

Respecting Human Rights: Does Treaty Ratification Lead to Compliance?

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Abstract: Since the nonbinding Universal Declaration of Human Rights, states have created treaties and conventions to outline what is or is not acceptable regarding the treatment of human beings, with the understanding that if a state signs and ratifies these documents then that state will comply with the principles outlined within it. Time and again however, compliance, or the lack thereof, has presented as a concern amongst many states, as well as non-state actors. The issue of compliance is a serious one because it speaks to credibility. If states do not anticipate compliance from one another it undermines the entire international system and any structure that has been created to address the anarchic nature of international relations will dissolve. In order to make analysis of this massive issue area manageable, I focus on state compliance with human rights law and more specifically, compliance with the Indigenous and Tribal Peoples Convention 1989, or C169. Both Brazil and Argentina have signed and ratified C169 and both are democratic with indigenous populations. Comparing these two states it allows us to better ascertain the circumstances under which states may comply with or defect from international human rights law. I provide an overview on what rationalist theories suggest about compliance, followed by constructivist views. I then outline my position before examining the results of the case study and assessing its' impact as related to both theory and my arguments. Ultimately, I find that notwithstanding ratification and well-developed democratic institutions that allow for a strong civil society to participate in politics, there are still circumstances wherein a state will defect from a human rights treaty because the gain of doing so outweighs the cost of non-compliance.

As the world has become more interconnected, state-to-state interactions have become an area of serious study in the realm of international relations. States contract with each other on myriad issues in an effort to reduce transactional costs, gain influence or improve trade and diplomatic relations. Since the nonbinding Universal Declaration of Human Rights, states have created treaties and conventions to outline what is or is not acceptable regarding the treatment of human beings, with the understanding that if a state signs and ratifies these documents then that state will comply with the principles outlined within it. Time and again however,

compliance, or the lack thereof, has presented as a concern amongst many states, as well as non-state actors. The issue of compliance is a serious one because it speaks to credibility. If states do not anticipate compliance from one another it undermines the entire international system and any structure that has been created to address the anarchic nature of international relations will dissolve. In order to make analysis of this massive issue area manageable, I will focus on state compliance with human rights law and more specifically, compliance with the Indigenous and Tribal Peoples Convention 1989, or C169. Both Brazil and Argentina have signed and ratified C169 and both are

democratic with indigenous populations. By comparing these two states it will allow us to better ascertain the circumstances under which states may comply with or defect from international law. I will first provide an overview on what rationalist theories would suggest about compliance, followed by constructivist views. I will then outline my position before examining the results of the case study and assessing its' impact as related to both theory and my arguments. I will contend that notwithstanding ratification and a well-developed democracy, there are still circumstances wherein a state will defect from a human rights treaty because the gain outweighs the cost of non-compliance. I ultimately believe that transnational legal process viably explains why states will engage and comply with human rights treaties, but with the realist caveat that there exist certain state interests that will lead to complete or partial non-compliance.

Realist theory tends to put forward less optimistic views on the effect of human rights treaties and state compliance with them. Realists, for example, maintain that states are unitary actors with an established set of preferences meant to achieve their own interests with little regard for the wellbeing of other states.¹ While realists acknowledge the existence of NGOs, IGOs and international law, they disregard them as having any real impact beyond their impact as tools for states to manipulate in order to succeed in their aims.² This view would have us

believe that compliance with a human rights convention is predicated entirely upon a cost vs. benefit analysis that would have the value of compliance exceed the cost. Progress on issues requires a motivator and until a state with influence is involved as a driving force, nothing will happen.³ Following this line of thought, whether or not human rights are being abused by a government elsewhere is of little concern to states unless one of their own citizens is in peril and thus coercion to comply from states is inconsistent and unlikely.⁴ A country and its citizens are not likely to be directly affected by human rights violations in another country and therefore they are less likely to feel compelled to act. Human rights treaties are also typically harder to enforce than other types of international agreements. Hathaway notes that less democratic states with poor human rights records are more likely to ratify treaties because they know there will be little to no consequences for violations while more democratic states, where ratification is more likely to change behaviour, are less likely to ratify them.⁵ The absence of an enforcement mechanism allows states to disregard elements they do not intend to or have the capability to adhere to. Neumayer explains the enforcement issue, noting that the comparative weakness of human rights regimes to economic regimes is that there are "no competitive market forces [driving] countries towards compliance, nor are there strong monitoring and enforcement

¹ Eric Neumayer, "Do International Human Rights Treaties Improve Respect for Human Rights?", *Journal of Conflict Resolution*, 926.

² Neumayer, 926.

³ Neumayer, 926.

⁴ Neumayer, 926.

⁵ Oona Hathaway, "Why Do Countries Commit to Human Rights Treaties?" *The Journal of Conflict Resolution* 51, 590.

mechanisms.”⁶ Neutral enforcement mechanisms can compel compliance without relying on coercion of actors by other self-interested actors. As a result, without these mechanisms the system can be manipulated. From the realist perspective, enforcement is a key component of compliance. Without it, there is little to prevent unitary actors from abiding by these international arrangements and they simply reflect the normative aspirations that *should* govern states but can be easily ignored.⁷ It can be interpreted that realists’ view compliance with human rights treaties as either a process of coercion or a simple calculation, and not a moral imperative.

In contrast to the realist perspective, transnational legal process, or TLP, is more optimistic about human rights treaties and the compliance issue. Howard Koh defines the theory as the way in which governmental and non-governmental actors interact on a variety of matters domestically and internationally to “make, interpret, enforce, and ultimately, internalize rules of transnational laws,”⁸ making TLP normative. The interaction between private and public actors at various levels can generate a new law which is then interpreted, debated, amended and adjusted, ultimately leading to internalization and enforcement by domestic authorities. In the human rights context, the various actors, such as human rights based NGOs, diplomats

or even interested individuals with resources, form a kind of “epistemic human rights community”⁹ that engages in or initiates actions meant to address abuses. This can then create awareness and prompt action at a state level, leading to the development of a treaty or convention. The continued interactions related to the treaties can apply pressure on non-compliant states, gradually persuading them of the benefits of compliance and thus, non-compliant actors accept and internalize the treaty norms.¹⁰ Norm internalization through participation and interaction is a far more effective way to generate compliance than coercion or self-interested calculations. Transnational legal process, unlike realism, allows for preference change within states because it places importance on state-to-state interactions, as well as on the influence of non-state actors, and their ability to alter or re-define a country’s set of preferences.

While theory is an excellent starting point in terms of understanding the compliance issue, each perspective tends to offer a fairly black-and-white explanation as to why states act the way that they do. Unfortunately, in practical application, nothing is quite so clear cut, especially when we are discussing concepts which involve the inherent complexity found in the application of human rights. There are an immense number of motivators that may compel a state to comply, or not, with international human rights law and a single theory will not account for them all. No matter the circumstances, my view is that states always act in accordance with their own interests and realism is sufficient in

⁶ Neumayer, 926.

⁷ Stephen Krasner, "Realist Views of International Law." *Proceeding of the Annual Meeting*, 265.

⁸ Koh "Transnational Legal Process." *Yale Law School Legal Scholarship Repository*, 183-84.

⁹ Neumayer, 929.

¹⁰ Neumayer, 929.

explaining this. Whether the benefit is financial, diplomatic, territorial or reputational, a state actor will engage in a calculation to determine the benefits of participating in an international agreement. Then, based on a cost-benefit analysis, ratify and comply or not. NGOs, IGOs and other interested non-governmental elements may have influence on a state at some level, but unless the interests of those organizations can be aligned with the greater state interest, it is unlikely a state will be compelled to act.¹¹ But unlike a realist, I do not commit to the idea that states cannot or do not change their set of preferences, nor do I believe that non-state actors have no influence in the defining of state interests. The transnational legal process, when taken with a realist grain of salt, is a viable explanation for why states comply with international law. Domestic societies develop through the internalization of norms based on a set of values that members debate, define, amend and promote,¹² so why could this not work at a state level as well? Transnational legal process makes sense at a basic level in that most of us in western society developed our values in this way and comply with the laws of society because we have taken, generally speaking, our society's values and aligned them with our individual values. However, when our individual self-interest runs counter to societies, we are less likely to defect because the consequences deter us. No such deterrent exists at the international level and therefore, when a state's interest runs counter to the principles of international law, it is likely that state

may defect with little or no consequence.

To determine whether my thesis is plausible, I have developed a case study based on compliance with The Indigenous and Tribal Peoples Convention, 1989 (C169). My selection was based on a desire to narrow the scope of the compliance question and focus on specific elements of the convention in order to better isolate instances of defection. I then selected Argentina and Brazil because they fit my study criteria, both being democratic rating 51st and 47th respectively on *The Economist's* 2010 Democracy index, with near identical federal, bicameral, presidential governing structures, and developing industrial economies.¹³ They have both ratified the convention and they both have significant indigenous populations.¹⁴ Based on these features, I determined a most-similar case study would adequately identify the causes of defection if any existed.

Argentina is currently in an era described as the "New Democracy."¹⁵ Since 1983, Argentina has been developing its' democratic governmental institutions, as well as privatizing industries nationalized under a stream of authoritarian rulers pre-1983. After a period of financial turmoil in the early-2000s the Argentine economy is growing at a reasonably steady pace

¹³ Economist Intelligence Unit, *Democracy Index 2010*, 12.

¹⁴ International Labour Standards Department. *Monitoring Indigenous and Tribal Peoples' Rights Through ILO Conventions*, 14.

¹⁵ U.S. Department of State, *Argentina*, <http://www.state.gov/r/pa/ei/bgn/26516.htm>.

¹¹ Krasner, 265.

¹² Koh, 185.

and is continuing to develop its' abundant natural resources.¹⁶

Argentina has 35 indigenous groups with a declared Amerindian population of 600,000 or roughly 1.6 per cent of the total population. In 1994, the country drafted a new constitution, specifically enshrining in Section 75, article 17, recognition of indigenous status as a pre-existing ethnic and cultural community. The article guarantees respect for indigenous identity, title to tribal lands, and consultative participation in issues related to resource and land development that may affect them.¹⁷ This kind of constitutional recognition suggests a level of respect for aboriginal status. More recently, Argentine news organizations reported on meetings between indigenous leaders and President Cristina Kirchner regarding territorial, cultural, and educational issues. These meetings were an opportunity for discussion on a range of issues that hold importance for the indigenous communities and while it may have been a stage photo opportunity, discussions at the highest level of government would also suggest an openness to address deficiencies or concerns in the government-indigenous relationship.¹⁸ In addition, since 2006, the Ministry of Social Development, through the National Institute of Indigenous Affairs, has been managing

a national territorial survey of indigenous communities meant to demarcate indigenous territory and register property for title as ancestral lands.¹⁹ This program was undertaken with section 75, article 17 of the constitution in mind and to facilitate compliance with C169. On the surface it appears indigenous rights are respected and the principles of C169 are valued in Argentina.

Similar to Argentina, Brazil recently emerged from a period in which the country was governed by military dictators. Now in what is termed the "New Republic," Brazil has been developing its' democracy since 1985.²⁰ The constitution was drafted in 1983 and created a presidential republic, paving the way for the first direct elections since 1960, in 1989.²¹ In addition to a developing democracy, the Brazilian economy is growing, with Brazil ranking 58th overall on the World Economic Forum's economic competitiveness ranking.²² As of 2009, Brazil's indigenous population accounts for approximately 1,334,000 people, or roughly 0.07 per cent of the total population.²³ The Brazilian constitution, 1988, enshrines indigenous rights in

¹⁹ Maria Bueno, "Indigenous Rights in Argentina", *Focal*, <http://focal.ca/publications/focalpoint/413-march-2011-maria-delia-bueno-en>

²⁰ Government of Brazil, *History*, <http://www.brasil.gov.br/sobre/history/periods/republican-brazil-1>.

²¹ Government of Brazil, *History*, <http://www.brasil.gov.br/sobre/history/periods/republican-brazil-1>.

²² Joaquim Alumnia et al., *Global Competitiveness Report*, 16.

²³ Government of Brazil, *Demographics*, <http://www.brasil.gov.br/sobre/brazil/brazil-in-numbers/demographics>.

¹⁶ U.S. Department of State, *Argentina*, <http://www.state.gov/r/pa/ei/bgn/26516.htm>.

¹⁷ Government of Argentina, *Constitution of the Argentine Nation*, http://www.argentina.gov.ar/argentina/portal/documentos/constitucion_ingles.pdf

¹⁸ Nationalia, "'Indigenous peoples and social organizations from Argentina head to Buenos Aires'", <http://www.nationalia.info/en/news/735>

Chapter VIII, articles 231 and 232, acknowledging indigenous title to ancestral lands, rights to minerals and resources found on their lands, and the forbidding of the removal or occupation of indigenous lands without express consent from the National Congress.²⁴ In her inauguration speech in 2010, President Dilma Vana Rousseff committed to protection and support of the most vulnerable in Brazilian society and called to action all segments of the population to achieve this end, noting the indigenous community specifically in her speech.²⁵ In addition, the National Indian Foundation, or FUNAI, is the governmental body tasked with establishing and carrying out policies related to indigenous people. It has been working to demarcate and title the 851 recognized indigenous territories and continues to monitor and enforce indigenous rights policy, as well as monitoring development in and around indigenous territories.²⁶ Much like Argentina, Brazil appears to support indigenous rights and has established policies and agencies to help aboriginals maintain their rights, as well as facilitate compliance with C169.

²⁴ "Constitution of Brazil", *Brazil Travel*, <http://www.v-brazil.com/government/laws/titleVIII.html>.

²⁵ Dilma Vana Rousseff, "Inaugural Address", *Ministerio Das Relacoes Exteriores*, <http://www.itamaraty.gov.br/sala-de-imprensa/discursos-artigos-entrevistas-e-outras-comunicacoes/presidente-da-republica-federativa-do-brasil/address-of-dilma-vana-rousseff-president-of-the-republic-inaugural-speech-to-congress-english-version/>.

²⁶ *Fundacao Nacional Do Indio*, 2011, <http://www.funai.gov.br/>.

Instead of trying to determine the level of general compliance with C169, I isolated a specific issue and looked specifically at compliance with the convention in terms of a specific article, or set of articles within the convention. Land rights and title have been hot button issues for most states with significant indigenous populations, so I chose Part II of the Indigenous and Tribal Peoples Convention, 1989 which encompasses articles 13-19 and directly addresses land issues. In addition to compliance problems with Part II, I endeavoured to make particular note of any significant non-compliance with unrelated sections of C169. I compiled information from a number of sources, including the International Labour Organization (ILO) monitoring and compliance report from 2009-2010, various news agencies and NGOs like Amnesty International, in order to draw substantive conclusions on compliance.

In Argentina, the ILO compliance report noted allegations of violations related to Article 15(2). This provision states that instances in which the government retains rights to minerals or sub-surface resources on designated indigenous lands, no exploration or exploitation may be permitted until consultation with the community is undertaken, and any benefits of development will be shared with the community.²⁷ The committee tasked with compiling the report had asked for additional details on these allegations from the Argentine government and "noted with regret" that they did not

²⁷ International Labour Standards Department. *Monitoring Indigenous and Tribal Peoples' Rights Through ILO Conventions*, 14.

receive the requested information.²⁸ In addition to these alleged violations, Amnesty International has reported as recently as June 2011 that forcible evictions occurred in San Miguel de Tucumén of indigenous families living on land that has also been claimed by Comunidad Aráoz Hermanos, a local company in the region.²⁹ In October 2009, a similar forcible eviction occurred in the same region by a different company and ended in tragedy when a leader of the indigenous community was killed, and 3 others were wounded, in an altercation with of the company.³⁰ These kinds of evictions were made illegal by Emergency Act No. 26.160, the same act that established the land survey meant to demarcate and title indigenous lands. Instead of providing comprehensive and definitive solutions, the survey has agitated existing conflicts and interests.³¹ There are impositions, violations, obstacles, delays and challenges to the communities because of insufficient indigenous participation. Institutions have been assimilationist and their responses have been paternalistic. Indigenous communities are seen as foreigners on their own native lands. Development on indigenous lands has also led to

substantial environmental issues and abuse. The Colla, a large indigenous group near the Bolivian border, have made verbal protests against the abuse of their land by gas companies, as well as against the environmental decline that has been the result of the construction of a gas pipeline in 1999.³² The National Plan of Indigenous Policy was put in place to coordinate development policy and monitor compliance with indigenous rights precisely because of problems like the Colla issue but the funding, however, is maintained at an inadequate level to address these types of concerns.³³ Although not widespread, there are still instances of indigenous abuse, specifically related to territorial occupation and land use.

In Brazil, the instances of abuse appear to be more widespread and severe. The ILO monitoring report notes a specific issue regarding the Quilombola indigenous community in Alcantara, Brazil. The Quilombola forwarded several complaints to the ILO regarding the expansion of the Alcantara Launch Centre and Alcantara Space Centre on territory traditionally occupied by the Quilombola community without consultation or participation.³⁴ In addition, the Brazilian government, after conducting a joint demarcation study with several ministries and agencies, established an area of a little over 78,000 hectares as Quilombola territory.

²⁸ International Labour Standards Department, 14.

²⁹ *Amnesty International*. 2011, <http://www.amnesty.org/en/news-and-updates/argentina-indigenous-community-takes-eviction-threat-2011-06-07>.

³⁰ *Amnesty International*. 2011, <http://www.amnesty.org/en/library/asset/AMR13/001/2009/en/e0d64633-567e-43cc-a403-4f91a850b494/amr130012009en.html>.

³¹ Maria Bueno, "Indigenous Rights in Argentina", *Focal*, <http://focal.ca/publications/focalpoint/413-march-2011-maria-delia-bueno-en>.

³² *UNHCR-The UN Refugee Agency*. 2011, <http://www.unhcr.org/refworld/country,,MAR,,ARG,,469f3a55c,0.html>.

³³ *UNHCR-The UN Refugee Agency*. 2011, <http://www.unhcr.org/refworld/country,,MAR,,ARG,,469f3a55c,0.html>.

³⁴ International Labour Standards Department, 39.

This study did not include participation from any indigenous representatives, and significantly reduced the size of the Quilombola territory, which the exact size of the lost territory is not noted.³⁵ The report emphasizes that this is a direct violation of Article 14 of C169, which recognises indigenous ownership and possession rights over the lands they traditionally occupy.³⁶ Furthermore, these actions also violated Article 6 of C169 which recognizes indigenous right to consultation and participation on development or re-distribution of their titled lands.³⁷ The Brazilian Constitution, as well as Article 14 of C169, guarantees indigenous communities the right to the lands which they occupy. However, the ILO report emphasizes that while 430 indigenous territories have been registered and land title had been transferred, there are almost 1100 indigenous territories that are caught in administrative proceedings, or proceedings have not even begun.³⁸ Due to this bureaucratic backlog, the number of indigenous persons who have been affected due to unresolved land claims has increased and despite requests from the monitoring committee, the Brazilian government still has yet to forward the requested information regarding the application of Article 14 of the Convention.³⁹ The ILO report also

³⁵ International Labour Standards Department, 39.

³⁶ "The Indigenous and Tribal Peoples Convention, 1989 (No. 169)." *International Labour Organization*. 2011, Article 14.

³⁷ "The Indigenous and Tribal Peoples Convention, 1989 (No. 169)." *International Labour Organization*. 2011, Article 6.

³⁸ International Labour Standards Department, 42.

³⁹ International Labour Standards Department, 42.

notes violations of Articles 6, 7 and 15 which guarantee rights on participation, consultation and natural resources, development projects.⁴⁰ On the list of these projects is the Belo Monte hydroelectric project which, I have observed from research, is a highly controversial development project. Amnesty International has noted that there has been almost no consultation with indigenous communities on this project. Furthermore, notwithstanding the concerns from a variety of organizations regarding the environmental impact and the impact on indigenous communities, the Brazilian government is determined to complete this project.⁴¹ The Organization of American-States has also raised a number of concerns related to the potential displacement of nearly 40,000 people in the region should the project be completed. However, *The Rio Times* reported that Brazil's Foreign Ministry rejected the request, citing that halting the project was unjustified based on the information presented by the OAS.⁴²

Ultimately I have found that in both Argentina and Brazil, there are instances of non-compliance with the Indigenous and Tribal Peoples Convention, 1989. Most of the violations I uncovered while compiling my research involve the articles relating

⁴⁰ International Labour Standards Department, 42.

⁴¹ *Amnesty International*, 2011, <http://www.amnesty.org/en/news-and-updates/brazil-urged-suspend-belo-monte-dam-project-2011-06-02>.

⁴² Patricia Maresch, "Belo Monte Dam Moves Forward", *The Rio Times*, 04 12, 2011 <http://riotimesonline.com/brazil-news/front-page/belo-monte-dam-moves-forward/>.

to consultation and land. There are fewer and less severe instances of non-compliance in Argentina and the government response seems to be more swift and productive than in Brazil. The primary issues in Argentina regarding compliance with C169 revolve around the actual reporting of data to the ILO. Most of the comments on Argentina within the report highlighted progress in areas of concern or offered constructive recommendations for improving compliance. Brazil, on the other hand, had significantly more violations and complaints than Argentina, and the nature of non-compliance was more severe. I specifically noted the Belo Monte hydro project because it consistently appeared and re-appeared as I conducted my research. It is a hot-button issue in Brazil and seems to be representative of Brazil's compliance violations. The most severe violations in both countries appear to stem from conflict between developers and private business and indigenous communities whose traditional territories are resource rich, strategically located or both. Again, using the Belo Monte dam project in Brazil as the archetypal example, the government either does not respond at all, or responds slowly and without adequate resources, which has led me to conclude that when economic interests are involved turning a blind eye to indigenous rights violations is more palatable. This also leads me to conclude that my initial assertion, that transnational legal process does lead to generally improved compliance but that self-interest may still override compliance when the benefits of doing so outweigh the costs of defection. As both Argentina and Brazil have engaged

on the indigenous rights issue internationally by ratifying C169 it seems clear that they place some value on the principles outlined in the convention. They have developed institutions designed to specifically improve compliance with indigenous rights, and both countries have entrenched indigenous rights in their constitutions which suggests through interaction and participation at the international level they have normalized these values. But as developing democracies with growing industrial economies, realist self-interest does appear to override compliance when the gains are significant enough.

While I submit that this paper does a credible job of explaining the circumstances under which states may consider non-compliance with a human rights treaty as acceptable, there are some limitations to my research. I noted the severity and number of violations in Brazil compared to Argentina was higher, which suggests that Brazil is perhaps less respectful of indigenous rights. However, my research does not take into account the considerable disparity in population size between these two countries. There are nearly 160 million more people living in Brazil, which translates into more development initiatives and private business activities. This may account for the higher number of C169 violations. Future research should take population size into account as a case study factor. Moreover, future research should also endeavour to offer options for greater external enforcement of this convention as a way to extricate self-interest as a potential non-compliance motivator.

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