

# Corporate Accountability for Dam Disasters in Brazil.

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**Abstract.** By examining the Mariana dam collapse in Minas Gerais, Brazil, the article analyses the challenges involved in corporate accountability under international human rights law. Following the introduction and the methodology, in the third part of this article, the context of international soft-law regulatory frameworks related to business and human rights is discussed. Afterward, the UN Guiding Principles on Business and Human Rights are described, which exclude direct corporate accountability. In the fourth section of the paper, there is an explanation of why a heightened risk assessment of human rights is a necessary protective measure, which is based mainly on the failures of an unprecedented self-regulated governance model implemented in the aftermath of the Mariana dam disaster. To conclude, the Mariana case illustrates that soft-law instruments may not be sufficient to ensure effective protection for vulnerable communities exposed to environmental damages.

**Keywords.** Business and Human Rights. UN Guiding Principles. Dam disaster. Brazil. Environmental damage. Vulnerable communities.

## 1. Introduction

This paper examines the challenges to corporate accountability under international human rights law, by analyzing a recent dam failure in Brazil: The Fundão Dam disaster in the state of Minas Gerais, Brazil, commonly referred to in the press as Mariana. Arguably the worst environmental disaster in Brazilian history, the case highlights the importance of conducting rigorous human rights and environmental safety assessments to ensure the protection of vulnerable populations. In the following paragraphs, the relationship between business and human rights will be explored based upon case-law and within its international framework. Further, a discussion regarding the United Nations Guiding Principles on Business and Human Rights will focus on its effectiveness as a soft-law instrument to protect victims of human rights violations committed by enterprises, especially in the case of vulnerable groups and environmental aggression. The final part of our discussion will examine the details of the Mariana case and what can be learned from them. To conclude, the Mariana case suggests that such soft-law instruments may not adequately protect vulnerable groups from environmental aggressions. Thus, it is imperative to strengthen corporate accountability for human rights violations. In order to accomplish this, protection mechanisms under the international human rights framework can be strengthened based on a more comprehensive risk assessment.

## 2. Research Methods

The data used for this study was sourced from a variety of primary and secondary sources. Primary sources included official government reports, legal documents, and media reports from Brazil. Secondary sources included academic literature, books, and news articles. The sources were chosen based on their relevance to the research questions and the quality of the information provided.

One limitation of this study was the language barrier, as not all relevant sources were available in English. Another limitation was the difficulty in obtaining access to certain legal documents due to confidentiality concerns. Finally, this study focused only on two specific dam disasters in Brazil, and the findings may not be generalizable to other contexts regarding the accountability of multinational corporations for human rights abuses against vulnerable communities.

## 3. Business and Human Rights: relationship and international framework of protection/promotion

It is not new in the history of business and human rights ("BHR") the struggle between corporations and vulnerable populations. It is clear that corporate

practices constantly confront the respect of human rights of vulnerable groups, particularly in the context of environmental concerns. Therefore, international human rights law must transcend the relationship between States and individuals.

The idea that business-driven economic activities directly and indirectly interfere with the enjoyment of all human rights, including the rights to life, housing, water, food, health, and an adequate standard of living, and thus companies may violate human rights obligations, was well developed in the case *Milieudefensie et al. v. Royal Dutch Shell* [1].

On April 5th, 2019, the environmental group Friends of the Earth Netherlands and co-plaintiffs served Shell a court summons alleging Shell's contributions to climate change violate its duty of care under Dutch law and human rights obligations. The case was filed in the Hague District Court, which ordered Shell to reduce its CO2 emissions by 45% by 2030. The case is still pending as the latter appealed the decision; however, it is provisionally enforceable.

Enterprises are responsible for respecting human rights throughout their operations; however, this does not undermine the primary responsibility and duty of the State to protect, respect, and enforce human rights. The problem regarding this framework construction resides in the sole dependence on soft-law instruments, which are non-binding. The question that remains is: do soft-law instruments provide adequate protection for victims of human rights violations committed by corporations, such as those who are vulnerable to environmental abuses? This issue must be addressed in light of the United Nations Guiding Principles ("Guiding Principles") on BHR.

## 4. Guiding Principles: overview and analysis

Developed by John Ruggie, the Guiding Principles are the world's leading framework to prevent and address business-related human rights impacts, including those caused by environmental degradation. The Guiding Principles represent key elements of international human rights law. Any responses to the human rights implications of environmental damages that involve business should be aligned with the Guiding Principles. The document consists of three pillars: protect, respect, and remedy.

Through the pillar of 'protection', states are tasked with the primary responsibility of respecting, protecting, and fulfilling human rights by means of appropriate legal and policy measures, all in an effort to prevent, investigate, punish, and remedy human rights abuses and violations.

In addition to state duty, the 'respect' pillar is addressed to corporations. As part of this pillar, we must also protect human rights, so as not to cause harm [2]. Corporations should also pay attention to

the adverse impacts they have on the environment.

In closing, the 'remedy' pillar emphasizes the importance of providing right-holders with adequate and effective remedies when companies violate their rights, which establishes appropriate legal and extrajudicial grievance mechanisms within state jurisdiction for abuses occurring within state territory or jurisdiction.

Yet, there are some reservations about the suggested solutions, since they do not adequately consider how to respond to the vulnerability of developing countries to the powerful influence of big companies [3]. The problem is further compounded by the weak formulation of the state's duty to protect human rights, including extraterritorially [4].

In this regard, the Guiding Principles are primarily concerned with advancing a binding business and human rights treaty [5]. Even though this is desirable, it does not suffice by itself since the present gaps are not being addressed.

Additionally, the Guiding Principles fail to recognize the unethical relationship between governments and corporations, blurring the distinction between private and public interests. In Brazil, an example of this trend is the loosening of environmental standards and the stigmatization of indigenous and traditional communities who may be prone to human rights violations by the Bolsonaro government.

## 5. The disaster of Mariana

A tailings dam failed on 5 November 2015, flooding the Doce River, Brazil, with 34 mm<sup>3</sup> of tailings and killing 19 people, together with massive riverine life annihilation, water-use impairments, and fisheries interruption. A total of 663.2 km of river channel were directly affected, leaving over 600 people homeless and impacting protected coastal areas with threatened marine species. Following the disaster, a series of political and management decisions were taken, impairing ecosystem recovery – even seven years post-disaster.

The exact reason for failure and the environmental consequences remains unclear. The owners of the Bento Rodrigues dam, Samarco, Vale, and BHP, were subject to extensive litigation and government sanctions. Controversy over the investigation grew after a 2013 report, indicating structural issues in the dam, was leaked.

BHP Billiton, together with Vale and Samarco, signed in 2016 an agreement with the Brazilian federal and state authorities [6]. In January 2016, the Brazilian government and Samarco reached an agreement and a fine of R\$20 billion (US\$4.8 billion) was issued. However, the values do not reflect the real losses suffered by the affected communities and do not provide any possibility for negotiation.

We have sufficient evidence to conclude that the mining dam was built on low wages, lax regulation,

and weak monitoring, and underestimated the human rights impact assessment (weak human rights due diligence) [7].

Even now, demands and pressures exerted by the affected groups are denied, as the environmental recovery remains incomplete (ongoing human rights abuses). There was a class action lodged in Australia in May 2018 in this regard [8]. It was lodged to hold BHP Billiton accountable for the risks associated with the Tailing dam in Mariana. According to the Brazilian Federal Criminal Prosecution Office, the company had knowledge of the risks of the dam breaking, but gave priority to economic outcomes over security procedures, so the company had qualified murder charges brought against them before the Federal Courts of Ponte Nova, Minas Gerais, Brazil.

Another interesting case, decided by the Inter-American Court of Human Rights (IACtHR), was the *Saramaka v. Suriname* (2007) [9]. IACtHR affirmed that corporation activities violated the human rights of indigenous groups, and that indigenous groups have the right to consultation with development or investment projects, and, where appropriate, a duty to obtain consent of those groups and communities, as well as the right to fairly share the benefits of such projects with those groups and communities, and the right to conduct independent and technically competent assessments of environmental and social impacts.

Finally, in *Kaliña and Lokono peoples v. Suriname* (2015) [10], the Court referred to the UN Guiding Principles on Business and Human Rights to hold the State of Suriname accountable for not undertaking an independent social and environmental impact assessment of the mining company activity.

## 6. Conclusion

There is no easy solution for the problems presented throughout this paper. However, a possible solution in relation to vulnerable groups potentially subject to environmental aggressions could be the strengthening of protection mechanisms within international human rights law, based on a better understanding of risks. There is an urgent need to conduct prior, free and informed participation of the communities in the decision-making process which would affect their rights.

It follows, therefore, that analysis of increased risk of the Fundão Dam and the negligent decision-making of the company can open up new research directions on the role of stakeholders in company decisions in light of human rights considerations. A debate has erupted over how willing company members are willing to lose profit in favor of human rights due diligence and is, for example, illustrated in the class action lodged in Australia (participation of many investors).

Finally, there is a myriad of human rights that are

systemically violated behind environmental disasters, such as the Mariana dam collapse, even with all the scientific and technological advances of our globalized society. Due to the weak state governance under the neoliberal order, the legitimate involvement of affected communities is often defeated by the powerful influence corporations have on the cultural, political, and social spheres. Therefore, it is our responsibility as individuals to help give voice to the people and not to profits.

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