

Mandates of the Working Group on the issue of human rights and transnational corporations and other business enterprises; the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment; the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes; the Special Rapporteur on the rights of indigenous peoples; and the Special Rapporteur on the human rights to safe drinking water and sanitation

REFERENCE:
AL OTH 58/2018

17 October 2018

Dear Mr. Mackenzie,

We have the honour to address you in our capacities as Working Group on the issue of human rights and transnational corporations and other business enterprises; Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment; Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes; Special Rapporteur on the rights of indigenous peoples; and Special Rapporteur on the human rights to safe drinking water and sanitation, pursuant to Human Rights Council resolutions 35/7, 37/8, 36/15, 33/12 and 33/10.

We are sending this letter under the communications procedure of the Special Procedures of the United Nations Human Rights Council to seek clarification on information we have received.¹ Special Procedures mechanisms can intervene directly with Governments and other stakeholders (non-state actors) on allegations of abuses of human rights that come within their mandates by means of letters, which include urgent appeals, allegation letters, and other communications. The intervention may relate to a human rights violation that has already occurred, is ongoing, or which has a high risk of occurring. The process involves sending a letter to the concerned actors identifying the facts of the allegation, applicable international human rights norms and standards, the concerns and questions of the mandate-holder(s), and a request for follow-up action. Communications may deal with individual cases, general patterns and trends of human rights violations, cases affecting a particular group or community, or the content of draft or existing legislation, policy or practice considered not to be fully compatible with international human rights standards.

In this connection, we would like to bring to your attention information we have received concerning the renewed agreement of 25 June 2018 on funding as well as socioeconomic and environmental reparations resulted from the 2015 Doce river disaster that Samarco Mining S.A., Vale S.A. and Australia-based BHP Billiton signed with the Federal Government and the State Governments of Minas Gerais and Espírito Santo on 25 June 2018 regarding socioeconomic and environmental reparations necessitated by the 2015 Doce River disaster. We would also like to bring to your attention information regarding some provisions of the agreement and the manner in which it was negotiated and

¹ Further information about the communication procedure is available at:
<http://www.ohchr.org/EN/HRBodies/SP/Pages/Communications.aspx>

prepared as well as more generally the persistent difficulties faced by affected communities.

The consequences faced by communities affected by the 2015 Doce river disaster, in particular violations of their rights, including the right to health, drinking water, housing and environment, were subject of previous communications sent to your company on 7 December 2015, case no. OTH 12/2015 (Report A/HRC/34/75) and to the Government of Brazil on 30 June 2016, case no. BRA 2/2016 (Report A/HRC/34/75) and 24 November 2015, case no. BRA 10/2015 (Report A/HRC/31/79). We thank you for the response provided, dated 14 January 2016. The reply contained information about the measures taken to address the adverse impact caused by the burst of the dam, such the elaboration of plans, management and supervision of actions implemented in all areas impacted along the Doce River. We took note of information on the 26 actions plans of the Committee for Human Rights Management. However, we regret that the reply did not provide more detailed information on how affected communities have been engaged in a meaningful process of participation and how they had been consulted in the remedy process.

According to the information received:

On 5 November 2015, an iron tailing dam named Fundão in the district of Mariana in the state of Minas Gerais, belonging to Samarco Mining S.A. (a joint venture between Vale and BHP Billiton), burst its walls and released 35 million cubic meters of iron ore waste. 19 persons died in what is considered to be the worst socio-environmental disaster in Brazil's history. Thousands of persons were displaced and one of the main Brazilian rivers, the Doce River was polluted with heavy metals. The tailing dam failure caused severe damage to the livelihoods of millions of people living throughout the river basin. The mud eventually reached the Atlantic Ocean, contaminating the marine life with heavy metals.

More than two and half years after the disaster, there is still no complete assessment of the socio-environmental and socio-economic damages suffered by the affected communities as well as health-related impact. Some communities and individuals are still struggling to be recognized as affected by the disaster and did not receive any type of remedy. Many of the problems faced by the affected communities persist. The Renova Foundation claims that the Doce River water meets the standards set out by the Brazilian National Water Agency. However, this analysis contradicts independent studies in the matter. According to the research conducted by the SOS Mata Atlântica Foundation, the water is contaminated with heavy metals, which may impact human health if consumed as well through as other uses. Particular concerns exist in some municipalities where the Doce River is their main source of water supply. It is reported that some persons who live at the watershed have increased rates of gastrointestinal diseases, respiratory disorders, rashes, and other skin allergies, which could be linked to the ingestion of and contact with heavy metals.

The resettlement of the communities who were forcibly displaced from their homes is far from complete. The Renova Foundation estimated that it would conclude the construction of the new districts of Bento Rodrigues, Paracatu de Baixo, and Gesteira to house forcibly displaced persons in March 2019. As of February 2018, the Renova Foundation had not even started the construction of the new districts. Therefore, the resettlement process could take longer than foreseen. Multiple indigenous and traditional communities used to live off fishing and farming in the margins of the Doce River. They have had to completely change their dietary patterns with adverse consequences on their health.

On 2 March 2016, the Brazilian Federal Union, joined by 13 public law entities, including the state governments of Minas Gerais and Espírito Santo and environmental agencies from both federal and state levels as well as the three responsible companies, Vale, Samarco, and BHP Billiton, signed a settlement agreement, under which the signatory parties committed to develop socio-environmental and socio-economic remedy programs. It created a governance structure composed of two legal entities: the Renova Foundation and the Interfederative Committee. According to the provisions of the agreement, the Renova Foundation is responsible for developing and implementing the remedy programs. The Interfederative Committee is an independent body composed mainly of representatives of the federal and state governments with authority to monitor the activities of the Foundation.

The Brazilian public authorities and the three involved companies allegedly negotiated and signed the initial settlement agreement without holding consultations with the affected communities, civil society organizations, and social movements. Although the agreement contained provisions related to the transparency and involvement of the communities in its implementation, the mechanisms for their proper enforcement were not clearly stated. The agreement did not discipline the process of the appointment of the representatives of the affected communities within the Renova Foundation and the Interfederative Committee. Community representatives had no decision-making power within the two entities.

Many communities and individuals are still struggling to be recognized as affected by the disaster, which is the first step toward receiving any remedies. Under the provisions of the previous settlement, the affected communities bore the burden of proving the damages they suffered and the means of evidence. The obligation to produce evidence about the material losses was particularly burdensome to those whose homes were destroyed since they barely had time to save themselves from the mud.

The fact that the agreement did not foresee meaningful participation mechanisms for the affected communities seriously undermined the remedies that companies provided to them. The Renova Foundation was in charge of determining the damages that are entitled to remedy, the type of remedy and the amount of monetary

compensation. Under the remedy programs, the Renova Foundation mainly offers the affected communities monetary compensations, failing to effectively address the concerns of the victims and return their lives to the *status quo ante*.

The Foundation has so far recognized a very limited list of intangible losses as entitled to remedies. Indigenous, fishing and other traditional communities, which depended on the Doce River, inter alia, for their cultural, religious, and leisure activities were not entitled to receive remedies for specific types of losses. Thus, persons who were recognized as affected by the disaster were not receiving an effective remedy and they had to choose between adhering to the Mediated Compensation Program or seeking judicial remedies. Within the mediation program, the affected people were offered values far below what was due. The criteria used to establish such values being unclear, there was no room for negotiation. Individuals were also required to waive any right to future claims.

In early 2016, Federal and State Public Defenders started to file individual lawsuits on behalf of those who had their request for recognition denied. Later the Public Defenders started to act collectively to seek the recognition of entire communities.

In May 2016 the Federal Public Prosecutors Office filed a lawsuit against the three companies and the Brazilian authorities who signed the settlement agreement, seeking its annulment. In August 2016, the Regional Federal Court of the First Region annulled the settlement agreement reasoning its decision on the lack of meaningful consultation with the affected communities. Despite the annulment by the Brazilian judiciary of the decision that ratified the settlement agreement, the companies and the Brazilian authorities, the Renova Foundation and the Interfederative Committee continued to operate according to the Agreement's provisions.

Following the annulment, the parties in the lawsuit initiated the negotiation of a new agreement, which provides for the creation of technical assistance committees to advise the affected people throughout the remedy process, as well as for the conduction of an assessment of the socio-environmental and socio-economic damages in the affected region. The negotiation process of this new agreement reportedly lacked meaningful participation and consultation with the affected communities and civil society organizations. The communities did not participate to a sufficient extent in the design of the participatory mechanism. At the meantime, the effective implementation of this agreement, particularly the creation of technical assistance committees is seen as critical to protect the rights of the affected communities and to avoid further irreparable harm, as it may guarantee the access to relevant information and to technical assistance by the affected communities.

On 25 June 2018, the three involved companies and the Brazilian State² signed this new settlement agreement seeking to adjust the governance of the Renova

² Brazilian Federal Union, the state governments of Minas Gerais and Espírito Santo, environmental agencies from both federal and state levels, the Public Prosecutors' Office and the Public Defense Office.

Foundation and the Interfederative Committee. This new agreement is intended to enhance the participation of the affected communities within the structure of the two entities, as well as to create local commissions composed by representatives of the affected communities to discuss the remedy programs at a local level and recommend adjustments. It also aims to reform the governance of the mechanism that was created to remedy the harm caused by the disaster and increase the participation of the affected communities in the development and implementation of the remedy programs.

However, the new participatory mechanism has allegedly been conceived in a top-down approach, despite the need of adjusting to the cultural and social dynamics of the affected communities. The representatives of the affected communities are reportedly not sufficiently represented in the body entrusted with a decision-making power within the structure of the Renova Foundation. Only two out of nine members in the decision-making body shall represent the affected communities, six members shall be appointed by the three companies and a ninth member is to be appointed by the Interfederative Committee. A draft version of the agreement had not been made available to the general public, the same applies to other relevant records, including records of meetings between the actors involved in the negotiation process.

We wish to express our general concern regarding the lack of notable progress in remedying the situation of communities affected by the disaster in the Doce River basin and the alleged continued violations of their human rights.

We consider that the signature by concerned parties of a new settlement agreement is an overall positive development which is aimed to address the gaps formed by the previous arrangement and to readjust the provision of remedy programmes. The effective implementation of the agreement is bound to contribute to the protection of rights of the affected communities. We nevertheless express our concerns at the fact that the affected communities themselves were not sufficiently involved in the negotiation and design process of the agreement, lacked access to adequate information and should now form a minority in the decision making body of the Renova Foundation. We believe that the lack of participation, lack of transparency and meaningful involvement of the affected communities in the planning process may lead to considerable distortions and further delays in the development and implementation of the remedy programs. We are also convinced that it is of crucial importance that the recipients of remedies, who have suffered gross violations of their rights, are provided with an opportunity to actively participate in the design, establishment and day-to-day functioning of such mechanisms.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

In view of the urgency of the matter, we would appreciate a response on the initial steps taken by your company to respect the rights of the above-mentioned person(s) in compliance with international instruments.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would therefore be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.
2. Please provide details regarding the plans for a robust assessment of the socio-economic damages suffered by affected communities along the entire length of the Rio Doce River and watershed.
3. Please provide details regarding the delayed resettlement process, timeline for completion and plans to ensure those who continue to be displaced have access to appropriate and effective remedies during the protracted resettlement process.
4. Please provide information regarding the alleged contamination of water with hazardous substances and measures taken to address this contamination.
5. Please describe the measures which have been put in place to fully involve the affected communities in the consultation process aimed at adjusting the existing remedy mechanisms.
6. Please explain how the affected communities have been engaged in a meaningful process of participation and consultation on the participatory mechanism to be established by the new settlement agreement.
7. Please provide information on reparation measures for indigenous, fishing and other traditional communities in the affected area.
8. Please provide information on whether your company, as a party to signature agreement, see an interest in and have an intention to increase the level of participation of the representatives of the affected communities in the bodies established by the new settlement agreement.
9. Please describe the envisaged action and the revised timeline, according to which Brazilian authorities and the three companies involved intend to provide the affected populations with full remediation.
10. Please provide information as to the steps taken or considered by your company to track the effectiveness of your new remedial response in line

with Principle 20 of UN Guiding Principles on Business and Human Rights which requires drawing “on feedback from both internal and external sources, including affected stakeholders”.

11. Please provide information on how the new settlement agreement satisfies the effectiveness criteria stipulated in Principle 31 of the UN Guiding Principles to redress adverse human rights impacts.

We would appreciate receiving a response as soon as possible. Your response will be made available in a report to be presented to the Human Rights Council for its consideration.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged abuses and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

Please be informed that a letter on the same matter has also been sent to the Governments of Australia and Brazil, as well as other involved companies.

We may publicly express our concerns in the near future as, in our view, the information upon which a press release would be based is sufficiently reliable to indicate a matter warranting attention. The press release would indicate that we have been in contact with your company to clarify the issue/s in question.

Please accept, Mr. Mackenzie, the assurances of our highest consideration.

Dante Pesce

Chair-Rapporteur of the Working Group on the issue of human rights and transnational corporations and other business enterprises

David R. Boyd

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

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Victoria Lucia Tauli-Corpuz

Special Rapporteur on the rights of indigenous peoples

Léo Heller

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Annex

Reference to international human rights law

In connection with above alleged facts and concerns, we would like to draw your attention to the United Nations Guiding Principles on Business and Human Rights, which were unanimously endorsed by the Human Rights Council in its resolution (A/HRC/RES/17/31), after years of consultations involving governments, civil society and the business community.

The Guiding Principles have been established as the global authoritative norm for all States and companies to prevent and address the negative consequences related to companies on human rights. The responsibility to respect human rights is a global standard of conduct applicable to all companies, wherever they operate. It exists regardless of the ability and / or willingness of States to meet their own human rights obligations and does not reduce those obligations. It is an additional responsibility to comply with national laws and regulations for the protection of human rights.

"The responsibility to respect human rights requires that business enterprises:

- (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;
- (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts."(Guiding principle 13).

To fulfill their responsibility to respect human rights, business enterprises should have in place:

- “(a) A policy commitment to meet their responsibility to respect human rights;
- (b) A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;
- (c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.”(15 guiding principle)

In this connection, we recall that Guiding Principle 22 states that “[w]here business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes”. The Guiding Principle 20 states that business should track the effectiveness of their response. Tracking should: a) be based in appropriate qualitative and quantitative indicators; and b) draw on feedback from both internal and external sources, including affected stakeholders.

The Guiding Principles 25 to 31 provide guidance to business enterprises and States on steps to be taken to ensure that victims of business-related human rights abuse have access to effective remedy.

The Guiding Principle 29 states that “[t]o make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted”. Moreover, as underlined in the commentary to Guiding Principle 29, operational-level grievance mechanisms should reflect certain criteria to ensure their effectiveness in practice (as set out in Guiding Principle 31) and they should not be used to preclude access to judicial or other non-judicial grievance mechanisms.

The Guiding Principle 31 clarifies that in order to ensure their effectiveness, non-judicial grievance mechanisms, both State-based and non-State-based, should be:

- (a) Legitimate: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;
- (b) Accessible: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;
- (c) Predictable: providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;
- (d) Equitable: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;
- (e) Transparent: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism’s performance to build confidence in its effectiveness and meet any public interest at stake;
- (f) Rights-compatible: ensuring that outcomes and remedies accord with internationally recognized human rights;
- (g) A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms; Operational-level mechanisms should also be:
- (h) Based on engagement and dialogue: consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances.

We would also like to recall the relevant international human rights that your company is expected to respect. In particular, the International Covenant on Civil and Political Rights (ICCPR) recognizes the right of victims to an effective remedy. ICCPR Article 2(3)(a) provides that “any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.” Under ICCPR Article 2(3)(b), “any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; [and] the competent authorities shall enforce such remedies when granted.”

We also would like to draw your attention to the right to meaningful participation and the right to information under ICCPR. Article 19 of ICCPR provides, *inter alia*, that “[e]veryone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers [...]”. Under article 25 (a) of the ICCPR, every citizen shall have the right and opportunity, without unreasonable restrictions, to take part in the conduct of public affairs, directly or through freely chosen representatives.

We also wish to refer to the Framework Principles on human rights and the environment of the Special Rapporteur on human rights and the environment (A/HRC/37/59, annex), which summarize the main human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. Namely, the Framework Principles 7, 9, and 10 obligate States to provide environmental information, enable public participation in decision-making, and ensure access to effective remedies in cases where human rights are violated.

The human rights to water and sanitation are essential human rights set forth in the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women, and the Convention on the Rights of Persons with Disabilities. UN Human Rights Council in its resolution 15/9 of 2010 and UN General Assembly in its resolution 64/292 of 2010 explicitly recognized the human right to safe drinking water and sanitation.

Furthermore, the UN General Assembly in its resolution 70/169 of 2015 recognized that “the human right to safe drinking water entitles everyone, without discrimination, to have access to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use”, and that “the human right to sanitation entitles everyone, without discrimination, to have physical and affordable access to sanitation, in all spheres of life, that is safe, hygienic, secure, socially and culturally acceptable and that provides privacy and ensures dignity, while reaffirming that both rights are components of the right to an adequate standard of living”.

With regard to the right to adequate housing, we would like to refer you to Article 11(1) of the ICESCR, which recognizes the right to an adequate standard of living, including housing, and to the continuous improvement of living conditions.

Finally, we would also like to refer you to Articles 18 and 19 of the Declaration on the Rights of Indigenous Peoples (UNDRIP), which recognize the rights of indigenous to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions. States should consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Furthermore, Article 28 of UNDRIP sets out that indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.