

The case against Human Rights

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In July 2013, Amarildo de Souza, a bricklayer living in a Rio de Janeiro favela, was arrested by police in an operation to round up drug traffickers. He was never seen again. De Souza's disappearance was taken up by protesters in street demonstrations, which were met with a ruthless police response. Normally, de Souza's story would have ended there, but public pressure led to a police investigation, and eventually to the arrest of 10 police officers, who were charged with torturing and murdering him.

Brazil, one of the largest democracies in the world, is rarely considered to be among the major human rights-violating countries. But every year more than a thousand killings by police – very likely summary executions, according to Human Rights Watch – take place in Rio de Janeiro alone. The prohibition of extrajudicial killings is central to human rights law, and it is a rule that Brazil flagrantly violates – not as a matter of official policy, but as a matter of practice. Brazil is hardly the only country where this takes place; others include India, the world's largest democracy, South Africa, the Dominican Republic and Iran. These countries all have judicial systems, and most suspected criminals are formally charged and appear in court. But the courts are slow and underfunded, so police, under pressure to combat crime, employ extrajudicial methods, such as torture, to extract confessions.

We live in an age in which most of the major human rights treaties – there are nine “core” treaties – have been ratified by the vast majority of countries. Yet it seems that the human rights agenda has fallen on hard times. In much of the Islamic world, women lack equality, religious dissenters are persecuted and political freedoms are curtailed. The Chinese model of development, which combines political repression and economic liberalism, has attracted numerous admirers in the developing world. Political authoritarianism has gained ground in Russia, Turkey, Hungary and Venezuela. Backlashes against LGBT rights have taken place in countries as diverse as Russia and Nigeria. The traditional champions of human rights – Europe and the United States – have floundered. Europe has turned inward as it has struggled with a sovereign debt crisis, xenophobia towards its Muslim communities and disillusionment with Brussels. The United States, which used torture in the years after 9/11 and continues to kill civilians with drone strikes, has lost much of its moral authority. Even age-old scourges such as

slavery continue to exist. A recent report estimates that nearly 30 million people are forced against their will to work. It wasn't supposed to be like this.

At a time when human rights violations remain widespread, the discourse of human rights continues to flourish. The use of "human rights" in English-language books has increased 200-fold since 1940, and is used today 100 times more often than terms such as "constitutional rights" and "natural rights". Although people have always criticised governments, it is only in recent decades that they have begun to do so in the distinctive idiom of human rights. The United States and Europe have recently condemned human rights violations in Syria, Russia, China and Iran. Western countries often make foreign aid conditional on human rights and have even launched military interventions based on human rights violations. Many people argue that the incorporation of the idea of human rights into international law is one of the great moral achievements of human history. Because human rights law gives rights to all people regardless of nationality, it deprives governments of their traditional riposte when foreigners criticise them for abusing their citizens – namely "sovereignty" (which is law-speak for "none of your business"). Thus, international human rights law provides people with invaluable protections against the power of the state.

And yet it is hard to avoid the conclusion that governments continue to violate human rights with impunity. Why, for example, do more than 150 countries (out of 193 countries that belong to the UN) engage in torture? Why has the number of authoritarian countries increased in the last several years? Why do women remain a subordinate class in nearly all countries of the world? Why do children continue to work in mines and factories in so many countries?

The truth is that human rights law has failed to accomplish its objectives. There is little evidence that human rights treaties, on the whole, have improved the wellbeing of people. The reason is that human rights were never as universal as people hoped, and the belief that they could be forced upon countries as a matter of international law was shot through with misguided assumptions from the very beginning. The human rights movement shares something in common with the hubris of development economics, which in previous decades tried (and failed) to alleviate poverty by imposing top-down solutions on developing countries. But where development economists have reformed their approach, the human rights movement has yet to acknowledge its failures. It is time for a reckoning.

Although the modern notion of human rights emerged during the 18th century, it was on December 10, 1948, that the story began in earnest, with the adoption of the Universal Declaration of Human Rights by the UN general assembly. The declaration arose from the ashes of the second world war and aimed to launch a new, brighter era of international relations. It provided a long list of rights, most of which are the familiar "political" rights that are set down in the US constitution, or that have been constructed by American courts over the years. The declaration was not dictated by the United States, however, and showed the influence of other traditions of legal thought in its inclusion of "social" rights, such as the right to work.

The weaknesses that would go on to undermine human rights law were there from the start. The universal declaration was not a treaty in the formal sense: no one at the time believed that it created legally binding obligations. It was not ratified by nations but approved by the general assembly, and the UN charter did not give the general assembly the power to make international law. Moreover, the rights were described in vague, aspirational terms, which could be interpreted in multiple ways, and national governments – even the liberal democracies – were wary of binding legal obligations. The US did not commit itself to eliminating racial segregation, and Britain and France did not commit themselves to liberating the subject populations in their colonies. Several authoritarian states – including the Soviet Union, Yugoslavia and Saudi Arabia – refused to vote in favour of the universal declaration and instead abstained. The words in the universal declaration may have been stirring, but no one believed at the time that they portended a major change in the way international relations would be conducted; nor did they capture the imagination of voters, politicians, intellectuals or anyone else who might have exerted political pressure on governments.

Part of the problem was that a disagreement opened up early on between the US and the Soviet Union. The Americans argued that human rights consisted of political rights – the rights to vote, to speak freely, not to be arbitrarily detained, to practise a religion of one's choice, and so on. These rights were, not coincidentally, the rights set out in the US constitution. The Soviets argued that human rights consisted of social or economic rights – the rights to work, to healthcare, and to education. As was so often the case during the cold war, the conflict was zero-sum. Either you supported political rights (that is, liberal democracy) or you supported economic rights (that is, socialism). The result was that negotiations to convert the universal declaration into a binding treaty were split into two tracks. It would take another 18 years for the United Nations to adopt a political rights treaty and an economic rights treaty. The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights finally took effect in 1976.

As the historian Samuel Moyn has argued in his book *The Last Utopia*, it was not until the late 1970s that human rights became a major force in international relations. President Jimmy Carter's emphasis on human rights seems to have been a reaction to Vietnam and the gruesome realpolitik of the Nixon era, but Carter himself was unable to maintain a consistent line. Allies such as Iran and Saudi Arabia were just too important for American security, and seen as a crucial counterweight to Soviet influence. Still, something changed with Carter. His five successors – Republicans and Democrats alike – have invoked the term "human rights" far more frequently than any president before him. It is not that presidents have become more idealistic. Rather, it is that they have increasingly used the language of rights to express their idealistic goals (or to conceal their strategic goals).

Despite the horrifying genocide in Rwanda in 1994, and the civil war in Yugoslavia, the 1990s were the high-water mark for the idea of human rights. With the collapse of the Soviet Union, economic and social rights lost their stigmatising association with communism and entered the

constitutional law of many western countries, with the result that all major issues of public policy came to be seen as shaped by human rights. Human rights played an increasingly important role in the European Union and members insisted that countries hoping to join the EU to obtain economic benefits should be required to respect human rights as well. NGOs devoted to advancing human rights also grew during this period, and many countries that emerged from under the Soviet yoke adopted western constitutional systems. Even Russia itself made halting movements in that direction.

America's recourse to torture was a significant challenge to the international human rights regime

Then came September 11, 2001 and the "war on terror". America's recourse to torture was a significant challenge to the international human rights regime. The United States was a traditional leader in human rights and one of the few countries that has used its power to advance human rights in other nations. Moreover, the prohibition on torture is at the core of the human rights regime; if that right is less than absolute, then surely the other rights are as well.

The rise of China has also undermined the power of human rights. In recent years, China has worked assiduously behind the scenes to weaken international human rights institutions and publicly rejected international criticism of the political repression of its citizens. It has offered diplomatic and economic support to human rights violators, such as Sudan, that western countries have tried to isolate. Along with Russia, it has used its veto in the UN security council to limit western efforts to advance human rights through economic pressure and military intervention. And it has joined with numerous other countries – major emerging powers such as Vietnam, and Islamic countries that fear western secularisation – to deny many of the core values that human rights are supposed to protect.

Each of the six major human rights treaties has been ratified by more than 150 countries, yet many of them remain hostile to human rights. This raises the nagging question of how much human rights law has actually influenced the behaviour of governments. There are undoubtedly examples where countries enter into human rights treaties and change their behaviour. The political scientist Beth Simmons, for instance, has described the observable impact in Japan and Colombia of the ratification of the Convention on the Elimination of All Forms of Discrimination Against Women. The puzzle is how to reconcile this with the many examples of blatant human rights violations. Saudi Arabia ratified the treaty banning discrimination against women in 2007, and yet by law subordinates women to men in all areas of life. Child labour exists in countries that have ratified the Convention on the Rights of the Child: Uzbekistan, Tanzania and India, for example. Powerful western countries, including the US, do business with grave human rights abusers.

In a very rough sense, the world is a freer place than it was 50 years ago, but is it freer because of the human rights treaties or because of other events, such as economic growth or the collapse of communism?

The central problem with human rights law is that it is hopelessly ambiguous. The ambiguity, which allows governments to rationalise almost anything they do, is not a result of sloppy draftsmanship but of the deliberate choice to overload the treaties with hundreds of poorly defined obligations. In most countries people formally have as many as 400 international human rights – rights to work and leisure, to freedom of expression and religious worship, to nondiscrimination, to privacy, to pretty much anything you might think is worth protecting. The sheer quantity and variety of rights, which protect virtually all human interests, can provide no guidance to governments. Given that all governments have limited budgets, protecting one human right might prevent a government from protecting another.

Take the right not to be tortured, for example. In most countries torture is not a matter of official policy. As in Brazil, local police often use torture because they believe that it is an effective way to maintain order or to solve crimes. If the national government decided to wipe out torture, it would need to create honest, well-paid investigatory units to monitor the police. The government would also need to fire its police forces and increase the salaries of the replacements. It would probably need to overhaul the judiciary as well, possibly the entire political system. Such a government might reasonably argue that it should use its limited resources in a way more likely to help people – building schools and medical clinics, for example. If this argument is reasonable, then it is a problem for human rights law, which does not recognise any such excuse for failing to prevent torture.

Or consider, as another example, the right to freedom of expression. From a global perspective, the right to freedom of expression is hotly contested. The US takes this right particularly seriously, though it makes numerous exceptions for fraud, defamation, and obscenity. In Europe, most governments believe that the right to freedom of expression does not extend to hate speech. In many Islamic countries, any kind of defamation of Islam is not protected by freedom of speech. Human rights law blandly acknowledges that the right to freedom of expression may be limited by considerations of public order and morals. But a government trying to comply with the international human right to freedom of expression is given no specific guidance whatsoever.

Thus, the existence of a huge number of vaguely defined rights ends up giving governments enormous discretion. If a government advances one group of rights, while neglecting others, how does one tell whether it complies with the treaties the best it can or cynically evades them?

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The reason these kinds of problems arise on the international but not on the national level is that within countries, the task of interpreting and defining vaguely worded rights, and making trade-offs between different rights, is delegated to trusted institutions. It was the US supreme court, for

example, that decided that freedom of speech did not encompass fraudulent, defamatory, and obscene statements. The American public accepted these judgments because they coincided with their moral views and because the court enjoys a high degree of trust. In principle, international institutions could perform this same function. But the international institutions that have been established for this purpose are very weak.

In truly international human rights institutions, such as the UN human rights council, there is a drastic lack of consensus between nations. To avoid being compelled by international institutions to recognise rights that they reject, countries give them little power. The multiple institutions lack a common hierarchical superior – unlike national courts – and thus provide conflicting interpretations of human rights, and cannot compel nations to pay attention to them. That is why, for instance, western countries have been able to disregard the human rights council's endorsement of “defamation of religion”, the idea that criticism of Islam and other religions violates the human rights of those who practice those religions.

The failure of the international human rights legal regime is, then, rooted in the difficulty of reducing the ideal of “good governance” to a set of clearly defined rules that can be interpreted and applied by trusted institutions. People throughout the world have different moral convictions, but the problem is not entirely one of moral pluralism. The real problem is the sheer difficulty of governance, particularly in societies in the throes of religious and ethnic strife that outsiders often fail to understand. There are many legitimate ways for governments to advance people's wellbeing and it is extremely hard for outsiders to evaluate the quality of governance in a particular country.

Many human rights advocates respond that even if human rights law does not function as a normal legal system, it does provide important moral support for oppressed people. When the Soviet Union signed the Helsinki Accords in 1975, which required it to respect human rights, various Helsinki committees sprouted in the eastern bloc, which became important focal points for agitation from dissidents. Women's rights groups in patriarchal countries have drawn inspiration from the ratification of the Convention on the Elimination of Discrimination Against Women. Advocates for children can point to the Convention on the Rights of the Child. NGOs like Human Rights Watch and Amnesty International can pressure governments to improve the human rights they care about, even if they can't get countries to comply with all their treaty obligations. The human rights legal regime, taken as a whole, has made human rights the common moral language of international relations, which has forced governments to take human rights seriously.

But while governments all use the idiom of human rights, they use it to make radically different arguments about how countries should behave. China cites “the right to development” to explain why the Chinese government gives priority to economic growth over political liberalisation. Many countries cite the “right to security,” a catch-all idea that protection from crime justifies harsh enforcement methods. Vladimir Putin cited the rights of ethnic minorities in Ukraine in

order to justify his military intervention there, just as the United States cited Saddam Hussein's suppression of human rights in order to build support for the Iraq war. Certain Islamic countries cite the right to religious freedom in order to explain why women must be subordinated, arguing that women must play the role set out for them in Islamic law. The right of "self-determination" can be invoked to convert foreign pressure against a human-rights violating country into a violation of that country's right to determine its destiny. The language of rights, untethered to specific legal interpretations, is too spongy to prevent governments from committing abuses and can easily be used to clothe illiberal agendas in words soothing to the western ear.

And while NGOs do press countries to improve their behaviour, they cite the human rights they care about and do not try to take an impartial approach to enforcing human rights in general. Sophisticated organisations such as Human Rights Watch understand that poor countries cannot comply with all the human rights listed in the treaties, so they pick and choose, in effect telling governments around the world that they should reorder their priorities so as to coincide with what Human Rights Watch thinks is important, often fixing on practices that outrage uninformed westerners who donate the money that NGOs need to survive. But is there any reason to believe that Human Rights Watch, or its donors, knows better than the people living in Suriname, Laos or Madagascar how their governments should set priorities and implement policy?

Westerners bear a moral responsibility to help poorer people living in foreign countries. The best that can be said about the human rights movement is that it reflects a genuine desire to do so. But if the ends are admirable, the means are faulty. Westerners should abandon their utopian aspirations and learn the lessons of development economics. Animated by the same mix of altruism and concern for geopolitical stability as the human rights movement, development economists have also largely failed to achieve their mission, which is to promote economic growth. Yet their failures have led not to denial, but to incremental improvements and (increasingly) humility.

In his influential book *The White Man's Burden*, William Easterly argues that much of the foreign-aid establishment is in the grip of an ideology that is a softer-edge version of the civilising mission of 19th-century imperialists. Westerners no longer believe that white people are superior to other people on racial grounds, but they do believe that regulated markets, the rule of law and liberal democracy are superior to the systems that prevail in non-western countries, and they have tried to implement those systems in the developing world. Easterly himself does not oppose regulated markets and liberal democracy, nor does he oppose foreign aid. He instead attacks the ideology of the "planners" – people who believe that the west can impose a political and economic blueprint that will advance wellbeing in other countries.

Since the second world war, western countries contributed trillions of dollars of aid to developing countries. The aid has taken many different forms: unrestricted cash, loans at below-

market interest rates, cash that must be used to buy western products, in-kind projects such as dams and plants, technical assistance, education and “rule-of-law” projects designed to improve the quality of legal institutions. For a while, the “Washington consensus” imposed cookie-cutter market-based prescriptions on countries that needed to borrow money. The consensus among economists is that these efforts have failed.

The reasons are varied. Giving cash and loans to a government to build projects such as power plants will not help the country if government officials skim off a large share and give contracts to cronies incapable of implementing those projects. Providing experts to improve the legal infrastructure of the country will not help if local judges refuse to enforce the new laws because of corruption or tradition or incompetence. Pressuring governments to combat corruption will not help if payoffs to mob bosses, clan chiefs, or warlords are needed to maintain social order. Demanding that aid recipients use money in ways that they believe unnecessary can encourage governments to evade the conditions of the donations. The Washington consensus failed because economic reform requires the consent of the public, and populations resented the imposition by foreigners of harsh policies that were not always wise on their own terms.

International human rights law reflects the same top-down mode of implementation, pursued in the same crude manner. But human rights law has its distinctive features as well. Because it is law, it requires the consent of states, creating an illusion of symmetry and even-handedness that is missing from foreign aid. Hence the insistence, wholly absent from discussions about foreign aid, that western countries are subject to international human rights law as other countries are. However, in practice, international human rights law does not require western countries to change their behaviour, while (in principle) it requires massive changes in the behaviour of most non-western countries. Both foreign aid and human rights enforcement can be corrupted or undermined because western countries have strategic interests that are not always aligned with the missions of those institutions. But the major problem, in both cases, is that the systems reflect a vision of good governance rooted in the common historical experiences of western countries and that prevails (albeit only approximately) in countries that enjoy wealth, security and order. There is no reason that this vision – the vision of institutionally enforced human rights – is appropriate for poor countries, with different traditions, and facing a range of challenges that belong, in the view of western countries, to the distant past.

With hindsight, we can see that the human rights treaties were not so much an act of idealism as an act of hubris

Development economics has gone some distance to curing itself of this error. The best development scholars today, such as Esther Duflo, have been experimenting furiously with different ways of improving lives of people living in foreign countries. Rigorous statistical methods are increasingly used, and in recent years economists have implemented a range of randomised controlled trials. Much greater attention is paid to the minutiae of social context, as it has become clear that a vaccination programme that works well in one location may fail in

another, for reasons relating to social order that outsiders do not understand. Expectations have been lowered; the goal is no longer to convert poor societies into rich societies, or even to create market institutions and eliminate corruption; it is to help a school encourage children to read in one village, or to simplify lending markets in another.

It is time to start over with an approach to promoting wellbeing in foreign countries that is empirical rather than ideological. Human rights advocates can learn a lot from the experiences of development economists – not only about the flaws of top-down, coercive styles of forcing people living in other countries to be free, but about how one can actually help those people if one really wants to. Wealthy countries can and should provide foreign aid to developing countries, but with the understanding that helping other countries is not the same as forcing them to adopt western institutions, modes of governance, dispute-resolution systems and rights. Helping other countries means giving them cash, technical assistance and credit where there is reason to believe that these forms of aid will raise the living standards of the poorest people. Resources currently used in fruitless efforts to compel foreign countries to comply with the byzantine, amorphous treaty regime would be better used in this way.

With the benefit of hindsight, we can see that the human rights treaties were not so much an act of idealism as an act of hubris, with more than a passing resemblance to the civilising efforts undertaken by western governments and missionary groups in the 19th century, which did little good for native populations while entangling European powers in the affairs of countries they did not understand. A humbler approach is long overdue.

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