

To Bind or Not to Bind  
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April 2014

Ecuador's proposal for a treaty to regulate human rights violations linked to or perpetrated by multinational corporations and other business entities is the latest in a much-divided series of debates around international law, business and human rights. In my view, there are three important points to consider in deliberations around this treaty proposal.

The first is the 'who'. Who is bringing the treaty proposal to the international table? It is of extraordinary relevance that the entity bringing the proposal forward is a state from the Global South. Why is this relevant? For the most part, the business and human rights debate has been staged and informed by members of the Global North. The result is that proportionally little engagement around business and human rights has occurred in the Global South. The response from a Global South state such as Ecuador calling for a binding treaty is a commentary not only on the deficiency of any regulatory regime that may exist (the Guiding Principles being an obvious point of target in this regard) but it also speaks to the legitimacy of those Principles. The Guiding Principles have been criticised not only for their content and the extent to which such is effective, but also for the legitimacy. The fact that those principles have been developed with an emphasis on the input of both business and the Global North highlights the importance of the Global South's stark move in promoting a treaty for this purpose.

The second key consideration is the question of the 'what'. What is being called for in terms of this treaty? The key issue that is at the heart of the treaty is twofold. The one is the notion of binding norms and rules; the notion that there has to be accountability for corporate malfeasance that causes or results in the perpetration of human rights violations with a particular and acute occurrence in the Global South. The status quo internationally continues to rely on an idealised assessment of the global landscape that does not reflect the reality. The emphasis on the state's duty to protect is being criticised for its failure to take into account the fact that several states in fact do not have in their interest the protection of citizens against corporate human rights violations and that this failure on the part of states is due in part to the well-recorded 'race to the bottom' as a result of unequal trade that leads to systems of poverty requiring intervention from foreign capital which in turn forces certain states, particularly in the Global South, to keep their regulatory frameworks weak and their labour standards and governance low. It then becomes an important notional statement – but practically artificial – requirement of states to impose duties on corporations, especially where that state is a host state in a developing economy. It also fails to address a situation where a nation is in a state of armed conflict where the presence of corporate activity is and always has been important for warring factions.

It is not only the binding nature of a treaty that is relevant; it is also the expressive value of noting that the violations linked to or caused by multinational corporations are linked to the trade disparity between the Global North and Global South and that this trade disparity creates systems of poverty that in turn attract low regulations in return for corporate investment.

The third relevant point about the treaty is the question of its usefulness. One of the dividing questions around a treaty is: is it worth the wait? Treaty-making is a lengthy process. However, of greater concern in my view is the question of the end point. Will a treaty be confined to 'gross human rights violations'. What are gross human rights violations? Typically these are associated with *jus cogens* norms violations such as genocide, crimes against humanity, and war crimes. It certainly relates to very traditional notions of civil and political violations such as the violation of the right to life, the right to freedom of religion and the right to be free from slave-like working conditions.

In the context of global economic inequality, however, the violation that is the most relevant is that of poverty. Does it make a real difference if a person is executed in a prison cell or if they die because they are denied access to medical assistance? The cruelty and the suffering inherent in both situations have *at least* common basic denominators. But the torturous conduct on the part of the state has been framed as an egregious violation, by those in the Global North, whereas poverty has been framed as a developmental aspiration and not a violation of law.

A treaty is a good idea but it is only part of a solution. And that solution lies in the unlawfulness of structural poverty. Poverty is created by a range of structures, not least of all by the imperatives of global trade. Why are we not asking the United States and the European Union to reconsider their approach to trade subsidies and trade barriers? How can we continue to have the business and human rights discussion without a very clear commitment to a harmonisation of trade interests that will not only seek to benefit some, but will ultimately assist to alleviate the systems of poverty that create the context in which corporate violations thrive.