



GONZALO BERRÓN

Gonzalo Berrón is Argentinian. He has a PhD in Political Science (University of São Paulo, Brazil), is the Project Director for the Friedrich Ebert Foundation – Brazil, and is an Associate Fellow of the Transnational Institute.

Email: gonzalo@fes.org.br

ABSTRACT

The end of the “Ruggie’s Peace” is defined by a new trend of questioning the voluntary standards for transnational corporations that, after more than 40 years of debate, still govern international law. The need for binding rules has been raised anew by governments and social organizations in response to failures to implement the Guiding Principles and growing evidence that the concentration of economic power in the hands of transnational companies (some of them *multilatinas*) leads to greater human rights violations and to weaker and more unequal democracies.

Original in Spanish. Translated by The Transnational Institute (TNI).

Received in March 2014.

KEYWORDS

Transnational corporations – Guiding principles – Corporate capture – Binding codes



This paper is published under the *creative commons* license.

This paper is available in digital format at www.surjournal.org.

ESSAY

ECONOMIC POWER, DEMOCRACY AND HUMAN RIGHTS. A NEW INTERNATIONAL DEBATE ON HUMAN RIGHTS AND CORPORATIONS

Gonzalo Berrón

We live in a time of global capitalism where certain trends appear to be converging, which, gathered, conspire against the ability of several generations to exercise democracy and human rights. On the one hand, the growing concentration of private wealth is superimposed on the old North-South geopolitical divide, and is now expressed at the global scale through transnational “megacorporations” (companies that own companies that own companies and so on) and the arrival of “multilatina” corporations and others based in the “emerging” economies. On the other hand, there is a new kind of interdependence between the financial world and the political world, which manifests itself through what some call “corporate capture” – or the capture of politics/democracy by economic powers, a phenomenon that cannot be summarized as just the participation of the “rich” in politics, or the old Weberian plutocracy. Rather, they speak to a greater promiscuity facilitated by politicians’ condition of financial dependence in competitive democratic systems. In other words, politicians’ chances of getting elected depend on the amount of money they have to carry out election campaigns, and their performance in executive or legislative positions is influenced by the commitments they make to ensure their future re-election or a “dignified withdrawal” from public service; as an example of the latter, several illustrious former European premieres now serve as consultants for large corporations.

The growth of economic power resulting from its concentration also has impacts on the international level; these mechanisms of capture can also be found in international institutions¹. Furthermore, in addition to the traditional geopolitical power calculations on the international scene, we must now add the economic calculations of business agents who have penetrated the so-called global governance mechanisms. They do so actively through the construction of

Notes to this text start on page 130.

what some call the "architecture of impunity" (BERRON; BRENNAN, 2012) – a web of agreements, treaties, and laws that expand the rights of "businesses" - or by directly occupying positions in international institutions, or by exerting pressure via national governments that defend the economic interests of their corporations (STIGLITZ, 2014).

1 Hyper-concentration, the “1%” and rights

Popularised after the 2008 crisis as the "1%", the high concentration of wealth, property and decision-making power in the hands of an increasingly smaller number of actors has been illustrated in a growing number of studies published in recent years. If we examine each of these three dimensions, starting with the concentration of wealth, we find recent studies showing that 1% of the population in the United States has 45% of the total wealth.² According to ECLAC, in Latin America, the “richest quintile owns on average 46%, which ranges from 35% (in Uruguay) to 55% (in Brazil)” (CEPAL, 2014). In Europe, in 2012, the income of the richest 20% of the population was 5.1 times higher than that of the poorest 20%; in 2003, this ratio was 4.6.³ As for the ownership of corporations, the famous ETH Zurich study showed that the global network of companies is currently managed by 147 mega-corporations (VITALI; GLATTFELDER; BATTISTON, 2011). The vast number of mergers and acquisitions has put us on an unstoppable trajectory; for many companies, the logic of “merger/acquisition or death” seems to be the cornerstone of globalization. Meanwhile, several publications and websites list the new “billionaire” rankings and describe how just a few executives sit on the boards of several companies or funds simultaneously (PROJETO..., 2013).

Similarly, the intensification of certain changes in the morphology of corporate management and ownership has implications for decision-making processes, increasing the probability that human rights violations or omissions will occur. For one thing, investment funds and the idea of *mega-corporations* render responsibility for decision-making increasingly invisible, and further distance those who make decisions from those who are directly affected by them. Moreover, outsourcing the management of corporations by hiring CEOs and executives has the added effect of diluting responsibility and immunizing corporations’ real owners against the illegal acts of their managers. The other aspect of this new structure is the pressure to earn profit. This may be either through the economic performance of the funds – and, paradoxically, the active and retired workers who own bonds - or the performance of executives whose success depends on their ability to generate more and more profit.

2 Political and social actions and responses

We are not dealing with an entirely new phenomenon, but rather a reconfiguration of contemporary capitalism that, in its new morphology, generates different effects and reactions. In the process of defending their rights, people historically or newly

affected - workers, users and consumers, people in general, communities and even States - identify the different types of responsible agents involved. They also help to elaborate on the type of problems, gaps and shortcomings that exist in the legal systems that are supposed to protect them. In countries like ours, there is a growing social awareness of the role of the abuses of international economic power, beginning with the privatisations in the 1990s, the globalisation of investments, emblematic cases of corruption, environmental disasters, layoffs and the flexibilisation of labour through relocation (or the threat to relocate). More recently, it has also included the aggressive role of investments and corporations in the "extractive"⁴ industries (agricultural or mineral) and pressure on the environment and natural resources.

In Brazil, the clearance of genetically modified organisms (GMOs), reforms to the Forestry Code, the debate over the Mining Code, initiatives to change the method used to demarcate indigenous land, the construction of massive infrastructure projects, and tax exemptions are but some of the manifestations of economic pressure on the State that affect people's rights. The recent case of hosting the World Cup exposes some of the most perverse forms of this phenomenon: violations of State sovereignty by obliging the State to reform laws and by demanding tax exemptions exclusively for FIFA (laws 12.663 and 12.350). In addition, the explosion of infrastructure projects and the pressure to meet deadlines left public administrators at the mercy of construction firms; authorities were forced to accept exorbitant overpricing, while the supposed beneficial legacy of these works - that is, new social and transportation infrastructure and benefits for urban areas in general - took a back seat. Government authorities also failed to stop the displacement of neighbourhoods and major increases in stadium entrance fees, which resulted in the privatisation of access to sports stadiums that previously were accessible to the public.

This increase in social conflict is an expression of the new contradictions emerging in this recent phase of global capitalism. These contradictions are also present in countries whose governments emerged as a political response in the period - immediately prior to the current one - dominated by the hegemony of the so-called Washington Consensus. Though not entirely distinct from the resistance movements of that period, the new struggles can be characterised as being in direct confrontation with the capital, whose systemic responsibility was emblematically exposed by the crisis that erupted in 2008. And, as in the previous period, this conflict is developing on several levels: within States and on the international scene, which I will address below.

3 The "Ruggie's peace" lasted only 3 years: new tensions in the international debate on human rights and corporations⁵

Not long after the victory of corporate interests in the last major round of discussions on the issue of "human rights and business" in the UN, the system is in the midst of a new debate that gives hope to those who advocate for binding

rules for corporations. Currently, the "Guiding Principles" (GPs) are in force; these were adopted by the UN Human Rights Council in 2011 following receipt of the report "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework", which was drafted by the Special Representative of the UN Secretary General, John Ruggie, based on a consultation process undertaken between 2006 and 2011. Defended by "optimists", these Guiding Principles are general guidelines on human rights and corporations, organised into the three now famous pillars: "protect, respect and remedy". In 2011, in addition to adopting the guidelines, the Council resolved to implement a program to promote them. This program includes various activities and the creation of a Working Group composed of 5 experts (chosen according to the usual UN criteria and balancing "business" affinities with academic and social ones). Activities worth highlighting include the national implementation plans and annual and regional forums. The resolution gave the Working Group a three-year mandate, which ends in June 2014 (NACIONES UNIDAS, 2011).

The Working Group began its work in what appeared to be a period of calm surrounding the "implementation" of the GPs. However, the "Ruggie's peace" came to an abrupt end: in September 2013, Ecuador, together with 80 other governments⁶, presented a declaration, which asserted that:

The endorsement by the UN Human Rights Council in June 2011 of the "Guiding Principles on Business and Human Rights: Implementing the United Nations Protect, Respect, and Remedy Framework" was a first step, but without a legally binding instrument, it will remain only as such: a "first step" without further consequence. A legally binding instrument would provide the framework for enhanced State action to protect rights and prevent the occurrence of violations.

(DECLARACIÓN..., 2013).

This declaration reopened the 40-year debate on the need to effectively regulate the conduct of corporations and protect people and communities from the violations perpetrated by corporations. In this dispute, corporations and the governments that protect them have won all of the battles so far, blocking attempts to get initiatives on binding standards approved⁷ and, as a way to draw attention away from what really matters in terms of protection, promoting various initiatives on soft or voluntary codes. Like "corporate social responsibility", these codes offer a response to society that aims to downplay both the exorbitant wealth that corporations obtain from their activities as well as the violations they often carried out to do so.

Those who defend the Ruggie process argue that one has to give the Guiding Principles time and that now is not the time to start discussing this issue again. They try to deny that Ecuador's declaration expresses a demand, always present in society, for the establishment of control over those whose irresponsible actions are seen as being responsible for the global crises (social, economic, energy, environmental and food). To defend their position, they use four main arguments, almost all based on practical or pragmatic issues:

1. Possible consensus: The GPs represent important progress in relation to what there was before. For the first time, the UN unanimously adopted norms on "business and human rights". This was the agreement that was possible to attain and we must respect it. It is not possible to go further.
2. Complexity: Generating binding rules for corporations is a Herculean task and, due to the complexity of the international system, it is practically impossible to do.
3. Implementation!: Since this is such a complex task, initiating a negotiation process that could take years would hinder efforts to effectively implement the Ruggie principles and, thus, also inhibit the concrete, albeit voluntary, enforcement of human rights when they are violated.
4. Responsibility lies with nation-states: It is ultimately states that must ensure that human rights are respected in their jurisdictions. The role of the international community, as the Guiding Principles indicate, is to help strengthen their capacity to enforce them. Therefore, these voluntary principles are sufficient.

One can add to this list the arguments that diplomats in New York or Geneva do not reveal in public, which are undoubtedly much more pragmatic and real than the ones listed above, and are related to the obstacles that this type of legislation could create for the free circulation of investment and increasing market liberalisation. As for the receiving countries, the majority being the poorest or developing countries, they are concerned that corporations may be discouraged from investing in their countries if binding obligations are adopted. It is clear that these kinds of binding rules would go against the logic that allowed the construction of what we referred to earlier as the "architecture of impunity", as they would imply reversing the excessive expansion of mechanisms that protect the "rights" of foreign investors (i.e., transnational corporations and funds).

Not only do these arguments run counter to the tradition of robust theoretical debates and the principles that have historically characterised the discussion on human rights in international forums; their weaknesses are staggering. This should shame the international community, most of all the members of the UN Working Group, who—whether to cling to the past (a certain patrimonialism) or to defend their own jobs—have defended the Ruggie principles as if they were the keystone rules on human rights and corporations.

The first issue we should address is that, by definition, there is no measure to indicate when it is an appropriate moment to address an initiative like the one led by Ecuador. Political timing is determined by a set of factors, such as the will of the actors involved. In this case, even though the debate had apparently ended in 2011, there are a significant number of States and social organisations that want to put the issue back on the agenda. Therefore, we can say that we are facing a new "moment" - one that demands that the debate on this issue be reopened. The fact that other actors do not want to do so reveals that they are

comfortable with the same status quo that many have been questioning for the past four decades. What is more, there is nothing preventing efforts to advance on both processes simultaneously. In other words, it is possible to discuss a treaty with binding obligations for corporations and to promote the Ruggie principles at the same time. The argument surrounding the “consensus that was possible” is also dynamic and depends on the historical context. There are no indications that the time is not ripe to reach a consensus on stricter rules on human rights. Or, to put it differently, public tolerance of the human rights violations of major corporations and their exorbitant profits has fallen, and therefore, there is now less political space to sustain a global *laissez faire* policy for corporations.

The task of developing such a treaty is indeed complex. It implies making decisions on what crimes are to be judged; who will judge them; what the penalties are; how to organize the various branches of human rights and select the level of applicability and detail; the extraterritorial application of the law; who is responsible; how to combine this kind of treaty with those already in effect; identifying judicial gaps; and many other issues. It is, without a doubt, a complicated task, yet its complexity does not eliminate the need for it. Protecting people and communities, defending their rights, and providing remedies when violations occur are also complex tasks, but they are just as complex and vital for humanity as the development of a vaccine against AIDS, for example, or finding a cure for cancer. The complexity of these tasks does not make them less urgent or necessary for people.

The issue of States’ responsibilities has been examined at great length. Everyone knows that where the nation-state falters, only international norms and/or the international community can protect people. Moreover, as Martin Kohr from the South Center⁸ argues in relation to the abuses of transnational corporations, the asymmetry is greater due to the fact that developed countries possess the institutional means to more effectively prosecute violators of the law and human rights, and, therefore, they are able to better enforce the rule of law. Powerful States have a greater capacity to exert control over powerful economic interests in their territory. As for poor countries, with low levels of institutionality and States that are weak in comparison to transnational mega-corporations, for example, the defense of peoples’ rights and access to justice are limited. Economic powers are able to use various extra-judicial mechanisms to circumvent the law, escape punishment or make it difficult to enforce sanctions. In the case of the contamination of the Gulf of Mexico, the United States government ordered British Petroleum to pay several billions of dollars in fines. In contrast, the Bophal disaster in India or the recent Chevron case in Ecuador provide telling examples of the difficulties that communities affected by human rights violations face in States with less economic power.

4 “Shielding” the rights of people, not of corporations

An international shield is needed to help protect people from the asymmetry of power produced by the accumulation of wealth and the political advantages it

creates. For this, we must overturn the system created through the international arbitration tribunals that protect investors' rights (ICSID and WTO dispute panels) - that is, the rights of major transnational corporations, which are responsible for the majority of international trade and investment flows.

Creating a legal framework that, through one or more treaties, can serve as an international reference for a new perspective on economic relations and rights in today's world is essential. By doing so, the fight for human rights can provide a fundamental tool that - when complemented by the mobilisation of affected communities and social organisations, movements and networks - can expand the frontier of the applicability of human rights throughout the world.

REFERENCES

Bibliography and Other Sources

- BRENNAN, B.; BERRÓN, G. 2012. Hacia una respuesta sistémica al capital transnacionalizado. *América Latina en Movimiento*, Quito, ALAI, n. 476, jun. 2012. (Capital transnacional vs Resistencia de los pueblos). Available at: <<http://alainet.org/publica/476.phtml>>. Last accessed in: June 2014.
- CEPAL. 2014. **Panorama Económico y Social de la Comunidad de Estados Latinoamericanos y Caribeños**, 2013. Santiago de Chile, enero 2014. Available at: <<http://www.cepal.org/publicaciones/xml/7/52077/PanoramaEconomicoSocial.pdf>>. Last accessed in: June 2014.
- DECLARACIÓN en nombre de un grupo de países en la 24ª edición de sesiones del Consejo de Derechos Humanos. **Empresas Transnacionales y Derechos Humanos**. 2013. Ginebra, Sept. Available at: <<http://cancilleria.gob.ec/wp-content/uploads/2013/09/DECLARACION.pdf>>. Last accessed in: June 2014.
- FRIENDS OF THE EARTH INTERNATIONAL. 2012. **Reclaim the UN from corporate capture**. Amsterdam, The Netherlands. 32 p. Available at: <<http://www.foei.org/wp-content/uploads/2013/12/Reclaim-the-UN.pdf>>. Last accessed in: June 2014.
- FUENTES-NIEVA, R.; GALASSO, N. 2014. **Working for the few**. Political capture and economic inequality. Oxfam Internacional, 20 enero. Available at: <<http://www.oxfam.org/sites/www.oxfam.org/files/bp-working-for-few-political-capture-economic-inequality-200114-en.pdf>>. Last accessed in: June 2014.
- GUDYNAS, E. 2009. Diez tesis urgentes sobre el nuevo extractivismo. Contextos y demandas bajo el progresismo sudamericano actual. In: CAAP; CLAES. **Extractivismo, política y sociedad**. Quito: CAAP/CLAES. p. 187-225.
- NACIONES UNIDAS. 2011. Consejo de Derechos Humanos. **Resolución 17/4**, A/HRC/RES/17/4 (16 julio 2011). Available at: <<http://www.business-humanrights.org/media/documents/resolucion-consejo-derechos-humanos-empresas-derechos->

humanos-6-julio-2011.pdf>. Last accessed in: June 2014.

PROJETO mapeia quem manda no Brasil. 2013. **Repórter Brasil**, 4 dic. Available at: <<http://reporterbrasil.org.br/2013/12/projeto-mapeia-quem-manda-no-brasil/>>. Last accessed in: June 2014.

STIGLITZ, J. 2014. On the Wrong Side of Globalization. **New York Times**, 15 marzo. Available at: <http://opinionator.blogs.nytimes.com/2014/03/15/on-the-wrong-side-of-globalization/?_php=true&_type=blogs&_r=0#more-152414>. Last accessed in: June 2014.

VITALI, S.; GLATTFELDER, J.B.; BATTISTON, S. 2011. The Network of Global Corporate Control. **Plos One**, California, 26 oct. Available at: <<http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0025995>>. Last accessed in: June 2014.

NOTES

1. Friends of the Earth International (2012) and more recently, Oxfam Internacional (FUENTES-NIEVA; GALASSO, 2014).

2. "Wealth inequality in America" by Wondershare. Available at: <<https://www.youtube.com/watch?v=QPKKQnijnsM&feature=share>>. Last accessed in: June 2014.

3. Data for 15 European countries, Eurostat. Available at: <<http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&plugin=1&language=en&pcode=tessi180>>. Last accessed in: June 2014.

4. For an analysis on "extractivism", see Eduardo Gudynas (2009).

5. This article was written prior to the 24th Session of the UN Human Rights Council, which, on June 26, 2014, approved resolution A/HRC/26/L.22/Rev.1, which launched the negotiation of a treaty to establish a legally binding international instrument on Transnational Corporations (TNCs) with respect to violations of human rights. The resolution, co-sponsored by

South Africa and Ecuador, was supported by 20 countries and rejected by 14 (European Union, United States, and Japan), and 13 abstained (many of them from Latin America, such as Brazil, Argentina, Chile, Peru). A broad social coalition, the Treaty Alliance, mobilized in favor of this resolution, garnering the support of more than 600 organizations around the world. For more information, go to www.treatymovement.org.

6. African Group, the group of Arab Countries, Pakistan, Sri Lanka, Kyrgyzstan, Cuba, Nicaragua, Bolivia, Venezuela, Peru and Ecuador.

7. The initiative of a UN Code of Conduct for Transnational Corporations (1983) and the Draft Norms on the responsibilities of transnational corporations approved in 2003 by the UN Sub-commission on the Promotion and Protection of Human Rights are of particular importance.

8. Intervention in the Seminar on Transnational Corporations and Human Rights, March 11 and 12, 2014, Palais des Nations, Geneva.