Corporations as subjects with rights: An architecture of impunity

When we speak of rights, we almost always refer to the rights of individuals, peoples, and minorities who are fighting for a dignified, more equitable and just life. However, we cannot ignore that corporations, especially large transnationals, also use the rhetoric of rights. Along with States and many international organizations, corporations promote certain rights that trample over people. Rights such as "free trade" or "free competition" help guarantee them access to and control of more and more areas of life. Lands, water sources, forests and mountains on which countless peoples and communities depend are handed over within the framework of large transnational corporations' "commercial rights."

Many people think that a river is just water and fish, but for us it was the source of our survival and a matter of culture. From the dawn of our ancestors, the Dulce River sustained our people. It is a matter of religion, it is sacred. But now it is dead" (1).

Chief Leomir Cecilio de Souza, Krenak Peoples, Brazil

"What Shell and Chevron have done to the Ogoni people, to their lands and rivers, streams and air, reaches the level of genocide. The soul of the Ogoni people is dying and I am its witness" (2).

Ken Saro-Wiwa, Ogoni People, Nigeria

"Throughout my life I have seen how our rivers, rainforest and air have been affected. In what was a paradise of natural beauty where we could fish and collect medicine from the forest in order to live a life of dignity, the oil company arrived, with no respect for the lives of people or nature" (3).

Humberto Piaguaje, Siekopai People, Ecuador

"We dream of our land. Everything we see, walk on, or feel with our bodies belongs to our land. We need the land to be able to understand ourselves, to know who we are. We are not a people without our land. The government should understand this. What is happening to us is not negotiable. It is not possible to compensate the land" (4).

Gregory Bahla, Orissa, India

"We call this a green desert because this eucalyptus plantation causes a lot of contamination, it causes a lot of problems for us and our children. This green desert does not bring us health, it does not bring us education, it does not bring us food; the birds don't even have the freedom to live in this plantation. It only brings wealth to people from outside; it brings nothing to us. And I feel outraged to be here, under a green desert within indigenous territory" (5).

Chief Jurandir, Pataxo people, Brazil

These accounts give us an idea of the destructive potential of transnational corporations on the lives

of traditional peoples. That which cannot be sold from iron mining, oil and charcoal extraction and pulp production is distributed in communities that have less political and economic power, thus enshrining a relationship of environmental injustice (6). The profits obtained from exploiting natural resources are privatized and transferred to the countries where companies are based, or to local elites. The effluents, pollution and destruction of territories remain in these villages, whose social existence and cultural identity are completely intertwined with the natural environment.

Transnational corporations are complex economic and legal structures, composed of different limited liability companies that operate in different jurisdictions. The fragmentation and intended independence of these companies end up exempting transnationals from the damages their subsidiaries cause. The current international regulatory framework protects transnational corporations and ignores the victims of their harmful operations, creating what has been called the "architecture of impunity" (7).

“The structural logic of these societies makes it difficult to attribute direct responsibility of these groups. Each commercial society has an autonomous architecture and its own active and passive legal sphere, making it impossible to indict its partners for their respective social liabilities (limited liability)” (8).

Existing international standards—by not addressing these issues and because they are of a voluntary nature—are incapable of promoting actions to get companies to take responsibility when they violate human or collective rights. They do not discuss or create mechanisms to reduce the great inequality in access to justice. In addition to sheltering themselves behind this intricate business structure, transnational corporations have the support of the judicial power's oligarchic structure in the countries in which they operate, as well as the best law firms in the world. One may ask whether “justice”—thought of as legal norms and the legal system—is really created and implemented to penalize those who commit injustices.

Who is at risk?

Neither the latest initiatives within the UN Working Group on business and human rights, nor John Ruggie's publication of the Guiding Principles on Business and Human Rights, have established any direct obligations for States or corporations responsible for violations. These voluntary initiatives do not even suggest that corporations should worry about the risks and costs of conflicts caused by the human rights violations that their operations cause. Let's see two paragraphs from the aforementioned document (9):

"Where these agencies [the entities officially or unofficially linked to the State that can provide support or services to business activities] do not explicitly consider the actual and potential adverse impacts on human rights of beneficiary enterprises, they put themselves at risk – in reputational, financial, political and potentially legal terms—[...]."

[States should] "ensure that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses.”

In other words, according to this perspective, those at risk are not the communities whose territories are destroyed, but rather the transnational corporations themselves. According to John Ruggie, "social risk occurs when an empowered stakeholder takes up a social issue area and applies pressure on a corporation (exploiting a vulnerability in the earnings drivers – e.g., reputation, corporate image) [...]" (10). Transnational companies are the ones that are vulnerable and fragile in

the face of traditional peoples' denunciations. Such peoples "have erected a wall of protection around their food cultures and specific territorialities, with which they ensure their physical and social reproduction. They do so not only by demanding compliance with the constitutional devices and the new laws of federal states, but also through direct actions" (11).

In this way, corporations must be alert to these complaints and develop corporate strategies to promote "better relations with local governments, NGOs and communities that can help ease approvals processes for project development, expansion and closure and help resolve disputes and avoid situations in which local groups might hinder or even prevent mining from taking place (...)." It is necessary to facilitate "access to [natural] resources, such as ore bodies, in environments that are increasingly challenging or remote" (12).

It is not a matter of modifying the business practices that traditional peoples point out violate their rights, but rather mitigating, moderating or neutralizing them through a number of strategies such as, for example, "social responsibility" initiatives.

What to do in the face of an intrinsically violent economy?

In order to confront this structure that exempts transnational corporations from responsibility, various social actors from different countries of the world (such as academics, traditional peoples, non-governmental organizations or unions) have discussed the creation of a binding instrument that would hold them responsible for human rights violations. A "Binding Treaty on Human Rights and Companies" whose signatory States "establish civil and criminal liability for corporations and their directors. [...] They must be held responsible, regardless of whether they have acted as perpetrators of the crimes or as accomplices; and this responsibility must be extended to all links of the productive chain of the corporation in question" and they must incorporate the obligations of the treaty in multilateral investment agreements, "in order to link the financial and arbitration institutions to human rights standards" (13). In addition to other devices, it is suggested that human rights obligations "be incorporated into the statutes and commercial contracts of companies, so that their violations constitute an infraction of international law and of their contractual obligations" (14).

To confront the violations of transnational capitalism it is necessary to transnationalize social struggles, joining people that suffer but that also resist violations. In this regard, an initiative like the International Coordination of People Affected by Vale is exemplary. (Vale is a Brazilian multinational mining company and one of the largest logistical operators in the country.) This coordination brings together indigenous peoples, quilombolas (communities formed by slaves who managed to escape captivity), peasants, union members and mine workers from various countries where Vale operates. "We work together to develop tools and common strategies to expose the true Vale, challenge its absolute power and strengthen the workers and all populations affected by its actions" (15).

It is important then to ask: Is it possible to have a capitalist production model without the innumerable damages and violations to peoples and forests and other devastating consequences? Which populations have their rights trampled when the rights to "free trade" or "free competition" are placed above them? The reality is that environmental and social injustice is a key piece of the capitalist economic system.

Raquel Giffoni, raquelgiffoni [at] gmail.com

Professor of Sociology at the Federal Institute of Río de Janeiro
(1) Índios lamentam tragédia em MG: “O rio Doce sabia que ia ser morto”. Available at: http://noticia

s.uol.com.br/cotidiano/ultimas-noticias/2015/11/19/indios-lamentam-tragedia-em-mg-o-rio-doce-sabia-que-ia-ser-morto.htm

(2) Shell en África, Eduardo Galeano. Available at: http://www.voltairenet.org/article124705.html

(3) Atingidos pela Chevron no Equador cobram reparação de danos ambientais, sociais e culturais na Justiça brasileira. Available at: https://fase.org.br/pt/informe-se/noticias/atingidos-pela-chevron-no-equador-cobram-reparacao-de-danos-ambientais-sociais-e-culturais-na-justica-brasileira/

(4) The case of the East Parej Coal Mines Open Cast Project in Jharkland, India. Available at: http://bit.ly/2ssDiYO

(5) Brasil: as plantações da Veracel, a usurpação certificada. Available at: https://www.ecodebate.com.br/2009/03/03/brasil-as-plantacoes-da-veracel-a-usurpacao-certificada/

(6) Environmental injustices are a set of "mechanisms through which unequal societies, from an economic and social standpoint, unload the greatest burden of the environmental damage of development onto low-income populations, discriminated racial groups, traditional ethnic peoples, working-class neighborhoods, and marginalized and vulnerable populations." Manifesto of the Rede Brasileira de Justiça Ambiental (Brazilian Environmental Justice Network), 2001.

(7) BRENNAN, B.; BERRÓN, G. 2012. Hacia una respuesta sistémica al capital transnacionalizado. Latin America in Movement, Quito, ALAI, n. 476, June 2012; HOMA. (2017) Center for Human Rights and Business. “Novos elementos para o Tratado de Empresas e Direitos Humanos da ONU.” Available at: http://homacdhe.com/wp-content/uploads/2017/07/Novos-elementos-para-o-Tratado-de-Empresas-e-Direitos-Humanos-da-ONU.pdf

(8) HOMA, 2017; p.12.

(9) Ruggie, J. (2011). Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework. New York, United Nations. Available at: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

(10) Kytle y Ruggie. (2005). Corporate Social Responsibility as Risk Management: A Model for Multinationals. Available at: https://sites.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_10_kytle_ruggie.pdf

(11) ALMEIDA, A. W. et al. (2010). Capitalismo globalizado e recursos territoriais: fronteiras da acumulação no Brasil Contemporâneo, p. 140. Rio de Janeiro: Lamparina.

(12) ICMM, ESMAP and the World Bank. (2005). Community Development Toolkit, pp. 11, 12. Published by ESMAP and the World Bank, Washington, D.C., United States, and ICMM, London, United Kingdom. Available at https://commdev.org/userfiles/ICMM_20community_20development_20toolkit.pdf

(13) HOMA, 2017, p.8

(14) HOMA, 2017, p.9

(15) International Coordination of People Affected by Vale
https://atingidospelavale.wordpress.com/quem-somos/