

Human Rights

Section IV: Powerful Democracies

Instructor: Barry Hashimoto

Agenda Wed 4-3

- What is the doctrine of universal jurisdiction?
- Who has adopted it, to what extent, and why?

Universal jurisdiction

- Traditional jurisdiction: over defendants, complainants, or territory
- Universal jurisdiction: based only on the nature of the crime
 - Which crimes qualify? Grave breaches of Hague and Geneva Conventions, crimes against humanity, genocide, torture, piracy
- UJ over piracy is well-established
- Why did UJ develop in the 1970s-1990s?
 - New details emerging on WWII, Nazi fugitives, mass atrocities in Latin America, Africa, Asia, the third wave of democratization
- Sources of legal authority for prosecuting the crimes
 - Genocide Convention 1948
 - Geneva Conventions 1949 and Additional Protocol I 1977
 - Convention Against Torture 1984
 - Rome Statute 1998

TABLE 4. UNIVERSAL JURISDICTION COMPLAINTS OR CASES BROUGHT ON MOTION OF PUBLIC AUTHORITIES, BY PROSECUTING STATE

Prosecuting State	Number	Percent
Australia	70	6.66
Austria	3	0.28
Belgium	63	5.99
Canada	216	20.55
Denmark	7	0.67
Finland	2	0.19
France	37	3.52
Germany	235	22.36
Iceland	2	0.19
Israel	3	0.28
Luxembourg	1	0.09
Netherlands	9	0.86
New Zealand	1	0.09
Norway	12	1.14
Senegal	1	0.09
South Africa	2	0.19
Spain	259	24.64
Sweden	11	1.05
Switzerland	16	1.52
Turkey	17	1.62
United Kingdom	85	8.09
United States ^a	1	0.09
Total	1051	100.00

Langer on universal jurisdiction

- The question
 - *Whom* do states prosecute people using universal jurisdiction, and *why*?
- The argument:
 - Cooperative international relations between rulers prevents the use of universal jurisdiction, but this cooperation can break down when the prosecuting state has a domestic separation of powers and conflict between the branches over the issue of prosecutions.

Langer on universal jurisdiction

- Key idea: Executives face a trade-off between “international relations costs” and a reciprocal benefit from domestic civil society.
 - Benefits: “To the extent that human rights groups’ actions and the media’s exposure of atrocities or offenders resonate with local constituencies, domestic politicians have incentives to address these issues because such activities may boost their electoral fortunes and support their political legitimacy.”
 - Costs, four types:
 - negative impact on diplomatic relations
 - expensive trials
 - Difficulty in proving guilt to an acceptable standard
 - Constituency protest for spending on prosecuting foreigners

Langer on universal jurisdiction

- **Prosecute when $E(\text{benefits}) > E(\text{costs})$**
- On what do the expected benefits from civil society depend?
 - Identify of defendants, identify of victim, seriousness of the crime, strength of evidence, domestic links to state where crimes happened, influence of civil society on politics.
- On what do the expected international relations costs depend?
 - Identity of defendants and victims, ability to arrest, availability of evidence, cooperation of foreign states, opposition from domestic and foreign actors
- Predictions:
 - **Costs dominate.** Only low-cost defendants prosecuted. . .
“especially. . . low-cost defendants about whom the international community has reached broad agreement.”
 - **But: high-cost defendants slip through when executives lack enough control of criminal proceedings to prevent the prosecution of high cost defendants.**

Langer on universal jurisdiction

- Method
 - Identify all public complaints leading to consideration of criminal trial under the doctrine of universal jurisdiction
 - Number of complaints = 1,051
 - Majority German, ex-Yugoslav, Rwandan, Argentine, U.S., Chinese, and Israeli
 - Number of trials = 32
 - All *German, Rwandan, ex-Yugoslav, Afghan, Argentinian, Congolese, Mauritanian, and Tunisian*
 - What does Langer conclude from these data?
 - Low-cost defendants seem to get prosecuted, high-cost defendants don't
 - Weakness of the design: No explicit measure of “cost” of a defendant

Langer on universal jurisdiction

- Method
 - Case studies test the hypothesis: the more *executive control* there is, the lower the cost of the defendants prosecuted under universal jurisdiction.
 - Not explicit in the article, but that's it
 - Rationales for case selection:
 - Selecting advanced democracies
 - makes it more plausible that judges are independent of the executive
 - » Why is this a good idea? Is it necessary?
 - Selects countries where universal jurisdiction is likely to find support among judges and the rest of the domestic legal community.
 - Variation in executive control: “*how easily a criminal case may move forward despite the opposition the executive branch and prosecutors appointed by it.*”

Langer on universal jurisdiction

- Germany:
 - **High control:** federal justice minister may, without review dismiss UJ cases, precluding even civil suits.
 - Prediction: only low-cost defendants will reach the trial phase (indicated below by italics)
 - Whom did national courts try to indict citing universal jurisdiction?
 - *Serbs & Bosnian Serbs*
 - *Hutu warlord operating in the DRC*
 - An Uzbek minister
 - Jiang Zemin of China, General Secretary of Communist Party (1989-2002), President of China (1993-2003)
 - Donald Rumsfeld, US Secretary of Defense (2001-2006)

Langer on universal jurisdiction

- England & Wales
 - **High control:** attorney general has veto over criminal and civil trials, despite complainants ability to generate arrest warrants
 - Prediction: only low-cost defendants will reach the trial phase (indicated below by italics)
 - Whom did national courts try to indict citing universal jurisdiction?
 - *Afghan warlord, Faryadi Sarwar Zardad*
 - Israeli major general, foreign minister, defense minister
 - Robert Mugabe, incumbent president of Zimbabwe
 - Chinese commerce minister
 - Rwandans, Sudanese, Sri Lankan military officials
 - George W. Bush, US President (2000-2008)
 - Augusto Pinochet, President of Chile (1974-1990)

Langer on universal jurisdiction

- France
 - **Medium control:**
 - Ministry of Justice permits tenured judges to investigate, but once it grants a prosecutor permission to prosecute, neither it nor prosecutors can dismiss without court approval, except on jurisdictional issues.
 - Individuals or NGOs can prompt investigations and prosecutions, and no political branch can veto them.
 - Prediction: a few high-cost defendants will reach the trial phase (indicated below by italics)
 - Whom did national courts try to indict citing universal jurisdiction?
 - *Mauritanian and Tunisian officials*
 - *Rwandan genocidaires and former first-lady*
 - *Rep. of Congo officials*
 - *Algerian militants*
 - Bosnian Serbs
 - Algerian general
 - Laurent Kabila, President of the D.R. Congo (1997-2001)
 - Robert Mugabe
 - Donald Rumsfeld

Langer on universal jurisdiction

- Belgium
 - **Low control:** King appoints and removes prosecutors, but neither he nor the legislature can dismiss cases; individuals and NGOs *had* authority to initiate prosecutions
 - Prediction: plenty of higher cost defendants will reach the trial phase (indicated below by italics)
 - Whom did national courts try to indict citing universal jurisdiction?
 - *Rwandans and Congolese*
 - Official of NATO member states
 - Israeli politicians
 - The reaction: In 2003 Belgium's executive branch fought back to rein in the courts and avoid pending prosecutions of NATO and Israeli officials. It passed new laws decreeing the following:
 - Only those who became Belgian citizens after alleged crime may be prosecuted
 - Victims and NGOs can no longer initiate formal proceedings, only the federal prosecutor

Langer on universal jurisdiction

- Spain
 - **Low control:** three triggers---federal prosecutor, tenured judges, or individuals or NGOs, and the federal prosecutor cannot dismiss without court approval
 - Prediction: plenty of higher cost defendants will reach the trial phase (indicated below by italics)
 - Whom did national courts try to indict citing universal jurisdiction?
 - *Adolfo Scilingo, Argentine military captain in the “dirty war”*
 - Augusto Pinochet
 - Rwandan, Moroccan, Salvadoran, and Chinese leaders
 - US officials from the Bush administration.
 - The reaction: the Spanish legislature amended Spain’s universal jurisdiction statute, following the indictment of Bush administration officials.

Civil suits citing the doctrine of universal jurisdiction in the United States

Legal bases

1. Alien Torts Statute

- Does the virtual absence of criminal trials citing universal jurisdiction in the U.S. mean that universal jurisdiction is “dead letter” here?
 - No, it’s alive and well in civil suits. But there’s a current debate over whether it should be, and under what circumstances.

2. Other laws established to ensure that universal jurisdiction has a place in U.S. courts

- These new laws differ in key ways from the Alien Torts Statute, however

Alien Torts Statute

- Alien Torts Statute, included by 1st Congress in Judiciary Act of 1789
 - Judge Henry Friendly called the ATS a “legal Lohengrin,” because “no one seems to know whence it came.”
 - The whole thing says:
 - “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”
 - Original jurisdiction
 - No statute of limitations

Alien Torts Statute

- *Filartiga v. Peña-Irala*, 1980
 - First modern instance of civil UJ in the U.S. for human rights law.
 - ATS suit by two Paraguayans living in the U.S. against a former Paraguayan official living in the U.S.
 - U.S. court held that torture is a violation of the law of nations. . . Under ATS, U.S. courts could rule on torture committed abroad
- Then, more than 100 HR-related ATS suits
 - Suits against Radovan Karadzic (leader of Bosnian Serbs), Ferdinand Marcos (President of Phillipines)
 - *Doe v. Unocal*
 - Case history?

Supreme Court Reacts to the Alien Torts Statute

- First intervention by USSC reined in lower courts
 - *Sosa v. Alvarez-Machain* 2004
 - Plaintiff and defendant both Mexican nationals
 - Forcible abduction in Mexico, prosecution and acquittal in U.S.
 - Plaintiff claimed arbitrary detention in violation of customary international law

Supreme Court Reacts to the Alien Torts Statute

- USSC ruled that the ATS is *just* a jurisdictional statute. It doesn't *create* a cause of action itself.
 - Yes, litigants can claim private causes of action for torts violating customary international law.
 - But, only three causes of action that 1st Congress had in mind:
 - offenses against ambassadors
 - violations of “safe conduct”, official permission for a foreigner to travel freely in the U.S.
 - Piracy
 - Any other violation would have to be sufficiently accepted internationally, and specific.
 - Stress on “case-specific deference to the political branches”
 - federal courts should be careful about complicating the international relations of the U.S. and defer to other branches.
 - Scalia's concurring opinion:
 - Present-day federal courts can't create any causes of action under ATS. Congress does that.

Supreme Court Reacts to the Alien Torts Statute

- Did lower federal courts behave?
 - Doesn't seem that way.
 - Suits alleging
 - U.S. bulldozer companies selling to Israel, which used them to demolish Palestinian homes
 - Canadian energy company investing in Sudan
 - ... aided and abetted human-rights abuses by those govts.
 - In a suit against U.S. companies that made Agent Orange for the Vietnam War, a district court called itself:
 - A “quasi international tribunal” dispensing an international law that “supersedes and supplies the deficiencies of national constitutions and laws.”

What to pay attention to as the debate over the Alien Torts Statute in the United States evolves

- Five controversial issues:
 - Does it apply extraterritorially?
 - Does U.S. federal law apply rather than international law when offenses were committed abroad?
 - Should local remedies be exhausted before U.S. courts can hear a case?
 - i.e. principle of complementarity
 - Can corporations be held accountable for aiding and abetting violations committed by foreign governments?
 - *Kiobel v. Royal Dutch Petroleum Company* ongoing at USSC
 - How to interpret *Sosa*'s requirement that a cause of action found in customary international law be sufficiently accepted and specific?
 - How to interpret *Sosa*'s requirement of case-specific deference to political branches?

Source: John Bellinger, legal counsel to Sec. State 2005-2009 in VJTL

Contrast ATS with other acts permitting suits for crimes abroad

- **Foreign Sovereign Immunities Act, 1976 & Anti-Terrorism and Effective DP Act, 1996**
 - Like:
 - Lets aliens sue
 - Retroactive (cases against Nazis and Argentinians)
 - Unlike:
 - Only states can be sued, and only if declared “state sponsors” of terrorism by the executive branch.
 - ATS: Executive only participates ex ante by nominating judges and ex post by filing amicus briefs with courts or refusing to comply with courts
- **Torture Victims’ Protection Act, 1991**
 - Like
 - Lets aliens sue
 - Natural persons can be sued
 - Unlike
 - Exhaustion of local remedies required
 - Statute of limitations of 10 years
 - Only torture and extrajudicial killing

Agenda, M 4-8 and W 4-10

Lecture and seminar discussion on four research articles, focusing on the following two questions:

1. Why, or why not, should humanitarian intervention be legalized? What kind of interventions are most valuable?
2. How are sanctions currently used to achieve human rights reforms in foreign policy? When have sanctions worked? How should sanctions be used?

Humanitarian intervention

Definition: “the threat or use of force by a state, group of states, or international organization primarily for the purpose of protecting the nations of the target state from wide-spread deprivations of internationally recognized human rights.” Goodman (2006, fn. 2)

Possible examples:

- Czechoslovakia 1938
- Pakistan 1971
- Kosovo 1999
- Iraq 2003
- Georgia 2008
- Libya 2011

General question: Why, or why not, should humanitarian intervention be legalized? What kind of interventions are most valuable?

Humanitarian intervention

Specific questions on the article by Ryan Goodman

1. When can states legally initiate interstate war?
2. Why do people think that states will use humanitarian concerns as a pretext for war?
3. Why does Goodman think that they're wrong?
 - Crises over humanitarian issues are easier to back down from than other crises.
4. *What implications does Goodman draw from his argument?*
 - Legalizing humanitarian intervention won't increase "pretext wars."
 - . . . And on balance, it may help if it deters or punishes those who commit humanitarian crimes

Specific questions on the article by Matthew Krain

1. What is Krain's understanding of the causes of mass killings (genocide, politicide)?
2. *What sort of humanitarian intervention does Krain think works best to stop them. Why?*
3. What is Krain's strategy for identifying causal effects? What do you make of it?

Sanctions and human rights

Definition: A sanction is the suspension of cooperative international relations.

Sanctions vary across the following dimensions:

- Issue area: trade, aid (economic, social, human rights, democratization), loans, finance, travel, participation in international organizations, severance of diplomatic ties
- Depth of suspension: partial sanctions, boycotts, embargoes
- Number of “senders”
- Cooperation between senders: unilateral, multilateral
- Legitimacy: authorized by the UN Security Council or not?

The dominant perspective in political science is that states use sanctions as tools of *economic statecraft*.

General question: How are sanctions currently used to achieve human rights reforms in foreign policy? When have sanctions worked? How should sanctions be used?

Sanctions and human rights

Specific questions on Nielsen

1. What puzzle does Nielsen's article solve?
2. What are the varieties of foreign aid, and how have they trended over time?
3. Which variety or varieties are used in sanctions?
4. *Which states are immune to sanctions, and why?*
 1. What does this imply? What sort of strategy might economically powerful democracies be using to promote human rights in the world, if any?

Specific questions on Drezner

1. What are smart or targeted sanctions? Why, in theory, would they work?
2. How do they compare with the sanctions imposed on Iraq and Serbia in the first decade after the Cold War? Which should we prefer, and why? Take into account:
 - Effectiveness
 - Collateral damage
3. How strong is the evidence on the effectiveness and collateral damage of smart sanctions? What about the effectiveness of targeted sanctions in changing human rights policy, specifically?

Agenda Monday, 2-15

- Why free trade?
- How is trade regulated internationally?
- Can free-trade institutions help human rights?
 - Hafner-Burton, 2005

Why free trade?

- Why is free trade good? The view from economics.
 - Theory tells us that free trade allows us to enjoy the aggregate gains from specializing in producing goods that we produce at comparative advantage (goods we produce most cheaply).
 - Ricardo 1821
 - Empirical work tells us that trade liberalization causes aggregate economic growth, whether we look across or within countries.
 - So free trade makes states wealthier in the aggregate.
 - There's a more controversial debate about whether free trade reduces or increases economic inequality within states.
 - One side of the argument points to cases like China & India.
 - Another side cites the work of Stolper and Samuelson (1941), showing that free trade disadvantages less-skilled workers.

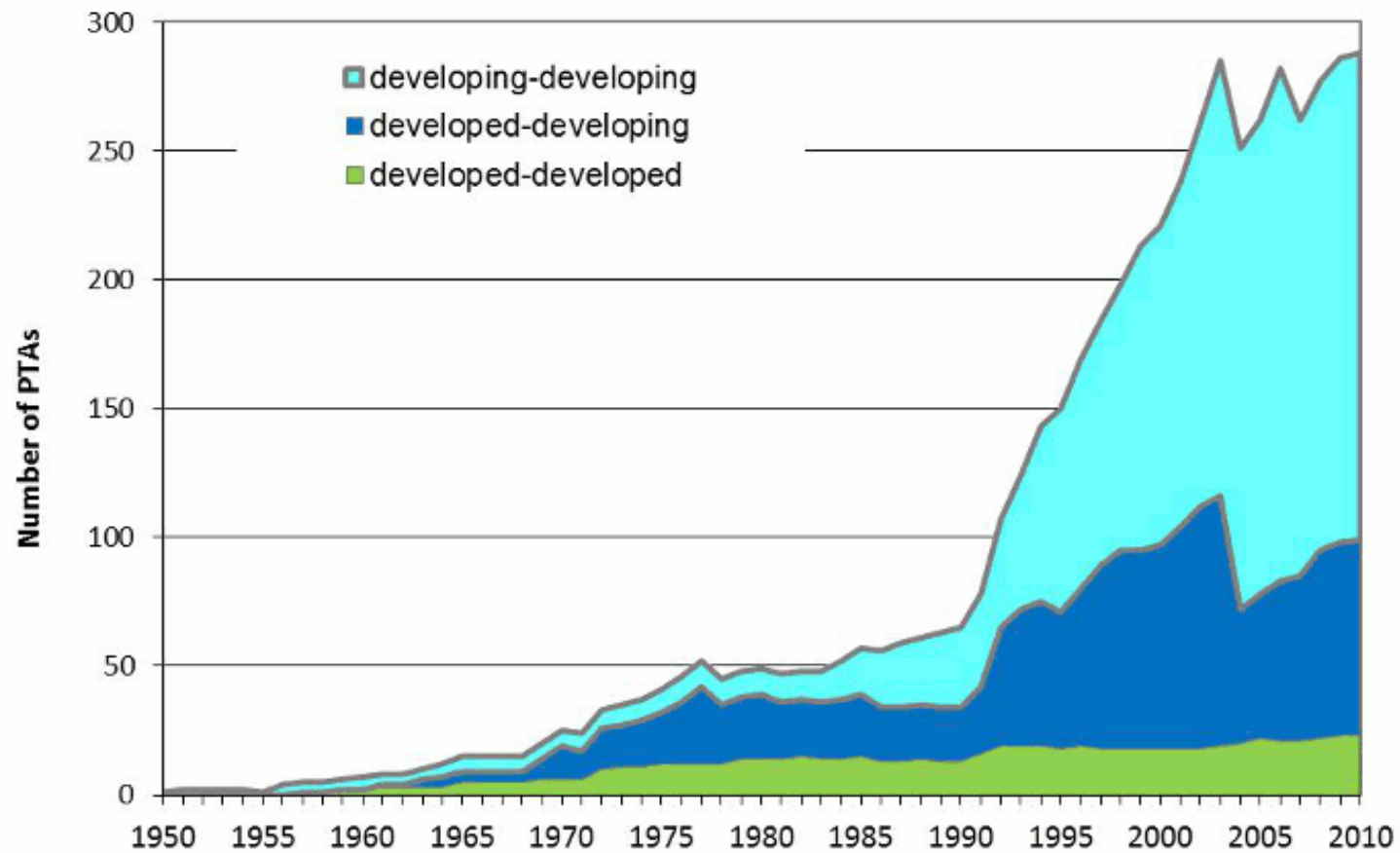
Why free trade?

- Why is free trade good? The view from political science.
 - One externality of more trade (made possible by freer trade) may be democracy.
 - Modernization theory
 - But what are the implications of distributive conflict theory?
 - Another externality of more trade is interstate peace. Five theories propose why.
 1. Eliminating protectionist barriers empowers domestic doves (consumers) and disempowers domestic hawks (monopolists).
(Cobden 1868/1870 and Schumpeter 1919, McDonald 2004).
 2. Free trade creates a transnational identity among trading states that replaces national and ethnic identities (Deutsch 1957).
 3. Opportunity costs of war are too high (Polachek 1980).
 4. Incentives for investing in conquest and plunder decrease relative to investing in productive resources (Rosecrance, 1986).
 5. Heavy traders can more credibly signal their resolve in disputes, leading to more negotiated settlements and less war (Morrow 1999, Gartzke, Li and Boehmer 2001).
 - Empirical work shows that states with greater trade volume (and *free trade*) are less likely to fight. Various causal identification strategies.

How is free trade regulated internationally?

- World Trade Organization
 - Most-Favored Nation component of the WTO's Non-discrimination Principle: All members should apply the same tariff on a given good, regardless of which state it imports the good from.
- Preferential trade agreements (PTAs) govern market access between groups of states. Not necessarily regional, but the most prominent examples are.
 - European Union, Generalised System of Preferences, North American Free Trade Agreement, Euro-Mediterranean Association Agreements, West African Economic and Monetary Union
- PTAs are a major exception to the WTO's ND principle.
- Why PTAs?
 - Disguised protectionism, but states can still achieve gains from freer trade with specific states with whom they desire reciprocal liberalization.
 - They often involve comprehensive agreements lowering non-tariff barriers to trade and achieving cooperation on other issues.
 - Lower border controls, investment protection, technical standards (food standards, intellectual property rules), environmental norms, *human rights*.

The growth of PTAs



... 84% of all trade still occurs on a non-discriminatory most-favored nation basis

PTAs and human rights standards

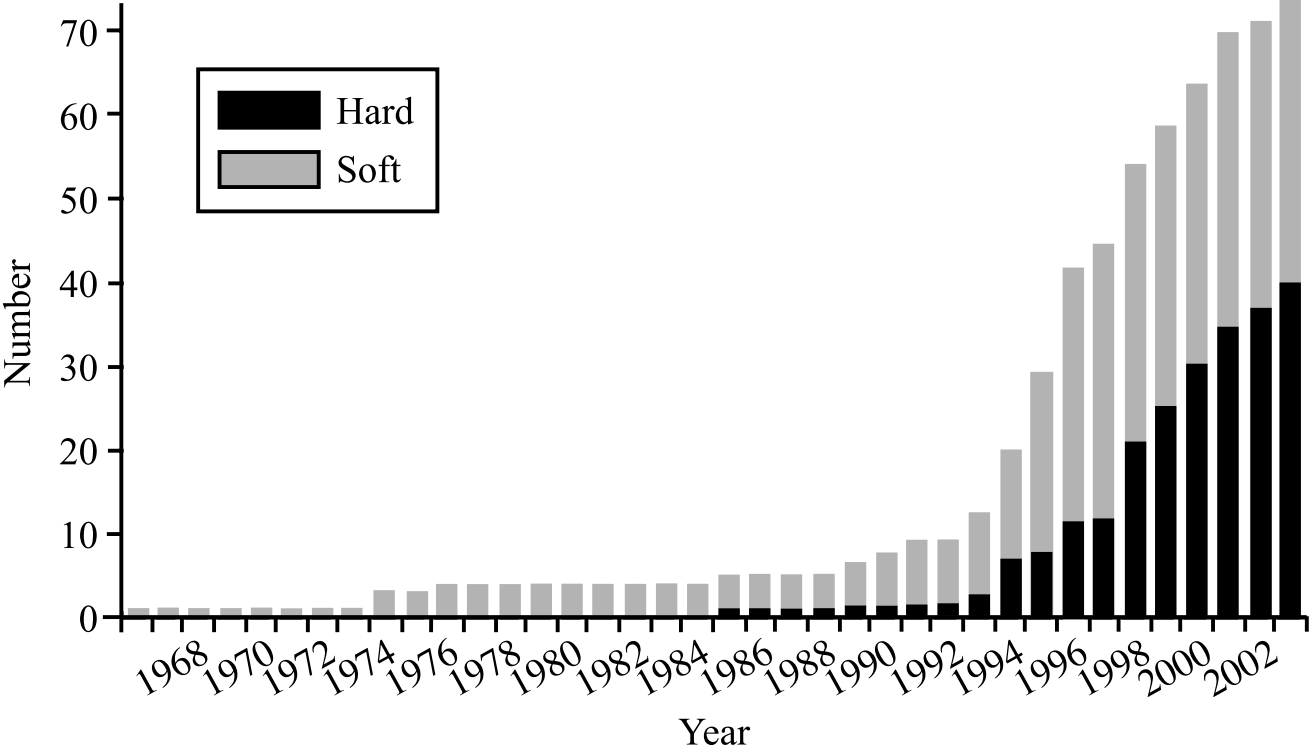


FIGURE 2. *Preferential trade agreements with human rights standards*

Hafner-Burton 2005, theory

- What is the difference between hard and soft standards on rights in PTAs?
- How are soft standards supposed to work?
- How are hard standards supposed to work?
- Why does Hafner-Burton think that hard standards are better?
- What do the data say?
- Alternative explanations?

Hafner-Burton's evidence

TABLE 2. *Estimates of the effects of international human rights agreements and preferential trade agreements on repression, 1972–2002*

<i>Variables</i>	(1) REPRESSION _{it}	(2) IMPUTE _{it}	(3) CIVILLIBERTY _{it}
INVESTMENT _{it-1}	-0.633 (0.36)	-0.616 (0.35)	0.262 (0.27)
TRADE _{it-1}	-0.483*** (0.13)	-0.450*** (0.12)	0.078 (0.10)
<i>pcGDP</i> _{it-1}	-0.162** (0.05)	-0.160** (0.05)	-0.264*** (0.05)
DEMOCRACY _{it-1}	-0.031** (0.01)	-0.028** (0.01)	-0.080*** (0.01)
DURABILITY _{it-1}	-0.006* (0.00)	-0.007* (0.00)	-0.005 (0.00)
DENSITY _{it-1}	0.091 (0.05)*	0.090* (0.04)	0.017 (0.03)
HRAS _{it-1}	0.082 (0.07)	0.078 (0.07)	0.029 (0.07)
PTAsoft _{it-1}	-0.265 (0.16)	-0.210 (0.15)	-0.197 (0.14)
PTAhard _{it-1}	-0.255* (0.12)	-0.273** (0.11)	-0.303** (0.11)
X ²	1033.23***	1054.57***	1273.75***
<i>Log likelihood</i>	-2026.06	-2135.31	-1594.92
<i>N</i>	2244	2359	2423

Note: All estimates are ordered logit, unless otherwise specified. The numbers in parentheses are panel-corrected standard errors. All models include binary variables for each level of the dependent variable (excluding the most repressive category), lagged. The estimates are not reported to save space: they are all negative and significant at $\leq .001$.

*** $p \leq .001$; ** $p \leq .01$; * $p \leq .05$.

Critiques

- Enforcement of hard provisions is often left to member states
 - Example: NAFTA
- Measurement strategy: why phys. Integrity rights?
- Selection bias: Why hard versus soft provisions?
- Identification strategy
- Heterogeneity: How much leverage does Europe have on the results?

Agenda, W, 4-16

- The big picture on economic globalization and human rights
 - Cao-Greenhill-Prakash
 - Hafner-Burton
 - Nielsen

The California Effect

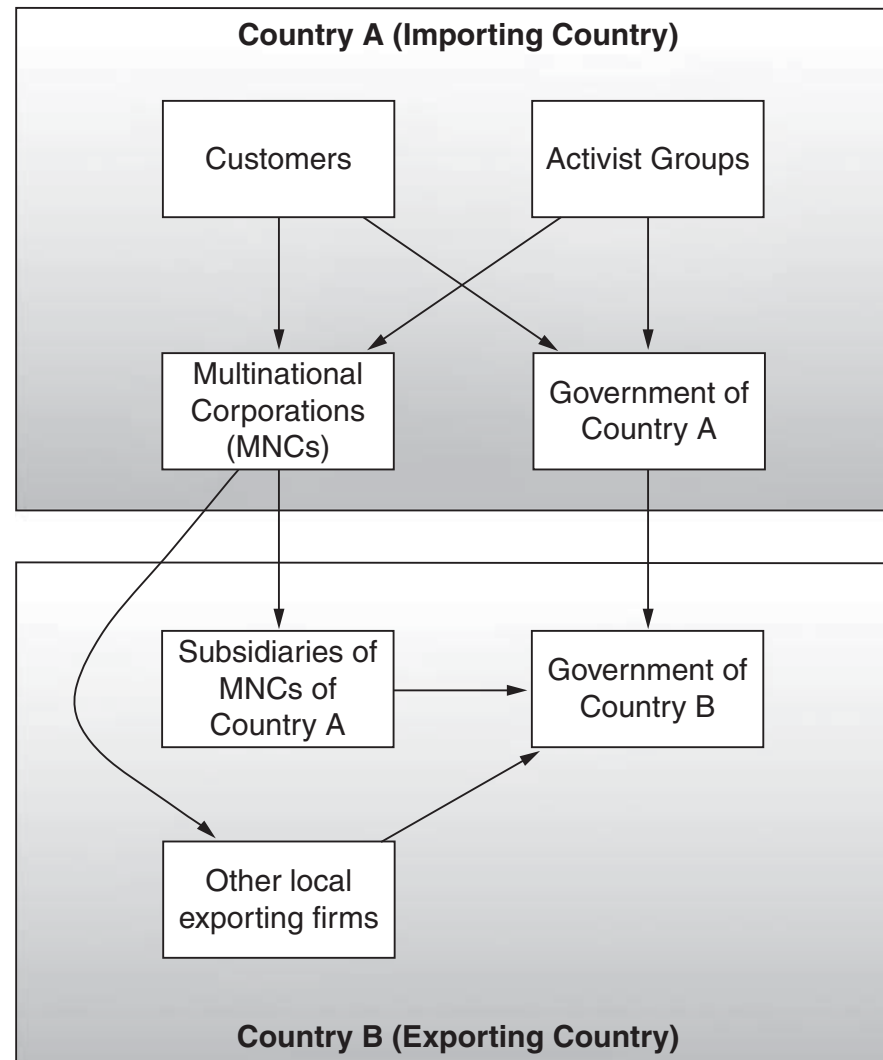


Fig. 1. California Effect in human right: Causal chains

Bilateral trade context in Cao-Greenhill-Prakash

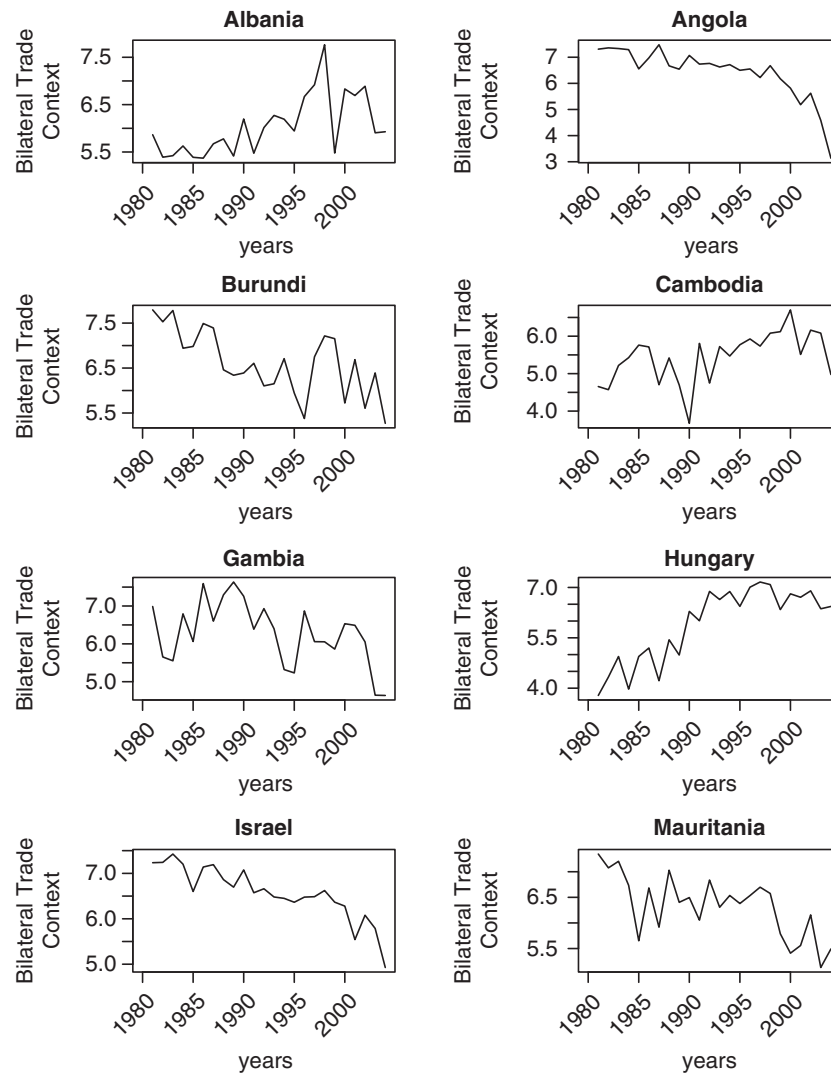


Fig. 2. Temporal variation in Bilateral Trade Context for a randomly selected sample of eight countries

Bivariate correlation between bilateral trade context and physical integrity rights

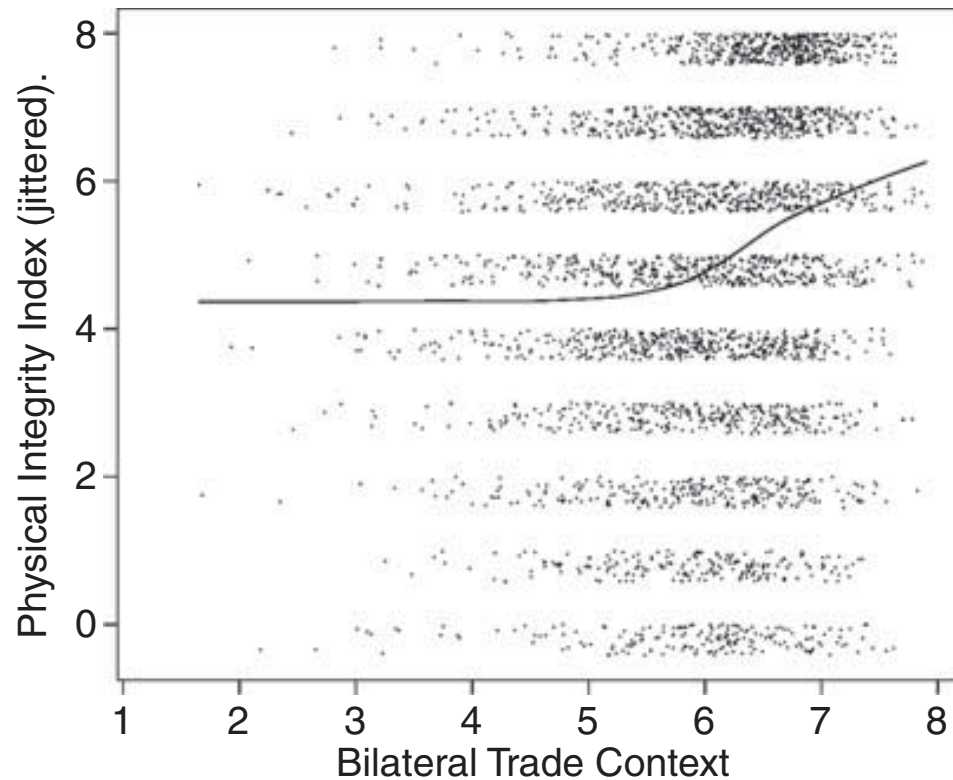


Fig. 4. Non-parametric lowess line showing the relationship between Bilateral Trade Context and Physical Integrity Right for all country-year observations in our sample

Effect of a high bilateral trade context: matching estimates

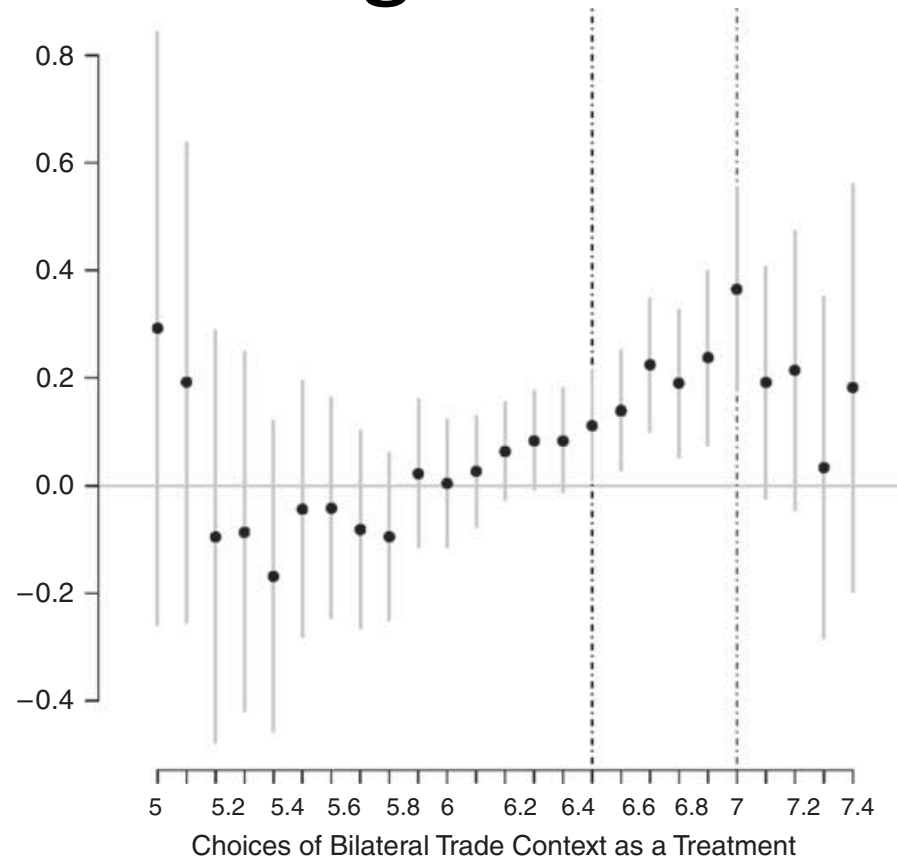


Fig. 5. Explaining levels of Physical Integrity Rights (PIR) across space and time

Notes: Estimated effect size of the Bilateral Trade Context variable in the regression analysis (after matching) when different thresholds are used to distinguish between 'low' and 'high' values of *Bilateral Trade Context*. The 95% confidence intervals around the coefficient estimates are indicated by the grey vertical lines around each point estimate.

Critiques

- Measurement strategy
- Identification strategies, selection bias/
endogeneity
- Heterogeneity: How much leverage does
Europe have on the results?

Take away points

- New thinking is that economic globalization is good for human rights.
 - Why?
 - Indirect effects via peace and democracy
 - Market power of advanced democracies, plus moral and economic concerns of domestic actors in those democracies.
 - Trade: Hafner-Burton and Cao-Greenhill-Prakash propose different mechanisms by which trade helps.
 - Sanctions: Nielsen shows that democracies sanction repression with them under certain circumstances.