


DEVELOPMENTS IN THE FIELD

# A Feminist Analysis of the Legal Mechanisms of Protection and Repair in the Context of the Brazilian Extractive Industry: The Doce River Case

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## I. Introduction

This piece uses the Doce River case (2015) to illustrate the gendered impacts of the failure of corporate human rights due diligence. We also ask the question: would the Gender Dimensions of the Guiding Principles on Business and Human Rights<sup>1</sup> (Gender Guidance) have made a difference to the way women were treated in preventive measures taken and in the application of redress mechanisms? Taking this specific case, we seek to illustrate the importance of integrating gender into international business and human rights (BHR) frameworks if women's rights are to be protected and respected in the context of business activities.

On 10 November 2015, the Fundão Dam, owned by Brazilian Vale SA and Anglo-Australian BHP Billiton, collapsed, causing an unprecedented environmental disaster.<sup>2</sup> The dam broke at 4:20 pm, a time when women and children in the city of Bento Rodrigues, district of Mariana, were at home. The warning sirens did not sound and people were not alerted to the danger. The collapse and the consequent 'overtopping' of the Santarém dam, located in the municipality, formed a devastating tsunami of residual mud that annihilated the small town and caused serious damage in seven other districts, in addition to contaminating the Gualaxo do Norte, do Carmo and Doce rivers.<sup>3</sup>

Officially, 19 people died on the day of the tragedy.<sup>4</sup> The sexual division of labour promoted by the extractive industry and demonstrated in Penelope Simons' work<sup>5</sup> was

<sup>1</sup> Human Rights Council, 'Gender Dimensions of the Guiding Principles on Business and Human Rights', A/HRC/41/43 (23 May 2019) (Gender Guidance).

<sup>2</sup> IBAMA, 'Laudo Técnico Preliminar: Impactos ambientais decorrentes do desastre envolvendo o rompimento da barragem de Fundão, em Mariana, Minas Gerais' (2015), [http://www.ibama.gov.br/phocadownload/barragemdefundao/laudos/laudo\\_tecnico\\_preliminar\\_ibama.pdf](http://www.ibama.gov.br/phocadownload/barragemdefundao/laudos/laudo_tecnico_preliminar_ibama.pdf) (accessed 17 June 2020), 2.

<sup>3</sup> Ibid, 3.

<sup>4</sup> Flávio Fonseca do Carmo et al, 'Fundão Tailings Dam Failures: The Environment Tragedy of the Largest Technological Disaster of Brazilian Mining in Global Context' (2017) 15 *Perspectives in Ecology and Conservation* 145, 146.

<sup>5</sup> Penelope Simons and Melisa Handl, 'Relations of Ruling: A Feminist Critique of the United Nations Guiding Principles on Business and Human Rights and Violence against Women in the Context of Resource Extraction' (2019) 31:1 *Canadian Journal of Women and the Law* 113.

reflected in the composition of the victims: the 13 men who died in the accident were company employees working at the dam at the time of the disaster, while the six women, children and adolescents had no direct relations with the company and were at home. There are still victims unaccounted for as women who experienced miscarriages resulting from the disaster are still fighting judicial battles to have their losses acknowledged.<sup>6</sup>

Regarding material damages, the Brazilian Institute of Environment and Renewable Natural Resources (IBAMA) stated that '82 per cent of the buildings were affected'.<sup>7</sup> The destruction of houses affects multiple aspects of women's livelihoods from the greater difficulty in caring for their children to the impossibility of continuing home-based informal economic activities.<sup>8</sup> The specific experiences of women demonstrate how the absence of gender mainstreaming in the United Nations Guiding Principles on Business and Human Rights (UNGPs) reverberates in the local actions of governments and companies and indicates the urgency of expressly including gender issues in international BHR frameworks if women's rights are to be protected and respected.

## II. Illustrative Gender Issues in the Doce River Case

The Doce River Case is taken as a paradigm for the investigation of dam disasters, demonstrating the distinctly gendered dimensions of the harm caused by extractive industries.<sup>9</sup> We argue that two of these impacts highlight the state's failure to fulfil its duties to protect and repair. First, women had less access to information about the dam's risks and safety protocols. Second, the state's absence in the oversight of reparations mechanisms, governed by the companies and focused on a male worker as the 'norm', makes it more difficult to repair abuses suffered by women.

Regarding the first issue, legal requirements on employers to provide safety training for employees is an important aspect of the state duty to protect. This is clearly a preventive measure that seeks to ensure protection of workers. However, there is no equivalent public policy or awareness-raising aimed at informing and training those who live near the dams, which exposes women and children in surrounding communities to high risks due to lack of information. Arguably, the absence of legislative provisions protecting women living in communities adjacent to the dam illustrates a significant shortcoming in terms of the state fully implementing the duty to protect as envisaged by the UNGPs. It should not go unnoticed that the illustrative guidance to UNGP 3 proposed in the Gender Guidance asks states to employ gender equality as a cross-cutting theme in drafting, revising and assessing all regulations that have a bearing on ensuring business respect for human rights.<sup>10</sup> To meet this, we would argue that the male/workforce and female/community members dichotomy would need to be broken down; including to ensure that dam safety training is expanded

<sup>6</sup> Cintia Paes, Patrícia Fiúza and Laura Marques, 'Mariana: mulher que abortou na tragédia luta há 4 anos para que bebê seja reconhecido vítima', *G1 Minas Gerais* (29 October 2019), <https://g1.globo.com/mg/minas-gerais/noticia/2019/10/29/mariana-familias-ainda-sofrem-impacto-de-rompimento-de-barragem-e-tentam-retomar-suas-vidas.ghtml> (accessed 20 December 2020).

<sup>7</sup> IBAMA, 'Nota técnica 02001.002155/2015-91 CSR/IBAMA' (2015), [http://www.ibama.gov.br/phocadownload/barragemdefundao/laudos/laudo\\_tecnico\\_preliminar\\_ibama.pdf](http://www.ibama.gov.br/phocadownload/barragemdefundao/laudos/laudo_tecnico_preliminar_ibama.pdf) (accessed 17 June 2020), Annex, 7.

<sup>8</sup> Ministério Público de Minas Gerais et al, *Atingidos: um olhar sobre a atuação das comunidades e do Ministério Público de Minas Gerais após o desastre de Mariana* (Belo Horizonte: O Lutador, 2016); Ramboll, 'Avaliação do Programa de Reparação Integral da Bacia do Rio Doce' (2017), <http://www.mpf.mp.br/para-o-cidadao/caso-mariana/documentos/relatorio-ramboll> (accessed 10 November 2020).

<sup>9</sup> FGV, 'A Situação das Mulheres Atingidas pelo Desastre do Rio Doce a partir dos Dados da Ouvidoria da Fundação Renova' (2019), [http://www.mpf.mp.br/grandes-casos/caso-samarco/documentos/fgv/fgv\\_a-situacao-das-mulheres-atingidas-pelo-desastre-do-rio-doce-a-partir-dos-dados-da-ouvidoria-da-fundacao-renova](http://www.mpf.mp.br/grandes-casos/caso-samarco/documentos/fgv/fgv_a-situacao-das-mulheres-atingidas-pelo-desastre-do-rio-doce-a-partir-dos-dados-da-ouvidoria-da-fundacao-renova) (accessed 19 July 2020).

<sup>10</sup> Gender Guidance, note 1, 15.

beyond the (male) workforce to also include surrounding communities, including the women and girls living around the dam, to ensure that they receive adequate information and warnings about the dam's condition.

In addition to inadequate safety information sharing, arguably the current legislation does not adequately tackle the need for recognition of women as workers and breadwinners. Notably, on many of the territories in Brazil that are affected by disasters, many small-scale economic activities are carried out by women informally and at home – e.g., sewing, handicrafts, subsistence agriculture or the so-called 'backyard economy' – constituting essential sources of employment, income and survival for women and their families. Furthermore, 87 per cent of single-parent families in Brazil are headed by women.<sup>11</sup> When disasters occur, these economic activities are rarely included in loss and damage estimates.<sup>12</sup> Disregarding this specific type of livelihood and income generation can have significant negative effects on women's financial autonomy, triggering impoverishment and increased financial dependence, which in turn can have adverse effects on domestic security and women's health.<sup>13</sup>

This was exactly the case in Doce River where women were not recognized as rights-holders affected by the dam collapse, and did not receive adequate reparations for the injuries they suffered.

The redress mechanism in the case of Doce River was created by an agreement signed between the companies involved and the Brazilian government,<sup>14</sup> without any participation by the affected populations.<sup>15</sup> The product of the agreement is the Renova Foundation (RENOVA), responsible for handling the registration of the people affected by the collapse of the dam, allowing 'immediate assistance and compensation' as opposed to judicial demands, which were considered to be too 'time-consuming'.<sup>16</sup>

RENOVA has imposed a socio-economic registration process to grant access to reparations. Under this process, 49 per cent of the registered individuals identified themselves as women, for whom only 10.17 per cent were granted benefits. Men, on the other hand, were successful in 21.57 per cent of their demands.<sup>17</sup> Arguably, this is due to the patriarchal stereotypes applied in the registration system. For example, it has been documented that women found it exceedingly difficult to be identified as 'responsible for the family', a factor that is disproportionately distributed between men and women (66.3 and 33.7 per cent, respectively)<sup>18</sup> and was used to calculate food assistance and monthly indemnity payments. In essence, women were treated in the registration process as a subordinate class,<sup>19</sup> and were not consulted

<sup>11</sup> IBGE, 'Censo 2010' (2010), <https://www.ibge.gov.br/apps/snig/v1/?loc=0&cat=-15,-16,53,54,55,-17,-18,128&ind=4704> (accessed 17 June 2020).

<sup>12</sup> Conselho de Defesa dos Direitos da Pessoa Humana, 'Comissão Especial "Atingidos por Barragens" Resoluções nos. 26/06, 31/06, 01/07, 02/07, 05/07' (2010), <https://www.mpmg.mp.br/lumis/portal/file/fileDownload.jsp?fileId=8A91CFA9673F5F3C016741DA79712493> (accessed 12 July 2021); FGV, note 9, 23.

<sup>13</sup> FGV, 'A Situação das Mulheres Atingidas pelo Desastre do Rio Doce a partir dos Dados da Ouvidoria da Fundação Renova' (2019), [http://www.mpf.mp.br/grandes-casos/caso-samarco/documentos/fgv/fgv\\_a-situacao-das-mulheres-atingidas-pelo-desastre-do-rio-doce-a-partir-dos-dados-da-ouvidoria-da-fundacao-renova](http://www.mpf.mp.br/grandes-casos/caso-samarco/documentos/fgv/fgv_a-situacao-das-mulheres-atingidas-pelo-desastre-do-rio-doce-a-partir-dos-dados-da-ouvidoria-da-fundacao-renova) (accessed 29 October 2021).

<sup>14</sup> *Federal Public Prosecutor's Office v Samarco et al*, Proceeding no. 0023863-07.2016.4.01.3800, 12th Federal Court of Minas Gerais.

<sup>15</sup> Joana Nabuco and Leticia Aleixo, 'Rights Holders' Participation and Access to Remedies: Lessons Learned from the Doce River Dam Disaster' (2019) 4:1 *Business and Human Rights Journal* 147.

<sup>16</sup> *Federal Public Prosecutor's Office v Samarco et al*, note 14.

<sup>17</sup> FGV, note 9.

<sup>18</sup> *Ibid.*, 12.

<sup>19</sup> Simone de Beauvoir, *The Second Sex*, 8th edn (London: Vintage Classics, 2015).

about their needs, including their responsibilities for caring and providing income to support themselves and their families.

There are also documented cases in which divorced women found it challenging to re-register to receive the indemnity payments, remaining outside the reparations solution proposed by Samarco – a situation tolerated by the Brazilian government and its institutions.<sup>20</sup> The consequences for women go far beyond this: out of 154 women affected by the Doce River disaster and interviewed by the RENOVA mediator reporting issues such as depression, attempted suicide and anxiety, 71.4 per cent also have domestic overload, especially with regard to costs of home maintenance (60.4 per cent) and care for children and grandchildren (33 per cent).<sup>21</sup> As for the first, factors such as debts, overdue bills, evictions and food insecurity reveal themselves as additional human rights abuses being experienced by the affected women.

In addition to managing the socio-economic claims registrations process, RENOVA also receives complaints from victims of the dam disaster. Notably, the complaints filed by women between 2016 and 2019 involve not only economic subsistence issues but also: failure to recognize women as right-holders entitled to compensation; lack of provisions for civil or criminal reparations for women who suffer miscarriage; health issues, e.g., increase in cancer cases, depression and suicide; and domestic overload and violence. All of these are pertinent examples of how gender-neutral approaches to due diligence and reparations can perpetuate structural gender discrimination and cause new harms. Recently, Samarco opened bankruptcy proceedings in the Brazilian courts, indicating that many of the victims will not receive the compensation promised via RENOVA. Again, the effects of this are likely to be distinctly gendered, as many of the women's claims were only admitted late in the proceedings and are therefore not likely to be prioritized for settlement.

These illustrative gender issues brought to light in the Doce River Case poignantly highlight the need for domestic and international BHR responses to take gender into account when addressing the adverse human rights impacts of business activities, including to ensure that mechanisms for remedy and reparation are responsive to the specific barriers faced by women in seeking effective remedies for business-related human rights abuses.

### III. Legal Mechanisms of Protection in Brazil and the Absence of Gender Concerns: A Replication of the Systemic Problems in the UNGPs

Brazil was part of the Human Rights Council Session that adopted Resolution 17/4 that endorsed the UNGPs.<sup>22</sup> Moreover, despite its abstention in the creation of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights (OEIGWG) that discusses the elaboration of a binding treaty on the subject, it has been one of the most vocal countries in the discussion since the beginning.<sup>23</sup> In the domestic sphere, Brazil's Federal Constitution covers all

<sup>20</sup> FGV, note 9, 51.

<sup>21</sup> *Ibid.*, 12.

<sup>22</sup> Human Rights Council, 'Human Rights and Transnational Corporations and Other Business Enterprises', A/HRC/RES/17/4 (6 July 2011).

<sup>23</sup> See, e.g., Permanent Mission of Brazil to the United Nations Office and other International Organizations in Geneva, 'General Comments: Brazil', First session of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights (2014), <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session1/Pages/GeneralComments.aspx> (accessed 25 August 2021); Human Rights Council, 'Annex to the Report on the Fifth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights', A/HRC/43/55 (9 January 2020), 6–7.

internationally protected human rights.<sup>24</sup> There is also a profusion of infra-constitutional legislation, which regulates extractive industry activities in the country.<sup>25</sup> Furthermore, there are bodies mandated to protect the rights of those who do not have access to private representation – e.g., the Public Defender’s Office – and bodies competent to defend collective rights. Also, in 2018, a Decree was issued for the implementation of National Guidelines on Business and Human Rights.<sup>26</sup>

As such, it is clear that the Brazilian government has knowledge on the subject of BHR. This understanding has been informed through its experience in international fora, including the Inter-American Court of Human Rights’ finding that it had failed to exercise due diligence to prevent and redress gender-based violence;<sup>27</sup> its statements in the Human Rights Council; the BHR Decree; and the attribution of competence to the Global Protection Secretariat of the Ministry of Women, Family, and Human Rights to address BHR. Finally, the Constitution permits the government to take temporary special measures to correct structural inequalities.<sup>28</sup> In short, the Brazilian state is aware of BHR and gender issues; it has institutions to tackle human rights abuses associated with business activities; and legislation to foster gender equality. This raises the question of how it is possible to have such disregard for gender issues in the face of corporate human rights abuses in practice.

Infra-constitutional legislation, for example, has been issued without concern for preventing adverse impacts or providing adequate reparations to female victims who are directly or indirectly affected by disasters involving business activities, such as the Doce River Case. Although the state has provided guidance to business enterprises on how to respect human rights throughout their operations, such guidance has not ensured that gender is taken into consideration, including by ‘recognizing the specific challenges that may be faced by women.’<sup>29</sup>

There are numerous examples of how norms have failed to tackle specific gender issues. Legislation<sup>30</sup> determines, for instance, that dam management companies must submit a report containing technical information of the dam, its Emergency Action Plan and safety measures. These reports are made available to the National Water and Basic Sanitation Agency (ANA) and to civil society. ANA will not review them, as this is not required by law, according to which mere submission of the report is sufficient.<sup>31</sup> As such, civil society often finds itself charged with monitoring dam safety, with only very scarce information available regarding the gendered nature of dam-related harms.<sup>32</sup>

What we have observed in studying the Doce River Case as an illustrative example, is the complete absence of concern by the Brazilian government in creating mechanisms to protect women affected by dams. To the extent that human rights due diligence measures are promoted, including those related to remedies, these remain gender neutral, with the effect of perpetuating existing structural gender discrimination and causing new gendered harms, rather than contributing to their remediation. We therefore suggest that international BHR

<sup>24</sup> Constitution of Brazil 1988, art 5.

<sup>25</sup> Federal Law no. 12.334, 2010 (Brazil).

<sup>26</sup> Decree no. 9.571, ‘Diretrizes Nacionais sobre Empresas e Direitos Humanos’, 2018 (Brazil).

<sup>27</sup> *Maria da Penha v Brazil*, Case 12.051, Report no. 54/01 OEA (2000); Federal Law no. 11.340, 2006 (Brazil).

<sup>28</sup> Committee on the Elimination of Discrimination against Women, ‘Concluding Observations of the Committee on the Elimination of Discrimination against Women: Brazil’, CEDAW/C/BRA/CO/7 (23 February 2012), 4.

<sup>29</sup> Gender Guidance, note 1, para 37.

<sup>30</sup> Federal Law no. 12.334, 2010 (Brazil).

<sup>31</sup> *Ibid.*

<sup>32</sup> A staggering 67 per cent of the dams’ reports indicate only name, state of location, coordinates and main destination, making a vertical analysis of their safety unfeasible. ANA, ‘Relatório Anual de Segurança de Barragens’ (2019), <http://www.snisb.gov.br/portal/snib/relatorio-anual-de-seguranca-de-barragem/2019/rsb19-v0.pdf> (accessed 20 December 2020).

frameworks addressing gender, such as the Gender Guidance, be promoted at the domestic level, as part of efforts to realize women's rights in the context of business activities.

#### IV. Conclusion

The Doce River disaster provides us with a range of examples of how women are differentially affected when there are harms related to extractive activities. We have suggested here, that each of these impacts could be addressed if Brazilian legislation was sensitive to their gender dimensions, including by better accounting for the specific position of women (e.g., community members who have less access to information than the (male) workforce) and avoiding a gender-neutral approach to compensation eligibility (e.g., lack of recognition of women as 'responsible for the family' and therefore entitled to compensation).

BHR is an issue known to the Brazilian state; there are institutions capable of addressing it and laws that seek to regulate the human rights impacts of business activity; but none of these currently evince a sufficient concern for women's rights. The logic of the system makes their needs invisible. Cases such as Doce River demonstrate the devastating effects of this for women in practice, simultaneously illustrating the importance of integrating gender in international and national BHR frameworks and practice. Gender-responsive international BHR frameworks can play an important role in stimulating changes in legislation and practice at the national level. It is highly recommended, therefore, that the Gender Guidance is used in Brazil to inform future regulations.

Lastly, it is important that the specific impacts of extractive activities on women's rights be made visible, making it possible to combine those findings with the Gender Guidance to better address gender in domestic BHR frameworks that may still emerge.

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