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PROTECTING HUMAN RIGHTS: AN EXAMINATION OF JUDICIAL INDEPENDENCE  
AND TREATY COMPLIANCE

by

Maegan Kay Traynom

A Thesis

Submitted in Partial Fulfillment of the

Requirements for the Degree of

Master of Arts

Major: Political Science

The University of Memphis

December, 2011

## Acknowledgments

Completing this project would not have been possible without the help of my advisors and family. First, I would like to thank my major professor, Dr. Robert Blanton, for investing time into this project. Thank you for reading my many drafts and always giving me honest and helpful feedback. This project would not have been possible without your guidance.

Thank you, Dr. Nicole Detraz, for your time as well. I appreciate you reading my drafts and always giving unique insight into many issues. Thank you especially for always being so encouraging. Your positive attitude has been extremely refreshing through this entire process.

I would also like to thank Dr. David Richards for encouraging me to enroll in the graduate program and for helping me focus in on my research interests. Thank you for giving me the opportunity to work on your CIRI Human Rights Data Project, as it is what initially sparked my interest in human rights. Thank you for setting the standard high in your classes and for showing me what I am capable of academically.

Mom and Dad, thank you for instilling in me a strong work ethic and always believing in me. You both have been so encouraging and supportive through my academic career. Thank you both for setting the bar high, and for always pushing me to reach it. Dad, thank you for teaching me to stand by my beliefs and convictions, even when they aren't popular. You have taught me to be confident, a lesson that will surely continue to help me in so many areas of life. Thank you for the stimulating conversations, and for always listening intently to my research interests. Mom, thank you for always calming me down when I get entirely too anxious about life. You have taught me to put

things in perspective, and I appreciate that so much. Thank you for teaching me during my 3<sup>rd</sup> grade spelling bee that “I can do ALL things through Christ who strengthens me!” I have recited this verse countless times over the past few months and will continue to do so as I take on more of life’s projects.

Lastly, but most importantly, thank you, Gene. You have supported me in countless ways. I could never adequately express my gratitude for the encouragement you have given me. You are truly my rock! Thank you for giving me plenty of space and time to get this project completed, and for being understanding when working on this project has taken priority over time with you. Thank you for listening to my research interests, even though I can be long-winded. You are such a patient person, and I am so thankful for that (as I do require a lot of patience at times). You have been such a blessing in my life and I know I could not have arrived at this point without you. I will forever be grateful for the love and support you have shown me. We are finally both done with school, time to celebrate!

### **Abstract**

Traynom, Maegan Kay. M.A. The University of Memphis. December 2011.  
Protecting Human Rights: An Examination of Judicial Independence and Treaty Compliance. Major Professor: Robert Blanton, PhD.

States agree to many human rights protections through treaty ratification. Often, however, states do not comply with the treaties they have ratified and human rights are abused. This study focuses on the role of the judiciary in holding the state accountable to their obligations under human rights treaties. Specifically, examining whether having an independent judiciary positively correlates with being compliant with human rights treaties. This is done through an exploratory case study of Brazil, which examines both its general court system and its military court system. While the general court system is very independent, the military court system is not. This clearly affects human rights practices in the area of physical integrity rights, leaving Brazil noncompliant with many human rights treaties.

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## Chapter 1 – Problem and Purpose

“Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world” (United Nations, 1948). In 1948 the General Assembly of the United Nations drafted the Universal Declaration of Human Rights. With this document the United Nations hoped to give states clear definitions of human rights to help them better protect the rights of their citizens. Since then, human rights have been reaffirmed and expanded with the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966) and the International Covenant on Civil and Political Rights (ICCPR, 1966). Together these three documents comprise the International Bill of Human Rights, which established the legal framework for human rights protections. Furthermore, there are nine core human rights treaties, and each treaty has an established committee of experts trained in monitoring the implementation of the treaties in their member states (United Nations, 2007). In addition to the legal foundations of human rights protections, involvement has expanded to include non-governmental organizations and international governmental organizations. For example, the Responsibility to Protect coalition consists of various non-governmental organization that strive to bring awareness to human rights violations and build up state capacities to prevent such violations from occurring (Responsibility to Protect). Together, these forces have facilitated the acceptance of human rights protections as an international norm, one which should be respected by all states.

However, even with the various legal documents, committees, and involvement from various groups that aim to enforce the protection of human rights, noncompliance

with human rights treaties still occurs, leading to human rights abuses. These human rights abuses are systematic and recurring, ranging from violations of civil and political rights, such as restrictions on domestic movement to violations of physical integrity rights, such as extrajudicial killings. These abuses are not centralized to a particular state or region, but rather occur in every state, albeit not equally severely. Ideally, human rights would be universally respected and protected by state governments. This would allow for the protection of the “inherent dignity and inalienable rights of all members of the human family,” as stated by the Universal Declaration of Human Rights. However, that simply is not the case currently, and unless positive changes are made in state compliance of human rights treaties, this outcome should not be expected. How can compliance with human rights treaties and the protection of human rights be encouraged and ensured?

A good bit of literature focuses on the issue of compliance and specifically whether states comply with international law in general (Chayes & Chayes, 1993; Hafner-Burton, 2008; Meyer, 1999; Simmons, 2009), as well as human rights treaties specifically. I suggest that a key variable for enforcing compliance with human rights treaties is the presence of an independent judiciary. The judiciary is a unique institution that is designed to reign in the power of the executive and legislative branches by providing horizontal and vertical accountability. Furthermore, the judiciary is charged with the responsibility to maintain the rule of law in a state. The judiciary is therefore capable of holding other branches of government accountable in general, and specifically to their obligations under human rights treaties.



To illustrate the relationship between judicial independence and compliance with human rights treaties, I use the case of Brazil, which is unique in that it has two separate judicial institutions. One of the judicial institutions is the general court system used for the majority of citizens. This institution was developed after Brazil democratized in the 1980s and has been established independently from the executive and legislative branch. The second judicial institution, the military court, is a vestige of the autocratic regime that existed in Brazil pre-democratization. This court is responsible for hearing all cases involving police officers. Incidentally, Brazil experiences a vast majority of its human rights abuses in the area of physical integrity rights, such as torture, political imprisonment and extrajudicial killings. These abuses mainly occur during police encounters. An examination of how the military courts do not function independently will explain this phenomenon.

Towards examining this issue, the next chapter will discuss human rights and the universality of human rights. In order to assume that states have an obligation to protect the human rights of their citizens, it must first be established that human rights do exist, and that each state has a universal responsibility to protect them. This chapter will consider various aspects of human rights, including cultural, normative and legal. Chapter 3 will look at state compliance with human rights treaties. Specifically, I will consider the reasons why some states comply with their international treaty obligations and other states fail to do so. This chapter will discuss the system level of analysis used for studying treaty noncompliance, as well as the state level of analysis. Chapter 4 will look at the existing literature on human rights practice and treaty compliance as studied using a regime level of analysis. Specifically it will consider the relationship between human

rights and liberalism, as well as human rights and democracy. Chapter 5 begins the discussion on judicial independence. The mechanisms of an independence judiciary will be analyzed and existing literature on the relationship between judiciaries and human rights will be discussed. Specifically this chapter will focus on the structure of the judiciary. Chapter 6 will begin my analysis of human rights data and the relationship between human rights treaty compliance and judicial independence. This chapter will include a case study of Brazil, specifically focusing on the structure of their judiciary and how these attributes relate to compliance with human rights treaties. My findings will be discussed and ultimately conclusions will be made regarding the viability and accuracy of my proposed theory.

## Chapter 2 – Human Rights and Universality of Human Rights

### What are Human Rights?

#### *Introduction*

In the Universal Declaration of Human Rights (UDHR), the UN states that “All human beings are born free and equal in dignity and rights” (United Nations). According to this statement, every person is entitled to the protection of human rights based on the qualification of being human. The UDHR includes both negative and positive rights. Negative rights are prohibitions, and are written in a way that protects citizens from specific actions of the government. Positive rights are written in a way that requires the government to actively protect specific rights. Negative rights include protections from slavery, torture, arbitrary arrest, being deprived of a nationality and arbitrary deprivation of property. Positive rights include the rights to life, liberty, property, recognition as a person before the law, equal protection of the law, fair and public hearings, marriage, property ownership, opinion and expression, assembly and association, education, adequate healthcare, to freely move within their country, and to leave and return to a country. These rights have not only been outlined by the UDHR but have also been reinforced by various human rights treaties.

There are three main categories of human rights: civil-political, socio-economic and collective-developmental. Civil-political and socio-economic rights represent rights of the individual against the state, whereas collective-developmental represent rights of peoples and groups against the state (Twiss, 1998, p. 272). Each group then contains two sub-categories. Civil-political rights include rights pertaining to physical and civil security (for example: protections against torture, extrajudicial killings, arbitrary arrest

and equality before the law) and civil-political rights (for example: freedom of speech, expression, assembly, and political participation). Socio-economic rights include provisions of goods meeting social needs (for example: access to nutrition, shelter, health care and education) and provisions of goods meeting economic needs (for example: fair wages and adequate living standard). Collective-developmental rights also includes two sub-types: rights pertaining to the self-determination of peoples (for example: rights to political status, and rights to economic, social and cultural development) and rights protecting religious and ethnic minorities (for example: the right to enjoy a groups own cultures, languages and religions) (Twiss, 1998, p. 272). These three basic types of human rights are largely recognized by the international community.

This chapter will examine the various controversies surrounding human rights protections. First, I will discuss the distinction between group rights and individual rights, and how each category has influenced the development of human rights in general. I will also consider the various positions on universality of human rights, ultimately discussing a legal defense of the universality of human rights, which will be used to defend universal human rights henceforth.

### *Group Rights*

Collective-development rights are more recently becoming an important topic in human rights discourse. When the UDHR was drafted, the goals were to clearly outline individual human rights. Individual rights had not yet been clearly defined in international law. This effort was actually in response to a previous effort to protect group rights, which was prevalent after World War 1. The shift in discourse from group rights to individual rights was a response to negative effects of the focus on group rights.

The focus on group rights actually led to more hostility towards minority groups. This occurred because the definition of group rights allowed majority groups to further marginalize minority groups because the minority groups were well defined and ostracized. This creation of the minority identity strengthened the identity of the majority ethnic groups, creating a very clear “other”. One commentator stated “The lesson of WWII was that emphasizing minorities and highlighting their differences through special protections encouraged groups to define themselves in opposition to others,” and “Nazi racial doctrines appeared to be the inevitable result of such a course” (Oestreich, 1999, p. 113). Because of this, the drafters of the UDHR made an effort to focus on individual rights, assuming that group rights would consequently be protected if individual rights were maintained.

While individual rights have been the main focus of human rights discourse since the drafting of the UDHR in 1948, recently there has been a new push to protect group rights in conjunction with individual rights. It is suggested that this change in human rights discourse is due to globalization (Twiss, 2004). Globalization has recently lead to more focus being placed on collective-development rights because many indigenous and minority groups have become further disadvantaged due to the effects of globalization.

The collaboration (whether intentional or not) of state actors and agents of capital formation (e.g., International Monetary Fund, World Bank, transnational corporations)- have instituted policies and procedures which have so accelerated the destruction of these peoples, their environments, their economies, and their cultures that they have been brought to the brink of annihilation. (Twiss, 2004, p. 44)

Indigenous groups, such as the Bayaka, Dinka, Wichi, Miskito, and Kuna (International Forum on Globalization) are falling victim to the process of globalization and

development. While larger corporations are able to succeed in the expanding global market, local indigenous groups are being stripped of their resources, land and rights in the name of global economic improvements and development. Because of this, more focus has been recently placed on the rights of these groups, which may be unique from individual human rights.

While I do believe there is value in studying collective rights, as of this time these rights are not universally accepted in the international community. In fact, the issue has been surrounded with much contention. The argument still stands that as long as individual rights are protected, group rights will be protected as well. Therefore, when examining compliance with human rights treaties, I will not be examining compliance with the Declaration on The Rights of Indigenous Peoples. Rather, the content “human rights” referred to in this thesis will include only individual rights.

### Universality of Human Rights

#### *Culture*

Human rights should be guaranteed to all human beings, on the basis that each person is a member of the human race. The various treaties drafted by the United Nations and ratified by various states rest on the assumption that human rights apply to everyone, based on the qualification of being human. If such universality exists, an implied duty on the state to protect these rights also exists. This would mean that every state has an obligation to protect the human rights of its citizens. However, some theorists argue against a universality of human rights, citing cultural aversions to many of the rights listed in the Universal Declaration of Human Rights (UDHR). If adhering to this argument, then it must be conceded that not every state has the duty to protect human

rights. Rather, states with cultural aversions to human rights have a legitimate excuse not to protect the human rights that go against the culture or religion of the state. Alison Renteln (1988a,b) and Anthony Pagden (2003) argue that the development of human rights has stemmed from mainly western theorists. Because of this, problems arise when a document, which was formulated from one culture's view on human rights, is applied universally. Views of the American Anthropological Association during the drafting of the UDHR reflect arguments made by Renteln (1988a, b) and Pagden (2003). The association released the "Statement on Human Rights" in 1947, in which they stated,

It will not be convincing to the Indonesian, the African, the Indian, the Chinese, if it lies on the same plane as like documents of an earlier period. The rights of Man in the Twentieth Century cannot be circumscribed by the standards of any single culture, or be dictated by the aspirations of any single people. Such a document will lead to frustration, not realization of the personalities of vast numbers of human beings. (American Anthropological Association, 1947, p. 543)

The American Anthropological Association argued that the UDHR would actually do the opposite of which it was intended. Rather than protecting human rights, it would cause frustration in the international community due to conflicting cultures.

Since the focus of human rights is basic human dignity and human needs, problems arise when presuming all human beings view dignity in the same light and have similar needs. Because of this it could be argued that universally enforcing states to comply with the same human rights takes on a form of cultural imperialism. If human rights truly are derived solely from Western theory, then to incorporate Western theory into international law to be applied universally would be very imperialistic. Universal rights cannot be fairly created and applied because the creation of rights historically has ignored cultural implications of specific rights. "The premise that individuals could negotiate for fundamental principles in the absence of culture is quite fantastic" (Renteln,

1988b, p.349). This argument deconstructs the presumption that human rights are universal, although it is not an opposition to human rights. Human rights, in general have been accepted as a universal norm and no state would blatantly argue that they do not agree with human rights (Messer, 1993, p. 223). Rather, human rights, constructed largely by western theorists, cannot exist as one unit, applicable to all human beings. Thus, states with differing cultures and religions continue to disagree on which rights should be applied universally, and who is actually protected under them. Along these lines, the idea that one document, derived from one culture, is able to regulate human rights practices internationally is not only absurd and impractical, but also imperialistic. Women's rights are an example of disputed rights. While the rights of women are widely protected and encouraged, many states still maintain religious oppositions to women's rights. Specifically, these oppositions could come from states that use Sharia law, including many Middle Eastern and Northern African states.

#### *Normative Standpoint*

Others take a normative standpoint, arguing that human rights should be protected simply because it's the right thing to do. This is seen in work by John Rawls who advocated the law of peoples. The law of peoples is a "political conception of right and justice that applies to the principles and norms of international law and practice" (Rawls, 1997, p. 36). The law of peoples is different from international law, as it is not a positive, legal contract. Rather, the law of peoples is derived from "political concepts of right, justice and the common good" (Rawls, 1997, p. 43). These concepts are then used to form international law. The law of peoples is derived from moral grounds, as opposed to legal grounds, and specifically has roots in natural law. The law of peoples is a concept of



right and justice, and should be applied to all international law to protect justice for all people in the international community. Justice should be accessible to everyone merely on the qualification of being human. The protection of human rights serves this purpose.

While natural law is typically seen as a liberal theory, and certainly the argument could be made that the law of peoples is derived from liberalism, Rawls states that a society does not have to be liberal in order to respect the law of peoples. In fact, a basic tenet of liberalism is tolerance of “other persons’ comprehensive religious, philosophical, and moral doctrines” (Rawls, 1997, p. 37). This, however, is not a *carte blanche* for tyrannical and dictatorial regimes. Rawls continues to say that other societies must be respected, provided their doctrines are “pursued in accordance with a reasonable political conception of justice” (p. 37). Thus, while other, perhaps non-liberal, doctrines should be respected, they still must adhere to a reasonable concept of justice. In the international community, human rights have been seen as something that ought to be protected. Therefore, states that adhere to a reasonable concept of justice will protect human rights. The protection of human rights is not necessarily inherently liberal, but rather is a part of a reasonable law of peoples (Avila, 2007; Rawls, 1997). Thus, states that do not respect human rights fail to recognize a normative concept of justice that is agreed upon in the international community. The claim that the human rights should be respected universally because it is derived from a universal moral norm would raise arguments from scholars who refuse to claim that any norm could be applied universally (American Anthropological Association, 1947; Gilligan, 1982; Messer, 1993; Renteln, 1988a, b).

While the arguments against the universality of human rights and the supporting argument for the universality of human rights based on norms are compelling, there are

problems with both that prevent either from being the most practical way to study and apply human rights. The argument against the universality of human rights leads to the conclusion that nothing can or should be done to enforce human rights protections universally. Yet concluding this, no progress can be made towards ensuring that all persons experience the human rights protections that they are indeed entitled to as a member of the human race. By simply stating they do not agree with the terms set forth by international law makers, due to cultural aversion or religion, state governments can effectively excuse themselves from any duties to protect human rights. However, the normative view of human rights leads much to be desired in terms of guaranteeing that all states commit to protect human rights. Most people would likely agree that human rights *should* be protected and that the protection of human rights leads to justice. However, simply stating that human rights are universal because all humans deserve access to certain rights does not provide any mechanism of accountability. Furthermore, it seems likely that this justification for the universality of human rights would be difficult to find complete agreement on. Scholars such as Pagden (2003) and Renteln (1988) would argue that norms can never be agreed upon. Because of this, a legal view of human rights serves the best purpose in terms of defining their universality and also in charging states with the duty to protect human rights.

### *Legal Standpoint*

International human rights have been largely advanced by the various human rights treaties drafted by the United Nations (UN). Without the legal documents that have advanced the protection of human rights, they would not have the legitimacy that they do today. According to the UN,

While international treaties and customary law form the backbone of international human rights law other instruments, such as declarations, guidelines and principles adopted at the international level contribute to its understanding, implementation and development. Respect for human rights requires the establishment of the rule of law at the national and international levels. (United Nations, 2011, *International Human Rights Law*)

The Universal Declaration of Human Rights was a legal document produced by the UN, to which a most states are parties. Furthermore, there are nine human rights treaty-based bodies that monitor the implementation of human rights. Each of these treaty-based bodies is specifically designed to monitor the rights outlined in a specific human rights treaty. Additionally, 19 other UN agencies are involved in protecting human rights, and work closely with the nine core treaty-based bodies to do so (United Nations, 2011, “Other”). Furthermore, at least some concept of human rights has been written into most state constitutions (Henkin, 1989, p.13; United Nations, 1948). According to the United Nations:

The core principles of human rights first set out in the UDHR, such as universality, interdependence and indivisibility, equality and non-discrimination, and that human rights simultaneously entail both rights and obligations from duty bearers and rights owners, have been reiterated in numerous international human rights conventions, declarations, and resolutions. Today, all United Nations member States have ratified at least one of the nine core international human rights treaties, and 80 percent have ratified four or more, giving concrete expression to the universality of the UDHR and international human rights. (United Nations, 1948)

The activity of the international community on ratifying the many human rights treaties gives the UDHR legitimacy from a legal standpoint. As parties of the United Nations, and ratifiers of the Universal Declaration of Human Rights, states make a contractual agreement to protect the human rights of their citizens. This shows that the state has not only an awareness of the terms to which they are agreeing, but also a willingness to commit to human rights protections. Thus, regardless of cultural or religious differences

between states, states are still willing to commit to human rights protections. The various states that have ratified the document have not only agreed on the terms of the document by doing so, but have also conceded that the state itself has a responsibility to protect human rights. Because of the contractual nature of human rights treaties, looking at the legal aspects of human rights establishes the best argument for the universality of human rights.

While the Universal Declaration of Human Rights has normative roots, the legality of the document solidifies its legitimacy. Rather than stating that states should protect human rights because it is the right thing to do, or relieve states of their duties to protect human rights based on cultural arguments, the legal nature of human rights treaties supports the argument that states should protect rights because such a large majority of states agree to do so. While not every state in the international community has ratified every human rights treaty, enough states of varying cultures and religions have to assume that cultural and religious traditions that opposed human rights are not enough to keep states from legally committing to human rights protections. Because of this, universality -- at least in terms of a standard body of principles -- can be assumed when discussing human rights.

Despite arguments against the universality of human rights, it has been well established in international law, and in state commitments to human rights treaties. This is crucial to recognize, as this acknowledgement necessarily leads to a state duty to protect human rights. Without recognizing the universality of human rights, then there is essentially no responsibility for states to strive to protect human rights. Because of this,

this thesis will presume universality of human rights, which also leads to a presumed duty of states to protect human rights.

Next, I will consider the issue of compliance, and look specifically at why states do or do not comply with the international treaties they have ratified. I will do this by looking at treaty compliance in general, specifically how it is affected by the structure of the international community and state interest. This will later be applicable in examining why some states comply with human rights treaties while others do not.

## Chapter 3 – Compliance

### Introduction

Human rights treaties aim to protect human rights by recruiting states to agree to certain obligations. However, the question arises whether these treaties are effective. Human rights treaties, like treaties in other issue areas, are plagued with a lack of compliance. Realists would argue that it could even be questioned whether compliance can actually be expected in the international system with its anarchical nature. Since there is no central law-making body, and also no central law-enforcing body, how can one expect states to comply with international law? Aside from the lack of a central governing body, a lack of compliance could also be a result of changing state interests, or interests which lie opposed to the interests outlined in a ratified treaty. This is reflected in arguments made by world-systems analysis theorists, such as Wallerstein, who argue that treaties are tools used by core states to control periphery states. With these complexities of the international system and state interests compliance can be difficult to achieve.

The reasons for compliance stated above reflect two ways of studying treaty compliance: by using a system level of analysis and a state level of analysis. A system level of analysis focuses on the characteristics of the international community which contribute to noncompliance. This is seen in scholarship that explains noncompliance as a result of the structure of the international system, specifically its anarchical structure and its lack of a central governing body. The state analysis focuses on state characteristics which lead to noncompliance, such as changing state interests. I will utilize both levels of analysis to give reasons for noncompliance with human rights treaties. After this is done, I will also discuss the consequences of noncompliance. Ultimately, I come to the

conclusion that studying compliance with human rights treaties specifically is best conducted with a state level of analysis as it gives more insight into specific state issues that lead to noncompliance.

### Noncompliance – System Level of Analysis

#### *Structure of the International Community*

Compliance with international treaties is often studied, and various theories exist regarding why state actors sign treaties and what leads to compliance, or lack of. Some of these studies focus on the characteristics of the international system, and how particular characteristics lead to noncompliance. In other words, they use an international system level of analysis. One way of using the system level of analysis to study human rights treaty compliance is by using Wallerstein's (1974) world-system analysis, which divides the international community into three types of states: core, semi-periphery and periphery. The core states are those that are most powerful within the system, such as the United States and Great Britain. Periphery states are those that are least power and are often exploited by the core states. The semi-periphery states create a buffer area between the core and periphery states, not having as much power as the core states, but also not as disadvantaged as the periphery states. The core states are not only the most developed states, but they also have the most legal power in the international community with a greater percentage of core states being represented in international law-making bodies. Using this model, one could argue that the structure of the international system gives more treaty drafting power to core states (Chayes & Chayes, 1993). Naturally the core states are going to draft treaties that fall in line with their state interests. Because of their power in the international community, the core states are able to draft treaties and then

coerce less powerful states into signing the treaties. While these treaties may reflect the interests of more powerful states, they do not represent the interests of all the less powerful states that were goaded to sign the treaties. This leads to noncompliance by less powerful states because often the ratified treaties will lie counter to their state interests, giving the state very little incentive to fully comply. In this case, the cause of noncompliance is not necessarily the state interests, but rather the structure of the system. Due to the periphery states' position in the international community they are coerced into signing treaties that lie in contrast to their interests. Rather than having the ability to contribute to the drafting of international treaties, periphery states are expected to ratify and comply with treaties drafted by core states. Examining this situation with a system level of analysis leads researchers to believe the noncompliance is a result of the hierarchical structure of the international community (Chayes & Chayes, 1993, p. 83). Thus if peripheral states were given the opportunity to contribute to treaty drafting, perhaps they would be more compliant with the treaties they are encouraged to ratify.

Realists cite another characteristic of the international system, its lack of a central governing body or enforcement agency, as hampering compliance with international law. A classical realist would argue that compliance and cooperation shouldn't be expected in an anarchical international system. To realists, while the term "international community" is used often, no such community actually exists. According to Karl Meyer (1999), the international community consists of one super power, the United States, about a dozen pivotal states, and about 150 smaller, weaker, and dependent states. This reflects the argument made by Wallerstein regarding the structure of the international community, although Meyer uses this structure to make a different argument. Since the international



community has no enforcement agency, the pivotal states, who are not as disadvantaged as the weak dependent states, consistently get away with noncompliance with human rights treaties. No punishment exists for noncompliance with international treaties and thus the pivotal states are able to shirk on their obligations under the treaties they have ratified. The pivotal states specifically are able to do this because they are the superior powers (aside from the United States) in the international community. Meyer discusses Turkey and the Kurds, Russia and the Chechens, and China and the Tibetans as examples of pivotal states that have denied massive amounts of people their human rights. Each state was noncompliant with the human rights treaties they had ratified. Even though these states were legally bound to the treaties they had ratified, no enforcement mechanism exists to ensure treaty compliance. These states simply received a pass on their human rights abuses while harsher measures are put in place by the pivotal states to enforce human rights treaties in the smaller, weaker states. The pivotal states are able to put international pressure on the weaker states to remain compliant with their human rights treaties, however, little international pressure is placed on pivotal states to comply with their human rights treaties. This shows the inequality in international justice, and sheds light on the fact that equal enforcement of international law is difficult to attain.

While world-system analysis and realism have different views regarding the structure of the international system, both come to similar conclusions. Both schools ultimately believe that states will continue to be noncompliant with many of the treaties they sign, although they come to this conclusion in different ways.

### *Collective Action Problem*

Another reason why the international system lacks enforcement is due to a collective action problem. Compliance with treaties is hardly ever enforced because “foreign governments face severe collective action costs when it comes to paying the military, economic, or diplomatic costs of enforcement” (Simmons, 2009, p. 115). Interfering in a foreign state’s affairs is accompanied with many costs. For example, support for military action is needed if a state plans on stationing troops in a foreign state. Furthermore, there are political and diplomatic costs of enforcement. Because of these costs, multiple states are often needed to enforce treaty compliance. However, few states are willing to pay the costs, and rather hope another state will enforce the treaty instead. Ultimately little is done by states in the area of human rights treaties enforcement. Even in the most egregious cases of human rights abuses, such as those that took place in Rwanda, or are currently taking place in Darfur, states are extremely hesitant to get involved diplomatically. The hope is always that another state will intervene and thus cover the costs of intervention. This collective action problem shows how the anarchical nature of the international system makes it difficult for foreign governments to mobilize to enforce international law. With the various competing interests from each government, as well as various diplomatic, economic and military capabilities of each state, the formation of a unified enforcement agency is not typically successful.

### *Naming and Shaming*

With the lack of an enforcement agency in the international system and the collective action problem that exists with state interventions, some theorists argue that compliance is encouraged in other ways. One way compliance with treaties is encouraged

is through “naming and shaming”. This occurs when violators of international treaties are exposed and shamed in the international community. Various NGO’s with stakes in various issue areas participate in the practice of naming and shaming. Within the issue area of human rights, Amnesty International and Human Rights Watch are most often noted. These organizations work to expose human rights violations by governments and then rally groups against the states that experience severe violations. While anecdotes exist to show that in some cases governments do decrease noncompliance when they are shamed in the international community, some scholars, like Emilie Hafner-Burton (2008), question whether naming and shaming is effective in reducing human rights abuses.

According to Hafner-Burton’s research (2008), naming and shaming has mixed results. In most cases, governments that are exposed for human rights abuses continue those abuses or actually increase abuses. The cause of increased human rights abuses by a government lies in the domestic unrest caused by exposing human rights abuses. The exposed abuses anger the citizens of the state that are experiencing the abuses, and often human rights NGO’s will appeal to the citizens of a state to make them more aware of the noncompliance of their government. The exposure encourages citizens to rally against the abusive government, often causing national unrest. This unrest threatens the government and thus causes the government to react with further abuses to suppress the complaints and grievances expressed by the citizens. This type of government response is especially common during an election or territorial dispute, situations which involve high stakes issues to government officials. The costs of losing an election or territorial dispute are much higher than the costs associated with being shamed in the international

community. Because of this, the government is anxious to respond with force before citizens are able to further mobilize (p. 4).

These studies on international compliance focus on the system level of analysis. Each points out a characteristic of the international system which leads to noncompliance. However, it seems as though this level of analysis is not very useful in determining solutions for noncompliance. Many problems are faced when turning to the international community to remedy the problem of noncompliance. Because of these problems, a state level of analysis should be used to determine why states are noncompliant. Using a state level of analysis could lead to state level remedies that are potentially more effective in encouraging compliance. This is evident in Hafner-Burton's analysis of naming and shaming as well. She states that often human rights abuses increase after international shaming because of the domestic results of shaming. The international response to treaty noncompliance caused further domestic human rights abuses. Therefore, a state level of analysis is more appropriate for studying compliance with international law. This level of analysis would target the causes of noncompliance at the state level, which begs the study of state level remedies (especially since the international community has very little ability to remedy noncompliance). A state level of analysis of the causes of noncompliance could allow a more productive response to the issue of noncompliance specifically with human rights treaties.

### Noncompliance – State Level of Analysis

#### *Introduction*

Many researchers focus on a state level analysis of noncompliance, specifically focusing on state interests. According to Beth Simmons (2009) “governments will not

honor international human rights treaties when it is not in their interest to do so” (p. 155).

If states do not comply with treaties they have ratified if it is not in their interest, then why did they ratify the treaty to begin with? On the surface it does not make sense that a state would ratify a treaty that is counter to state interest, yet there are several reasons a state will do so. As mentioned previously, this could be a result of international pressure by larger, more powerful states on smaller states to sign treaties that they otherwise would not have signed. This answers the question with a system level of analysis.

However, there are many reasons to explain why states sign treaties counter to their interests using a state level of analysis as well. In fact, using a state level analysis helps researchers better understand why states ratify treaties as there are different state characteristics which help explain motivation behind treaty ratification.

#### *Treaty Ratification and State Interests*

According to Beth Simmons (2009), there are three types of treaty ratifiers. Each type ratifies treaties for different purposes. The first type of treaty ratifier is a sincere ratifier. These states are in agreement with the content of the treaty and plan to comply with the treaty. These states likely ratify treaties that already align with state interests. In the case of human rights treaties, sincere ratifiers are likely to be democracies which already strive to protect the rights of citizens. These states have low costs associated with ratifying the treaty because in many cases they are either already implementing parts of the treaty, or at least have the institutional capabilities to do so. While not every sincere ratifier is a developed, democratic state with capabilities to easily comply with treaties, the majority are.

The second group of ratifiers is a group of states which make up “false negatives.” Simmons explains that these are states which may already be adhering to the principles of the treaty domestically, but they fail to officially ratify international treaties for various reasons. According to Simmons the United States offers an example of a false negative state. The United States often refuses to sign international treaties, such as the Committee of the Elimination of Discrimination against Women (CEDAW), even though the United State adheres to many domestic laws which align with the values in the treaty. False negatives are at times weary of officially ratifying treaties for fears of a loss of sovereignty or control. While treaty ratification costs would still remain low, the state refuses to ratify for political reasons.

The third group of ratifiers consists of strategic ratifiers. These states ratify treaties because they are coerced to do so by other states, or simply because they want to avoid criticism. These are, in a sense, meaningless commitments, also referred to by Simmons as “false positives”. These states are focused on the immediate diplomatic benefits of ratifying a treaty as opposed to focusing on the goals and values of a treaty. Also, research suggests that concern over reputation leads a state to strategically ratify a treaty (Downs & Jones, 2002, p. 95). Furthermore, there are tangible benefits to ratifying treaties such as investment from other governments. Also, membership into some IGO’s requires treaty ratification. These benefits lead states into ratifying treaties that may not have otherwise, and may not have the capabilities or the interest in upholding the treaty.

#### *Noncompliance and State Interests*

Strategic ratifiers, by definition, are ratifiers of the treaty but are not compliant. For these states the costs of not ratifying the treaty outweigh the costs of noncompliance.

This is not to say that there are no costs to noncompliance, certainly there are. These states, however, are simply not concerned with the costs. They have a short time horizon, meaning that are more concerned with immediate costs than future costs. Furthermore, governments that are strategic ratifiers often are out of power by the time the consequences for noncompliance affect their state.

These explanations help clarify why states ratify treaties. However, according to Simmons most states fall under the category of sincere ratifiers. Meaning most states ratify treaties with the intention of complying. While many states sincerely ratify treaties, some are still noncompliant with treaties for various reasons. As stated earlier, “governments will not honor international human rights treaties when it is not in their interest to do so” (Simmons, 2009, p.155). If most states ratify a treaty fully intending to comply with its measures, and then are noncompliant with some aspects of it, this must indicate a change in state interest from the time of ratification. How do state interests change? There are three reasons why state interests may change from the time of treaty ratification.

### *Changing State Interests*

One reason why state interest would be opposed to the interests outlined in ratified treaties would be that there is often ambiguity in the treaty language. Political circumstances and economies can change rapidly in a state, and often the treaty language is too ambiguous to determine how to respond to new problems within a state. For example, the treaty might reflect state interests at the time of ratification, but after a quick change in state interests due to political or economic circumstances, the state fails to remain compliant with the treaty. While the state had originally complied with the treaty,

the treaty language may be too vague to be able to interpret how new state interests fit with treaty guidelines. This involves a reaction time during which the state must figure out how to respond. In this case the state is not being willfully noncompliant. Rather, the state simply does not know where their interest would fit in with the interests of the treaty, since the state interests have changed since ratification (Chayes & Chayes, 1993).

Furthermore, treaties are often left ambiguous for political reasons. Specifically, more states agree to ratify a treaty if it is less detailed, which allows states to adopt various positions as to the meaning of their obligations (Chayes & Chayes, 1993, p. 189). In this case, organizations are able to get more states to sign treaties because there is less risk associated with ratification. With an ambiguous treaty states are left with room for interpretation. In this situation there is less cost of ratification since states feel as though they are not surrendering as much sovereignty. However, if a state acts in a way that other states would perceive as counter to the treaty, these acts are still seen as noncompliance, regardless if the acting state agrees. Ultimately vague wording in treaties allows states to interpret the treaty differently depending on changing political and economic conditions within the state. However, if state actions are not agreed to be in line with the treaty interests by other states in the international community, questionable actions could very well be seen as noncompliant.

#### *Lack of Capabilities to Comply With Treaties*

A second reason, according to Chayes and Chayes (1993), for noncompliance with treaties is a lack of capability to carry out the provisions of the treaty (p. 193). Often, smaller, developing states are unable to comply with international treaties because they simply lack the capability to do so. In this case, while the state sincerely ratified the



treaty and intended on complying, a lack of capability to do so increased the costs associated with compliance. In these cases of high costs with treaty compliance, it is often not in the interest of the state to comply (Hathaway, 2007). Chayes and Chayes give the example of the Montreal Protocol. After the treaty was signed, only half the states had complied with the provision to report all CFC consumption. Experts discovered that a large majority of the non-reporting states were developing states that could not track CFC consumption without technical aid from the treaty organization. While they were not intentionally being noncompliant, they were not given the tools necessary for compliance. For states that lack capabilities to comply with treaties, ratification comes with high costs. Ratifying states would have to gain capabilities to comply with the treaty which could mean having to alter many domestic institutions. Many states lack the means to do so. However, these costs do not prevent them from ratifying. These states may ratify treaties for any of the aforementioned reasons: international pressure, strategy, diplomatic benefits, etc. While the states may be aware they lack the capabilities to comply, they may not always. Noncompliance in these cases may be intentional, but there are also cases where noncompliance is unintentional.

#### *Treaty Compliance Takes Time*

Lastly, Chayes and Chayes (1993) point out that treaties are intended to affect state action over a given period of time, and therefore a single snapshot of state behavior may not accurately depict state compliance. For this reason, it may appear that states are noncompliant with treaties and that their interest lie opposed to the treaty. However, states sometimes take time to adjust their interests to align with treaty obligations. Often it takes states years to fully comply with international treaties. In many cases states must

alter existing institutions or implement new domestic policies to be fully compliant. These types of state alterations take time and funding. These changes do not take place immediately. Because of this, immediate snapshots of state compliance are sometimes inaccurate, since a state may be in the middle of a transition process. Rather, analyses should be done over a period of time to measure change towards compliance. Chayes and Chayes argue that a transition period is necessary when considering treaty compliance, and most treaties allow time for states to transition into compliance, during which noncompliance is more or less forgiven since state interests are in the process of adjusting.

The state level of analysis used in this chapter to analyze noncompliance will now be more focused on specific government types in chapter four. Specifically, the links between democracy, compliance and human rights practices will be considered. The various issues mentioned in this chapter, such as state interests, institutional capabilities and time, all are intertwined with the topic of the next chapter. A closer look at specific government types will shed light on why some states are compliant, while others are not.

## Chapter 4 – State Level of Analysis: Regime Type

### Introduction

If a state level of analysis is more appropriate for determining why states ratify treaties and why some are later noncompliant, then perhaps a state level of analysis needs to be used to determine ways to engage states in treaty compliance. What characteristics of the state contribute to noncompliance, and how can these characteristics be altered to be more conducive to compliance? For the states that are strategic ratifiers and do not intend on being compliant with the treaty, an institution needs to be in place to keep them accountable to their treaty commitments. Since no formal international enforcement exists, ideally enforcement would lie in the state itself. Specifically, citizens who elect the noncompliant government should be able to hold that government accountable.

Of course, to say that the citizens of a state should have a certain level of power to hold their governments accountable implies a certain level of democracy. As mentioned earlier, many scholars would argue that the very concept of human rights is liberal in nature. If this is the case, then certainly a democratic regime would seem to be more able, and more willing, to protect human rights and comply with international human rights treaties. It would also seem that the costs of noncompliance are much higher in democratic states, where the citizens could penalize the government for noncompliance. The role of democracy and specific institutions utilized by citizens to hold governments accountable should be looked at and their success in encouraging compliance should be measured. Looking at regime type provides a more specific analysis of characteristics of the state.

## Regime Type and Compliance

### *Introduction*

The question of why some states comply with international law, while others do not, is a topic of much scholarly contention. In terms of regime type, democratic governance is generally linked to respect for human rights (Poe & Tate, 1994). At the most basic level both democracy and human rights have many roots in liberalism. A state regime will reflect how closely a state adheres to liberalism. For example, a democratic regime would be expected to be more compliant with human rights treaties, while an autocratic regime would not. By examining human rights treaty compliance across different regime types, one can determine whether there is actually a relationship between regime type and compliance.

### *Human Rights and Liberalism*

The liberal roots of human rights are seen through various studies on human rights. According to Howard and Donnelly (1986), human rights are “the equal and inalienable rights, in the strong sense of entitlements that ground particularly powerful claims against the state, that each person has simply as a human being” (p. 802) The concept of human rights can easily be pulled from liberal theory in regards to the individual and the protection the individual is entitled to from the state. Human rights also have roots in natural law, which is considered a liberal theory. The Universal Declaration of Human Rights (1948) declares in Article 3 that “Everyone has the right to life, liberty and security of person.” Similar natural rights doctrine is seen in John Locke’s Second Treatise of Government (1690) in which Locke argues that everyone is

entitled to certain inalienable rights that are endowed by a creator: life, liberty and property. The liberal aspects of human rights cannot be denied.

Along these lines, the expectation is that liberal, or democratic, regimes will be the most active states in ratifying human rights treaties, adopting constitutional provisions which protect human rights, and most importantly actively protecting human rights. While Howard and Donnelly place a heavy emphasis on regime type, they do not parse out different types of liberal regimes, or specific institutions within liberal regimes. Rather, they look at liberal regimes in general, not paying attention to the fact that many liberal regimes vary significantly in build and in practice. To suggest that *all* liberal regimes *should* have better human rights practices is to suggest that *all* liberal regimes have the same institutions which allow for more human rights protections. This becomes problematic when studies suggest that the human rights records of democratic regimes are mixed, also suggesting that democratic, or liberal, regimes vary in their ability to protect human rights.

### *Human Rights and Democracy*

Ideally, it would seem that democracies would have better human rights records. If the concept of human rights is strongly tied to liberal theory (Howard & Donnelly, 1986), then it seems intuitive that democracies would best protect human rights. The liberal ideals that permeate democratic governments are ones which advocate protection of basic human rights, as well as civil liberties. Individuals tend to cooperate naturally, and governments are established to cater to the needs of the citizenry. Democracy also influences compliance with human rights treaties in its processes. International treaties are most often enforced domestically, not internationally (Powell & Staton, 2009, p. 151).

This is due to the anarchical nature of the international system as explained earlier.

Because international treaties are enforced domestically, Democracies tend to be more compliant for two main reasons. First, constituents “punish” representatives for violating treaties, and democratic regimes provide more institutional mechanisms through which citizens can hold their government accountable to their treaty obligations (Keith, 2002, p. 122). Second, democracies tend to be more compliant with their human rights treaties because of the domestic legal framework established in democratic states. For example, democracies tend to incorporate international law into their domestic constitutions more often, and have enforcement mechanisms to ensure the laws are respected (Powell & Staton, 2009, p. 152). These two explanations briefly look at various aspects of democracy that may make democratic regimes more compliant with human rights treaties.

When observing the relationship between human rights and democracy, it is important to define democracy. Democracy is flooded with conceptual obscurity. Definitions of democracy vary greatly. Is democracy dichotomous or a continuum? According to the Polity IV project, democracy is measured on a continuum, assigning states a score on a range from -10 to +10. The spectrum is divided from -10 to -6 being autocracies, -5 to + 5 indicating anocracies and +6 to +10 indicating democracies. (Polity IV Project, 2010). Freedom house measures democracy on a similar continuum, placing states in one of three categories: free, partly free or not free (Freedom House, 2006). Bueno de Mesquita, George Downs, Alastair Smith, and Feryal Marie Cherif (2005) discuss various multidimensional characteristics of democracy which would all need to be present before a state could be declared fully democratic, such as “1) An allocation of

power that is inclusive; (2) a scope of power that is liberal; (3) a balanced and dispersed distribution of power; (4) elite recruitment that is egalitarian; (5) a sense of widely diffused self-responsibility; (6) impartiality; and (7) decisions that are changeable” (p. 440) These definitions of democracy suggest that states do not fall into two categories: democratic or non-democratic. Rather there is a range of characteristics that contribute to democracy in a state, of which a particular state may only have a few, may have a lot or may have none. Depending on how many democratic characteristics exist within a state lead one to address how democratic that state is. Therefore states may be partially democratic, fully democratic or non-democratic. Even in the partially democratic category there are so many varying levels of democracy that it becomes impossible to say whether a state is “democratic” or “non-democratic.” While most would agree that there are many complex aspects of democracy which keep the term from being dichotomous, the complexities convolute the conceptualization of democracy, making it difficult to measure and define. Since democracy in general is not at the crux of my argument, I will assume that democracy is a continuum, as opposed to a discrete variable, but will not explore further the various aspects that make a state democratic. The only institution of democracy I will explore further is judicial independence, which will be addressed at a later time.

According to Bruce Bueno De Mesquita et al. (2005) on democracies and human rights practices, the relationship between democracy and human rights treaty compliance is not linear (p. 440). They do find a statistically significant relationship between democracy and human rights compliance, however this is only present in states with full-fledged democracies. They did not find the same relationship within states that simply made an improvement in the level of democracy or had a weak democracy. They argue

that the accountability in full-fledged democracies appears to be what causes states to promote human rights protections, while this same level of accountability is not present in weaker democracies. Jenifer Whitten-Woodring (2009) echoes Bueno De Mesquita et al. in saying that the relationship between human rights and democracy is not linear. Rather there is a threshold of democracy, below which, democracy does not improve respect for human rights.

This relationship implies that in many instances there are democratic regimes with practices and characteristics that are non-democratic. Thus when democracies violate human rights, this isn't necessarily a failure of democracy. Rather, it could be argued that the state has relied on its non-democratic attributes. It would seem that if a state were fully democratic and completely reliant upon its democratic characteristics, it would not experience human rights abuses since they lie counter to the very liberal nature of democracy. Because democracies still experience human rights abuses, it could be assumed that these states are either not fully democratic, or not fully reliant on their democratic characteristics in their decision-making. Especially in the case of transitioning or weaker democracies, the state is more likely to make decisions based on its non-democratic attributes as opposed to democratic ones.

#### Democracy: Necessary but not Sufficient?

The findings by Bueno de Mesquita et al. (2005) regarding the non-linear relationship between democracy and respect for human rights, and the conceptual obscurity of the term "democracy" lead me to believe that research should rather focus on the mechanisms within a democracy that contribute to accountability. While democracies are typically more compliant with human rights treaties they still experience systematic



human rights violations, thus suggesting that democracy is not a sufficient condition for human rights protections. Emilia Justyna Powell and Jeffrey K. Staton (2009) echo this, showing proof that democracies are not immune to human rights abuses. Their research focuses on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and under what conditions states are most likely to violate their obligations under the CAT. They find that regardless of regime type, states routinely violate their obligations under the CAT. “81 percent of ratifying states violated the convention in the very year of ratification, including 78 percent of the democratic ratifiers” (p. 150). These are astounding numbers. While democracies overall have better human rights track records (Bueno de Mesquita et al., 2005), there still exists a lack of accountability which keeps governments acting in obligation to their ratified human rights treaties.

If a state level of analysis is not sufficient in explaining human rights treaty compliance, then perhaps a closer look at institutions will provide more insight into why some states are compliant while others are not. This argument is reflected by research done by Oona Hathaway (2007), who states that “human rights treaties are most likely to be effective where there is domestic legal enforcement of treaty commitments” (p. 593). Domestic legal enforcement of treaty commitments does imply some level of democracy. Furthermore, research conducted by Wade Cole (2005) shows that domestic enforcement mechanisms of a state largely affect whether a state is compliant with their treaty obligations (p. 472). This research suggests that domestic institutions do have a great affect on state compliance with treaty obligations.

While much research is done on compliance with international law, only limited insights are provided into the specific mechanisms through which regimes may support compliance. If the purpose of research on this topic is to find ways to lead states to become more compliant with their treaty obligations, then research should focus on ways to hold states accountable to their obligations. The international community is incapable of enforcing compliance by states that do not intend to comply upon ratification or by states whose interests lie opposite of treaty values. There exists no formal enforcement agency, naming and shaming often leads to increased noncompliance and while diplomatic benefits entice states to ratify treaties they are not compelling enough to ensure compliance. If the international community is incapable of holding states accountable to their human rights treaty obligations, then perhaps the citizens of states should be equipped with the necessary tools to provide a check on their government. Focus should be placed on institutions that equip citizens to hold their governments accountable, specifically the institution of the judiciary.

Towards that end, I posit that the nature of this institution, specifically whether or not a state has an independent judiciary, plays a key role in holding a state accountable for protecting the human rights of its populace and this complying with human rights treaties. The next section will further explicate the role of judicial independence in ensuring compliance.

## Chapter 5 – Judicial Independence

### Introduction

The executive and legislature are often focused on in studies of democratic institutions; however the judiciary is less recognized. Yet, its importance is undeniable. The judiciary is essential to the viability of democracies (Staats, Bowler and Hiskey, 2005). In order to move forward with this discussion of judicial independence and democracy, first judicial independence needs to be defined. According to Arun Chatterjee (1973), a judiciary is independent when “the judge has no other superior except the law” (p. 65) It is crucial that the judiciary is not subject to any power besides the law. Judges and justices must have the opportunity to give their preferences and opinions without facing retaliation measures by the legislature or executive (Iaryczower, Spiller, Tomasi, 2002, p. 699). “This depends not only on political constraints face by the court, but also the justice’s political alignment. Political alignment...depends on both the nomination process, and turnover in the court” (Iaryczower et al., 2002, p. 700). Ideally, judges and justices will not have a political alignment, thus making them independent of any persuasions aside from the law.

Independent judges have a responsibility to guard the principle of constitutionality and legality and provide checks and balances. Second, the independent judiciary is responsible for resolving disputes and protecting rights (Domingo, 2000, p. 708). A political alignment could possibly lead judges or justices to rule based on political alignment as opposed to making an unbiased decision based on their interpretation of the law, rendering them inadequate to execute their responsibilities. Iaryczower et al. (2002) argue that judges with shorter tenures will naturally tend towards being aligned with

appointing powers, which would lead to a political alignment with those with the authority of appointment. Furthermore, elected judges will be working towards reelection, which would lead to a political alignment with the constituency that elects. Thus, the most independent judiciaries are made of appointed judges with a long tenure who have no ties to a constituency and do not tend to align with appointing authorities. Considering these definitions of judicial independence and the responsibilities of independent judges, an independent judiciary is one in which the judges are not elected, but rather appointed. Also, the judges must not be manipulated or pressured by the powers in the other branches. Lastly, judges should have reasonably long tenures, which is later defined and explained by my measurements as more than seven years.

#### Judicial Independence and Human Rights

Ultimately in measuring the success of judiciaries, three facets need to be considered: the level of independence, efficiency and accessibility. “Each of these dimensions is viewed as having a strong theoretical link to the ability of the judiciary to ensure the democratic regime” (Staats, Bowler, & Hiskey, 2005, p. 79). In a study done by Staats et al. (2005), they tested the correlations of 11 variables relating to judicial performance. Their findings show that the level of judicial independence has a positive correlation to “effectiveness regarding civil liberties” and “effectiveness regarding equal justice.” The study was conducted with an index of Latin American judiciaries. These variables seemingly would be the ones considered for human rights compliance research, since many measures of human rights reflect how well the government respects rights which would often be considered forms of civil liberties. Human rights such as these would include the right to “free speech, freedom of association and assembly, freedom of

movement, freedom of religion, and the right to participate in the selection of government leaders” (CIRI, 2011). This relationship between judicial performance and effectiveness protecting civil liberties is a microcosm of the larger relationship between judicial independence and human rights. Thus, the judiciary could very well be a mechanism that holds states accountable to their obligations under the human rights treaties they have ratified.

Further research by Linda Keith also suggests that increases in judicial independence would lead to more protections of human rights. Keith examines multiple elements of judicial independence and runs a regression analysis to determine the impact judicial independence has on human rights. While her results were somewhat mixed in terms of strength, overall each of the elements of judicial independence had at least a slight positive relationship with human rights practices, while four of the seven elements of judicial independence had a statistically significant positive relationship with human rights practices (Keith, 2002, p. 5). Also, according to Keith’s research, the implementation of constitutional provisions for an independent judiciary has been increasing since the Cold War. This is significant because it creates a specific time frame researchers can look at when studying the relationship of independent judiciaries with human rights practices. As more states adopt constitutional provisions providing for an independent judiciary, there should be an increase in the respect for human rights. Keith used seven characteristics to define judicial independence: guaranteed terms (or constitutional provisions), finality of decisions, exclusive authority, ban against exceptional or military courts, fiscal authority, separation of powers, and enumerated qualifications. While only four of the seven measures of judicial independence had a

statistically significant relationship with human rights practices, this is still significant in that it shows that the judiciary does affect state behavior regarding human rights. It should also be noted that implementing independent judiciaries is a costly and time consuming process. The process “involves a wide range of steps, from the drafting of legislation to the training of judges and lawyers and the modernization of court systems, police forces and prisons” (United Nations, 1996). Because of the lengthy process, results may not be seen immediately. Therefore further research should continue to be conducted in this area to test the effect judiciaries have on human rights as they emerge and evolve into fully functioning independent judiciaries. Relationships that did not exist strongly when Keith conducted her study may evolve as time lapses from the implementation of the constitutional provisions for an independent judiciary.

Powell and Staton (2009) also come to the conclusion that a functioning judiciary is a democratic institution capable of placing restraints on the state, keeping it accountable to its human rights agreements (p. 154). While they discuss various characteristics of judicial independence, they ultimately measure this by measuring judicial effectiveness. Judicial effectiveness is defined as a judiciary that “constitutes a genuine constraint on state behavior.” Furthermore, the judiciary must be willing and capable of imposing penalties for human rights violations. Their findings reflect that when a state judicial system is effective, there are fewer violations of human rights treaties in states (p. 167). Interestingly, their findings also show a positive relationship between judicial effectiveness and the probability of not ratifying and human rights violations. In other words, judicial effectiveness could increase compliance with human rights treaties, but it also increases the likelihood that a state will not ratify a treaty and

continue to violate human rights. In this case the institution that encourages human rights protections also prevents states from ratifying new treaties (p. 167). Though they do provide insights into the linkages between the judicial branch and compliance, they do so by focusing on judicial effectiveness, rather than judicial independence. Judicial independence is one aspect of judicial effectiveness. Specifically, judicial independence is a measure of structural aspects of the judiciary – how judges are elected, how they act in office, etc. This measure does not look at outcomes of the judiciary as judicial effectiveness does. The particular variable of judicial independence, specifically the structure of the judiciary in a state, is of specific importance, and should be considered separately from overall judicial effectiveness. Judicial independence is a necessary condition for judicial effectiveness. While Powell and Staton’s research does not specifically reflect mine, their findings are extremely important and solidify the argument that the judiciary is a critical domestic institution capable of affecting international human rights treaty compliance.

Other researchers have found similar results. During democratic reforms in El Salvador, judicial reforms were greatly encouraged as a way to protect human rights (Jackson, Dodson & O’Shaughnessy, 1999). The people living in El Salvador at the time were not satisfied with the level of independence practiced by the judiciary, and believed that the judiciary was not holding the state accountable to its treaty obligations. Using survey data, information was collected regarding the public’s feelings regarding the judiciary. A large discrepancy existed between how the public believed the judiciary “ought” to function and how the judiciary was actually functioning. The public wanted reform in the judiciary to expand the protection of human rights. Furthermore, in Latin

America in general over 60% of citizens express “little” or “no confidence” in the judiciary across numerous surveys (Staats et al., 2005). These survey results show that the people of El Salvador were aware of the practices of the judiciary and were not content with the manner in which the judiciary was functioning.

These studies show that citizens are aware of the actions of the judiciary, and look to the judiciary to legitimize their state governments. This is important in the protection of human rights because citizens view the judiciary as a way to hold the executive and legislative accountable to their responsibilities. They also look to the judiciary to provide a check on the executive and legislative power. If citizens have little or no confidence in their judiciary, it is likely because the judiciary is not functioning in a way which allows for the protection of their rights. Thus, the judiciary is important in providing citizens with the security that their rights will be protected, as well as to give legitimacy to the actions of the executive and legislative branches.

Similar to the situation in El Salvador, from 1917-1994, constitutional reforms in Mexico made judicial independence difficult to attain, leading to a passive judiciary characterized by submission to the executive (Domingo, 2000). During this time it was argued that the Mexican government was not only illegitimate, but also careless in the protection of citizens’ rights. Mexican citizens even believed that the federal government was illegitimate due to the political nature of the judiciary. Ultimately the judiciary was extremely important in portraying the legitimacy of the state. When unable to hold the executive and legislature accountable for their decisions and actions, the judiciary becomes nothing more than another political institution, leading to the feelings of distrust the citizenry had of the government. This is because an independent judiciary “should



guard the principles of constitutionality and legality, and provide checks and balances against other branches of the state” (p.708). Without these capabilities, the state government becomes unable to function in a way that is beneficial for its citizens. While this research does not specifically relate to human rights practices, it does show the importance of an independent judiciary, not only in protecting citizens, but also in protecting the legitimacy of federal regimes.

### The Judiciary as a Characteristic of Democracy

This distinction between majoritarian influences on democracy, such as elections, and actual legal institutions of democracy, such as an independent judiciary, is critical. If each separate democratic institution did not have independent effects on the outcome of treaty ratification and compliance, then there would be no need to study them independently. Rather, state level analyses, specifically those that look at regime type, would provide conclusive evidence regarding democracies and their behavior regarding human rights practices. This, however, is not the case, and thus distinctions between institutions must be made. There are numerous democracies that hold popular elections but do not have thriving independent judiciaries (Jackson, Dodson, & O’Shaughnessy, 1999). There are also numerous democracies that have thriving independent judiciaries, but do not have fully functioning popular elections (Powell & Staton, 2009). Each institution has unique effects on the regime as a whole. Popular elections in El Salvador were not enough to satisfy the citizens’ desire for a democratic regime (Jackson et al., 1999). Likewise, democratic regimes are not compliant with human rights treaties simply because they hold popular elections. Rather, there is something unique about the judiciary

which allows it to hold state accountable to their treaty obligations, making it a necessary, although not a sufficient, condition for treaty compliance.

Governments are held accountable in two ways. The first is through horizontal accountability. This accountability exists through other government institutions and is defined as “the capacity of a network of relatively autonomous powers (i.e., other institutions) that can call into question, and eventually punish, improper ways of discharging the responsibilities of a given official” (Stapenhurst & O’Brien, 2007). The judiciary functions as one institution that provides horizontal accountability. The second type of accountability is vertical accountability. This type of accountability is the means through which citizens hold their governments accountable to certain standards. The judiciary can also function as an institution that provides vertical accountability, as it gives citizens access to the government. These two forms of accountability relate and interact with one another.

As discussed earlier, democracy can be thought of as a continuum. There are states that are less democratic than others that are still considered democratic. In states such as these, simply being a democratic state may not mean there are sufficient mechanisms in the state to hold the government accountable to their obligations under ratified human rights treaties. For example, Argentina has been given a score of ‘8’ from Polity IV data project since 2003 (Authority Trends, 2011, Argentina). According to this, Argentina would be considered democratic, and a fairly strong democracy as well. However, Argentina still experiences widespread human rights abuses. In 2008 Argentina experienced extrajudicial killings and violations of freedom of speech, as well as widespread instances of torture (CIRI Human Rights Data Project, 1990-2010,

Argentina). Argentina has ratified various different human rights treaties (United Nations, 2011, “United”). From this, it can be concluded that Argentina is noncompliant with the human rights treaties they have ratified. Argentina has regular, peaceful elections, with the federal government having a certain level of accountability to the people. This is an example of the aforementioned vertical accountability. However, when examining the institution of the judiciary, it becomes very clear that Argentina’s judiciary is not independent. Because of this, the federal government lacks a horizontal accountability to other branches of the federal government. From this, it can be argued that without horizontal accountability, means of vertical accountability are not effective.

In 1983 Argentina began the transition from an authoritarian regime toward democracy. However, even though Argentina now maintains a democratic status with regular elections for numerous government positions and a smoothly operating political system, power in the federal government has been largely concentrated in the executive branch. When President Menem took office in 1989 he began making constitutional reforms which would weaken the checks the judiciary was able to place on the executive branch. Menem began by offering prestigious positions to various Supreme Court justices at the time, in hopes of inducing resignations. Menem was able to appoint one new justice with this scheme, although that was not enough to reign in the power of the judiciary as he had hoped. Menem then proposed a provision to congress which would allow Menem to increase the number of justices from five to nine, allowing Menem to appoint justices which would be partial to his policies, giving his a five person majority in the court. Menem succeeded in the passing of the provisions, and appointed various family friends and former colleagues to the positions in the Supreme Court. This gave

Menem the power he hoped for in the Supreme Court, creating a court that was extremely partial to the policies of the president, limiting the likelihood that the court would usurp any of his decisions as President (Larkins, 1998, pp. 423-443).

With such a partial judiciary, horizontal accountability is not only sacrificed, but in many ways vertical accountability is as well. Due to the partial and politicized judiciary in Argentina, much of Argentina's population no longer sees the federal government as legitimate. According to a Gallup Poll taken in 1994, after the constitutional provisions made by President Menem, 72% of respondents stated that judges were too "influenced by the government," while 69% stated that "the decisions of the supreme court were either 'extremely politicized' or 'very politicized.'" More recently a poll conducted by Graciela Romer (1996) showed that "64 percent of Argentines considered the Supreme Court either 'very corrupt' or 'corrupt,' and that 47 percent of respondents thought it was 'obsolete.'" Overall, 87 percent of respondents stated that they were "wholly unsatisfied with the state of justice in Argentina" (as cited in Larkins, 1998, p. 429).

The case of Argentina shows that while democracy is necessary for improvement in human rights conditions (since human rights are inherently liberal, and need a liberal-type regime to function under), it is not a sufficient condition for treaty compliance, as seen with the human rights violations that Argentina still experiences. According to Christopher Larkins (1998), "the judiciary (vested with independence) enforces "the rule of law," which in turn leads to the secure functioning of constitutional democracy" (p. 436). Because of this, the stability of democratization and the functioning and practice of democratic ideals rests on the establishment of an independent judiciary.

## Functions of the Judiciary

In order for a judiciary to be able to function adequately and independently, the judiciary needs to have reasonable power to place checks on the executive and legislative branches, and the judges need to be impartial to political persuasions. In the case of Argentina, the judiciary was given plenty of power to make decisions. Their active role as the judiciary was not limited. However, the judges were not impartial, thus rendering the institution ineffective in serving as a check on the rest of the federal government. Rather, the judiciary worked as a pawn of the executive, making decisions based solely on political alliances with the party in power. This looks vastly different from how judiciaries in authoritarian regimes tend to function. In the case of authoritarian regimes, the judges tend to be fairly independent. “Authoritarian and semiauthoritarian regimes often go to great lengths to respect the impartiality of their judges in order to attach a bit of legitimacy to their rule” (Larkins, 1998). In this case the judges are nominated or elected through independent channels, unlike the case of Argentina where family friends or people of close political affiliation are nominated. Of course, executives of authoritarian regimes are not willing to risk the judiciary limiting the scope of their power. Because of this, the executive often times places heavy political pressure on judges to make certain decisions or pass statutes to limit the institutional authority of the judiciary. The judges may be elected independently, but once in office are forced to act as an arm of the executive. Because of this, the judiciary is no longer a limit on the power of the executive. In the case the judiciary is no longer able to function adequately or independently.

The independent judiciary needs to be established through constitutional provision. The first reason for this is that constitutional provisions have very specific channels through which they are modified, and often this process is lengthy and difficult to achieve. This creates a permanency to judicial independence which is crucial for its viability. In the example of Argentina, President Menem was able to adjust the number of Supreme Court judges with ease, as the number of judges was not set in Argentina's constitution. With this, Menem was able to appoint judges that shared in his political ties. Had a constitutional provision existed that established the number of judges, then perhaps he would not have been able to change it with such ease. A second reason why constitutional provisions regarding the judiciary are important is because it holds the executive and legislature accountable to respecting the independence of the institution. "In legal terms, [this] allows redress to be sought in the courts in the event of a law of action undermining the independence of the judiciary" (Madhuku, 2002, p. 233). Furthermore, in political terms it allows the public to criticize any action by the executive or legislature attempting to interfere with the work of the judiciary. Interference with the judiciary in states where the independence of the judiciary is mandated in a state constitution is a legitimate reason to call for the removal of the current administration or to call for a new administration at the soonest election.

The judiciary, as an institution, clearly has the ability to affect state practices and is critical in protecting the rule of law. The case of Argentina shows that the relationship between democracy and human rights protections is not as direct as some may argue. Rather, many democracies, such as Argentina, remain noncompliant with their treaty obligations. It also shows that when the independence of the judiciary is suppressed,

human rights practices suffer as well. Because of this, I would like to now look specifically at the relationship between judicial independence and human rights practices.

## Chapter 6 – Methods and Case Study

### Introduction

Ultimately the regime level of analysis of human rights is entirely too broad. When using this level of analysis there is no way to measure the various complexities that come with the different institutions included in the make-up of the regime. These institutions could ultimately reveal where the link between ratification and compliance is broken. The judiciary, although understudied, is a vital institution in maintaining democratic ideals in a state. Thus, my research will continue to focus on the judiciary, and how it holds the executive and legislative accountable to their human rights treaty obligations. This research will be conducted through an exploratory case study of Brazil, and an evaluation of the independence of the judiciary and human rights treaty compliance will be conducted. With only one case study being conducted, of course it could be questioned whether the results of this case study would be generalizable. First, Brazil provides a unique case, in that it has two separately functioning judiciaries. Brazil has a general judiciary that hears the majority of cases, and a military judiciary which hears cases involving military personnel and the national police force. This distinction becomes very important in my analysis. So, while the scope of the case study focuses on one state, it examines two subsystems within the state. This does serve the ultimate purpose of comparing separate judiciaries. Also, by focusing on separate subsystems within one state, many other variables are held constant, such as culture, economy, history, language and other state institutions. By holding these variables constant, it helps ensure that the relationship between judicial independence and treaty compliance is being measured. Furthermore, many states in Latin America still utilize a military court system.



Because of this, the results of the case study can be used to make assumptions about the relationship between judicial independence and human rights treaty compliance in the various Latin American states that have a military court system.

Based off the previous research, I expect my findings to show a positive correlation between judicial independence and treaty compliance. If this is the case, this research could aid in the development of independent judiciaries world-wide. Specifically, the findings could have strong implications for the development of a judiciary in Iraq. The international community is heavily involved in the democratization of Iraq, and knowing which mechanisms of a democratic regime are most conducive to human rights protections could greatly aid in achieving the ultimate goals of democratization and protection of human rights.

### Case Study: Brazil

#### *Introduction*

Brazil is an ideal state to look at for numerous reasons. First, Brazil is a democratic state that still experiences widespread human rights abuses. Because of this, it provides a good example of why the regime level analysis is too broad for studying compliance with human rights treaties. Furthermore, Brazil ideally should be capable of protecting human rights for numerous reasons. First, Brazil completed its democratization process in 1985, since having 26 years to develop institutions which are conducive to the protection of human rights. Furthermore, Brazil does not lack the material resources necessary for developing such institutions. Brazil has a GDP of \$2.1 trillion and in 2010 experienced a growth rate of 7.5%. Brazil is also heavily involved in international trade, which suggests it has numerous diplomatic ties which would give it an incentive to

comply with the international human rights treaties it has ratified. These characteristics make Brazil an ideal state to study when examining human rights practices.

Brazil is a federal republic consisting of 26 states and a federal district.

According to the Polity IV Regime Trends data, Brazil has been given a score of 8 since 1989, which falls under the “democracy” category (Authority Trends, 2011, Brazil).

However, According to the United States State Department, which releases annual human rights reports of every country for which there is available data, Brazil has experienced widespread human rights abuses since 1989. In the 2009 human rights report, it is stated that:

The following human rights abuses were reported: unlawful killings; excessive force, beatings, abuse, and torture of detainees and inmates by police and prison security forces; inability to protect witnesses involved in criminal cases; harsh prison conditions; prolonged pretrial detention and inordinate delays of trials; reluctance to prosecute as well as inefficiency in prosecuting government officials for corruption; violence and discrimination against women; violence against children, including sexual abuse; trafficking in persons; discrimination against indigenous persons and minorities; failure to enforce labor laws; forced labor; and child labor in the informal sector. (Human Rights Report, 2010, Brazil)

If regime type is enough to explain human rights practices in a country, then Brazil should be protecting the human rights of its citizens. This, however, is clearly not the case. Brazil does have a legal obligation to protect the human rights of its citizens because it has ratified various human rights treaties such as the Convention on the Prevention and Punishment of the Crime of Genocide (ratified in 1952), the International Convention on Economic, Social and Cultural Rights (ratified in 1992), the International Covenant on Civil and Political Rights (ratified in 1992), the Convention on the Elimination of All Forms of Discrimination against Women (ratified in 1984), the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or

Punishment (ratified in 1989), the Convention on the Rights of the Child (ratified in 1990), the Convention on the Rights of Persons with Disabilities (ratified in 2008) (United Nations Treaty Collection, 2011). Brazil has been very active in ratifying treaties on human rights. However, Brazil continues to experience widespread human rights abuses, especially in the area of physical integrity rights (rights against torture, extrajudicial killings, disappearance, and political imprisonment).

### *Background and Human Rights Practices in Brazil*

To provide some historical context regarding human rights practices in Brazil, I will first give some background information of the government in Brazil and the development of democracy in Brazil. Prior to 1982 Brazil maintained a presidential form of government, marked with economic inflation, political violence and very little government stability. In 1982 Brazil began a transition towards a democratic form of government. This transition was further solidified in 1985 when the Brazilian Democratic Movement Party won the office of the presidency. “Brazil completed its transition to a democratically elected government in 1989, when Fernando Collor de Mello won 53% of the vote in the first direct presidential election in 29 years” (Background Note: Brazil, 2010). In October, 2010, Brazil held its sixth consecutive presidential election since its democratic reform in 1985.

Although Brazil has had a stable democratic government since 1985, it has failed in many arenas to comply with its human rights treaty obligations. Data from the CIRI Human Rights Dataset reveals a problematic record of human rights that constitutes a significant departure from the intent of the numerous human rights treaties to which Brazil committed. Since 1989 Brazil has scored a ‘0’ in the categories of “extrajudicial

killings” and “torture,” meaning that every year since then Brazil has experienced at least 50 cases of human rights abuses in each of these areas (CIRI Human Rights Data Project, 1990-2010, Brazil). These abuses should not have occurred had Brazil remained compliant with its treaty obligations under the various human rights treaties it has ratified.

Brazil has a responsibility to protect its citizens from torture under the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (CAT), which it ratified in 1989. Article two of this convention specifically states “Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction” (CAT, 1984). These are clear terms that the state government of Brazil has a duty to protect its citizens from torture and extrajudicial killings. Furthermore, Article 10 states

Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment. (CAT, 1984)

Not only does the government have the responsibility to implement policies which prevent the torture and killing of its citizens, it has a responsibility to ensure that all law enforcement personnel respect protections against torture as well.

One agency that is used in Brazil to train officers according to international human rights standards is the International Committee of the Red Cross (ICRC). The ICRC is a neutral, non-governmental organization that strives to ensure humanitarian protection world-wide, especially in states that have experienced conflict and political violence. ICRC has delegates in every state, and works to train governments and

government bureaucrats in correct humanitarian practices that meet international standards. The ICRC has a regional delegation in Brazil that works with Brazil's armed forces and police forces to teach them practices that protect human rights. The delegation works to ensure the incorporation of international human rights law into local, federal legislation (The Mandate and Mission of the ICRC, 2011).

The ICRC has worked with Brazilian police numerous times. In 1998 ICRC implemented a training program through which it worked with the Brazilian Ministry of Justice to provide adequate training for Brazil's military police officers. Brazil's military police are not a branch of the armed forces, but rather serves as Brazil's federal police force. The federal police force consists of 500,000 officers that are responsible for maintaining public order and implementing legislation (Brazil: Police Instructors Learn the Law, 2000). The course includes theoretical training in the norms of humanitarian law and human rights practices, as well as practical training in how to perform police duties without using excessive force. Since then, ICRC and the Brazilian Ministry of Justice have continued to work with the military police in Brazil to help train them in appropriate practices. This reflects at least some effort being made by the federal government to train officers.

However, even though they are somewhat active in training their officers in protecting human rights, the majority of the torture incidents in Brazil occur during interactions between police and citizens. According to the 2009 Brazil country report, "torture by police and prison guards remained a serious and widespread problem" (Human Rights Report, 2010, Brazil). The report gives numerous cases of police officers using torture during arrests and interrogations. While the Brazilian government has

attempted to train officers to respect human rights, this clearly has not been enough to prevent the abuses from occurring with overwhelming frequency.

While Brazil experiences widespread human rights abuses in the context of physical integrity rights, it does an excellent job of ensuring that its citizens are guaranteed their civil and political rights. In 2009 Brazil received the score of 2 on 9 out of 10 civil and political rights, meaning there were no instances of violations of these rights. Aggregating all the scores of civil and political rights, Brazil scored a total of 12 points out of 14. Since Brazil's democratic reform in 1985, this aggregated score has only fallen below 10 once (in 2008 Brazil scored a 9) (CIRI Human Rights Data Project, 1990-2010, Brazil). This shows compliance with many of the human rights treaties that Brazil has signed. However, it only shows compliance with a particular type of human rights.

## Brazil's Judiciary

### *Introduction*

Brazil has maintained respect for civil and political human rights, while widely disregarding any obligation to protect physical integrity rights. Perhaps analyzing how the judiciary in Brazil functions will give us further insight into these discrepancies in human rights practices. Brazil's constitution provides for an independent judiciary, and in general, the practices of the judiciary do meet the description of an independent judiciary. For example, justices of the Federal Supreme Court are nominated by the President and then voted on by other branches of the government and then approved by the senate. Justices are appointed for an indefinite term until the justice retires, is forced to retire at age 70 (by constitutional provision) or is impeached (Supremo Tribunal Federal, 2011).

The federal courts tend to be more independent in practice than state and municipal courts.

While the Federal Supreme Court is funded adequately and functions properly, some local courts remain under-funded and inefficient. According to the 2009 United States Department of State country report, some rural courts had difficulties maintaining an effective judiciary and were influenced by outside politics (Human Rights Report, 2010, Brazil). However, for the scope of this paper I will not be looking at the independence of each individual court in Brazil for numerous reasons. Rather, I will be examining the independence of the Federal Supreme Court and the independence of the specialized military courts. Local courts that are not completely independent exist in every country, and not necessarily as a result of state mandate. There is a very stark difference between a local court that is influenced by local politics and a court system which has no level of independence due to the structure and design of the court. Brazil's courts, in general, are structured to function independently and judicial independence is provided for in the state constitution. Furthermore, as stated previously in chapter 5, there is a difference between horizontal accountability provided by the courts and vertical accountability. While municipal courts give citizens access to the judiciary, they do not provide horizontal accountability. Municipal courts would provide horizontal accountability if they held jurisdiction over police officers (which are a local arm of the federal government), however in Brazil police officers do not fall under the jurisdiction of the local courts. Therefore, since the local municipal courts of Brazil do not provide horizontal accountability, I will not be analyzing them. Brazil does have specialized

military courts which hold jurisdiction over Brazil's police force. Since the military court provides horizontal accountability it will be examined later.

### *Brazil's General Courts*

Brazil's independent federal judiciary could explain why there are relatively no violations of civil and political human rights. Brazil has clearly adopted international norms regarding respect for these rights. How has the independent judiciary helped maintain compliance with the particular human rights treaties Brazil has ratified regarding civil and political rights? An independent judiciary has the responsibility to hold other branches of the government accountable to its constitutional provisions and treaty commitments. In fact, according to Brazil's constitution, all courts have the power to hear cases involving human rights violations (Lima Marques & Lixinski, 2009 p. 19). Generally, the courts are used in this scope to interpret the meaning of international human rights treaties as applied to the creation of federal law, to ensure that the legislator is acting in accordance with the treaty obligations. The judiciary also uses the international treaties in interpreting federal law in cases involving human rights practices in Brazil. For example, in 2002 the courts used wording from the Universal Declaration of Human Rights (UDHR) to determine that "essential utility services, such as the provision of water, could not be suspended in case of non-payment, precisely because of their essential character for the realization of human rights and human dignity as protected by the Declaration" (Lima Marques & Lixinski, 2009, pp. 20-21).

Other cases exist as well which show the use of international human rights treaties by the courts to protect human rights. The right to life protected by the UDHR was used to guarantee access to medical treatment by the state. Furthermore,



Other uses [of the UDHR] include: to reinforce the right of association and the formation of labor unions; to guarantee the right to housing against eviction; to guarantee the right of access to justice; to have access to independent and impartial courts in the determination of a person's rights and obligations; to protect the right to privacy in its balance with the right of freedom of expression; or to guarantee the secrecy of mail communications. (Lima Marques & Lixinski, p. 21)

This shows specifically how the courts of Brazil have used international human rights treaties to interpret local laws and to ensure that the rights in the treaties they have ratified are adequately respected. In doing so, Brazil's courts have acted independently to ensure that the rights outlined in ratified treaties are protected, rather than acting in regard to any conflicting state interest. The actions the courts have taken to interpret state laws in a way that is cohesive with ratified human rights treaties is reflected by the widespread respect for civil and political human rights experienced in Brazil.

However, there are still widespread violations of physical integrity rights in Brazil that need to be addressed. As stated before, these incidents usually occur during police encounters and in prison. The Brazilian government has completely failed at maintaining any effective level of police oversight. Rather, the police force runs amuck, committing numerous human rights violations while receiving little to no punishment. In fact, fatal police shootings accounted for 10% of all homicides in Sao Paulo and Rio de Janeiro (Macaulay, p. 4; Winslow, Crime and Society). There is clearly a lack of accountability for Brazilian police officers. Interestingly, the word "accountability" is cannot be translated into Spanish or Portuguese, reflecting the weakness of the concept in Brazilian culture. The lack of accountability of Brazil's military police could be explained by the structure of Brazil's judiciary.

### *Brazil's Military Courts*

While Brazil's judiciary is general designed to be independent, there is one caveat. The police in Brazil do not answer to the general court system that the remaining citizens do. Rather, there is a separate court system for the Brazilian police force. This adds a new variable to the analysis. Instead of just looking at judicial independence, in this case it is necessary to examine the military court system in which Brazil's police officers are tried. Historically, the military court system is much older than the newer, general court system. The general court system was formed after democratization in 1985. Prior to 1985, Brazil's authoritarian and militaristic regime utilized the military court system in all cases, even during peacetime. During this time the courts were used specifically to prosecute cases of subversion. Because of this, the court was used more to suppress citizens, especially those who were against the government. The courts commonly relied on confessions extracted by torture, and also convicted citizens of activities that were not crimes at the time the act was committed (Pereira, 2000, p. 5). After Brazil was democratized in 1985, the military court system was not dissolved. While its jurisdiction was limited in ways due to minor reform efforts, police officers still fall under its jurisdiction. Furthermore, the courts system maintains the mentality that they are working for the state, rather than the people. This creates a slew of problems, considering that the courts are intended to provide protections for individual citizens.

There are many problems with this system that keep it from being considered independent. First, the manner in which judges in the court are selected and maintained is far from being considered independent. The judges in the military court system are not actually judges at all. They have little to no legal training. Rather, active duty personnel

serve as judges on the courts. Because of this, there is no separation between the courts and the military, which is an arm of the executive branch of the government. This lies completely counter to the characteristics of an independent judiciary. Furthermore, the very nature of a separate court system for a specific group of citizens violates any notion of equality before the law, something an independent judiciary should strive to protect (Pereira, 2000, p. 2). The military courts are not created or intended to protect the rights of the citizens. Rather, this institution has been maintained from Brazil's militaristic history to protect the interests of the state. In this way, the democratization of Brazil has failed to produce completely democratic results. While Brazil is democratic and was able to construct an independent judiciary, this one institution of the state has failed to progress. This may not keep Brazil from being considered democratic, but it does create a threat to democracy, and to the protection of citizens' rights.

The military court system is not only independent in structure, but also in practice. According to the 2009 United States Department of State country report, the law mandates that the military court system has jurisdiction over cases involving police officers, except in cases where an officer is charged with willful homicide (Human Rights Report, 2010, Brazil). Cases of homicide are investigated by fellow police officers to determine whether the act was willful. Often this is done by comrades in police force, resulting in very few cases actually being reported to the civilian court system (Human Rights Report, 2010, Brazil; Macaulay, p. 9; Winslow, Crime and Society). Very little accountability is exercised in the specialized military court. Even though the majority of police cases are heard in the military court, very few of the cases actually result in convictions or punishment. Furthermore, many of the charges against police are either

dismissed or reduced, with the reasoning that the police tactics were justified and necessary. For example, many torture charges are dropped stating that the actions are an appropriate response to the situation or are standard police practice. Other torture charges that are not dropped are reduced to 'abuse of authority' or 'bodily harm' which carries a much lesser sentence and a shorter statute of limitations (Macaulay, p. 12; Winslow, Crime and Society). Because of these changes in charges, police either serve lesser sentences or the charges are eventually dropped after the courts delay trials as to intentionally exceed the statute of limitations. In 2001 of the 224 complaints filed regarding the military police, only two reached the prosecutor's office (Macaulay, p. 13; Winslow, Crime and Society). This means that an overwhelming amount of complaints against the military police never resulted in charges against the police.

The military courts in Brazil are clearly on the side of the police, not the people. This is shown through the number of complaints against the police that never result in charges, the delaying of cases to exceed the statute of limitations and the reduction in charges to allow police to serve less time than what is appropriate for the crimes committed. The military court system is in no way holding the police, an arm of the government, accountable to their commitments to protect the human rights of the citizens of Brazil. Rather, the structure of the judiciary encourages impunity in the area of human rights protections. The military courts are not independent. Instead of respecting the law as a superior power (Chatterjee, 1973, p. 65), it is subject to political influences, and ignores the law to further empower the police in their corruption. In this case, the lack of independence in the judiciary appears to be directly related to the widespread human

rights abuses experienced by the citizens of Brazil in the context of torture and extrajudicial killings.

### Findings and Application

Brazil's judiciary system is unique from many modern democracies. While the federal court system appears to function well and remain independent from political influences, the military court system fails to do both. The federal court system has been successful in using international human rights treaties in making decisions and interpreting laws, leading to widespread respect of many rights civil and political rights, such as freedoms to association, speech, foreign and domestic movement, practice of religion, and the right to participate in elections. The federal and civil courts, however, do not have jurisdiction over police affairs, which is where Brazil's human rights violations seem to be concentrated. The military court system has failed to remain independent, but rather serves to protect the police forces in Brazil from charges and sentences.

The case of Brazil provides a lot of support for the argument that independent judiciaries help keep states accountable to their obligations to the human rights treaties they have ratified. The juxtaposition of the federal courts and the military courts in Brazil show just how effective an independent judiciary can be in protecting human rights, and also how ineffective a judiciary can be in protecting human rights. The importance of the judiciary cannot be overstated. Many states have military courts, in which military personnel are tried specifically for military crimes such as insubordination. Brazil's military courts far overstep this power and instead try military officers for non-military crimes, and federal police officers as well (Kyle & Reiter, 2011, p. 1)

Further research needs to look at other Latin American states that also have a military court system along with their general courts. There are 10 other states in Latin American that have some form of military court system: Bolivia, Chile, Colombia, Mexico, Cuba, Nicaragua, Paraguay, Peru, Argentina and Venezuela. Research should focus on how these military court systems are utilized in the state. Specifically, it should be considered whether these courts are used to try non-military crimes, and whether the federal police fall under their jurisdiction. This would help determine whether military courts commonly encourage impunity with human rights violations. Furthermore, Ecuador recently unified its court system, and this year passed legislation that integrated the members of the former military court system with those of the general justice system. The new unified system tries all cases, including those dealing with military officers (Human Rights Report, 2010, Ecuador). Research looking at states with separate military court systems should be compared to Ecuador's judiciary. Ideally, Ecuador will see improvements in their human rights practice as a result of this recent transition.

## Chapter 7 – Conclusion

“Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world” (United Nations, 1948). The United Nations established a legal concept of human rights in 1948 with the Universal Declaration of Human Rights. This document stated that all members of the human race are entitled to specific rights, based merely on the qualification of being human. Since then, the United Nations have also drafted various human rights treaties that specify further various human rights. As discussed earlier, human rights are universal, meaning every human being is entitled to them, and every state has a duty to protect them. However, states continue to violate human rights, making them noncompliant with the human rights treaties they have ratified.

While many studies have attempted to explain the reasoning behind state noncompliance with human rights treaties, a vast majority of these studies are too broad. While studies examining the relationship between democracy and human rights treaty compliance produce very mixed results, studying the relationship between judicial independence and human rights treaty compliance narrows the focus enough to determine concisely the root of specific human rights issues in various states. Judicial independence is a critical component to democracy, and to the protection of human rights.

As seen with the case study on Brazil, the lack of judicial independence, specifically in the military courts, leads to widespread human rights abuses in a specific area of human rights: physical integrity rights. There is a very discernable relationship between the two variables in this case. Other states in Latin American also have established military courts as well. Further research needs to examine how these courts

are used and whether they are independent or whether, similarly to Brazil, they work for the state and against the people. The military courts in these states also need to be compared to the general courts in each state, evaluating whether the general court is independent or not as well. My research has policy implications in this area. Foreign policy should focus on improving human rights practices through improving the independence of the judiciary.

My research contributes to the existing literature on human rights treaty compliance, as well as the literature on judicial independence. Examining the relationship between specific state institutions and human rights treaty compliance has only recently become popular, and little research exists on the specific institution of the judiciary. While Powell and Staton did examine these variables, they focused more broadly on judicial effectiveness. However, looking more specifically at judicial independence gives insight into the specific structures of the judiciary which cause judicial effectiveness or a lack thereof. This distinction is especially important in the case of Brazil, where judicial independence explains the lack of effectiveness in the military courts.

My research also suggests that democratic transitions remain imperfect. Despite efforts to democratize various states, some institutions fail to transition. For example, the judiciary in Brazil is a vestige of the previous autocratic regime. Knowing this can allow efforts to focus more diligently on democratic transitions, and specifically how to make transitions more effective. Doing so would allow democratization efforts to better meet their goals. This would also result in more viable democratic institutions, as well as an increase in human rights protections.



Determining whether judicial independence affects state compliance with human rights treaties is critical in the study of human rights. If a significant relationship can be established between the two variables, then efforts can be focused on the judiciary to help improve human rights practices. Ideally, this would result in an improvement in human rights practices, allowing more members of the human race to access to the rights they are promised.

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