

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

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Excellency,

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.

In this connection, we would like to bring to your attention information we have received concerning the renewed agreement of 25 June 2018 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 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 prepared as well as more generally the persistent difficulties faced by affected communities.

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 State¹ signed this new settlement agreement seeking to adjust the governance of the Renova 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 adverse human rights impacts, which the Australia-based company, BHP Billiton, has caused or contributed to. This is underscored by the obligations under the international human rights framework for your Excellency's Government to protect against human rights abuse by business enterprises domiciled in

¹ 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.

its country. This requires taking appropriate steps in relation to business enterprises domiciled in its country to prevent, investigate, punish and redress such abuse and ensure that affected people have access to effective remedy.

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 Excellency's Government to safeguard 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 highlight the steps that the Government has taken, or is considering to take to protect against human rights abuse by business enterprises, including BHP Billiton, and ensuring that business enterprises domiciled in its territory conduct effective human rights due diligence to identify, prevent, mitigate and account for how they address their impacts on human rights throughout their operation, as set forth by the UN Guiding Principles on Business and Human Rights.
3. Please provide information regarding the measures that your Excellency's Government is taking, or considering to take, to ensure that those affected by the activities of BHP Billiton's overseas subsidiaries have access to effective remedies as per the UN Guiding Principles.

We would appreciate receiving a response as soon as possible. Your Excellency's Government's 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 violations 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 Government of Brazil and the 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 Excellency's Government to clarify the issue/s in question.

Please accept, Excellency, 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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Annex

Reference to international human rights law

We would like to highlight the UN Guiding Principles on Business and Human Rights, which were unanimously endorsed in 2011 by the Human Rights Council in its resolution (A/HRC/RES/17/31) following years of consultations involving Governments, civil society and the business community. The Guiding Principles have been established as the authoritative global standard for all States and business enterprises with regard to preventing and addressing adverse business-related human rights impacts. These Guiding Principles are grounded in recognition of:

- a. “States’ existing obligations to respect, protect and fulfil human rights and fundamental freedoms;
- b. The role of business enterprises as specialized organs or society performing specialized functions, required to comply with all applicable laws and to respect human rights;
- c. The need for rights and obligations to be matched to appropriate and effective remedies when breached.”

It is a recognized principle that States must protect against human rights abuse by business enterprises within their territory. As part of their duty to protect against business-related human rights abuse, States are required to take appropriate steps to “prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication” (Guiding Principle 1). This requires States to “state clearly that all companies domiciled within their territory and/or jurisdiction are expected to respect human rights in all their activities” (Guiding Principle 2). In addition, States should “enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights...” (Guiding Principle 3). The Guiding Principles also require States to ensure that victims have access to effective remedy in instances where adverse human rights impacts linked to business activities occur.

States may be considered to have breached their international human law obligations where they fail to take appropriate steps to prevent, investigate and redress human rights violations committed by private actors. While States generally have discretion in deciding upon these steps, they should consider the full range of permissible preventative and remedial measures.

Business enterprises, in turn, are expected to carry out human rights due diligence in order to identify, prevent, mitigate and account for how they address their impacts on human rights. Where a business enterprise causes or may cause an adverse human rights impact, it should take the necessary steps to cease or prevent the impact. Similarly, where a business enterprise contributes or may contribute to an adverse human rights impact, it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible (commentary to Guiding Principle 19).

Furthermore, business enterprises should remedy any actual adverse impact that it causes or contributes to. Remedies can take a variety of forms and may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition. Procedures for the provision of remedy should be impartial, protected from corruption and free from political or other attempts to influence the outcome (commentary to Guiding Principle 25).

In addition, the Committee on the Economic, Social and Cultural Rights in its General Recommendation 24 (2017) states that “extraterritorial obligation to protect requires States Parties to take steps to prevent and redress infringements of Covenant rights that occur outside their territories due to the activities of business entities over which they can exercise control, especially in cases where the remedies available to victims before the domestic courts of the State where the harm occurs are unavailable or ineffective.”.

In connection with above alleged facts and concerns, we would like to recall the relevant international human rights obligations that your Excellency’s Government has undertaken. In particular, the International Covenant on Civil and Political Rights (ICCPR), signed by your Excellency’s government on XXXX 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 Excellency’s 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.

Australia acceded to the International Covenant on Economic, Social and Cultural Rights (ICESCR) on XXX. Under article 12 of the Covenant, States parties are bound to recognize the right of everyone to the enjoyment of the “highest attainable standard of physical and mental health.” In its General Comment No. 14, the Committee explains that the “right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health.”

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 your Excellency’s Government 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 your Excellency’s Government to Articles 18 and 19 of the Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted by the General Assembly in 2007 and which Australia endorsed in 2009. The UNDRIP states that indigenous peoples have the right 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.