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The Mariana dam disaster in Brazil: open issues about corporate accountability under international human rights law

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ABSTRACT: This article analyses the challenges involved in corporate accountability under international human rights law, by examining the Mariana dam collapse in the state of Minas Gerais, Brazil[1] as a test case. The first part highlights the concepts of sustainable development, and vulnerability, in the context of the international soft-law regulatory framework regarding business and human rights. The following section outlines the United Nations Guiding Principles on Business and Human Rights, which rule out the possibility of direct corporate accountability. In the third section, the article explains that a heightened human rights risk assessment is a necessary protection mechanism, mainly based on the failures of an unprecedented self-regulated governance model adopted in the aftermath of the Mariana disaster, where there is a considerable overlapping issue of business and human rights, and corporate social responsibility. In conclusion, the Mariana case demonstrates that such soft-law instruments may not be sufficient to ensure adequate protection for vulnerable communities exposed to environmental aggressions.
Keywords: Brazil, corporate social responsibility, disaster risk management, environmental law, human rights, international law, vulnerability.

"O desastre de Mariana no Brasil: considerações sobre a responsabilidade corporativa no sistema Internacional de Direitos Humanos"

RESUMO: O artigo analisa os desafios sobre a responsabilidade corporativa no Sistema internacional de direitos humanos, com base no exame do desastre do rompimento da barragem de Mariana, no Estado de Minas Gerais, Brasil.[2] A primeira parte trata dos conceitos de desenvolvimento sustentável e vulnerabilidade, no contexto do quadro normativo de soft-law no sistema Internacional. A segunda parte aborda os Princípios Orientadores de Empresas e Direitos Humanos da ONU, que não permite a responsabilidade direta das empresas. Na terceira parte, o artigo aponta que o controle de risco rigoroso é um mecanismo necessário para a proteção dos direitos humanos, principalmente devido às falhas apresentadas pelo modelo inédito de regulação adotado após o desastre, que consideravelmente embaraça os conceitos de responsabilidade social corporativa e a relação entre empresas e direitos humanos. Em conclusão, o caso de Mariana demonstra que os instrumentos de soft-law não são suficientes para assegurar a proteção adequada às comunidades vulneráveis expostas aos desastres ambientais.

Palavras-chave: Brasil, direito ambiental, direitos humanos, direito internacional, gerenciamento de riscos, responsabilidade social corporativa, vulnerabilidade.

1 Portions of the discussion in this piece are adapted from the final paper work entitled "The Mariana case and the new environmental safeguards for the protection of vulnerable communities" (freely translated from the original, in Brazilian Portuguese, "O caso Mariana e as novas salvaguardas ambientais para proteção das comunidades vulneráveis", 2018, presented in the *Lato-Sensu* Post-Graduation Program of GV Law (GVLaw), in São Paulo, Brazil, as a partial requirement for obtaining the aforementioned degree in Human Rights and Access to Justice. Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3376286

2 O artigo foi parcialmente extraído do trabalho de conclusão de curso intitulado "O caso Mariana e as novas salvaguardas ambientais para proteção das comunidades vulneráveis", apresentado como requisito parcial para obtenção do título de pós-graduação na FGVLaw.

Introduction

What are the challenges to corporate accountability in the international human rights law and what can we learn from the Mariana dam collapse in this regard? In what follows, I will develop an argument to suggest that, in the aftermath of Brazil's worst environmental disaster, there has been a significant overlap between issues of business and human rights (BHR) and corporate social responsibility (CSR). To sustain my argument, I will discuss the soft-law framework regarding business and human rights and describe their lack of enforcement mechanisms in case of corporate malfeasance, and the concrete disconnection among sustainable development, economic growth, vulnerability and direct corporate responsibility. Given the problems stemming from both an unprecedented self-regulated model of corporate governance and the weak human rights diligence adopted, the Mariana case demonstrates that such soft-law instruments may not be sufficient to ensure adequate protection for victims of multinationals wrongdoings, particularly in the case of vulnerable groups and communities exposed to environmental aggressions. Therefore, it is necessary to reinforce corporate liability for human rights violations. This can be achieved by strengthening protection mechanisms under the international human rights framework, based on an enhanced risk assessment, and combined with an agenda for sustainable human development.

1. **Sustainable Development. Vulnerability and Environmental Risk. The relation between Business and Human Rights. The International framework of protection and promotion of Human Rights.**

Sustainable-development guidelines demand that the protection and promotion of human rights must encompass economic, social and ambient dimensions for the development and environmental needs of present and future generations (UNCED, 1992, Principle 3). This is, however, often overlooked in corporate practices. This neglect has been historically witnessed: among other examples, the Bhopal gas leak

Disaster, the BP oil spill, the GE and the Hudson River case; the OK Tedi Mine disaster, and the Rana Plaza collapse are notable.

Indeed, the full exercise of fundamental rights and freedoms by minorities and respect for human rights (United Nations Human Rights, 1993) is constantly challenged by transnational corporations [TNCs] (McCorquodale & Simons, 2007) – or multinational corporations [MNCs] (Ruggie, 2018; Deva, 2013),[3] whose impacts in social, cultural, and political contexts create complex relationships between business enterprises and vulnerable communities.

It is therefore necessary to make a distinction between two main notions: human development and economic growth, by decoupling their processes from a social-economic perspective. Human development is understood as an expansion of substantive freedoms, which are not linked to the metrics of economic growth or wealth prosperity; therefore, freedoms are both the primary ends of development and its principal means (Sen, 2001). Likewise, "redistribution to the less privileged is not only intrinsically important for enhancing their capabilities, but also an instrument for human development." (Anand & Sen, 1994, p. 33).

In this sense, understanding vulnerability is fundamental to the progress of human development (Lyster, 2016).[4] Yet, MNCs in general underestimate the possible impacts of a disaster in favour of reducing operational costs and maximizing profits, without the effective participation of the vulnerable communities, without an independent social and environmental assessment, and without providing those communities with a fair share of the benefits of the economic activity.

Vulnerability is a complex issue, involving economic, social, political and cultural features. However, the vulnerability of the communities under multidimensional poverty is coupled with the hazardous places in which they live, which significantly increases environmental risks. In the Brazilian context, this concept of vulnerability is extended to individuals or social groups without access to justice

3 "An MNC is an economic entity, in whatever legal form, that own, controls, or manages operations, either alone or in conjunction with other entities, in two or more countries. The central element of this definition is the control exercised by a corporation in various ways including by ownership of shares, control over the Board of Directors or through management of operations and affairs" (Deva, 2013, p. 3).

4 Lyster links vulnerability with sustained human development in the context of capabilities referred in Amartya Sen, by explaining that "real progress in human development not only entails enlarging people's capabilities but is also a question of how secure the achievements are, and whether conditions are sufficient for sustained human development" (2015, p. 136).

(BRASIL, 1988, article 134).[5] Likewise, vulnerability comprises all social groups without enough power to be heard or to be recognized. These groups should be included in the dialogue throughout all stages of the decision-making process in environmental issues. In fact, this necessary concept of inclusion is present in legal instruments, such as the International Labour Organization Convention n. 169 (ILO, 1989), and the Convention on Biological Diversity (CDB, 1992, articles 8, "j", 15 and 19).

Given the presence of certain vulnerable groups in different parts of the business chain with potential environmental risks, international human rights law must go beyond the relationship between states and individuals. By adopting a broader approach, it is possible to ensure fair protection for victims of human rights abuses perpetrated by TNCs, particularly regarding extraterritorial obligations whose business crosses borders and whose property is usually mixed among investment funds, banks, anonymous partners, and often the state itself.

While the main duty to protect, respect and implement human rights remains with states, multinationals also hold liability for respecting human rights in their operations. However, under international law, the relationship between business and human rights has been built upon the concept of 'soft-law', whose treaty bodies are "authoritative and influential (including on courts) but technically non-binding" (Pitts, 2016, p. 63). This framework encompasses broad guidelines for the political bodies of the United Nations system, for multilateral institutions, and for non-governmental organization statements. These guidelines may have significant regulatory power, but they are legally softened and without enforcement power. For instance, BHP Billiton – a corporation which signed a Letter of commitment to implement the ten principles of the UN Global Compact in 2013,[6] is currently facing criminal and civil charges, as the company was previously aware of the risks of the collapse of Samarco's Fundão Dam.

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[5] This article defines the main function of the Public Defender's Office: to guarantee the defense and the promotion of collective rights held by the most unprivileged people. The people are those who are more exposed to the negative impacts of environmental degradation, who are deprived of access to their basic social standards and who are subjected to an even more serious picture of unworthiness (Sarlet, Machado & Fensterseifer, 2015).

[6] Launched in 2000, the UN Global Compact is a voluntary initiative based on 13000 corporate participants and stakeholders from over 170 countries to implement universal sustainability. In its letter, BHP's states: "I am pleased to confirm that BHP Billiton supports the ten principles of the Global Compact with respect to human rights, labour, environment and anti-corruption. With this communication, we express our intent to advance those principles within our sphere of influence. BHP Billiton is committed to making the Global Compact and its principles part of the strategy, culture and day-to-day operations of our company, and to engaging in collaborative projects which advance the

In the Mariana disaster, a more accurate perspective must go beyond the obvious failures stemming from the state itself. An unprecedented, but problematic, self-regulated model of repair, mitigation and compensation for social and environmental impacts was adopted, through the Renova foundation. This model unveiled considerable overlapping themes: on the one hand, the relation between business and human rights (BHR); on the other hand, 'corporate social responsibility' (CSR). All in all, this demonstrates that such soft-law instruments are not sufficient to ensure adequate protection for victims of human rights violations perpetrated by TNCs, particularly in the case of vulnerable groups and communities exposed to environmental aggressions.

Therefore, the concrete experience of the worst environmental disaster in Brazilian history leads us to question what could be more effective for protecting the vulnerable groups. A possible path is the enforcement of the risk assessment for adverse human rights impacts, combined with a sustainable agenda for human development, by conducting a prior, free and informed participation of the communities in the decision-making process which would affect their rights; providing them with the access to an independent, social and environmental impact assessment; finally, granting them a fair share of the benefits.

2. The 'Corporate Social Responsibility' (CSR) and the relation between 'Business and Human Rights' (BHR). The United Nations Guiding Principles on Business and Human Rights (2011). Implementing the 'Protect, Respect, and Remedy' framework in a scenario of vulnerability.

In a broad sense, CSR refers to business practices involving initiatives toward sustainable development goals, which encompass economic, social, and positive environmental impacts on operations. CSR entails an ethical component of sustainability as a supererogatory moral obligation, reducing "human rights responsibilities to mere acts of corporate goodwill" (Wettstein, 2016, p. 80). This cannot be confused with BHR, just as human development must not be confused with economic growth.

broader development goals of the United Nations, particularly the Millennium Development Goals" (UN Global Compact, Letter of commitment from BHP, 2013. <https://www.unglobalcompact.org/what-is-gc/participants/1306-BHP> accessed 28 April, 2019).

The idea of CSR is best illustrated by the UN Global Impact, 2017, considered the most important initiative for corporate sustainability in the world. Likewise, the OECD Guidelines for Multinational Enterprises (2011, updated)[7] established voluntary compliance for companies in order to contribute to sustainable development and promote business ethics. Finally, the Equator Principles (2002) is a set of performance standards, adopted by financial institutions, designed to avoid, mitigate and manage environmental and social risks associated with development projects.[8]

As a benchmark in BHR, The United Nations Guiding Principles on Business and Human Rights, known as "Guiding Principles" (GPs), developed by Professor John Ruggie, have issued a set of guidelines for all states and for all business enterprises, both transnational and others, being fostered on three pillars: protect, respect, and remedy.

The pillar of 'protection' endorses the responsibility of states to respect, protect and fulfill human rights, through appropriate legislative and policy measures, all in order to prevent, investigate, punish and repair abuses and violations of rights by companies. States indeed hold a large share of liability: they have to enforce and ensure business enterprises to respect human rights, and to carry out periodic assessments to correct any gaps, as well as to provide guidance and effective advice on best practices, including human rights due diligence and satisfactory issues of vulnerability.

The pillar of 'respect' is addressed to companies – over and above the duty of the states. This pillar also involves protecting human rights, in order to "do no harm" (Wettstein, 2016, p. 83). Additionally, companies must address the adverse impacts with which they are involved. The material content of such obligations corresponds to internationally recognized human rights as well as additional standards, depending on circumstances. Ruggie introduces the concept of "human rights due diligence" which

[7] OECD (2011), OECD Guidelines for Multinational Enterprises, OECD Publishing http://dx.dol.org/10.1787/9789264115415-en. The Guidelines were updated in 2011 to embody a human rights chapter for the establishment of the due diligence mechanisms in line with the "Guiding Principles", which are presented in second part of the article.

[8] In March 2019, the US Supreme Court withdrew the immunity of the International Finance Corporation (IFC) when its investments in overseas development projects caused human rights violations on local communities (´Supreme Court rules that World Bank Group can be sued in US Courts in historic decision´, Center for Environmental Law, 27 February, <https://www.ciel.org/news/supreme-court-rulesworld-bank-group-immunity-jam-v-ifc/> accessed 25 March 2019). This decision can be trigger a debate about the role of all public financial institutions financing big development and infrastructure projects, for establishing independent grievance entities to hear complaints from populations adversely affected, or who risk being adversely affected, by the financial institutions not carrying out their own fiduciary, environmental and social protection policies. For a similar approach: Yoshida, Kishi, Piazzon & Vianna, 2017.

should involve independent experts and meaningful consultations with potentially affected groups and other meaningful stakeholders, all in order to identify, prevent, mitigate and account for adverse human rights impacts.[9] In this sense, Wettstein explains that human rights due diligence sets concrete and tangible instruments that has always been missing from CSR (2016, 83), even though CSR benefits in terms of "risk management, cost savings, access to capital, customer relationships, human resources management, and innovation capacity" may encompass some aspects of human rights (Ramasastry, 2015, p. 4).

Lastly, the 'remedy' pillar points out the need to provide right-holders with adequate and effective remedies in case of violation by companies, which enshrines appropriate state-based judicial and non-judicial grievance mechanisms, when such abuses occur within state territory and/or jurisdiction. Moreover, the non-judicial grievance can be adopted by companies through operational-level mechanisms, which companies themselves also help to administer.

However, there is some disagreement with the proposed solutions, especially because they not address how to deal with the vulnerability of developing countries to the powerful influence of TNCs and foreign investments (Bilchitz, 2015). This is deepened by the "weak formulation of the states' duty to protect human rights, including extraterritorially" (De Schutter et al, 2012, p. 45). Consequently, to push forward a binding business and human rights treaty is the main focus of the GPs (Bilchitz, 2015; De Schutter, 2016; Deva, 2011).

Under the neoliberal perspective – marked by the reduction of the domain of the state – the filling of governance gaps as proposed by GPs through effective policies, legislation, regulations and adjudication does not take into account those TNCS whose authority is directed at states and public agents. In this sense, there are public service concessionaires or state-owned enterprises that receive substantial state agency support and services, or operate in conflict-affected areas, and finally, privatized central public sector companies (Deva, 2012). Moreover, the GPs overlook the immoral connections

[9] Accordingly, the assessments should be undertaken prior to the business project; "identifying who may be affected; cataloguing the relevant human rights standards and issues; and projecting how the proposed activity and associated business relationships could have adverse human rights impacts on those identified. In this process, business enterprises should pay special attention to any particular human rights impacts on individuals from groups or populations that may be at heightened risk of vulnerability or marginalization, and bear in mind the different risks that may be faced by women and men." (Commentary to Guiding Principle 18, UN Doc. A/HRC/17/31, p. 20-21).

between governments and corporations, which blurs the borders between private and public interests. This movement is expressed in the loosening of environmental standards and the stigmatization of indigenous and traditional communities, potentially exposed to human rights violations.[10]

Furthermore, this hypervulnerability may indicate the absence or at least the weakness of enforcement of legal protections for these communities, so such measures are likely to have a greater impact on their human rights. As a result, the engagement of affected communities is often set back by the powerful influence of TNCs in the cultural, political and social orders, especially through the legitimacy of its business operations by the practices of CSR (Bruno, Rodrigo & Raquel, 2016). Thus, through their agenda for sustainability, corporations implement social and environmental projects in unsettled communities, reducing the risk of social conflicts and proactive involvement in the decision-making processes by the affected groups. All this results in a lack of transparency underlying economic activities, in addition to an increased economic dependence on the corporations. In other words, this vulnerability allows the BHR agenda to be instrumentalised under a CSR discourse, rather than being based on a better understanding of how the costs of company-community conflicts interface with business risk, associated costs, and financial liabilities (Franks et al, 2014). There is still a large impact on reputation when companies do not respect human rights, including ethics violations or environmental issues.

On the one hand, the CSR may have incorporated the assessment of human rights impacts on the core business decision-making; on the other hand, this diminishes the empowerment of the vulnerable groups and communities affected by business activities. (Bruno, Rodrigo & Raquel, 2016, p. 139). Therefore, both reinforcing the human risk impact assessments and promoting sustainable human development agenda

[10] In Brazil, there has been a debate about a bill that significantly restricts environmental licenses and public hearings during the decision-making process. The argument is that environmental licenses should not act as a barrier against economic and infrastructure development. Moreover, a new regulatory decree establishes weaker standards for the use of pesticides, and another decree allows the hunting of some wild animals. Regarding indigenous people, the new Brazilian Government dismantled the indigenous affairs agency, FUNAI, handing reservation and demarcation decisions to the Ministry of Agriculture, currently controlled by farming interests (Abessa, Famá, & Buruaem, 2019). Sonia Guajajara, national coordinator of Brazil's Association of Indigenous Peoples, reported to the press that land invasions and other attacks against tribes led by illegal miners and loggers had increased. "We have resisted for five centuries and we are not going to surrender in four years. We will continue fighting," she said (Benassatto & Boadle, 'Brazil indigenous tribes protest Bolsonaro assimilation plan', Reuters, 26 April <https://www.reuters.com/article/us-brazil-indigenous/brazils-indigenous-tribes-protest-bolsonaro-assimilation-plan-idUSKCN1S22B5> accessed 28 April).

are fundamental measures for effectively preventing and redressing human rights violations in the case of vulnerable groups and communities exposed to environmental aggressions. In other words, a heightened risk assessment for the protection of the vulnerable communities is a necessary shift point toward social and environmental governance regulated model, based on effective participation by means as a prior, free, and informed consultation process; and on an independent social and environmental due diligence.

Accordingly, paired with the BHR, vulnerability is the criterium for the assessment of adverse impacts, which reinforces the mechanisms of human rights due diligence through new environmental safeguards, such as those developed in the case laws of the Inter-American Court of Human Right (IACHR). For instance, in the case *Saramaka v. Suriname* (2007), the Court recognised the impact caused by corporation activities on human rights of indigenous groups, acknowledging the right to consultation, and, where applicable, a duty to obtain consent with regards to development or investment projects by the affected groups and communities; the right of reasonably sharing the benefits of such projects; and the right to conduct environmental and social impact assessments by independent and technically competent entities. Further on, in the case *Kaliña and Lokono peoples v. Suriname* (2015), the IACHR relied on the GPs in order to hold the state of Suriname responsible for the failure to conduct an independent social and environmental impact assessment of the mining company activity[11].

3. The challenges company accountability for violations of Human Rights and the disaster of Mariana. The Renova Foundation. The lawsuits against BHP Billiton in Australia and in Brazil.

Two disastrous and tragic tailing dam collapses recently happened in Brazil: Fundão mine, in Mariana[12] (November 2015), and Feijão mine, in Brumadinho[13]

[11] In order to approach the need for this type of study, see the previous paper: "The Mariana Case and the New Environmental Safeguards for the Protection of Vulnerable Communities", 2018, presented at the GVLaw *Lato Sensu* Post-graduation Program. Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3376286

[12] 'Dam burst at mining site devastates Brazilian town', Al Jazeera, 6 November 2015, <https://www.aljazeera.com/news/2015/11/dam-burst-mining-site-devastates-brazilian-town-151106022548631.html> accessed 25 March 2019.

(January 2019). Both episodes demonstrate the urgent need to undertake rigorous environmental safeguard assessments for the protection of the vulnerable communities, based on effective participation by means as a prior, free, and informed consultation process; and on an independent social and environmental due diligence. Due to the technological and scientific progress in the field of sustainable mining, considering these tragedies as "accidents" rather than "disasters" does seem misleading, because the risks were increasingly predictable and a constant human rights impacts assessment on the core business decision-making should have been taken into account. Instead, the mining dams were built on low wages, lax regulation and weak monitoring. For instance, constant monitoring was imperative to verify if the tailings were working, if the inspection was regular, and if the alarm signals were properly set[14].

Likewise, there is the complicity adopted by the host state – where Samarco, a joint venture between BHP Billiton and Vale S/A, is based – to be stressed. This complicity regards failures in the environmental licensing process (Salinas, 2015) and very weak government monitoring, which eventually disclosures a "long-term promiscuous relationship between governments and mining corporations" (Santos & Milanez, 2017, p. 5). Coupled with this, underestimating human rights impact assessment, led to the disruption of the Fundão dam.

In March 2016, there was the signing of a Term of Transaction and Adjustment of Conduct (TTAC). The term was among Samarco, its shareholders and the Federal and State governments of Minas Gerais (MG) and Espírito Santo (ES). The agreement created Renova, a private and non-profit foundation, to be jointly established by Samarco, BHP Billiton and Vale S/A, in order to shape and implement socio-economic and environmental programs, in addition to socio-economic programmes for repairing the damages caused by the breaking of the Fundão dam, in the District of Mariana, Brazil.

As a self-regulated corporate governance model, Renova itself discloses a series of failures in terms of governance and effective remedies to be provided to right-holders. Conceived as a way of resuming the activities conducted by the mining company Samarco, which had been interrupted due to the economic impacts of its

[13] Sena, Ricardo. 'Brazil's dam disaster, BBC, 22 February, <https://www.bbc.co.uk/news/resources/idt-sh/brazil_dam_disaster> accessed 25 March 2019.
[14] For a chronological narrative of the disaster of Mariana: Global, 2015.

shutdown[15], the creation of Renova did not produce positive effects. It excluded the dialogue with the victims and the Public Prosecution Service, by assigning the immediate responsibility to Samarco and subsidiary liability to the transnational companies Vale S/A and BHP Billiton for damages. This also exempted the Brazilian Federal government from responsibility for insufficient measures to prevent the disaster (Salinas, 2016).

In other words, the Renova Foundation is an unprecedented mechanism of self-regulation (Santos & Milanez, 2019; Milanez, & Santos & Giffoni Pinto, 2016), because it transfers all responsibilities for recovery, remedy and compensation linked to the rupture of the Fundão dam to a private institution. Moreover, it addresses selective roles for the state and for the real companies involved in the disaster, while denying the demands and pressures exerted by the affected groups and communities. (Santos & Milanez, 2018, p. 137).

In addition to governance failures, decoupling repair programs into socio-economic and socio-environmental axes, without the necessary compatibility with human rights, does not guarantee fair reparations to the affected communities. This was observed in the grievance mechanisms adopted for the repair of the communities around the Doce river basin, including the indigenous communities of Krenak, Tupiniquim, and Guarani; the 'quilombolas',[16] and the artisanal fishermen. In all these cases, while the environmental recovery remains incomplete, affected groups and communities will not have access to the right of water, work, and wealth, in addition to inherent rights, such as the right to an adequate standard of living and health (Conectas, 2018).

Another criticism was the payment of general damages provided by the Mediated Indemnity Program (PIM). Established by the TTAC, these indemnities consisted of a list of damages and the respective values for individual contracts, without the procedures and costs of a lawsuit. Hereby lies one of the major distortions in setting

[15] The municipalities suffered losses, both due to the decrease in tax collection and to emergency actions taken to mitigate the effects of the disaster on the population affected. Losses still reached essential services, such as water supply, sewage and electricity production. In the case of the Mariana district, Samarco's downtime resulted in a 26% drop in tax collection and an unemployment rate by 27%. (Salinas, 2016).

[16] The term 'quilombolas' refers to the offspring of the escaped slaves and rural black communities who remained in lands given to them by former slave owners. (, 'Improving the Recognition and Land Regularization of Brazilian Quilombola (Slave Descendent) Communities' World Bank Group <http://web.worldbank.org/archive/website00912B/WEB/OTHER/3CF6C2F7.HTM?OpenDocument> Acessed 27 April, 2019).

compensation values, since the values do not reflect the real losses suffered by the affected communities and do not provide any possibility for negotiation. Therefore – due to the incompatibility between the values offered by the Renova Foundation and the real losses suffered by the affected people – many individuals suffer continuous violations of rights (Global, 2015).

The solution created by the authorities was challenged by federal prosecutors and by NGOs, mainly due to the lack of participation of those affected in the agreement, and due to the unfair mechanisms of repair to the communities. By disagreeing with the TTAC, Federal prosecutors filed a lawsuit against the mining companies in May, 2016, seeking a total cost recovery of 155 billion Brazilian reais (approximately USD 5,3 billion). In June, 2018, the controversial agreement that created the Renova Foundation was revised, for changes in governance, in order to include effective participation of the vulnerable groups and communities[17], by suspending the collective actions for compensation.

Similar to "CSR voluntarism", therefore, the agreement between the Government and the companies that created the Renova Foundation looked more like "a letter of intent than an effective repair" (Santos & Milanez, 2018, p. 137). At the same time, it also sought to meet the governance gaps between state and companies, based on strong and consistent corporate regulatory governance.

In the Mariana disaster, the problems of adopting an unprecedented self-regulated model of corporate governance and a leading weak human rights due diligence might demonstrate that such soft-law instruments might not be sufficient to ensure adequate protection for victims of human rights violations perpetrated by TNCs, particularly in the case of vulnerable groups and communities exposed to environmental aggressions.

[17] The new agreement established that an accountable and guarantee compensation for damages in the case of indigenous peoples and traditional communities must be preceded by a preliminary consultation protocol, according to their customs and traditions ('Povo indígena Krenak cria protocolo de consulta prévia', MPF, 30 August 2017 <http://www.mpf.mp.br/mg/sala-de-imprensa/noticias-mg/povo-indigena-krenak-cria-protocolo-de -consulta-previa>, accessed 17 August 2018).

4. Conclusions

One of the key challenges concerning BHR lies in central questions, such as how to fill the governance gaps between BHR and CSR, in order to hold corporations accountable for the negative impacts of their operations. According to Ruggie, "no single silver bullet can resolve the business and human rights challenge. A broad array of measures is required, by all relevant actors" (2016). In the case of vulnerable groups and communities potentially exposed to environmental aggressions, one potential solution lies in the following measures: the strengthening of protection mechanisms under the international human rights framework, based on an enhanced assessment of risks, combined with an agenda for sustainable human development.

In this sense, the analysis of the increased risk of the Fundão Dam and the negligent business decision-making can open new research fronts on the role of shareholders in company decisions based on human rights approach. There is a growing debate concerning the question of how shareholders can contribute to human rights. This movement is becoming more effective in company activities, encompassing other parameters, such as corporate ethics, accountability and sustainability. The analysis of the behaviour adopted by shareholders, both in short-term and long-term, for investing is important to understand the degree of their responsibility in the company and how willing they are to mitigate future economic gains in favour of an assessment for human rights. By analysing these investment processes, it will be more possible to protect both the environment and the affected communities.

This movement is expressed, for instance, in the recent class action lodged in the Federal Court of Australia in May 2018 and signed up by more than 3,000 investors in Melbourne. The lodgement was in order to hold BHP Billiton accountability for being aware of the risks of the Tailing dam in Mariana[18] (Impiombato v BHP Billiton Limited, Federal Court Proceeding VID 649/2018); and is also being explored in the criminal lawsuit proposed in Brazil involving the executives of BHP Billiton. Although none of these claims mention human rights due diligence, their intersection is inevitable, because both claims rely on the fact that the Board of Directors, including Samarco

18 TIMSON, Lia, 'Profit before people': documents allege BHP execs were warned over deadly dam', Sydney Morning Herald, 4 March, accessed 25 March 2019, <https://www.smh.com.au/business/companies/profit-before-people-documents-allege-bhp-execs-were-warned-over-deadly-dam-20190215-p50y6y.html>.

BHP and Vale S/A members, were previously aware of the negative risk assessments, years before the collapse.

In the security class action before the Australian Federal Court, it is alleged that BHP misled investors about its commitment to safety and protection of the environment and failed to disclose the safety risks posed to the people working at the mining complex, the environment, and the communities affected by the operations. Likewise, in the criminal procedure, before the Federal Courts of Ponte Nova, in the state of Minas Gerais, Brazil, the Brazilian Federal Prosecution Office has charged 21 mining executives from Samarco, which controls the dam, and its shareholders Vale and BHP Billiton with qualified murder, in addition to 12 different types of environmental and flood crimes, for previous knowledge of the risks of dam breaking, although the company allegedly gave priority to economic outcomes at the expense of security procedures.[19]

In conclusion, despite all the scientific and technological advances of the globalized world, behind environmental disasters, such as the Mariana dam collapse, there is a myriad of human rights being systemically disrespected. Given the weak state governance under the neoliberal order, the legitimate engagement of affected communities is often defeated by the powerful influence of corporations in the cultural, political and social orders, especially through the legitimacy of their business operations by CSR practices. Indeed, while the primary duty of protecting human rights remains with the states, TNCs must also hold a responsibility to respect human rights in their operations. Thus, the International Human Rights Law has developed a normative framework regarding relations between companies and human rights, by seeking a CSR agenda on the one hand; and on the other, by reinforcing the interconnections between BHR. Such positive moves have acquired strength especially after the development of the GPs, under which are established guidelines for states and companies to prevent, address and remedy human rights abuses committed in business operations. However, in the extremely vulnerable context of a man-made crisis, enforcing the assessment of human risk impacts, combined with an agenda for sustainable human development, are

19 On 23 April, the Federal Higher Court (TRF- 1), in Brasília, blocked the charges of murder for all the executives of Samarco, Vale and BHP Billiton, in the process of the Fundão dam in Mariana. The decision was unanimous. Now, it remains only the environmental and flood crimes in the original claim that runs in Federal Court in Ponte Nova, in the State of Minas Gerais. In other words, this means that all the defendants will not go to the popular jury (which judges crimes against life).

fundamental actions in order to effectively prevent and redress human rights violations in the case of vulnerable groups and communities exposed to environmental aggressions. In this sense, the Mariana dam collapse shows that, beyond the state failures in protecting, its unprecedented self-regulated model based on Renova foundation, unveils a problematic overlapping between BHR and CSR in the protection of the affected groups and communities. As a result, more in-depth research might be necessary, based on a broad and interdisciplinary view, combining sustainability, human rights, development and vulnerability for a better understanding of the limits between CSR and BHR. It is up to each of us to give voice to people, not to profits. Human-rights advocates are beginning to shape civil society mobilizations, in which human rights are respected. It is equally important that "human duties" – as claimed by José Saramago, Portuguese writer – be exerted. From Saramago's speech, delivered in 1998 for his Nobel Prize award, our true mission emerges: "Let us common citizens therefore speak up. With the same vehemence as when we demanded our rights, let us demand responsibility for our duties. Perhaps the world could turn a little better."

5. References

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