, showing the extent and effects of these damages, as well as the need for professional follow-up. See

PFEFFERBAUM, Betty; JACOBS, Anne; HORN, Richard; HOUSTON, J. Brian. (2016). Effects of Displacement in Children Exposed to Disasters. *Current Psychiatry Reports*. 18. 10.1007/s11920-016-0714. Available on: <https://bit.ly/2GkB3hQ>.

KAR, N. Psychological impact of disasters on children: review of assessment and interventions. *World J Pediatr* 5, 5–11 (2009). Available on: <https://bit.ly/34j8DwD>.

BORGES, Jeane Lessinger et al. Transtorno de Estresse Pós-traumático (TEPT) na infância e na adolescência: prevalência, diagnóstico e avaliação. *Aval. psicol.*, Porto Alegre, v. 9, n. 1, p. 87-98, April 2010. Available on: <https://bit.ly/36mpdP2>.

⁶⁴ SANTOS, Marcela Alves de Lima. Eu quero minha liberdade de volta: Saúde Mental e Atenção Psicossocial junto aos Adolescentes Atingidos pelo Rompimento da Barragem de Fundão. 2018. 90 f. Master Thesis (Master Degree in Collective Health) - Graduate Program in Health Sciences, Instituto René Rachou, Fundação Oswaldo Cruz, Belo Horizonte, 2018. p. 48

⁶⁵ VALENTE, Laura, Barragens criam novo 'bicho-papão' que as crianças precisam aprender a superar. *Estado de Minas*, 7 April 2019. Available on: <https://bit.ly/34fQsrZ>.

with the principal and his teacher. There they told me that he is very quiet, thoughtful. And the principal managed, at great cost, to make him say that he is afraid of the dam [...] There was already a meeting at his school [his 3-year-old son] to talk about it too. When the school bell rings, they climb on top of the chairs saying that the dam has collapsed. So this situation brought psychological problems, yes. - **Micheline Roberta Silva, resident of Barão de Cocais/MG, mother of 2 children**⁶⁶

In these communities that face the "*terrorism of dams*," the situation of uncertainty, the lack of training and the lack of information on how to proceed with the ringing of the sirens destabilizes the emotional of young people. This is what reports a resident of Itabira (MG)⁶⁷ about the physical reaction of her 7-year-old son when the sirens went off improperly in March 2019.

When I told him to run and get in the car, he asked 'Is that what I'm thinking it is?' By the time he confirmed [that it was the siren about the collapse of dams] he began to get nervous, threw up a lot, had diarrhea, did not want to go home. He said we should go to his Grandma's house, where it's safer. - **Resident of Itabira/MG**⁶⁸

Faced with this panorama, parents and teachers of children and adolescents in areas affected by dams report the change in behavior of young people, who become more dependent and fearful:

My son [6 years old] cried a lot, said he did not want to die. I tried to reassure them, I said that we lived outside the risk area, but, still, they are stunned, they have lost autonomy. They don't want to do anything by themselves, not even get water in the kitchen or sleep in their room. - **Juscineia Gobbi de Moraes, resident of Macacos**

On the day of the siren, he [her 5-year-old son] sent me desperate audios and since then he hasn't even gone to the bathroom alone. We have already asked psychologist to accompany children, I filled out forms more than once, but so far nothing. He was smart, active, independent, but since the siren he is different. - **Bruna Cristina Demetrio, resident of Macacos**⁶⁹

⁶⁶ MENEZES, Bruno, Crianças têm sofrido com situação incerta de barragem em Barão de Cocais. O *Tempo*, 1 June 2019. Available on: <https://bit.ly/2SnIFm5>.

⁶⁷ Municipality where the exploration of iron ore by the company currently known as Vale S/A in Brazil began.

⁶⁸ On that day, the siren would have sounded mistakenly in the city of Itabira. Residents were only informed of the fact after moving out of their homes towards the relief point. Many report that they had not been trained on how to proceed in case the sirens went off. In addition, the false dam collapse alarm was heavily criticized for putting in check the company's credibility for future situations. See SILVA, Cristiane, Criança em pânico e acidente de carro: moradores de Itabira falam sobre sirenes acionadas por engano. *Estado de Minas*, 28 March 2019. Available on: <https://bit.ly/3ilXWi3>.

⁶⁹ VALENTE, Laura. Op. cit.

Displacement due to the collapse of the dam or the risk of collapse causes children and adolescents to experience a process of territory dislodging, with the hasty departure from their homes without time for any farewell ritual. Toys and memories are left behind. Multiple feelings are reported: rage at the loss of liberty in the new daily life imposed by living in the city, the feeling of losing friends, family and neighbors who moved far away, the will to remain a child able to return to his homeland.

In their testimonies, many of the young people mention a strong feeling of loss of freedom tied to the loss of rural daily life and relationship with nature. If before the day to day involved playing in the streets, picking fruit in the yard, riding a bike freely, swimming in the river and freely transit through the community where everyone knew each other, now these children and adolescents see themselves in inns and apartments in the middle of the urban center. The possibility of a life connected to nature and community is lost without choice.

Olivia was 7 years old at the time [of the collapse of the dam] and she grew up carrying pigs, playing with chickens. Olivia's passion is Bento [Rodrigues], you ask where she likes to go on weekends and she answers "to Bento" - **Monica Santos, affected by the Bento Rodrigues collapse, Mariana district / MG**⁷⁰

There is a sort of suspension of childhood. They say they will be children again when returning to Bento [Rodrigues]. [...] There is a severe social isolation arising from the difference of their former rural life to the city life. Even after 4 years, this change is still very evident. Parents themselves are also afraid to allow children to play freely or teenagers to go out, afraid of the dangers of the city. - **Maira Almeida, psychologist in Mariana / MG**⁷¹

There was freedom, nature, an inexplicable feeling. It was our place... simple and humble, but such a beautiful place. - **Irlaine, 15 years old, affected by the collapse of the Fundão Dam**⁷²

In urban centers, children and adolescents modify their behaviors and come into contact with new technologies and new ways of life, which were previously not part of their daily lives. The resident of the rural area of Barão de Cocais / MG, Amauri Gustavo, reports

⁷⁰Interview by CdH/UFMG on 22 September 2020.

⁷¹MENDONÇA, Heloísa. Children and orphans of Mariana and Brumadinho face a childhood interrupted by a tragedy far from over. *El País*, 19 September 2020. Available on: <https://bit.ly/36uU9wJ>.

⁷²PEIXOTO, Angélica et al. The future goes to school. *A Sirene*, 13rd edition, April 2017. Available on: <https://bit.ly/3cSS92f>.

about how his son experienced a rupture of his bond with nature and with the São João River:

I had a life, worked, built my house to give comfort to my family, to my children. [...] The older [son] was 5, was already learning to ride a bike, already played with his classmates. He'd go out and go alone to Grandma's. We had that trust, the neighbors, everyone knew each other. If someone else came along, everyone would inform themselves and be alert. [...] There was not even a proper internet: the boy played, rode on horseback, sometimes went to the plantation field with Grandpa and Grandma, rode a bike everywhere. Today, I live in a different neighborhood, schoolmates have moved, everything has changed. Whatever slope he sees, he says, "*Dad, let's not go there, that the dam may collapse*". To give you an idea, she took one year to ride a bike again. He took long to accommodate, was deeply traumatized. We had a deep bond with the river, swimming in it at this time in the summer; there was a stone in the river that we always sat on it, played. During daylight savings time we stayed until the twilight, we had very much of a bond with nature and [he] lost it all. Nowadays, when we go to the countryside, we take him to bathe in the river and he does not want it anymore. We call him to fish, and he doesn't want it anymore. Now it's just phone, he wakes up on the phone, just wants to watch Youtube videos, it's a new reality. The children there did not have this behavior: they really lived the life there was to live. By dawn he would play, study, go to school, a country life - **Amauri Gustavo, a resident of the rural community of Socorro, in Barão de Cocais/MG**

In addition, children displaced by mud suffer stigmatization in the urban schools to which they have moved, because of their condition as affected by dams.⁷³ Called "mud foot" and "*Marilama*" in the schools of the urban centers to which they were displaced, the children of Bento Rodrigues face the particular challenges of a childhood interrupted by the collapse of the Fundão dam. In the city of Mariana, a petition circulated demanding the departure of children and adolescents from the schools to which they were transferred, as a result of the prejudice of the residents of the region against the affected people. Now, in community-specific schools, some children report the shame and fear of bullying in walking around the city in school uniform associated with

⁷³ according to data collected by Caritas / MG, some of which previously demonstrated, 20.6% of children and adolescents in Mariana reported cases of discrimination and social stigmatization due to the condition of people affected by the collapse of the Fundão dam.

their Bento Rodrigues origins. It is a violent process of separation, exclusion and erasure of identities.⁷⁴

THE CHILDHOOD OF BRUMADINHO

Children have their own experiences and often cannot rationally elaborate what they are feeling or do not find the explanation from relatives satisfactory and begin to fall ill. Oftentimes, the symptom of depression is a constant irritability and isolation. - **Rodrigo Chaves Nogueira, psychologist of the mental health team of Brumadinho / MG.**⁷⁵

In Brumadinho, one deals with a scenario of collective mourning. The mud killed 281 people and 11 bodies remain missing. Thus, many residents of the region have lost someone or know people who have lost someone in the tragedy. The community experienced a period of successive funerals and burials, in which the city Church established protocols for fast ceremonies to be able to hold all such ceremonies.⁷⁶ Families lost several members, receiving effective news of the deaths as the bodies were found. Children and adolescents lost relatives and acquaintances overnight and began living in a scenario of insecurities, uncertainties, feelings of abandonment and loneliness.

They get scared with any noise, they think it is the dam again. The other night, they woke up to the noise of the fan, I jumped out of bed and had to calm them down. They still do not have psychological follow-up. Vale so offered, wrote down our names and said someone was coming to my house. But no one showed up. - **Josefa Josenilda Evangelista Braga, affected by the collapse of the dam in Brumadinho / MG, mother of 3 children**⁷⁷

⁷⁴ There are many reports of prejudice and bullying suffered by children affected by forced migration due to dams. The hostility of the other children reproduces the speech of adults, residents of the municipalities receiving affected people. In the case of Mariana (MG), many consider the affected people liable, albeit indirectly, for the suspension of the activities of Samarco, the employer of the city's population. In turn, in other localities the prejudice stems from the families affected receiving compensation from the mining company amid rumors that they would be "profiteers" or would have "unjustly enriched." See MENDONÇA, Heloísa. Op. cit. and RIBEIRO, Bruno; FERNANDES, Márcio. Desabrigados pela lama enfrentam preconceito e desconfiança em Mariana. *Estadão*, 29 October 2016. Available on: <https://bit.ly/3jzvvid>.

⁷⁵ MENDONÇA, Heloísa. Op. cit.

⁷⁶ GOULART, Júlia Castelo. *Memórias de Brumadinho: Vidas que não se apagam*. Brasil: Autonomia Literária, 2020.

⁷⁷ RICCI, Larissa MONTEIRO, Lilian. Children and adolescents manifest traumas after the Brumadinho tragedy. *Estado de Minas*, 24 February 2019 Available on: <https://bit.ly/3cO7scq>

The delay in finding the bodies of those deceased by virtue of the collapse and the ceremonies with closed coffins hindered the mourning process:

In Córrego do Feijão [neighborhood heavily affected by the mud tailings], a seven-year-old boy kept on building a mini barrage of clay, throwing water and collapsing it. He would repeat the scene to comprehend the situation, a very painful event. Another grabbed a picture holder with his father's photo, put it in the backpack and said " Mom, Dad is taking me to school - **Rodrigo Chaves Nogueira, psychologist of the mental health team of Brumadinho / MG**⁷⁸

According to Ana Christina Mageste⁷⁹, a psychiatrist specialized in children and adolescents and Secretary of the Department of Child Psychiatry of the Brazilian Association of Psychiatry, the main mental disorder suffered by children and adolescents in the Brumadinho situation is Post-traumatic Stress Disorder (PTSD), which can lead to sleep disorders, depressive signs, feelings of anxiety and constant alertness, as well as difficulty demonstrating affection, irritability and other symptoms. When experienced in childhood, PTSDs usually becomes a chronic disorder, there being great chances that the condition will leave marks life-enduring marks.

⁷⁸ MENDONÇA, Heloísa. Op. cit.

⁷⁹ RICCI; MONTEIRO. op.Cit.

PART II: Comments on the Draft UN binding Treaty on Business and Human Rights, 2020 version, in light of the facts of the cases presented

2.1 The definition of the term "victim" in the light of the cases presented: analysis of Article 1

Article 1. Definitions

1. "Victim" shall mean any person or group of persons who individually or collectively have suffered harm, including physical or mental injury, emotional suffering, or economic loss, or substantial impairment of their human rights, through acts or omissions in the context of business activities, that constitute human rights abuse. The term "victim" shall also include the immediate family members or dependents of the direct victim, and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization. A person shall be considered a victim regardless of whether the perpetrator of the human rights abuse is identified, apprehended, prosecuted, or convicted.

Article 1 of the Draft Treaty 2020 version sets forth a more protective definition of "victims" than the previous version, since it no longer requires the agreement with each signatory country law to the Treaty.

As a core definition of the effective protection to be conferred by the Treaty in negotiation, it is essential that the concept of "victim" be able to comprehend all persons who suffer damages in the context of business operations. In this sense, by taking on the task of defining who are the people to be considered victims, the document prevents this classification from being made by the companies themselves, a recurring practice in the context of the cases narrated. In the Fundão dam collapse, for example, the companies liable for the dam and the Federal government and Minas Gerais and Bahia state governments signed an out-of-court settlement agreement. It set the criteria for the classification of "directedly" affected individuals, without consultation with or the participation of victims, civil society and Justice Institutions (the Public Prosecutor Office or the Public Defender's Office), and without acknowledging certain categories of damages, especially immaterial damages and those arising out of a change in lifestyle.⁸⁰

The agreement also established that the Renova Foundation would be responsible for assessing the damages suffered and compensating the victims according to parameters stipulated in its Mediated Damage Assessment and Registration Programs. As already highlighted, Renova is a private foundation, maintained and controlled by the companies that caused the damages in the basin of the

⁸⁰ UNIÃO et al. TTAC. Op.cit.

Rio Doce. Therefore, in the event the party liable for damages is the same that defines who should be indemnified, there is a clear conflict, since the company tends to decrease the scope of the concept of victim and damage to be repaired.

There are different forms of harm, such as mental health, physical housing, food safety, the right to leisure, community living, and these various communities were indeed affected, even if in different ways - **André Sperling, Prosecutor at Minas Gerais Prosecution's Officer.**⁸¹

Families who live in towns affected by the risk of structural disruption, although not in the so-called “self-saving zones”, usually do not undergo compulsory dislodging. It happens that these people closely observe the traumatic and extreme situation experienced by their neighbors, live with the fear of continuing in the regions near the dams and, still, they are often not considered by the companies as direct victims.

This state of fear is already a way to get hit, even if the dam does not collapse. The company has to compensate the population of these regions for these stressful situations somehow. In Barão de Cocais, families from rural communities were evacuated, but the city center was not, as is the case with Itabirito. This generates fear, because people think: if they have removed someone, it is because there is danger, and I remain in the risk area. This fear will continue to be generated as long as the dams' emergency procedure is to only remove families that are located in the Self-Saving Zone and leave the others at risk. We need to develop more serious and efficient emergency procedures that are designed from the communities under the threat of a dam collapse longings. - **Leticia Oliveira, Coordinator of the movement hit by dams (MAB)**⁸²

The 2020 drafting of Article 1 sets forth different ways in which a person can be considered a victim. The first would be an individual who suffers damage (in any of its forms mentioned herein) in the context of corporate operations. In this concept, both children and adults can be included as direct victims of the harmful event, without distinction of degree. The second would be an indirect classification, in which the immediate relatives of the affected persons covered by the first definition or their dependents are considered. Such a consideration is an additional possibility of embracing and protecting children's rights, even if they have not been reached in the manner given in the first possibility

⁸¹ STROPASOLAS, Pedro. Para tratar rejeitos tóxicos, Vale atormenta moradores do bairro Pires, em Brumadinho. Brasil de Fato. <https://bit.ly/2EQb3KC>. Accessed 30 September 2020

⁸² ATINGIDOS (AS) antes do rompimento. Op. cit.

of the article, since it recognizes the impact that affecting the rights of parents or caregivers has on the rights of children. Also case law by the Inter-American Court of Human Rights uses this concept to protect the families of victims.⁸³ Finally, the definition encompasses people who have suffered any harm when acting to help victims or prevent them from being affected by the action in question, which is important for strengthening the actions of human rights defenders.

Given these elements, it is believed that the terms used by the 2020 Draft of the Treaty bring a more protective conception, bringing repair of human rights violations closer to reality in the context of business operations.

2.2 Prevention and non-repetition measures as a pillar of full redress: analysis of Article 6

Article 6. Prevention

1. State Parties shall regulate effectively the activities of all business enterprises domiciled within their territory or jurisdiction, including those of a transnational character. For this purpose States shall take all necessary legal and policy measures to ensure that business enterprises including but not limited to transnational corporations and other business enterprises that undertake business activities of a transnational character, within their territory or jurisdiction, or otherwise under their control, respect all internationally recognized human rights and prevent and mitigate human rights abuses throughout their operations.

2. For the purpose of Article 6.1, State Parties shall require business enterprises, to undertake human rights due diligence proportionate to their size, risk of severe human rights impacts and the nature and context of their operations, as follows:

- a. Identify and assess any actual or potential human rights abuses that may arise from their own business activities, or from their business relationships;
- b. Take appropriate measures to prevent and mitigate effectively the identified actual or potential human rights abuses, including in their business relationships;
- c. Monitor the effectiveness of their measures to prevent and mitigate human rights abuses, including in

⁸³ In *Gelman v. Uruguay*, for example, which ruled human rights violations against Maria Cláudia Garcia Iruretagoyena Gelman and her daughter, María Macarena Gelman Garcia Iruretagoyena, within “Operation Condór”, the Court ruled that the victims’ father and grandfather, respectively, should be considered a victim, considering he had his psychic integrity compromised by the facts therein. Another case in which family were considered direct victims within the ICHR was the *Herzog et al. vs. Brazil*. Then, the Court ruled on the State international responsibility for the impunity situation of the arbitrary detention, torture, and subsequent death of journalist Vladimir Herzog which took place on 25 October 1975, during the military dictatorship. The journalist’s sons, along with his wife, were considered human rights violation victims. Cf. ICHR. *Gelman v. Uruguay*. Judgment on 24 February 2011; *Herzog et al. v. Brazil*. Judgment on 15 March 2018.

their business relationships;

d. Communicate regularly and in an accessible manner to stakeholders, particularly to affected or potentially affected persons, to account for how they address through their policies and measures any actual or potential human rights abuses that may arise from their activities including in their business relationships.

3. State Parties shall ensure that human rights due diligence measures undertaken by business enterprises under Article 6.2 shall include:

a. Undertaking regular environmental and human rights impact assessments throughout their operations;

b. Integrating a gender perspective, in consultation with potentially impacted women and women's organizations, in all stages of human rights due diligence processes to identify and address the differentiated risks and impacts experience by women and girls;

c. Conducting meaningful consultations with individuals or communities whose human rights can potentially be affected by business activities, and with other relevant stakeholders, while giving special attention to those facing heightened risks of business related human rights abuses, such as women, children, persons with disabilities, indigenous peoples, migrants, refugees, internally displaced persons and protected populations under occupation or conflict areas;

d. Ensuring that consultations with indigenous peoples are undertaken in accordance with the internationally agreed standards of free, prior and informed consent;

e. Reporting publicly and periodically on non-financial matters, including information about group structures and suppliers as well as policies, risks, outcomes and indicators on concerning human rights, labour rights and environmental standards throughout their operations, including in their business relationships;

f. Integrating human rights due diligence requirements in contracts regarding their business relationships and making provision for capacity building or financial contributions, as appropriate;

g. Adopting and implementing enhanced human rights due diligence measures to prevent human rights abuses in occupied or conflict-affected areas, including situations of occupation.

4. States Parties may provide incentives and adopt other measures to facilitate compliance with requirements under this Article by small and medium sized business enterprises conducting business activities.

5. State Parties shall ensure that effective national procedures are in place to ensure compliance with the obligations laid down under this Article, taking into consideration the potential human rights abuses resulting from the business enterprises' size, nature, sector, location, operational context and the severity of associated risks associated with the business activities in their territory or jurisdiction, or otherwise under their control, including those of transnational character.

6. Failure to comply with the duties laid down under Articles 6.2 and 6.3 shall result in commensurate sanctions, including corrective action where applicable, without prejudice to the provisions on criminal, civil and administrative liability under Article 8.

7. In setting and implementing their public policies with respect to the implementation of this (Legally Binding Instrument), State Parties shall act to protect these policies from the influence of commercial and other vested interests of business enterprises, including those conducting business activities of transnational character.

Building an international apparatus that guarantees responsibility for prevention and due diligence in controlling the actions of companies and states is essential for the protection of human rights, especially those of children and adolescents. After all, human rights violations by companies are often irreversible, cause long-lasting effects and, in the case of children, hinder their development, interrupt lifestyle, cause loss of familiarity with the space, make it difficult for them to identify and integrate themselves in new environments, cut ties by distancing family and friendship networks, and cause harmful consequences to mental health, as shown in item 1.5.

Therefore, it is essential to establish strong preventive measures in a binding treaty at the international level, ensuring that states and companies adopt all necessary measures, whether legal, political, administrative or cultural, to avoid human rights violations, enforce and protect children's rights from the beginning of business operations.

According to international human rights standards, preventive actions are essential components of the right to full reparation, in its pillar of the guarantees of no repetition.⁸⁴ This means that, in addition to restitution, compensation and rehabilitation, and satisfaction, in a context where violations have already occurred, it is essential to act to change the structural situation that served as the context for such violations.⁸⁵

In the situations already reported, unfortunately, no preventive or sufficient measures have been adopted to avoid the serious setting of human rights violations. In the case of the Fundão dam, the federal criminal investigation carried out proved that dams basic safety conditions were systematically ignored by the companies and by public power inspections in its seven years of operation⁸⁶.

⁸⁴ OHCHR. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. 2005; ICHR, 2013.

⁸⁵ ALEIXO, Leticia Soares Peixoto. Implementação das sentenças interamericanas no Brasil: Desafios e Perspectivas. Belo Horizonte: Arraes Editora, 2019.

⁸⁶ It's important to highlight that, in the Mariana Case, there was no siren structure allowing the evacuation of residents in the event of collapse. For years Samarco has ignored the recommendation made by a third-party to install an alarm system, which has halted and, in some cases, prevented affected families' evacuation, which were notified by phone. Cf. SAMARCO descumpre orientação sobre alerta de sirene. *Estado de Minas*, 21 January 2016. Accessed <https://bit.ly/3jnb08c>.

generated the tragedy. The problems were present since the beginning of the undertaking, as the company did not present geotechnical nor social studies essential for carrying out the work thus ensuring the safety of the affected communities, and even so, the public power granted authorization for its construction.⁸⁷ It is worth mentioning the fact that the consultancies and audits for the drafting of impact studies and inspection of the tailings structures are carried out, in Brazil, by companies hired directly by the mining companies, which impairs the impartiality and independence of the procedure.

Even after such a disaster, almost no legislative effort was made to strengthen Brazilian Dam Security Policy, or to meet the budgetary demands and independence of the agencies responsible for granting and inspecting environmental impact works.

Only 4 years after the disaster, the crime of Córrego do Feijão mine dam collapse, in Brumadinho, was also the result of serious negligence of the public power and the business sector.

[...] the occurrence of a dam disaster of such magnitude involving the same company, Vale, is evidence of the State's failure to guarantee non-repetition. [...] ⁸⁸

Since 2017, internal company reports have shown that Vale S.A. was already aware of the structure risk of collapse being twice as high as is considered tolerable.⁸⁹ In addition, the company's industrial areas, such as the employees' restaurant and the company's headquarters were built on the mud route.

In both cases, there was no personal accountability of the company's executives, even with the strong evidence of acceptance of the risk of dam collapse

⁸⁷ At the time, the licensing process was conditioned to the compliance of conformity obligations for the work to continue. The company was requested to present, then, studies on water runoff to ensure that Vale S.A. stripping pile, Fundão dam neighbor, did not pose a threat to the work construction. The study was never made. Furthermore, dam construction was authorized without geological-geotechnical studies that could provide for the safety of the structure and without a Contingency Plan that mapped out and provided safety information to the communities affected by the venture. *In: SERRA, Cristina. Tragédia em Mariana: a história do maior desastre ambiental do Brasil. 1ª ed. Rio de Janeiro: Record, 2018. Chapter 9.*

⁸⁸ Human Rights Council. Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes. A/HRC/45/12/Add 2, §88.

⁸⁹ To learn more, see: DOCUMENTOS indicam que Vale sabia das chances de rompimento da barragem de Brumadinho desde 2017. G1, 12 February. 2019. Available on: <https://glo.bo/2SgOMZt>.

by the companies. The impunity that operates in the process of taking responsibility for Fundão and Córrego do Feijão dams collapse make it impossible to truly prevent new cases of dam break, as it builds on the collective idea of impunity and lack of redress for the violation of human rights by the economic power.

On the day that Vale collapsed in Brumadinho, my niece was with me and was upset. We were watching TV. When I saw her near my Our Lady statuette, I said, "What is this, Ana Amélia?" she said, "I'm praying to our Mama in heaven, Aunt Tê. Asking to help those people there just like us. The girl is only six years old. The company puts an end to the life of children, the elderly, puts an end to everything. They don't care, they say: it's 100 thousand reais! And that's it, does that pay for a life? It doesn't. - Terezinha Quintão, resident of Bento Rodrigues/MG⁹⁰

At the national level, several bills⁹¹ on dam safety and disaster prevention were introduced in the Brazilian Congress⁹² after the tragedies, but most of them are still in a slow or halted pace.⁹³

It was only after Brumadinho's⁹⁴ collapse that the organized civil society of Minas Gerais state achieved victory in the legislative sphere: the approval and enactment of Law nº 23,291/2019, known as "Law Mud Sea No More" (*Lei Mar de Lama Nunca Mais*). The legal text arose from a popular initiative campaign by the civil society, which gathered more than 55 thousand signatures in its favor since 2016, therefore, post-Fundão collapse.⁹⁵ It is important to emphasize that

⁹⁰ ATINGIDOS(AS) antes do rompimento. *Jornal Sirene*, 03 jun. 2019. Available on: <https://bit.ly/36npllu>.

⁹¹ To this regard, we mention Bill 2,787/2019, Bill 2,788/2019, Bill 2,790/2019, and Bill 2,791/2019.

⁹² In September 2020, Bill 550/2019, which establishes the new Brazilian Dam Safety Policy, was sent to the Presidency to be approved after approval in the Congress. Despite representing an advancement as to dam safety in Brazil, the Bill initial language, introduced by the legislative as an answer to Brumadinho disaster, has suffered important changes after submission. The mandatory requirement of mining companies to hire insurance was mitigated in the final language.

⁹³ To learn more, see: ANGELO, Maurício. Projetos de lei criados após Brumadinho estão há mais de 1 ano parados no Congresso; mudanças levantam suspeitas. *Observatório da Mineração*, 27 August 2020. Available on: <https://bit.ly/2SjpycV>.

⁹⁴ After Vale dam collapsed, in Brumadinho, the Bill, which had been shelved in the past three years, as subject to intense political pressure to have stricter rules for tailings dam construction and monitoring be approved.

⁹⁵ To learn more about the Bill, see: LEI Mar de Lama Nunca Mais: uma lei para salvar vidas e evitar tragédias. Available on: <https://bit.ly/2HOplaf>.

Although Law Sea of Mud No More⁹⁶ came into force a year and seven months ago, important legal provisions of the text are not yet in force due to lack of regulation. As an example, the lack of regulation by the Executive regarding the criteria and parameters for applying penalties to companies or for calculating and distributing fines generated by non-compliance with the law.

In addition, the legal advances aimed at guaranteeing dam safety in Brazil have already been made technically flexible in order to allow for the expansion of new enterprises, contrary to legal forecasts. This was the case with the interpretation given by the Minas Gerais Chamber of Mining Activities to the “Law Mud Sea No More” when approving the operating license for the raising of transnational company Anglo American dam, in the city of Conceição do Mato Dentro (MG).⁹⁷ The dam, which is five times larger than the one that broke in Brumadinho, is located less than 10 kilometers away from two communities: Água Quente and Passa Sete.

Several studies have already highlighted mining companies strong performance in order to focus on the state and national environmental legislation.⁹⁸ The work of the companies is through privately financing electoral campaigns⁹⁹ and lobbying, with the goal of drafting environmental legislation, changing the licensing parameters and modifying the environmental inspection itself.

In the international arena, after Vale S.A. dam collapsed in Brumadinho/MG, the International Council on Mining and Metals (ICMM), the United Nations Environment Programme (UNEP), and the Principles for Responsible Investment (PRI) launched

⁹⁶ In the same understanding was Order n° 13/2019 of the Brazilian National Mining Company (ANM), “the usage of the mining dams construction or raise method known as ‘upstream’ within State borders.” Currently, dam decommissioning deadline, meaning the full halt of the operations removing associated infrastructure, is until 15 September 2022 (for dams with volume equal or below to 12 million m³); 15 September 2025 (volume between 12 and 30 million m³), and 15 September 2027 (volume equal or above 30 million m³).

⁹⁷ RONAN, Gabriel. MP entra na Justiça para suspender alteamento de barragem em Conceição do Mato Dentro. *Estado de Minas*, 05 March 2020. Available on: <https://bit.ly/3jntchM>.

⁹⁸ For a better understanding of how mining companies influence politics in Minas Gerais, see: MILANEZ; MAGNO; PINTO. Op.cit.

⁹⁹ Private campaign financing was ruled unconstitutional by the Brazilian Supreme Court in 2015 in ruling the Direct Action for the Declaration of Unconstitutionality n° 4650. Despite, most environmental laws in effect in Minas Gerais are from earlier.

a review of tailings management standards.¹⁰⁰ As non-binding standards, however, these measures are insufficient to ensure proper protection for victims of mining-affected areas, and are even less protective than national legislation on the subject, since it does not provide for the obligation to decommission dams built in the same way of those that collapsed in Mariana and Brumadinho, upstream dams.¹⁰¹

Understanding the Brazilian legislative panorama today, the insufficiency of international measures to ensure prevention, and truly protective measures that guarantee the non-repetition of disaster-crimes such as those narrated becomes essential to have a binding international treaty on human rights in companies. Positive prevention measures should not be initiatives that depend solely on the efforts of the countries' internal legislation, voluntary adherence parameters, or the free and unmonitored will of business organizations, but should add up to the efforts of the entire international community to make them happen.¹⁰²

The Myth of Economic Dependence

How does the relationship between economy and mineral extraction affect future generations?

Brazilian mineral exploitation began in colonial times, by mining wealth from underground and sending it abroad. In the 20th Century, there was a great expansion of Brazilian ore production, also driven by foreign interests. The organization of the current multinational Vale S.A. is from this era aiming to explore regions of the state of Minas Gerais in order to provide iron ore to the Allied nations in World War II. Furthermore, the beginning, in 1980, of the Grande Carajás project, which

¹⁰⁰ Global Tailings Review, international standards for the safer management of tailings storage facilities. To learn more, see: <https://bit.ly/2HS3Vid>.

¹⁰¹ To learn more about the criticism towards Global Tailings Review, check Earthworks document direct action for the declaration of unconstitutionality: <https://bit.ly/3cMwM2R>.

¹⁰² OEIGWG CHAIRMANSHIP SECOND REVISED DRAFT 06.08.2020: Legally Binding Instrument to Regulate International Humans Rights Law, The Activities Of Transnational Corporations And Other Business Enterprises. Available on: <https://bit.ly/2Sjqj62>.

created the largest open-pit iron mine in Brazil in the state of Pará, was motivated by the need to supply Japanese steel mills.¹⁰³

Currently, the Brazilian export tariff is characterized by the reduction of diversification and growing dependence on the trade balance in a few products, among them, mineral products.¹⁰⁴ According to the report of the Brazilian Mining Institute (Ibram) in 2019, the mineral extraction industry represents 1.4% of all Brazilian Gross Domestic Product (GDP).¹⁰⁵ The issue to be discussed is: is it justified to depend on the Brazilian mining industry? How do these alleged economic benefits revert to the territory and the population as a whole?

A deeper analysis shows how fragile the internal revenue is faced with the mining activity. It can be said that the current configuration of the Brazilian mining activity exhausts "the (natural) wealth capacity of the state rich in natural resources, without giving it any financial compensation (for the tax purposes)".¹⁰⁶ Take for example the fact that the export of primary products such as iron ore has been exempt from taxation on the circulation of goods (ICMS) since 1996, an important source of revenue for the states.¹⁰⁷

In addition to the flexibility of internal tax collection on mining activities supported by legal forecasts, transnational companies also make strategic use of the judiciary, in order to avoid the due economic compensation of their actions:

¹⁰³ The Carajás complex was built from Japanese and European funding. The communities denounce its destruction caused by the articulation of a large project, with the interruption of daily life through the implementation of a railroad of almost 900 kilometers in the territories, as well as the destruction of the environment. To learn more, see the report CAMPELO, Lilian. Projeto Grande Carajás desestrutura comunidades e territórios indígenas. Brasil de fato. 19 May 2018. Available on: <https://bit.ly/3l84cMi>.

¹⁰⁴ CARVALHO, Alba Maria; MILANEZ, Bruno; GUERRA, Eliana Costa. Rentismo-Neoextrativismo: a inserção dependente do Brasil nos percursos do capitalismo mundializado (1990-2017). In: RIGOTTO, Raquel Maria et al (org.). *Tramas para a justiça ambiental: diálogos de saberes e práxis emancipatórias*. Available on: <https://bit.ly/2F2J0b3> <https://bit.ly/2F2J0b3>.

¹⁰⁵ INSTITUTO BRASILEIRO DE MINERAÇÃO. Relatório anual de atividades (July 2018 - June 2019). Available on: <https://bit.ly/33wTpoH> <https://bit.ly/33wTpoH>.

¹⁰⁶ To learn more see: SILVA, Fernanda Alen Gonçalves. *Romper com a maldição da mineração: um caminho a ser trilhado*. 2017. Available on: <https://bit.ly/3cYa33R> <https://bit.ly/3cYa33R>.

¹⁰⁷ The Kandir Law (Supplementary Law nº 87/96) exempts from the Tax on the Circulation of Goods and Services (ICMS) any products, primary or manufactured, destined for export. The estimate is that, between 1996 and 2018, Brazilian states have stopped collecting 812.5 billion reais due to legal flexibilization. In turn, most of the Brazilian ore is destined for export.

Vale owed more than R\$800 million to CFEM¹⁰⁸ in Carajás (PA). Vale also owes more than R\$ 400 million in phosphate exploration and Anglo America owes more than R\$ 400 million to CFEM in the exploitation of Niobium, in Catalão, Goiás state. They use the judiciary, and this drags on for years and years. Meanwhile, they do not pay - Marcio Zonta, coordinator of the Movimento para Soberania Popular na Mineração (*Movement for Popular Sovereignty in Mining*) (MAM)¹⁰⁹

It is important to note that China is Brazil's largest trading partner for the export of mining products today, as 61% of the iron ore produced is sent directly to the country. Nevertheless, 81% of the Brazilian export volume is sold to Switzerland. According to the Institute of Fiscal Justice, this happens because the mining companies practice export triangulation to avoid taxes, that is, they sell the extracted mineral products to their own subsidiaries located in tax havens at a lower price than that practiced in the market. Its subsidiaries resell the products to final consumers at higher prices. The operation is merely financial, in that the product is sent directly from Brazil to the final buyer. The situation becomes more serious when one notices that 70% of all Brazilian foreign trade in the mining industry uses this type of practice¹¹⁰ that hides the real value of the products practiced in the market, on which the activity's royalties should be charged. In this sense, it would be important to create international mechanisms that prohibit, inspect and sanction the practice of tax avoidance.

It is also important to emphasize that the complex business structure of companies that operate at a transnational level cannot represent an obstacle to the execution of due diligence measures.

¹⁰⁸ According to Article 20 of the Constitution of the Brazilian Republic, mineral resources, including those of the subsoil, are property of the Federal Government. In order to reward the Federal Government for their exploitation, the legislation foresees the collection of taxes on the activity and the obligation of environmental restoration. It is CFEM - Financial Compensation for the Exploration of Resources.

¹⁰⁹ GUIMARÃES, Juca. Minas Gerais perdeu em média R\$ 1 bilhão por ano em isenção de impostos da mineração. *Brasil de Fato*, 12 February 2019. Available on: <https://bit.ly/3ihqI3b>.

¹¹⁰ Data obtained in a study conducted by the Latin American Network on Debt, Development and Rights (Latindadd) in partnership with the Institute of Fiscal Justice (IJF). Another common practice of the companies is the underreporting of the amount of ore extracted and the amount collected in the economic activities, in order to escape the charges. This is facilitated by the fact that the companies themselves are responsible for making the declaration of their production, without controlling or checking by the state, which suffers with the lack of personnel. For more information, please check: FOWLER, Naomi. 'Terrible Transactions': How much does mining benefit the Brazilian state? *Tax Justice Network*, 22 July 2019. Available on: <https://bit.ly/3nctnPI>.

diligence and fair reparation for human rights violations committed by companies. In this sense, it is essential to define the incidence of the treaty on “*Business activities of a transnational character*” encompassing actions “conducted through affiliates, subsidiaries, agents, suppliers, partnerships, joint venture, beneficial proprietorship, or any other structure or contractual relationship as provided under the domestic law of the State, including activities undertaken by electronic means”, set forth by article 1.5 Of the Draft Treaty.

The Brazilian municipalities that receive money from mining royalties have specific problems linked to their economic dependence on mining activity, without great incentives for the diversification of their economy. The so-called mining cities fear that the legacy left by mining in the event of closure or suspension of activities is economic destabilization and high unemployment rates,¹¹¹ which occurred in the municipality of Raposos/MG after the scarcity of the region's mine.¹¹² The situation of alleged dependence and risk of withdrawal from economic activities often makes local power connivance with mining practices that put at risk the interests of the population, the environment, and the water security of the place. Within this supposedly asymmetrical power relationship, the perception of territory sovereignty is necessary for negotiations that are more beneficial to the municipality, in that even if the ore exploration company threatens to leave the territory or close operations, the ore will remain concentrated in that region, a fact that should offer better bargaining power that does not materialize in practice.

In this sense, the predatory extraction of mineral wealth, so as to cause serious environmental and social damage and, also, without the proper economic compensation to the affected localities, harms children and adolescents and causes generational impacts. This is because

¹¹¹ To learn more about local mine-dependence in Brazil, read the paper by GUIMARÃES, Carolina Lucinda; MILANEZ, Bruno. *Mineração, impactos locais e os desafios da diversificação: revisitando Itabira*. *Desenvolvimento e Meio Ambiente*, v. 41, p. 215-236, 2017. Available on: <https://bit.ly/3nhEnv9>.

¹¹² In 2003, AngloGold Ashanti, a South African multinational, closed its activities at the Espírito Santo mine. The city, which depended totally on mining for the generation of jobs since its emergence, became a kind of “dormitory city”, in which the residents only sleep, forced to look for jobs in other municipalities in the region. To know more, see the report LOPES, Raíssa. *Raposos, uma cidade que a mineração criou e destruiu*. *Brasil de Fato*, 19 March 2019. Available on: <https://bit.ly/34bVoxU>.

extracted wealth is a scarce, finite resource that leaves impacts that extend over time:

The aggravating factor for mining companies is that they work with a non-renewable resource that legally belongs to the entire society. In other words, what a mining company extracts, and exports disappears. It can no longer be extracted; it is a unique harvest. Future generations will no longer be able to exploit this resource. - **Dão Real Pereira dos Santos, director of institutional relations of the Institute of Fiscal Justice and auditor of the Federal Revenue Service**¹¹³

In the mining cities, many groups fight for building economic alternatives to mining and greater popular control over the income from mineral exploration of the territory, in order to guarantee the socio-environmental preservation and the interruption of the processes of forced migration and water contamination. They also denounce the terrible working conditions of the sector, which lives in a "constant state of accident", capable of even breaking the currency of the work and reaching families and communities.

In turn, in regions threatened by mining projects, the struggle for sovereign territories, free from mining, is articulated. This is a critical resistance, which understands that the existence of the mineral resource in a certain region should not necessarily imply in its extraction. In this sense, several movements and communities defend that human lives, local interests and the environment be placed first in decisions about the territory.¹¹⁴

In such a way, Local communities should not be forcibly dislodged by predatory mining processes, and the right to effective consultation of affected communities within a territory, connected to it by links of tradition and history, must remain. Thus, although the wording of the second version of the draft treaty guarantees, in its Article 6.3.c, the conduction of "meaningful consultations with individuals or communities whose human rights can potentially

¹¹³ MELLO, Alessandra. Artificio fiscal de mineradoras leva US\$ 2 bilhões dos cofres de Minas. Estado de Minas, 07 August 2017. Available: <https://bit.ly/2Gieier>.

¹¹⁴ This struggle to resist mineral extraction can be exemplified by the articulation of the residents of the city of Caldas (MG) that, with the publication of Municipal Law n° 1,973/2006, created an Environmental Protection Area of Ecological Sanctuary of Pedra Branca and imposed restrictions to local mining activity. The legislative competence of the municipalities to determine mining exploitation rules was endorsed by the Supreme Court. In this regard, see: ARE 1051716, Reporting Justice: Min. Dias Toffoli, Individual Ruling, judgment on 25 June 2018, DJe 27 June 2018. Available on: <https://bit.ly/2SoOWxS>.

be affected by business activities”, with emphasis on the classification of children as a special attention group, it is essential that the wording of this treaty provides for the right to "meaningful and effective consultations," with due respect and sovereignty of the affected communities regarding economic decisions about their territories.

2.3 Access to justice guarantees for victims of human rights violations by transnational corporations: analysis of Article 7

Access to justice right is recognized as an imperative norm of international law¹¹⁵, requiring not only the formal existence of judicial remedies, but that they be simple and capable of guaranteeing material justice in the specific case. In this sense, the 2020 Draft of the binding treaty includes, in its article 7, the provision that:

Article 7. Access to Remedy

1. States Parties shall provide their courts and State-based non-judicial mechanisms, with the necessary jurisdiction in accordance with this (Legally Binding Instrument) to enable victims’ access to adequate, timely and effective remedy.
2. State Parties shall ensure that their domestic laws facilitate access to information, including through international cooperation, as set out in this (Legally Binding Instrument), and enable courts to allow proceedings in appropriate cases.
3. State Parties shall provide adequate and effective legal assistance to victims throughout the legal process, including by:
 - a. Making information available to victims of their rights and the status of their claims;
 - b. Guaranteeing the rights of victims to be heard in all stages of proceedings;
 - c. Avoiding unnecessary costs or delays for bringing a claim and during the disposition of cases and the execution of orders or decrees granting awards;
 - d. Providing assistance to initiate proceedings in the courts of another State Party in appropriate cases of human rights abuses resulting from business activities of a transnational character; and,
 - e. Ensuring that rules concerning allocation of legal costs at the conclusion of legal proceedings do not place an unfair and unreasonable burden on victims.
4. States Parties shall ensure that court fees and other related costs do not become a barrier to commencing proceedings in accordance with this (Legally Binding Instrument) and that there is a provision for possible waiving of certain costs in suitable cases.
5. State Parties shall ensure that the doctrine of forum non conveniens is not used by their courts to dismiss legitimate judicial proceedings brought by victims.
6. State Parties may, consistent with the rule of law requirements, enact or amend laws to reverse the burden of proof in appropriate cases to fulfil the victims’ right to access to remedy.
7. State Parties shall provide effective mechanisms for the enforcement of remedies for human rights

¹¹⁵ ICHR. Goiburú Case, §131; ICHR. Massacre of Pueblo Bello (Merits). Opinion of Judge A. Cançado Trindade, §64.

abuses, including through prompt execution of national or foreign judgements or awards, in accordance with the present (Legally Binding Instrument), domestic law and international legal obligations.

Five years after Fundão dam collapsed, the feeling that remains in the entire population of the Rio Doce Basin is that of injustice. As pointed out in the account of the facts, even after so long, the families are still waiting to build their new houses, they fight for dignified compensations, for the right to resume their lifestyle, for an active and decisive participation in the reparation process and for reliable information about the picture of systemic environmental contamination.

Many are afraid to die and not see this indemnity. [...] [they] have no perspective, no hope that it will be the right way. You don't see a deadline to finish it, forget it. It seems to be something that will be for the rest of your life. - **Mônica Santos, affected individual from Bento Rodrigues.**¹¹⁶

Damage reparation process, in the case of the Rio Doce Basin, is led by the own companies causing the damages, through a foundation created by them with the consent of the Government, based on a first settlement on the case (TTAC 2016).¹¹⁷ According to the document, the objective of the so-called Renova Foundation is to create mechanisms and actions necessary for the full reparation of those affected. The main stakeholders, the people affected, were not consulted nor heard when drafting this agreement, but only relegated to a minority representation on the Advisory Board of the entity then created.¹¹⁸

This problem led to the request by the Federal Public Prosecutor's Office to annul the confirmation of the TTAC, which was accepted by the Federal District Court for the 1st Region, but did not prevent the Foundation from continuing to act. Since then, there have been numerous lawsuits, whether individually brought by the victims or public interest litigations brought by Justice Institutions: Federal Public Prosecutor's Office, Public Prosecutor's Office of Minas Gerais, Public Prosecutor's Office of Espírito Santo, Federal Public Defenders, Public Defenders of Minas Gerais and Espírito Santo.

¹¹⁶ Interview by CdH/UFMG on 22 September 2020.

¹¹⁷ UNIÃO et al. TTAC. Op. cit. and ACP nº 0069758-61.2015.4.01.3400

¹¹⁸ Of the 17 members of the Renova Foundation's Advisory Board, only 5 would be representatives of the affected communities. UNIÃO et al. TTAC. Op. cit. Clause 219.

within the main Public Interest Litigation¹¹⁹ filed by the Federal Public Prosecutor's Office.

In this case, numerous agreements were signed between the parties to the process in an attempt to ensure full reparation of the damages caused to the people affected and to the environment due to Fundão dam collapsing. Throughout this process, the agreements provided for a complex governance arrangement of the reparation process, aiming to expanding the participation of the people affected in the decision-making processes and ensuring that studies are carried out in relation to the companies causing the damage.¹²⁰

It occurs that, even though in this "new" structure, Renova Foundation continued responsible for the execution of the repairs. Although its Advisory Board¹²¹ was restructured and affected communities commissions were created along the Rio Doce Basin, representation of the affected communities remained minor and insufficient to guarantee significant influence in repairing the damages. The fact is that, on the brink of the 5-year rupture of Fundão dam, even the most important court agreement signed by the parties and ratified by the judge (the so-called TAC-Settlement Agreement), continues to be blatantly disregarded by the companies, since they refuse to hire the so-called independent technical advisors for the affected communities.¹²² Such a position is, at the very least, contradictory, since the companies themselves have taken on the responsibility and legal obligation of such contracting, by the aforementioned agreement.¹²³

This impasse has been going on for more than two years, which led the justice institutions to request, on September 30, 2020, the procedural process and the fulfillment of the commitments assumed by the companies in the scope of the lawsuit to resume.¹²⁴

¹¹⁹ Public Interest Litigation 0023863-07.2016.4.01.3800, of 02 May 2016. Filed by the Federal Prosecution's Office before the 12th Court for Belo Horizonte. Available on <https://bit.ly/2EV3brc>

¹²⁰ UNIÃO et al. Termo de Ajustamento de Conduta (TAC-Settlement Agreement), signed on 25 June 2018. Available on: <https://bit.ly/36tDRUG>.

¹²¹ Ibid., Clause 48.

¹²² The independent technical advisors were established in the Settlement Agreement (TAC) as entities to be chosen by the affected people themselves, funded by the defendant-companies, but totally necessary in relation to them. The objective is to make effective the participation of the affected population, an essential condition for the legitimacy of the decisions related to the damages reparation process, respecting the principle of centrality of victims.

¹²³ The selection process has been carried out by the affected population and confirmed in court, but only five advisors have been hired so far, leaving 16 to be implemented.

¹²⁴ CASO Samarco: Ministérios Públicos e Defensorias Públicas pedem retomada do trâmite da ação de R\$ 155 bi suspenso desde 2018. Federal Prosecutor's Office, 01 October 2020. Available on: <https://bit.ly/2GsYuWf>.

The picture is one of a large number of actions in a context of governance that is neither clear nor effective for the victims and, unfortunately, in the criminal sphere too, accountability has not been obtained to date.

Following the Mariana and Brumadinho disasters, no corporate executive of Vale, BHP or Samarco stands convicted of criminal conduct, a travesty of justice suggesting some in Brazil are indeed above the law.¹²⁵

The case of the Rio Doce is emblematic in terms of ineffective access to justice, since, as reported in the first session of this document, hundreds of families are still waiting for resettlement, thousands of people are living with the uncertainty about environmental contamination of the region, and compensation follows parameters unilaterally imposed by the Renova Foundation.

In this regard, it is important to point out that the Brazilian Government itself, when it signed an agreement that foresees that the foundation controlled and maintained by the defendant-companies would be responsible for coming out with the indemnization parameters and determining the people's eligibility for a Mediated Indemnity Program, conducted by itself, was colluding with this situation of victims' helplessness.¹²⁶ The situation is problematic, as it puts victims in a theoretical equality position of forces in out-of-court negotiation regarding compensations, which does not happen in practice.

So far, the company's matrix is used, so it can be seen that there is no justice. The people who were compensated was for the value that the companies stipulated, or you accept or go to justice, and we know that it takes time. - **Mônica Santos, affected individual from Bento Rodrigues.**¹²⁷

Renova is guided by the criteria of compensation for damages called "direct impact", not considering, however, the countless immaterial damages and thus preventing the realization of a real compensation of the negative effects caused.¹²⁸ The matrix used by Renova systematizes the damages starting from three aspects: recognition, valuation, and verification, not clarifying the

¹²⁵ Human Rights Council. Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes. A/HRC/45/12/Add 2, §85

¹²⁶ UNIÃO et al. TTAC. Op. cit. Clauses 34 and 35.

¹²⁷ Interview made by CdH/UFMG on 22 September 2020.

¹²⁸ FUNDAÇÃO Getulio Vargas. Análise das Matrizes de Danos no Contexto da Reparação do Desastre do Rio Doce. Fundação Getulio Vargas. – Rio de Janeiro; São Paulo: FGV, 2019. P. 39-41. Available on: <https://bit.ly/3n7yDDP>.

methodology used, not including the victims in its elaboration process and often requiring impossible evidence.¹²⁹

Renova has an exaggerated attachment to documentary evidence and ignores the characteristics of the people who were affected. There is no way of arriving in a riverside community and asking for a professional fisherman's license, or a record of the boat he has. - **Rafael Mello, Public Defender of Espírito Santo.**¹³⁰

That is why the provision in Article 7.6 of the current version of the draft binding instrument is so essential. Reversing the burden of proof in situations of human rights violations by transnational corporations is an essential mechanism for ensuring access to justice for victims, and the current wording of the article is vague when it refers to "appropriate cases". Who will be in charge of determining which cases are appropriate?

In cases of tailings dam collapses, for example, affected communities are absolutely hypothesis-sufficient compared to large corporations, both economically and technically. The majority of these populations are made up of self-employed or informal workers, farmers, indigenous peoples, and small traders, and it is excessively onerous for them to hire expertise, technical studies, or even to require documentary evidence on certain issues.¹³¹ In many situations, reporting the victim and his or her community environment is the only possible evidence to demonstrate the damage suffered.¹³² In this sense, it is important to recognize the criterion of self-declaration of the damages suffered by victims and the reversal of the burden of proof.

¹²⁹ *Ibid.*, p. 53.

¹³⁰ TAJRA, Alex. Indenizações sem pagar e ninguém preso: 3 anos após a tragédia de Mariana. *UOL*, 06 fev. 2019. Available on: <https://bit.ly/34eBVN4>.

¹³¹ FUNDAÇÃO Getúlio Vargas. Impacto do Rompimento da Barragem de Fundão sobre a Renda Agregada de Minas Gerais e Espírito Santo. Fundação Getulio Vargas. Rio de Janeiro; São Paulo: FGV, 2019. 87 p. Available on: <https://bit.ly/3cNknLI>.

¹³² This situation is also present in the case of families that have been evicted from their homes due to the risk of other dams collapsing, as in Barão de Cocais. According to the interviewee, Amauri Gustavo, there is great difficulty in proving the material damage suffered. Although the company requests that those affected present invoices or other proofs of assets, many of the families do not have this type of documentation due to the informality of the work carried out. In addition, Amauri reports that looters have plundered the community's assets. Goods such as television sets and household appliances would have been lost, as well as assets of inestimable value, such as family belongings. Cf. Interview carried out by CdH/UFMG on 15 September 2020.

Brazilian legislation already determines the reversal of the burden of proof in cases related to consumer's right,¹³³ however, in the cases narrated, case law has not been consistent about this recognition. In individual cases related to Fundão dam collapse, for example, the Court of Appeals of Espírito Santo has granted the reversal, either because of the recognition of a consumer relationship (consumer by equivalence), or because of the principles of environmental law that transfer to the supplier of services/products and cause the environmental damage the burden of proving that their conduct did not give rise to risks to the environment and, consequently, to the fishermen / residents / exploiters of the region and any injured. This reversal has been limited, in a large number of cases, to the production of proof of "environmental damage and the consequences that such damage has generated in the areas affected," with the affected persons being required to demonstrate any individual damage.¹³⁴ The most favorable precedents have recognized the possibility of reversing the burden of proof in the face of the candor of the affected individual allegations,¹³⁵ but the scenario is not, therefore, one of legal certainty.

In the context of public interest litigations, specifically concerning the communities of the city of Mariana/MG, an agreement was approved that recognized the reversal of the burden of proof, which would be an advance.¹³⁶ However, the people affected still report that, at this time, Renova Foundation continues to disregard this agreement and the evidence produced by the communities, in addition to using only its own parameters in the compensation proposals.

[...] In the aftermath of the disaster, BHP and Vale rushed to create the Renova Foundation to provide the affected communities an effective remedy. Unfortunately, the true purpose of the Renova Foundation appears to limit liability of BHP and Vale, rather than provide any semblance of an effective remedy.

¹³³ BRASIL. Law nº. 8,078, of 11 September 1990. Código de Defesa do Consumidor. Dispõe sobre a proteção do consumidor e dá outras providências. Articles 6, VIII, and 17. Available on: <https://bit.ly/2SeAQPA>.

¹³⁴ TJES. Interlocutory Appeal nº 0008562-42.2019.8.08.0030. 2ª Civil Court. Reporting Judge Carlos Simões Fonseca. Date of Adjudication: 12 November 2019.

¹³⁵ TJES. Interlocutory Appeal nº 0002094-65.2019.8.08.0030. 4ª Civil Court. Reporting Judge Wallace Pandolpho Kiffer. Date of Adjudication: 24 June 2019.

¹³⁶ Public Interest Litigation 0400.15.004335-6, of 10 December 2015. Filed by the Prosecution's Office of Minas Gerais.



Institutional shortcomings are well-documented in literature and litigation.[...] ¹³⁷

That is why it is so important that victims have the right to technical, multidisciplinary, and independent advice, which can help them in opposing parameters and include them in the debate. The current wording of item 3 of Article 7 is important in this matter and precisely because it refers to the guarantee of legal assistance, available information and, especially, participation.

In the case of Brumadinho, it has been almost two years from the disaster and there are also obstacles to full redress, despite the difference in governance in relation to the Rio Doce case. In Brumadinho, soon after the dams broke, communities and justice institutions mobilized against the creation of a foundation, as they did in the previous case. There are also countless legal actions, both class actions and individual ones, regarding the socioenvironmental and socioeconomic reparation measures. In relation to individual indemnifications, an agreement was reached between the Public Defender's Office of Minas Gerais and Vale, establishing parameters for out-of-court agreements. ¹³⁸ According to the Public Defender's Office, the objective of the agreement was to guarantee that the families could access the indemnifications without having to wait as long as in the previous case. However, there was a lot of criticism about this negotiation, since, once again, the parameters of indemnity did not include the participation of those affected and the other institutions of justice, such as the Public Prosecutor's Office, were not consulted and informed about this negotiation in parallel with the public interest litigation. ¹³⁹ The fact is that, by April 2020, about 273 families had already signed out-of-court settlements with the support of the institution. ¹⁴⁰

The agreement between the Public Defender's Office and Vale in Brumadinho case was also applied to the situations of families who were evacuated from their homes in Barão de Cocais. However, residents confirm the difficulties and pressures that companies impose on families to accept low levels of compensation.

¹³⁷ Human Rights Council. Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes. A/HRC/45/12/Add 2, §87.

¹³⁸ PUBLIC Defender's Office of the Federal Government et al. Preliminary Settlement Agreement (TAP), signed in 2019.

¹³⁹ LOVISI, Pedro. MPMG repudia acordo da Defensoria Pública com a Vale sobre indenizações de Brumadinho. *Estado de Minas*, 09 April 2019. Available on: <https://bit.ly/3n51zMS>. and AMARAL, Carlos. Brumadinho: ação coletiva vale mesmo após acordo extrajudicial, diz Defensoria de MG. G1, 08 April 2019. Available on: <https://glo.bo/36rbG8O>.

¹⁴⁰ SOUZA, Renata Martins de. Defensoria e solução extrajudicial de conflitos após a tragédia de Brumadinho. Available on: <https://bit.ly/34fhTSD>.

In Brumadinho, besides public interest litigations and individual actions, there are several labor lawsuits in progress due to the fact that the collapse has also configured one of the largest collective labor accidents in the country. In January 2020, an agreement between the Labor Public Prosecutor's Office and Vale was approved by the Labor Courts, establishing compensation for workers who survived and the families of workers who died in the collapse. The public interest litigation commenced by the Labor Public Prosecutor's Office shows the company great disregard for labor safety, an example being the great risk that the location of the cafeteria and administrative center, which were just below the dam, represented for the employees.¹⁴¹

Finally, the main issue related to extrajudicial negotiations between affected families and companies may be the disparity of forces between the parties, with families reporting feelings of coercion and, in many cases, they end up accepting values that do not reflect the damage suffered, either by wear and tear or disappointment in relation to the judicial channels, or by finding themselves in a situation in which they prefer to try to overcome the trauma and have some life project again, avoiding reliving their damage at each agreement or meeting. Many times, even negotiations between justice institutions (Public Prosecutor's Offices and Public Defenders) and companies are unequal in terms of balance of power. The institutional challenge in these cases is to ensure access to justice for victims, in the face of the economic power of business and without negotiating fundamental and unavailable rights.¹⁴²

An international instrument that acts in this direction and binds the State to the need for adequate, effective and participatory access to justice is very important to support those affected and to make real reparation for the damage to victims of human rights violations.

¹⁴¹ Public Interest Litigation 0010080.15.5.03.0142, of 25 March 2019 Filed by the Labor Prosecution's Office. Available on: <https://bit.ly/2SnsghP>

¹⁴² LASCHEFSKI, Klemens; ZHOURI, Andréa. Rompimento de barragens em Mariana e Brumadinho (MG): Desastres como meio de acumulação por despossessão. *AMBIENTES*. Volume 2, Number 1, 2020, p 108.

2.3 Protection of the rights of children and adolescents under Brazilian law

Article 4. Rights of Victims

[... victims shall:]

d. be guaranteed the right to submit claims, including by a representative or through class action in appropriate cases, to courts and non-judicial grievance mechanisms of the State Parties; [...]

According to Brazilian legislation, the legal protection of children and adolescents is done through representation or assistance. Thus, although under the age of 18, children and adolescents have the capacity to be a part (*legitimatío ad causam*), but not the procedural capacity (*legitimatío ad processum*). Representation is available to those who are absolutely incapable, considered those under 16 years of age; while assistance is available to those between 16 years of age and under 18 years of age 18.¹⁴³ Therefore, parents or representatives can go to court on behalf of the children or adolescents they represent or assist.

Children and adolescents can also be protected by the filing of a public interest litigation by those legitimated to do so: Public Prosecutor, federated entities, associations, Public Defender's Office. The public interest litigation is one of the mechanisms established by the Brazilian Constitution to protect fundamental rights, having as objective the responsibility for damages to the environment, to the consumer, to goods and rights of artistic, aesthetic, historical, tourist and landscape value, to diffuse and collective interests, to public and social patrimony, among others, covering therefore the interests also of children affected by the violations.

2.5 The risk of being barred by the statute of limitations: analysis of article 10 in the light of the facts of the cases narrated

Article 10. Statute of limitations

1. The State Parties to the present (Legally Binding Instrument) undertake to adopt any legislative or other measures necessary to ensure that statutory or other limitations shall not apply to the prosecution and punishment of all violations of international law which constitute the most serious crimes of concern to the international community as a whole.

2. Domestic statutes of limitations applicable to civil claims or to violations that do not constitute the most serious crimes of concern to the international community as a whole shall allow a reasonable period of time for the investigation and commencement of prosecution or other legal proceedings, particularly in cases where the violations occurred in another State or when the harm may be identifiable only after a long period of time.

¹⁴³ BRAZIL. Civil Code. Articles. 3, 84, 384, 426.

The tenth article of the 2020 version of the draft binding instrument, by providing the need for domestic legislation to guarantee a reasonable period of time for investigations and the commencement of procedures for holding companies liable for the actions taken and damages caused, maintains a closer dialogue with the cases reported. This is because, especially in the case of Fundão dam collapse, in which almost 5 years have already passed, the communities are very afraid of being helpless due to the passage of time and consequent statute of limitations.

In Brazil, as a rule, the statute of limitations for individual lawsuits is 3 years¹⁴⁴. However, Brazilian case law has not reached an understanding on respect for the influence of the class action in the term for filing the individual action and, as already narrated, there are countless class actions filed especially by the Public Prosecutors in this case. A first understanding considers that the class action does not interrupt or suspends the time for filing the individual action. The second understanding considers that the filing of the class action suspends the statute of limitations on the individual action. Finally, the most beneficial understanding says that there is no statute of limitations for remedying environmental damages, therefore, damages caused to third parties, derived from environmental violations, would suspend the statute of limitations until remedy to the environment has been adjudicated.¹⁴⁵

There are also those who consider applying the 5-year statute of limitations, according to consumer law, to the cases of dam collapses, since the affected communities would be consumers by equivalence;¹⁴⁶ or, even, the impossibility of starting the term, since the damage would be continued. It is worth mentioning that, regarding the ones under 16-year old, for being absolutely incapable in the terms of the legislation, statute of limitations is tolled¹⁴⁷. In the face of such uncertainty, since 2018, Brazilian Populations along the Rio Doce Basin are worried about the issue.

In an attempt to put an end to such collective anguish, an agreement was signed in the District of Mariana reaffirming the obligation of the companies to indemnify those affected and expressly establishing the suspension of the statute of limitations for the assessment of individual or class action liquidations, with the term starting on the date of approval of the agreement

¹⁴⁴ BRAZIL. Civil Code. Article 206, §3º.

¹⁴⁵ MENECHIN, Guilherme de Sá. Direito de Entender: Prescrição - Ação coletiva e ação individual. *Jornal A Sirene*. Available on: <https://bit.ly/2SrZXDK>.

¹⁴⁶ BRAZIL. Consumer Protection Code. Article 27.

¹⁴⁷ BRAZIL. Civil Code. Articles 198, I, and 3º.

(October 2, 2018).¹⁴⁸ In a near sense, in the scope of the public interest litigation that is being processed in the Federal Justice, a term of commitment was signed on October 26, 2018, stipulating that the rights and claims of the affected persons shall not be barred by the statute of limitations on the date of November 5, 2018.¹⁴⁹

Therefore, it is clear that the Treaty needs to be drafted stating the need for not only broad, but also clear, statute of limitations, in order to make the issue less controversial and to ensure that those affected by the harmful actions of transnational companies have their rights protected.

2.6 Jurisdiction: the importance of Article 9 in light of the cases narrated

Article 9. Adjudicative Jurisdiction

1. Jurisdiction with respect to claims brought by victims, irrespectively of their nationality or place of domicile, arising from acts or omissions that result or may result in human rights abuses covered under this (Legally Binding Instrument), shall vest in the courts of the State where:

- a. the human rights abuse occurred;
- b. an act or omission contributing to the human rights abuse occurred; or
- c. the legal or natural persons alleged to have committed an act or omission causing or contributing to such human rights abuse in the context of business activities, including those of a transnational character, are domiciled.

The above provision does not exclude the exercise of civil jurisdiction on additional grounds provided for by international treaties or national law.

2. Without prejudice to any broader definition of domicile provided for in any international instrument or domestic law, a legal person conducting business activities of a transnational character, including through their business relationships, is considered domiciled at the place where it has its:

- a. place of incorporation; or
- b. statutory seat; or
- c. central administration; or
- d. principal place of business; or

3. Where victims choose to bring a claim in a court as per Article 9.1, jurisdiction shall be obligatory and therefore that courts shall not decline it on the basis of *forum non conveniens*.

4. Courts shall have jurisdiction over claims against legal or natural persons not domiciled in the territory of the forum State, if the claim is closely connected with a claim against a legal or natural person domiciled in the territory of the forum State.

¹⁴⁸ Public Interest Litigation 0400.15.004335-6, de 10/12/2015. Filed by the Prosecution's Office of Minas Gerais.

¹⁴⁹ FEDERAL Prosecution's Office *et. al.* Settlement Agreement of 26 October 2018. Available on: <http://www.mpf.mp.br/mg/sala-de-imprensa/docs/termo-de-compromisso-prescricao>.

5. Courts shall have jurisdiction over claims against legal or natural persons not domiciled in the territory of the forum State if no other effective forum guaranteeing a fair trial is available and there is a sufficiently close connection to the State Party concerned.

Brazilian lawyers intermediated the contact between the people affected by the Fundão dam collapse, along the entire Rio Doce Basin, and a British law firm, which filed a class action in England against BHP's headquarters. Since this company is a part of the joint venture Samarco S.A. and has an Anglo-Australian origin, it was alleged *jurisdictione rationae personae* so that the litigation could take place on foreign soil. In turn, BHP, in view of Article 34 of Regulation (EU) No 1215/2012,¹⁵⁰ argued that the lawsuits are still ongoing in Brazil and requested that the class action be suspended in the British court. It was also alleged the need to implement the theory of *forum non conveniens* seeking recognition that, because it occurred in Brazil, it would be necessary to be judged by Brazilian courts.¹⁵¹ Finally, seeking the negative of British jurisdiction, was guided by the provisions of articles 4 and 7 of Regulation (EC) No. 864/2007,¹⁵² which state that the law applicable to a non-contractual obligation should be that of the country in which the damage occurred, including environmental damage.

In Brazil, on the other hand, BHP claims that, because it is not a national company, its parent company could not feature as a defendant in the lawsuits that are processed there and defends that the measures and remedial actions are the responsibility of the Renova Foundation. One of the main points in question in the current phase of the process that runs in the British courts at the moment is precisely to verify the effectiveness of the actions of reparation and the Brazilian jurisdiction. It is expected that the decision on the jurisdiction of the case will be out by October 2020.

In the case of Brumadinho, the technical audit company TÜV Süd was responsible for issuing stability reports on the dam. Also, in September 2018 it issued safety certification of the structure. The same entity that filed the lawsuit against BHP in

¹⁵⁰ UNIÃO EUROPEIA. Regulation (EU) No 1215/2012, 20 December 2012. Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. 2012. Available on: <https://bit.ly/34axAuk>.

¹⁵¹ To learn more, see: REUTERS, BHP classifica como 'sem sentido' ação na Inglaterra por desastre em barragem no Brasil. G1, 22 July 2020. Available on: <https://glo.bo/2SgqXB3>; and PARREIRAS, Mateus, Tragédia de Mariana: vítima conta com ação na Inglaterra para receber R\$12 milhões de indenização. *Estado de Minas*, 27 July 2020. Available on: <https://bit.ly/30pmArO>.

¹⁵² UNIÃO EUROPEIA. Regulation (EC) No 864/2007, Available on: <https://bit.ly/3cQ6FaU>.

the first case also seeks to hold the German company responsible in the case of Brumadinho, on the grounds that the firm ignored the fact that the dam did not meet stability factors and attested to its safety. TÜV Süd claims to have no legal responsibility for what happened, because it does not own the mine, and is anchored on a defense basis similar to that used by the BHP.¹⁵³ Still in this case, in the criminal sphere, the criminal responsibility of TÜV Süd's directors is being sought after the request by some relatives of fatal victims at the German Prosecutor's Office.

In this sense, an instrument that clearly and directly enables the establishment of extraterritorial jurisdiction is relevant in the search for accountability for human rights violations and for the fair, integral and effective reparation of victims.

FINAL REMARKS

In this document, the social-environmental violations committed by mining companies in Brazil are analyzed, with particular focus on those suffered by children and adolescents. The loss of family members, the psychological traumas affecting their development, the forced displacement and the stolen idea of freedom and future, coupled with the deprivation of childhood among nature are some of the notable damages identified by the document. The need for preventive measures and access to justice was highlighted in order to ensure the non-recurrence of human rights' violations and the full, fair and effective reparation to the affected people.

A binding international instrument on human rights and companies is essential in ensuring justice to the affected communities and all the more urgent when we note that non-binding mechanisms do not produce sufficient effects.

It is expected that the information organized in this document may contribute to the process of negotiation of a binding instrument on human rights and companies, in order to guarantee protective provisions for the communities and, in particular, children and adolescents.

¹⁵³ For more information, see: PARREIRAS, Matthew, Tragédia de Brumadinho vira ação de US\$ 1 bilhão na Justiça da Alemanha. *Estado de Minas*, 27 April 2019. Available on: <https://bit.ly/36n4cUh>; WELLE Deutsche, Queixa contra TÜV Süd avança na Alemanha. *Poder 360*, 19 February 2020. Available on: <https://bit.ly/3n7AXe1>.