

DEVELOPMENTS IN THE FIELD

## Access to Remedies and Reparations: From Brazilian Practice to International Binding Standards

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### I. Human Rights Violations in Brazil's Global Supply Chains

Brazil is a large exporter of commodities that supply global value chains. According to the United Nations Conference on Trade and Development (UNCTAD), in 2019 commodity exports entailed 8.4 per cent of Brazilian Gross Domestic Product.<sup>1</sup> Although commodities exportation is important for the Brazilian economy, their production or extraction often causes human rights harms and environmental damages.

Cattle farming and large-scale crop cultivation in the Amazon region is frequently associated with deforestation and forced labour. A study conducted by the Institute of Environmental Research of Amazonia (IPAM) revealed that approximately 75 per cent of deforested public areas from 2011 to 2020<sup>2</sup> were being used, in 2020, for cattle farming.<sup>3</sup> Research by another organization, Repórter Brasil, found slave labour in cocoa farms that allegedly supplied multinational companies such as Nestlé and Mondelez.<sup>4</sup>

Environmental hazards, like water pollution, are common in the oil and gas value chain. In 2019, a crude oil spill from a tanker ship off the Brazilian coast<sup>5</sup> reached 4,334 km of coastline in eleven states of the northeast and southeast of the country, affecting 120 municipalities (counties). The disaster is considered the worst oil spill in Brazil's history and showed the government's lack of preparedness for disaster response.<sup>6</sup>

<sup>1</sup> United Nations Conference on Trade and Development, 'State of Commodity Dependence 2021' (New York: UNCTAD, 2021), [https://unctad.org/system/files/official-document/ditcom2021d2\\_en.pdf](https://unctad.org/system/files/official-document/ditcom2021d2_en.pdf) (accessed 19 October 2022).

<sup>2</sup> The total deforested public areas between 2011 and 2020 correspond to 18.27 million hectares.

<sup>3</sup> IPAM Amazonia, 'Amazônia em Chamas – desmatamento, fogo e pecuária em terras públicas: nota técnica no. 8' (Brasília: IPAM Amazonia, 2021), <http://amazonia-em-chamas-8-desmatamento-fogo-e-pecuaria-em-terras-publicas> (accessed 19 October 2022).

<sup>4</sup> Repórter Brasil – Organization of Communication and Social Projects, 'Monitor #6 – Slave labor in the Brazilian cocoa' (Sao Paulo: Repórter Brasil, 2020), <https://reporterbrasil.org.br/wp-content/uploads/2020/10/Monitor-6-Cacau-EN.pdf> (accessed 19 October 2022).

<sup>5</sup> 'Brazil blames devastating oil spill on Greek-flagged tanker', *The Guardian* (1 November 2019), <https://www.theguardian.com/world/2019/nov/01/brazil-blames-oil-spill-greek-flagged-tanker-venezuelan-crude> (accessed 13 January 2022).

<sup>6</sup> Paulo G L Pena, 'The crude oil spill on the Brazilian coast in 2019: the question of public health emergency' (2020), *Cad Saude Pública* 36, Thematic Section: Public Health Emergencies in Debate, <https://www.scielo.br/j/csp/a/RdpV54PDWjxktvSjhJRCvTP/?format=pdf&lang=en> (accessed 19 October 2022).

Mining is also linked to frequent workplace accidents and major socio-environmental disasters. On 5 November 2015, the collapse of the Fundão dam in Mariana, Minas Gerais, under the control of the mining company Samarco, a joint venture between mining giants Vale and BHP Billiton, led to one of the biggest environmental disasters in Brazilian history. The immediate and continuous flow of tailings caused mass destruction throughout the entire Doce River basin, over 600 km long, until it reached the ocean in Linhares, Espírito Santo, killing 19 people, some of whom were Samarco's employees and subcontractors.<sup>7</sup>

Less than four years later, on 25 January 2019, the collapse of Vale's Córrego do Feijão mine dam in Brumadinho municipality, also in the state of Minas Gerais, left 270 people dead, including 130 employees and 121 outsourced workers, and ravaged nearby forests, rivers and communities.<sup>8</sup>

While the prevalence of these types of environmental and human rights disasters is a huge cause for concern in the country, the Brazilian legal system provides specific remedies, many of which have been used successfully in cases against corporate actors.

## II. Remedies Landscape

In Brazil, there are judicial and non-judicial remedies for human rights violations that can be used to hold both the state and corporations accountable for their failures at preventing, or their involvement in, environmental and human rights harm.

Judicial remedies include criminal and civil actions, such as class actions that can be filed before domestic courts, and also the possibility of case submissions before the Inter-American Commission of Human Rights, which can later be brought to the Inter-American Court of Human Rights. Non-judicial or 'hybrid' avenues include recommendations and out of court agreements.

### Class Action

Class actions have proven to be one of the most important judicial remedies to protect human rights. This is to a large extent due to the role given to the Public Prosecution Service and other features that facilitate access to justice. They have also increasingly been used to seek justice and reparations against companies involved in large-scale human rights abuses with some degree of success.

Brazil's Public Civil Action Law of 1985 confers exhaustive standing to initiate a class action<sup>9</sup> on behalf of rights holders upon the Prosecution Service, the Public Defender's Office, the federal government, states and city governments, administrative agencies, as well as private associations (non-governmental organizations).<sup>10</sup> These entities can bring a class action alone or jointly.

Class actions can be filed in case of violation (or risk of violation) of any group rights, including diffuse, collective or homogenous individual rights.<sup>11</sup> Since the enactment of the Public Civil Action Law in 1985, the Public Prosecution Service (state and federal branches)

<sup>7</sup> Daniela A Prata, 'Corporate crime and environmental victimization: analysis of the Samarco Case' (2020) in Manuel Espinoza de los Monteros de la Parra, Antonio Gullo and Francesco Mazzacuva (eds.), *The Criminal Law Protection of Our Common Home, International Review of Penal Law*, issue 1, 203–223.

<sup>8</sup> 'Vale dam disaster: \$7bn compensation for disaster victims', *BBC* (4 February 2021), <https://www.bbc.com/news/business-55924743> (accessed 13 January 2022).

<sup>9</sup> Generally speaking, 'public civil action' is the designation given to class actions by Brazilian law.

<sup>10</sup> Public Civil Action Law 1985, art 5.

<sup>11</sup> *Ibid*, art 1.

has played the primary role in the protection of collective rights in Brazil, bringing important class suits to curb illegal or abusive conduct against groups of rights holders, whenever the public interest has been at play.<sup>12</sup>

The case of the garment brand M. Officer is an example of a successful class action brought by the Prosecution Service. In that lawsuit, the Labor Regional Court of the 2nd Region (São Paulo) held the company liable for modern slavery in its supply chain, imposing on it the duty to compensate the victims for the moral and material harms caused.<sup>13</sup>

Another example is the class action filed by the Federal Prosecution Service against the television station RedeTV due to the broadcasting of discriminatory content. The 2nd Federal District Court of the State of São Paulo ordered RedeTV to broadcast, for 30 days, educational TV shows related to the promotion and respect of human rights.<sup>14</sup>

The success of class action claims is the result of a number of unique features. These include the Prosecution Service's status as an independent public agency, which means that it does not need to report to any branch of government. This gives prosecutors the independence and strength to take action against human rights abusers or violators, whether these are state or non-state actors (such as individuals or legal entities), and no matter how powerful they are.

Another strength is the complete absence of legal or court fees for victims of human rights violations, whose rights are defended by the public prosecutors through the filing of class actions on their behalf. The Public Civil Action Law exempts the Public Prosecution Service, as a plaintiff in class actions, from having to pay the costs borne by the defendants, even if the case is unsuccessful.<sup>15</sup>

The high success rate of class actions filed by the Prosecution Service is also due to the possibility of using specific legal powers, such as the reversal of the burden of proof. This has been accepted in some environmental cases in which obtaining evidence of the damage is challenging for the plaintiff but simple for the defendant. According to the Brazilian Superior Court of Justice, the inversion of the burden of proof applies to civil actions related to environmental harm and serves the purpose of fulfilling victims' right to access remediation.<sup>16</sup>

As well as leading to reparations for rights holders in specific cases, class actions have also played a significant role in the context of the judicialization of structural injustices, helping public and private actors find solutions to complex or systemic problems. The 'Coal Industry' case, for example, resulted in collective and individual compensation for damage caused by the exploitation of coal deposits in the state of Santa Catarina, but it also contributed to averting a huge economic crisis in the region.<sup>17</sup>

<sup>12</sup> Antonio Gidi, 'Class Actions in Brazil: A Model for Civil Law Countries', in *The University of Houston Law Series, Public Law and Legal Theory Series 2006-A-11*, 311-408.

<sup>13</sup> 'TRT confirma condenação da M. Officer por trabalho escravo', *Veja* (23 March 2018), <https://veja.abril.com.br/economia/trt-confirma-condenacao-da-m-officer-por-trabalho-escravo/> (accessed 31 January 2022).

<sup>14</sup> Bia Barbosa, 'Justiça obriga Rede TV! a transmitir programas sobre direitos humanos', *Repórter Brasil* (16 November 2005), <https://reporterbrasil.org.br/2005/11/justica-obriga-rede-tv-a-transmitir-programas-sobre-direitos-humanos/> (accessed 31 January 2022).

<sup>15</sup> Public Civil Action Law 1985, art 18.

<sup>16</sup> This understanding is enunciated in the Precedent no. 618 of the Superior Court of Justice and was adopted in several cases, such as Special Appeals no. 883.656/RS, no. 972.902/RS and no. 1.060.753/SP.

<sup>17</sup> For more details, see Gustavo Osna, 'Solving Complex Problems: 'Practicalism' and 'Structural Litigation' (2020) 279 *Administrative Law Review*, Rio de Janeiro 251-277, <https://bibliotecadigital.fgv.br/ojs/index.php/rda/article/download/82013/78919/179831> (accessed 13 January 2023).

### Inter-American Human Rights System

Cases of human rights abuse involving companies have also been brought before the Inter-American human rights system, leading to the establishment of some important principles in the area of business and human rights.

According to the jurisprudence of the Inter-American Court of Human Rights, the United Nations Guiding Principles on Business and Human Rights (UNGPs) reinforce the state obligations to respect and protect human rights provided in articles 1.1 and 2 of the American Convention on Human Rights, as well as those established in other international legally binding instruments such as Conventions 81 and 155 of the International Labor Organization (ILO).<sup>18</sup>

Such judicial understanding was adopted, more recently, in the *Case of the Workers of the Fireworks Factory and their Families v Brazil*, in which the Inter-American Court of Human Rights, quoting the UNGPs among the normative basis,<sup>19</sup> condemned Brazil for failing to prevent the death of 64 people, most of them black women and children, at the Fireworks Factory in Santo Antônio de Jesus, in the Recôncavo Baiano region.<sup>20</sup>

### Non-Judicial and ‘Hybrid’ Remedies

Beyond court cases, recommendations and out of court settlements are two types of non-judicial or ‘hybrid’ remedies for human rights violations.<sup>21</sup>

Recommendations can be issued by the Prosecution Service and, in some cases, by the Public Defender’s Office, against human rights abusers or violators, to compel them to immediately cease their illegal actions. For instance, as the result of a recommendation issued by the Federal Prosecution Service, the digital communications company Meta delayed the launch of a new WhatsApp tool, called ‘Communities’, for fear that it might drive the spread of fake news during an election year, violating voters’ right to access information and threatening democracy.<sup>22</sup>

Recommendations are a legal instrument that serves as a lighter-touch enforcement action, like a warning, and are not binding on the recipient. Nonetheless, non-compliance with a recommendation can be followed by the filing of a class action or even a full-blown criminal prosecution.

Out of court settlements can be concluded between the possible plaintiffs in a class action, such as the Prosecution Service, and individuals or legal entities involved in human rights abuses or violations, and are meant to establish some reparation measures for the harm caused. If not honoured, they can be enforced in court.

<sup>18</sup> The Court’s jurisprudence has been built up mostly from the cases *Hacienda Brasil Verde Workers v Brazil*, *Lagos del Campo v Peru*, *Escaleras Mejía v Honduras*, *Indigenous Communities of the Lhaka Honhat (Our Land) Association v Argentina*, *Kaliña and Lokono Peoples v Suriname* and *Muelle Flores v Peru*. For more details, see Andressa Oliveira Soares, ‘Aportes do Sistema Interamericano de Direitos Humanos para a Agenda Global de Direitos Humanos e Empresas’, Master’s Dissertation, <https://repositorio.ufjf.br/jspui/bitstream/ufjf/12441/3/andressaoliveirasoaresh.pdf> (accessed 31 January 2023).

<sup>19</sup> *Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their families v Brazil*, Inter-American Court of Human Rights (2020), paras 149–150, [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_407\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_407_ing.pdf) (accessed 4 December 2022).

<sup>20</sup> *Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their families v Brazil*, Inter-American Court of Human Rights (2020), [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_407\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_407_ing.pdf) (accessed 4 December 2022).

<sup>21</sup> In the Brazilian judicial system, out of court agreements can be considered as a hybrid remedy (neither judicial nor non-judicial strictly speaking), as they can be used both inside and outside court cases.

<sup>22</sup> Bala Chambers, ‘Brazil urges WhatsApp to delay new tool ahead of national elections’, Anadolu Agency (30 July 2022), <https://www.aa.com.tr/en/americas/brazil-urges-whatsapp-to-delay-new-tool-ahead-of-national-elections/2649014> (accessed 13 January 2023).

For example, in the paradigmatic ‘Beef Agreements’, which came after an in-depth investigation conducted by the Federal Prosecution Service,<sup>23</sup> giant companies in the cattle industry, such as JBS, Minerva and Marfrig, agreed to help fight deforestation in the rainforest by engaging in environmental and human rights due diligence. The corporations accepted to monitor their supply chains and set clear targets for the registration of farms that supply them with cattle, both directly and indirectly. They also committed to adopting measures to end the purchase of cattle from indigenous lands and from farms that use slave labour.<sup>24</sup>

### Some Weaknesses

Despite the strengths of Brazil’s remedies system discussed above, there are also some weaknesses. Courts are often not prepared to try cases involving human rights violations due to lack of expertise on such matters and lack of proper procedures. This is especially so in relation to cases in which the participation and hearing of large numbers of people affected by huge socio-environmental disasters or mega infrastructure projects is required. The most common consequence of that unpreparedness is the delay in the trial of the lawsuits. Moreover, there is a clear asymmetry of resources between companies and the victims of corporate abuse in these types of cases.

That asymmetry problem led the Federal Prosecution Service, together with other institutions of the justice system and civil society organizations, to innovate in the Mariana Dam Disaster Case mentioned earlier. It created and implemented a system of ‘independent technical advisors’ – experts on certain issues whose costs were covered by the perpetrators (the mining companies Samarco, Vale and BHP Billiton) but who were chosen by, and responded directly to, the affected people.

To tackle the aforementioned lack of expertise, the Brazilian National Council of Justice, together with the United Nations High Commissioner for Human Rights in South America, launched, in September 2022, an exclusive course for judges on the topic of business and human rights.<sup>25</sup>

To avoid delay in judicial proceedings, Draft Law no. 572 of 2022, which aims to put in place a binding normative framework on business and human rights in Brazil, provides for the priority of trials in lawsuits involving disasters caused by business activity.<sup>26</sup>

### III. Reparation Landscape

The legal system in Brazil includes at least four types of reparation: (i) restitution – meaning the return to the *status quo ante*; (ii) compensation – when the return to the *status quo ante* is not possible; (iii) satisfaction – in other words, symbolic measures; and (iv) guarantees of non-repetition – to prevent new wrongdoings.

<sup>23</sup> The work of the Federal Prosecution Service was profoundly assisted by civil society organizations, such as Greenpeace, which conducted its own three-year investigation on illegal cattle raising prior to the establishment of the ‘Beef Agreements’. cf. Daniel Brindis, ‘Slaughtering the Amazon’, *Greenpeace* (9 June 2009), <https://www.greenpeace.org/usa/research/slaughtering-the-amazon/> (accessed 13 January 2023).

<sup>24</sup> Alexei Barrionuevo, ‘Giants in Cattle Industry Agree to Help Fight Deforestation’, *New York Times* (6 October 2009), <https://www.nytimes.com/2009/10/07/world/americas/07deforest.html> (accessed 4 December 2022).

<sup>25</sup> ‘Curso capacita Justiça a garantir direitos humanos em casos que envolvam empresas’, CNJ (31 August 2022), <https://www.cnj.jus.br/curso-capacita-justica-a-garantir-direitos-humanos-em-casos-que-envolvam-empresas/> (accessed 31 January 2023).

<sup>26</sup> Draft Law no. 572 of 2022 (BRA), art 11, item XI, [https://www.camara.leg.br/proposicoesWeb/prop\\_mostrarintegra?codteor=2148124&filename=PL%20572/2022](https://www.camara.leg.br/proposicoesWeb/prop_mostrarintegra?codteor=2148124&filename=PL%20572/2022) (accessed 31 January 2023).

Restitution was the main type of reparation pursued by the Federal Prosecution Service in the class action filed against Potássio do Brasil, a mining company that, according to a previous investigation, had seized indigenous lands traditionally occupied by the Mura people. In this case, the 1st Federal District Court of the State of Amazonas granted a primary injunction ruling that any activity by the company in Mura territory must respect the right to free, prior and informed consultation provided by ILO Convention 169.<sup>27</sup> The lawsuit is still in progress and the Federal Prosecution Service has requested that the primary injunction ruling become definitive in the court's sentence.

In contrast, in the 'Vale Agreement' established after the Brumadinho dam disaster mentioned earlier in this piece, compensation was the kind of reparation that prevailed. The material and moral damages caused by the dam collapse were estimated at US\$ 7 billion, an amount that the company agreed to pay to the victims, halting the filling of a class action by the Federal Prosecution Service.<sup>28</sup>

The Public Prosecution Service sought symbolic measures to reach a settlement with the German automobile manufacturer Volkswagen for its complicity with the Brazilian Military Dictatorship between the years 1964 and 1985. In order to provide some kind of satisfaction to the victims, the company agreed to publish a statement recognizing its cooperation with the Brazilian repression agencies<sup>29</sup> and to pay for the construction of the Fight for Justice Memorial.<sup>30</sup>

Finally, guarantees of non-repetition had a prominent place in the agreement reached by the Public Prosecution Service with the French supermarket chain Carrefour, in relation to the murder of an afro-descendent worker by an outsourced security guard characterized as a hate crime. To avoid civil liability, Carrefour, among other commitments, agreed to create and implement an anti-racist action plan for the company and its contractors.<sup>31</sup>

#### IV. Possible Inputs from Brazilian Practice to International Binding Standards

The ability of the Prosecution Service to file class actions on behalf of victims of human rights violations, the absence of legal or court fees for them and the possibility of reversing the burden of proof in such cases are some of the great strengths in Brazil's remedies system.

The ease with which claims involving human rights violations can be brought in Brazil, especially through the avenue of class actions, can be hampered by significant delays in proceedings, which can make it difficult to obtain positive results within a reasonable time. The disparity of arms between the parties can also affect the chances of success. However, the Public Prosecution Service has found ways of circumventing or alleviating these challenges in certain cases.

<sup>27</sup> Elaíze Farias, 'A guerra do potássio em Autazes', *Amazônia Real* (27 March 2022), <https://amazoniareal.com.br/especiais/projeto-autazes/> (accessed 4 December 2022).

<sup>28</sup> 'Vale dam disaster: \$7bn compensation for disaster victims' *BBC* (4 February 2021), <https://www.bbc.com/news/business-55924743> (accessed 4 December 2022).

<sup>29</sup> Stephanie Vendruscolo, 'Volkswagen assina acordo milionário de reparação por colaborar com ditadura e abre precedente histórico', *El País* (24 September 2020), <https://brasil.elpais.com/brasil/2020-09-24/volkswagen-assina-acordo-milionario-de-reparacao-por-colaborar-com-ditadura-e-abre-precedente-historico.html> (accessed 4 December 2022).

<sup>30</sup> 'VW assina acordo e indenizará funcionários perseguidos na ditadura militar', *UOL* (23 September 2020), <https://www.uol.com.br/carros/noticias/redacao/2020/09/23/vw-assina-acordo-e-indenizara-funcionarios-perseguidos-na-ditadura-militar.htm> (accessed 4 December 2022).

<sup>31</sup> Ana Cristina Rosa, 'Acordo histórico institui Plano Antirracista do Carrefour para o Brasil', *Folha de S. Paulo* (13 June 2021), <https://www1.folha.uol.com.br/colunas/ana-cristina-rosa/2021/06/acordo-historico-institui-plano-antirracista-do-carrefour-para-o-brasil.shtml> (accessed 4 December 2022).

Recommendations and out of court settlements usually solve problems involving human rights violations by companies in a simpler, cheaper and faster way than judicial remedies. For that reason, class actions are typically filed only when the use of non-judicial or hybrid remedies is not possible or has proven insufficient. The creative range of reparations measures available through both judicial and non-judicial avenues is another asset.

Considering this scenario of strengths and weaknesses, it is fair to conclude that Brazil has strong features that could inspire the drafting of remedy provisions in an international legally binding instrument on business and human rights, especially with regard to a strong and independent public entity entitled to defend the interests of rights holders through a variety of judicial and non-judicial proceedings, the absence of financial costs which often prevent victims of human rights abuses from accessing justice, and the reversal of the burden of proof in lawsuits involving human rights violations.

**Competing interest.** The author declares none.