

9-3-2019

The Transnational Legal Ordering of the Death Penalty

Stefanie Neumeier
University of Southern California

Wayne Sandholtz
University of Southern California

Follow this and additional works at: <https://scholarship.law.uci.edu/ucijil>



Part of the [Criminal Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Neumeier, Stefanie and Sandholtz, Wayne (2019) "The Transnational Legal Ordering of the Death Penalty," *UC Irvine Journal of International, Transnational, and Comparative Law*. Vol. 4, 124.

Available at: <https://scholarship.law.uci.edu/ucijil/vol4/iss1/8>

This Article is brought to you for free and open access by UCI Law Scholarly Commons. It has been accepted for inclusion in UC Irvine Journal of International, Transnational, and Comparative Law by an authorized editor of UCI Law Scholarly Commons.

The Transnational Legal Ordering of the Death Penalty

Stefanie Neumeier and Wayne Sandholtz*

A transnational legal order (TLO) authoritatively shapes “the understanding and practice of law” in a specific area of social activity, involving both state and civil society actors, and linking national, regional, and international levels. We argue that a TLO has emerged and settled since 1945 around capital punishment. Our analysis of the death penalty TLO treats “bottom-up” and “top-down” effects as interconnected, addresses the creation of legal order at both national and international levels, and emphasizes the recursivity linking developments at both levels. We trace the development of death penalty abolition from its origins in the immediate aftermath of World War II. Because the practical effects of abolition—in shaping legal and penal practice—necessarily occur at the national level, the analysis focuses on the international, transnational, and domestic factors that lead states to end capital punishment. After describing the emergence of a TLO abolishing the death penalty, we offer a new way of measuring the global and country-specific activities of transnational advocacy groups (Human Rights Watch and Amnesty International). We incorporate that measure in an analysis of data from about 150 countries. The central hypothesis is that making the TLO on capital punishment effective through abolition in national law requires modes of political action that overcome majoritarian public support for retention. We suggest two domestic institutional features that make abolition more likely despite retentionist popular opinion: proportional representation in the legislature and independent courts. We also suggest that transnational non-governmental organizations (NGO) and some regional organizations can support the move to abolish. The data analysis is largely consistent with these propositions and brief case studies illustrate the principal mechanisms.

Introduction.....	125
I. Abolition: the Big Picture.....	127

* Stefanie Neumeier is a PhD student at the University of Southern California, Political Science and International Relations; Wayne Sandholtz is John A. McCone Chair in International Relations and Professor of International Relations and Law, University of Southern California.

II. Abolition and Legal Ordering: International..... 131
 A. Global Ordering..... 132
 B. Regional Ordering..... 134
 C. Transnational Actors 141
 III. Data and analysis 144
 IV. Case studies 150
 A. Lithuania..... 151
 B. South Africa 152
 C. Belarus 154
 D. Japan 155
 Conclusion..... 157
 Appendix 159

INTRODUCTION

A transnational legal order (TLO) has emerged since 1945 around capital punishment. The TLO is clearly *transnational*: as of 2017, 105 countries had abolished the death penalty for all crimes. A further eight countries had prohibited it for ordinary crimes, and forty-six had abolished it *de facto* (by not carrying out any executions for at least ten years).¹ The death penalty TLO is also *legal*, at both the national and international levels. In national law, the prohibition on the death penalty can be written into the constitution itself, established by judicial interpretation, or implemented via legislation. At the international level, core human rights treaties do not prohibit the death penalty, but rather envision its “progressive restriction.”² And the death penalty is explicitly excluded as a punishment in the international criminal tribunals established in the 1990s and since.³ Regional treaties, including the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, and especially Protocol No. 6 and Protocol No. 13 to the European Convention on Human Rights (ECHR), aim directly at its abolition. Finally, the interconnected domestic, international, and regional legal rules related to capital punishment constitute an *order*: they authoritatively shape “the understanding and practice of law” in a specific area of social activity.⁴

The death penalty TLO differs from TLOs that have emerged in other areas of criminal justice, in which the objective is to regulate criminal activity that crosses borders. TLOs for money laundering, the financing of terrorism, human trafficking, or drug smuggling, for example, fit that mold. But TLOs can also regulate activities

1 Data compiled by the authors.
 2 ROGER HOOD & CAROLYN HOYLE, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE* 26 (5th ed. 2015).
 3 Including the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the International Criminal Court.
 4 Terence C. Halliday & Gregory Shaffer, *Transnational Legal Orders*, in *TRANSNATIONAL LEGAL ORDERS* 3, 5, 20 (Terence C. Halliday & Gregory Shaffer eds., 2015).

that are essentially national or local, like prison conditions or the death penalty, which is the focus of this Article. Addressing the punishment end of the criminal justice spectrum, this study directly addresses several themes that are central to the TLO framework, including normative settling, concordance, institutionalization, and recursivity.⁵ We seek to show that the death penalty TLO has attained partial normative settling, uneven concordance, and patchy institutionalization. The explanation for this set of mixed outcomes builds on the insight that distinct TLOs are almost invariably interconnected. In the case of capital punishment, the key linkage is to the broader international human rights regime. The consolidation of international standards for criminal law, as well as the movement for death penalty abolition, were shaped by the larger post-World War II human rights movement; indeed, both the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) delineate basic rights of those subject to criminal proceedings. The cause of death penalty abolition advanced under a banner of rights: the fundamental right to life and the right to be free from cruel, inhuman, or degrading punishment.

Our analysis of the death penalty TLO incorporates core features of the TLO framework. It assesses the creation of legal order at both national and international levels, and emphasizes the recursivity linking developments at both levels.⁶ We directly confront several of the questions posed in the introduction. We return to some of them more specifically in our conclusion, but the core of our argument is that the death penalty TLO has attained *partial* settling, concordance, and implementation in large part because the global human rights framing has been at odds with domestic framings that see the death penalty not just as congruent with local values, but as necessary to protect them. In fact, death penalty abolition at the national level has generally occurred not in response to public demands, but despite public support for retention. Calls for restoring the death penalty arise now, as they have in the past, even in states that have long since abolished it. A key puzzle is therefore how the death penalty TLO has been able to achieve substantial settling and partial concordance in the face of general public opposition.

The story at the global and regional levels is relatively straightforward: treaties limiting or abolishing the death penalty were agreed upon by political elites who worked at one remove, at least, from mass political opinion. However, and importantly, abolition of the death penalty has practical effect only at the domestic level, which is also where the primary puzzle resides. The core of our analysis therefore examines abolition in domestic law, where we confront the question of how abolition can occur domestically when publics almost universally favor retention. We argue that specific types of domestic institutions can make non-majoritarian policy-making more likely, specifically: (1) legislatures with proportional representation and (2) courts that are independent of the political

⁵ *See id.*

⁶ *See id.* at 3, 5.

branches. These institutions make more likely, respectively, abolition through legislation and abolition via judicial decision. We additionally hypothesize that transnational influences can enhance the likelihood of abolition, in particular: (1) the incentive of membership in regional organizations, and (2) the persuasive and socializing influence of international non-governmental organizations (INGOs). We offer a novel means of measuring INGO influence and incorporate it in the analysis of data from about 150 countries.

The first two sections describe the death penalty TLO and the broad outlines of its emergence at both national and international levels. The third section presents our data and analysis of abolition in national law. A fourth section offers brief case studies to illustrate the mechanisms highlighted by the broader analysis, including instances of both abolishers and non-abolishers. In the conclusion, we return to the broader questions posed by the overall project.

I. ABOLITION: THE BIG PICTURE

Punishment by death has existed since antiquity and is still seen in some parts of the world as a natural, or even necessary, part of penal law. The death penalty served simultaneously as a public spectacle, an exemplar of the wages of crime (or of sin), and a tool of social control and repression.⁷ Enlightenment thinkers sought to demolish the assumptions and myths that accumulated over the centuries surrounding capital punishment.⁸ Cesare Beccaria argued that punishment, instead of seeking to terrorize the populace into compliance with the laws, should be proportionate to the nature of the offense. He contended that capital punishment had no place in a modern society because it was inhumane and ineffective.⁹

The first laws to abolish capital punishment were enacted in U.S. states, perhaps ironically, given the continued retention of the death penalty in the United States. Pennsylvania in 1794 abolished it for all crimes except premeditated murder; Michigan became the first state to abolish the death penalty for murder in 1846.¹⁰ A few countries banned capital punishment for peacetime offenses in the nineteenth century and early twentieth century (though some would later reinstate it for periods of time). These were clustered in Europe (Portugal, San Marino, the Netherlands, Italy, Austria, Romania, and Switzerland) and Latin America (Venezuela, Costa Rica, Ecuador, and Uruguay). The Latin American countries banned the death penalty for all crimes, in peacetime and in war. The Nordic countries (Denmark, Finland, Iceland, Norway, and Sweden) abolished the death penalty for ordinary crimes (excluding treason and certain wartime offenses) in the first decades of the twentieth century.¹¹ After World War II, a global movement to ban capital punishment

⁷ See HOOD & HOYLE, *supra* note 2, at 10.

⁸ See, e.g. Cesare Beccaria, *On Crimes and Punishments*, in ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS 1, 52 (Aaron Thomas ed., Aaron Thomas & Jeremy Parzen trans., 2008).

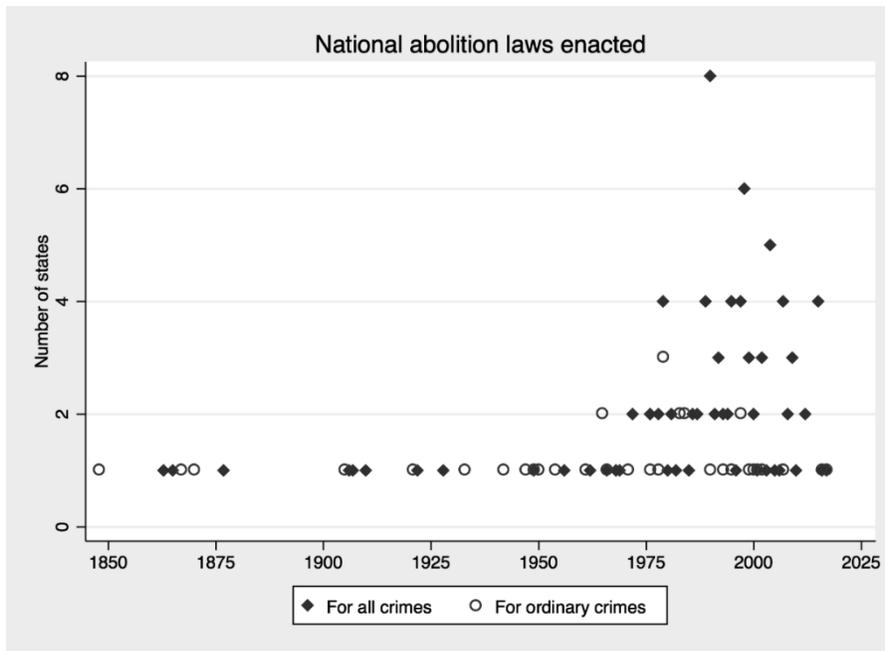
⁹ See *id.*

¹⁰ See HOOD & HOYLE, *supra* note 2, at 12–13.

¹¹ See *id.* at 13.

developed, aiming to prohibit its use under both national and international law. As Figure 1 shows, the majority of legislative acts abolishing the death penalty have occurred since about 1950.

Figure 1

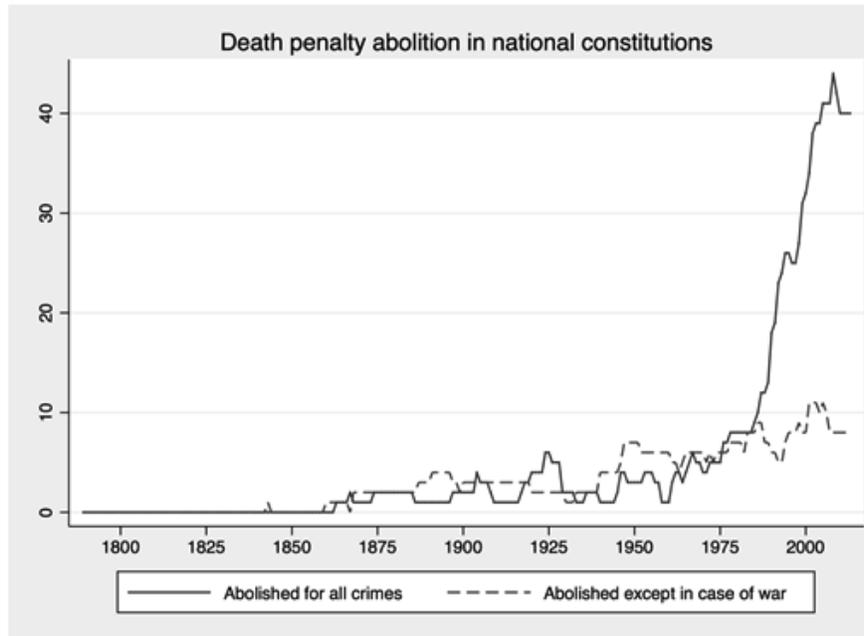


Source: Abolition year data from Hood and Hoyle (2015) and Amnesty International Annual Reports

Of course, states can abolish capital punishment through various legal means: by constitutional enactment or amendment, by judicial interpretation, and by legislation. Abolition of the death penalty in constitutions has, like abolition overall, taken off after World War II. Figure 2 displays the cumulative number of constitutions that abolish the death penalty, based on data from the Comparative Constitutions Project.¹² Constitutions written after 1945 were framed in the era of global human rights and were overwhelmingly shaped by the rights-based “new constitutionalism.”

¹² See Zachary Elkins et al., *Characteristics of National Constitutions, Version 2.0* (2014), <http://www.comparativeconstitutionsproject.org>. Accessed 28 December 2016.

Figure 2



As the preceding figures show, the momentum for abolition gathered after World War II and peaked in the 1990s and in the first decade of the twenty-first century (Table 1). Figure 3 depicts the global situation as of 2017. “De facto abolition” refers to countries that retain capital punishment in the law but that have not carried out an execution in the previous ten years. Some of those states have announced moratoria on executions or an intention to halt them entirely.¹³

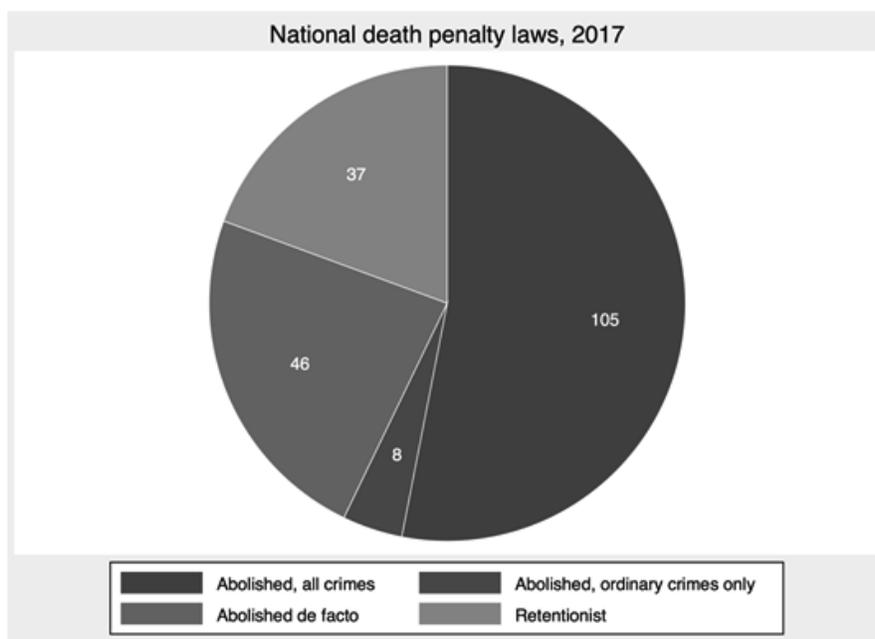
¹³ See HOOD & HOYLE, *supra* note 2 at 75–147. Examples of de facto states which have announced moratoria or intention to halt executions include Tunisia, Morocco, Algeria, Tanzania, Kenya, Ghana, Papua New Guinea, Maldives, South Korea, etc.

Table 1: Abolitions in law, by decade

	Abolished for all crimes	Abolished for ordinary crimes	Total
Before 1950s	9	9	18
1950s	1	2	3
1960s	4	4	8
1970s	10	6	16
1980s	14	4	18
1990s	35	6	41
2000–2009	23	4	27
2010–2017	9	2	11
Total	105	37	142

Note: a number of states first abolished for ordinary crimes and later for all crimes; the table counts both. The overall total is greater than the sum of abolitionist countries as of 2017 because some states appear twice, once in the column for all crimes and once in the column for ordinary crimes.

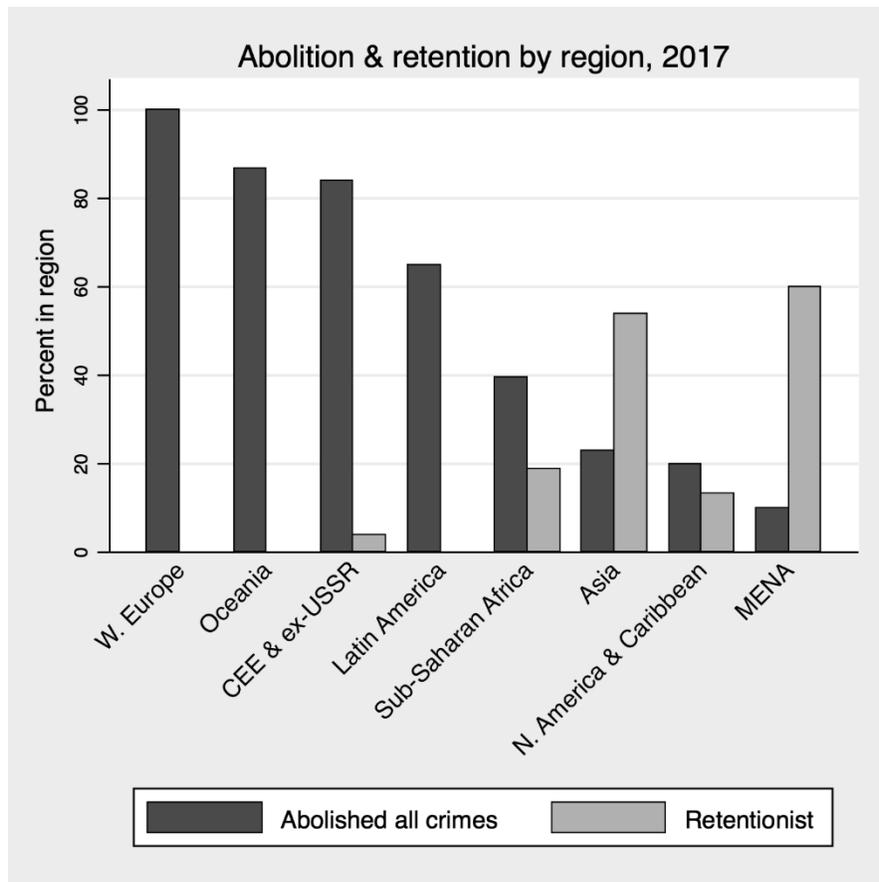
Figure 3



Finally, the extent of abolition varies dramatically across regions. Figure 4

depicts the regional picture as of 2017. Note that all Western European countries have abolished the death penalty for all crimes, as have most post-Soviet states and the countries of Oceania (Australia, New Zealand, and the Pacific Island states). In contrast, abolition has made little headway in Asia and the Middle East and North Africa (MENA), where more than half of states retain the death penalty.

Figure 4



II. ABOLITION AND LEGAL ORDERING: INTERNATIONAL

The construction of the death penalty TLO proceeded in parallel at the domestic and international levels, with both processes drawing force from the emerging global human rights movement. We begin with the international level because the global development of human rights exercised a powerful influence on the incorporation of human rights in domestic law, especially during the waves of democratization that swept the globe from the 1980s to the early 2000s. For instance, empirical research has clearly demonstrated the influence of international

instruments like the UDHR and the core international human rights treaties on the incorporation of human rights in national constitutions.¹⁴ The international movement to build global human rights norms started even before World War II ended, so we begin with a historical sketch of the transnational movement to end capital punishment.

A. Global Ordering

Though a number of countries abolished capital punishment in the nineteenth and early twentieth centuries,¹⁵ a genuine transnational drive to prohibit executions began only after World War II. The campaign to abolish the death penalty was, in large part, a reaction to the horrible excesses that had occurred during the war. Fascist regimes had used widespread executions—judicial and extrajudicial—as a tool of political repression. The Nazi Reich, for example, had issued “some 16,500 death sentences.”¹⁶ Thus, the “right to life” language that appeared in post-World War II international human rights documents was aimed at the death penalty. The drafting of those documents began shortly after peace was achieved. The U.N. Economic and Social Council created the Commission on Human Rights in June 1946 and charged it with preparing an International Bill of Rights. Its drafting committee produced the text of the UDHR, which was adopted by the United Nations General Assembly on December 10, 1948.¹⁷ The UDHR declares in Article 3: “Everyone has the right to life, liberty and security of person.”¹⁸ As Schabas relates, in the discussions that accompanied the drafting of the UDHR, the right to life provision triggered debate on two issues: abortion and the death penalty. Some participants favored recognizing capital punishment as an exception to the right to life, whereas others advocated an explicit ban on the death penalty. In the end, a compromise emerged, in which the UDHR affirmed the right to life without qualification and omitted any statement for or against the death penalty.¹⁹

The UDHR was a statement of common aspirations, but its authors were simultaneously beginning work on a document that would take the form of a binding convention, namely, the ICCPR. The UN Commission on Human Rights

14 See, e.g. David Sloss & Wayne Sandholtz, *Universal Human Rights and Constitutional Change* (2018); Colin J. Beck et al., *Constitutions in World Society: A New Measure of Human Rights* (Feb. 2017), <https://ssrn.com/abstract=2906946>; Mila Versteeg, *Law versus Norms: The Impact of Human Rights Treaties on National Bills of Rights*, 171 J. OF INSTITUTIONAL AND THEORETICAL ECON. 87 (2015); Zachary Elkins et al., *Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice*, 54 HARVARD INT'L L. J. 61 (2013); David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CAL. L. REV. 1163 (2011).

15 Data compiled by the authors.

16 RICHARD J. EVANS, *RITUALS OF RETRIBUTION: CAPITAL PUNISHMENT IN GERMANY 1600–1987*, at 795 (1996).

17 See WILLIAM A. SCHABAS, *THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW* 25–39 (1997).

18 G.A. Res. 217 A (III), *Universal Declaration of Human Rights*, art. 3 (Dec. 10, 1948).

19 WILLIAM A. SCHABAS, *THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW* 25–39 (2002).

worked from 1947 to 1954 on drafting a covenant, the early versions of which treated the death penalty as an exception to the right to life. The draft of the ICCPR approved by the Commission on Human Rights in 1954 went before the General Assembly, which turned it over to its Third Committee for continued refinement. The provision that occupied the greatest share of the Third Committee's time concerned the right to life, particularly capital punishment.²⁰ The Third Committee reached agreement on what would become Article 6 of the ICCPR in 1957.²¹

During the debates in the Third Committee, Uruguay proposed a text that would have prohibited the death penalty in absolute terms. Colombia, Finland, Panama, Peru, and Ecuador spoke in favor. A number of other states endorsed abolition in principle, but judged that its inclusion in the convention would be overly ambitious and would make it difficult for some states to accept the treaty. France proposed wording that would commit states only to move toward the abolition of capital punishment, an idea that garnered substantial support. A number of states opposed the French suggestion, though none offered an explicit defense of capital punishment. The Committee eventually passed compromise language and entered Article 6 as paragraphs 2 and 6.²² In the Third Committee, Article 6 passed with fifty-five votes in favor, none opposed, and seventeen abstentions; that article underwent no subsequent revision before the adoption of the Covenant by the General Assembly in 1966.²³ The relevant parts of Article 6 read as follows:

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court. . . .
4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.
6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.²⁴

²⁰ *See id.* at 45–46.

²¹ *See id.* at 44, 48.

²² *See id.* at 62–64.

²³ *See id.* at 68–70, 80.

²⁴ International Covenant on Civil and Political Rights art. 6, Mar. 23, 1976, S. Exec. Doc. No. E, 95-

In addition, Article 4 prohibits any derogation from Article 6, even in “time of public emergency which threatens the life of the nation.”²⁵ Article 4 thus forbids states from compromising the procedural safeguards that must accompany imposition of the death penalty (Art. 6(2) and 6(4)) or the prohibition on applying it to specific categories of persons (Art. 6(5)), even during the most critical national emergencies. In other words, the ICCPR signaled that the direction of development of human rights law was to the “progressive restriction” of capital punishment.²⁶

In 1980, a set of Latin American and European countries introduced in the General Assembly a draft Second Optional Protocol to the ICCPR.²⁷ The Protocol would both require abolition of the death penalty and prohibit its reintroduction by any state that abolished it. The General Assembly passed a decision to continue work on the proposal, though a number of states declared that they would have voted against an actual protocol. Work continued over the subsequent years, and by 1989, the General Assembly had a draft before it. The Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty (Second Optional Protocol) passed in the General Assembly in December 1989; fifty-nine states voted in favor, twenty-six against, and forty-eight abstained.²⁸ The key provisions appear in Article 1:

1. No one within the jurisdiction of a State Party to the present Protocol shall be executed.
2. Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.

The Second Optional Protocol also prohibits any reservations except for those that retain the death penalty for serious military crimes in wartime (Art. 2) and renews the ICCPR’s ban on derogations (Art. 6). As of May 2018, eighty-five states were parties to the Second Optional Protocol and another two had signed the Protocol but had not ratified it.²⁹

B. Regional Ordering

The international movement to end capital punishment also has a powerful regional dimension. Regional bodies in Europe and Latin America began preparing their own international human rights instruments in parallel with the United Nations in the late 1940s. Regional organizations can create various incentives for states to abolish the death penalty. The most powerful such incentive is almost certainly the one implemented in Europe, where both the Council of Europe (COE) and the

2, 999 U.N.T.S. 171.

25 *Id.* art. 4.

26 HOOD & HOYLE, *supra* note 2.

27 The sponsors were Austria, Costa Rica, the Dominican Republic, the Federal Republic of Germany, Italy, Portugal, and Sweden.

28 *See* SCHABAS, *supra* note 17, at 168–175.

29 *See* Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, December 15, 1989, https://treaties.un.org/doc/Treaties/1991/07/19910711%2007-32%20AM/Ch_IV_12p.pdf.

European Union (EU) have actively promoted death penalty abolition. Hood goes so far as to argue that, though multiple causes are responsible for the spread of abolition, none is as “vital as the political influence and pressure exerted by European political institutions.”³⁰ Regional institutional incentives had an effect on abolition, especially among the Central and Eastern European countries that democratized after 1990.

Following the example of the United Nations, the Ninth International Conference of American States (1948) envisioned a general declaration to be followed by a more specific and binding convention. The resulting 1948 American Declaration on the Rights and Duties of Man (ADRDM) thus included in Article 1 a statement that “every human being has the right to life,” but made no mention of the death penalty. Respect for the right to life provision in Article 1 of the ADRDM became obligatory with the 1967 amendments to the Charter of the Organization of American States.³¹

A special Inter-American Conference in 1969 considered a draft American Convention on Human Rights (ACHR). Though several states favored an all-out ban on capital punishment, the final text contained a number of restrictions on the death penalty, without prohibiting it. The ACHR was signed in November 1969 and entered into effect in July 1978. Fourteen out of nineteen national delegations issued a declaration of their “firm hope of seeing the application of the death penalty eradicated from the American environment” and called for an additional protocol, which would finalize the unconditional abolition of the death penalty.³² The ACHR follows the lead of the ICCPR in limiting the application of the death penalty and pointing toward abolition, but it is more restrictive than the U.N. document. For instance, under Article 4(2), the death penalty may “not be extended to crimes to which it does not presently apply.”³³ Furthermore, states that have abolished the death penalty may not reinstate it (Art. 4(3)).³⁴ The ACHR also expands the categories of persons to whom the death penalty cannot be applied to include those over seventy years of age (Art. 4(5)), and it prohibits capital punishment for “political offenses” (Art. 4(4)).

In the mid-1980s, the Inter-American Commission on Human Rights, created by the ACHR, became concerned with the extension of the death penalty to new crimes in some states. At the urging of Uruguay, the Commission proposed in 1987 a protocol to the ACHR to ban the death penalty. Only four of the nineteen states parties to the convention had retained capital punishment, and in June 1990, the Organization of American States (OAS) General Assembly approved the optional

30 ROGER HOOD, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE* 16 (3d ed. 2002).

31 *See* SCHABAS, *supra* note 19, at 312–15.

32 *See id.* at 326–32.

33 Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (Dept. of Int. Legal Affairs 2006 ed.).

34 *See id.*

protocol (ACHR Protocol).³⁵ Whereas the Second Optional Protocol to the ICCPR requires states to take legislative action to abolish capital punishment, the ACHR Protocol abolishes the death penalty directly: “the States Parties to this Protocol shall not apply the death penalty in their territory to any person subject to their jurisdiction.”³⁶ The ACHR Protocol, like the Second Optional Protocol, allows states to enter reservations with respect to capital punishment during wartime, though it restricts its application to “extremely serious crimes of a military nature” and “in accordance with international law” (Art. 2(1)). Thirteen states are parties to the ACHR Protocol.³⁷

The abolition movement in Europe has been even more far-reaching than that of Latin America, at least in terms of the number of countries affected. Western European countries were among the first to prohibit capital punishment.³⁸ A number of them, including Austria, Germany, the Netherlands, Sweden, Norway, Denmark, Spain, Portugal, and Italy, were leading promoters of abolition in the UN and sponsored (along with a number of Latin American states) many of the General Assembly resolutions on the subject.³⁹ International institutions in Europe reflected the abolitionist commitments of a growing number of European states. For instance, the COE’s European Convention on Human Rights (ECHR), the first general international human rights treaty, defines capital punishment as an exception to the right to life.⁴⁰ By the 1980s, most member states of the COE had abolished capital punishment in national law.

In order to bring the ECHR up to date with respect to European practice, the COE prepared Protocol No. 6 to the ECHR, which twelve states signed in April 1983. Protocol No. 6 bans the death penalty directly: “The death penalty shall be abolished. No-one shall be condemned to such penalty or executed.”⁴¹ Under Protocol No. 6, however, states may retain capital punishment provisions for wartime or imminent threat of war (Art. 2). In May 2002, the COE passed Protocol No. 13 to the ECHR, which directly and completely abolishes the death penalty, with no reservations or derogations permitted.⁴² As of May 2018, forty-four states had ratified or acceded to Protocol No. 13 and one (Russia) had signed but not

35 See SCHABAS, *supra* note 19, at 350–53.

36 Protocol to the American Convention on Human Rights to Abolish the Death Penalty, art. 1, June 8, 1990, O.A.S.T.S. No. 73. (Dept. of Int. Legal Affairs 2006 ed.).

37 Signatories and Ratifications, Protocol to the American Convention on Human Rights to Abolish the Death Penalty, June 8, 1990, O.A.S.T.S. No. 73. (Dept. of Int. Legal Affairs 2006 ed.).

38 See HOOD & HOYLE, *supra* note 2, at 13, 49.

39 See HOOD & HOYLE, *supra* note 2, at 26–27; See SCHABAS, *supra* note 19, at 156–67.

40 See Convention for the Protection of Human Rights and Fundamental Freedoms, April 11, 1950, C.E.T.S. No. 005, 213 U.N.T.S. 2889 (Council of Europe 2006 ed.).

41 Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, art. 1, April 28, 1983, C.E.T.S. No. 114, 2889 U.N.T.S. 1496.

42 See Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty in All Circumstances, art. 1–3, March 3, 2002, C.E.T.S. No. 187, 2889 U.N.T.S. 2246 (Council of Europe 2006 ed.).

ratified.⁴³

The EU has similarly embraced death penalty abolition. Of course, all EU states are also members of the COE, and are therefore potential parties to Protocol No. 6 and Protocol No. 13. By 2000, all twenty-seven of the current EU member states had ratified Protocol No. 6. That same year, the EU bodies with legislative roles—the European Council, the European Parliament, and the Commission—all approved a Charter of Fundamental Rights. Article 2 of the Charter, titled “Right to Life,” declares, “No one shall be condemned to the death penalty, or executed.”⁴⁴ The Charter was incorporated as Part II of the Treaty Establishing a Constitution for Europe.⁴⁵

Even prior to 2000, in June 1998, the EU decided to make abolition of the death penalty an issue in its relations with other countries, with the objective of working “towards universal abolition of the death penalty as a strongly held policy view agreed by all member states.”⁴⁶ The EU, in fact, has made *démarches* to a number of countries, including Lebanon, the Palestinian Authority, Malaysia, Sri Lanka, Japan, Guinea, Botswana, and the United States, on specific death penalty cases. The EU has issued numerous diplomatic communications to the United States, both regarding the death penalty in general and with respect to specific cases. For instance, in a May 2001 letter to the U.S. government, the EU declared that it was “deeply concerned about the high number of executions in the United States,” and it called on the government “to consider further steps towards the abolition of the death penalty.”⁴⁷ In December 2005, the EU announced its “deep regret that, with the execution of Kenneth Lee Boyd by the State of North Carolina on 2 December 2005, the US ha[d] carried out its 1,000th execution since the reinstatement of the death penalty in 1976.”⁴⁸ Over the past several years, the EU has also filed *amicus curiae* briefs at the U.S. Supreme Court in death penalty cases, including *Roper v. Simmons*, 543 U.S. 551 (2005), in which the Court determined that the execution of juveniles violated the U.S. Constitution. Several U.S. states have also been the recipients of EU communications.⁴⁹ Considering that the United States continues to employ the death penalty, it may appear that the influence of

43 See Chart of Signatures and Ratifications to Treaty 187, Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty in All Circumstances, March 3, 2002, C.E.T.S. No. 187, 2889 U.N.T.S. 2246 (Council of Europe 2018 ed.).

44 Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364).

45 See Treaty Establishing a Constitution for Europe, Part II, Dec. 16, 2004, 2004 O.J. (C 301) 47.

46 European Union, *Guidelines to EU Policy Towards Third Countries on the Death Penalty*, 29 June 1998, available at <https://www.refworld.org/docid/4705f3d12.html> (last visited Jan. 22, 2019).

47 Press Release, European Union, EU Policy on the Death Penalty (May 10, 2001) (on file with author).

48 Council of the European Union Press Release 15262/05 (Presse 341), Declaration by the Presidency on Behalf of the European Union on the 1,000th Execution in the US (Dec. 2, 2005).

49 For a compilation of EU death penalty actions vis-à-vis the United States and specific U.S. states, see EU Policy & Action on the Death Penalty: Actions on US Death Row Cases, European Union - Delegation of the European Commission to the USA (2006), https://ceas.europa.eu/delegations/united-states-america/35027/death-penalty-archive_en.

European institutions is rather limited. However, the COE and the EU have played a central role in promoting abolition in other countries.

To illuminate the influence of regional institutions, we take a closer look at how the COE and the EU actively promoted abolition in the newly independent states of Central and Eastern Europe. The COE and the EU exercised considerable influence because the transition states were eager to consolidate their fledgling democracies and market economies by joining these key European institutions. With respect to the COE, some newly independent states abolished the death penalty before joining; it is difficult to assess the extent to which anticipation of COE membership figured among the motivations for abolition. In other cases, the Parliamentary Assembly of the Council of Europe (PACE) played an active role in pushing for abolition. PACE did not make death penalty abolition an explicit requirement for the early applicants, like Hungary in 1990 or Estonia and Lithuania in 1993. It did, however, attach "great importance to the commitment expressed by the Lithuanian authorities to sign and ratify the European Convention on Human Rights." The opinion on the Estonian application contained similar language.⁵⁰

By the mid-1990s, the COE had made signature and ratification of Protocol No. 6 to the ECHR a condition of joining.⁵¹ Thus, PACE opinion on Latvia's application for membership declared that Latvia had committed itself to ratifying the ECHR and Protocol No. 6 within a year of accession.⁵² The Former Yugoslav Republic of Macedonia, Armenia, Georgia, and the Federal Republic of Yugoslavia also agreed to one-year time frames for ratifying Protocol No. 6.⁵³ The agreements with Moldova, Albania, Ukraine, Croatia, and Russia required ratification of Protocol No. 6 within three years of joining the COE.⁵⁴ Some COE accession agreements obligated new members to establish an immediate moratorium on executions (Albania, Russia, Ukraine) or to pass legislation abolishing the death penalty in domestic criminal codes within one year (Armenia).

In a few cases, when new members failed to fulfill their obligations related to abolition of capital punishment, PACE increased the pressure for them to comply.

50 Eur. Parl. Ass., *Report on the Application of the Republic of Lithuania for Membership of the Council of Europe*, Op. No. 168 (1993); Eur. Constul. Ass., *Report on the application of the Republic of Estonia for Membership of the Council of Europe*, Op. No. 170 (1993).

51 See Eur. Parl. Ass., *Abolition of the Death Penalty in Europe* ¶6, Res. 1097 (1996); Eur. Parl., Ass., *Abolition of Capital Punishment* ¶6, Res. 1044 (1994).

52 See Eur. Parl. Ass., *Report on the Application by Latvia for Membership of the Council of Europe*, Op. No. 183 (1995).

53 See Eur. Parl. Ass., *The Federal Republic of Yugoslavia's Application for Membership of the Council of Europe*, Op. No. 239 (2002); Eur. Parl. Ass., *Armenia's Application for Membership of the Council of Europe*, Op. No. 221 (2000); Eur. Parl. Ass., *Georgia's Application for Membership of the Council of Europe*, Op. No. 209 (1999); Eur. Parl. Ass., *Application by the Former Yugoslav Republic of Macedonia for Membership of the Council of Europe*, Op. No. 191 (1995).

54 See Eur. Parl. Ass., *Croatia's Request for Membership of the Council of Europe*, Op. No. 195 (1996); Eur. Parl. Ass., *Russia's Request for Membership of the Council of Europe*, Op. No. 193 (1996); Eur. Parl. Ass., *Application by Albania for Membership of the Council of Europe*, Op. No. 189 (1995); Eur. Parl. Ass., *Application by Moldova for Membership of the Council of Europe*, Op. No. 188 (1995); Eur. Parl. Ass., *Application by Ukraine for Membership of the Council of Europe*, Op. No. 190 (1995).

For instance, Armenia faced strong criticism from PACE in 2002 for having failed to ratify Protocol No. 6 and having failed to abolish the death penalty in its criminal code, contrary to commitments made at accession.⁵⁵ By September 2003, Armenia had both ratified Protocol No. 6 and eliminated capital punishment from its domestic statutes.⁵⁶ In other cases, COE pressure did not induce countries to abolish. For instance, after a number of executions in Belarus in the late 1990s, PACE suspended the country's status as a Special Guest and froze its accession process. PACE urged Belarus "to declare an immediate moratorium on executions and set in motion the legislative procedure for the abolition of capital punishment."⁵⁷

Similarly, following executions in Ukraine in 1996, PACE threatened to withhold recognition of the "credentials of the Ukrainian parliamentary delegation at its next session."⁵⁸ The following year, after more executions, PACE decided to "reconsider" the credentials of the Ukrainian delegation, pending notice of a moratorium on executions.⁵⁹ A de facto moratorium followed, but PACE continued to condemn Ukraine for failing to honor its accession commitment to ratify Protocol No. 6 and abolish capital punishment de jure.⁶⁰ In 1997, PACE also criticized Russia for failing to honor its commitment to institute a moratorium on executions, and has since repeatedly pressured Russia to ratify Protocol No. 6. In a 2005 resolution, PACE reminded Russia that the deadline for ratifying the death penalty protocol had passed in 1999, and that other countries had been exposed to sanctions for failing to meet the same commitment.⁶¹

In general, the COE requirement has been effective in spreading abolition to the former communist countries. By 2002, "16 East European countries had abolished capital punishment and ratified the Sixth Optional Protocol to the ECHR, and three had signed it"—all had been retentionist up to the end of Communist rule in 1989.⁶²

The EU has similarly promoted abolition through its enlargement process.⁶³

55 See Eur. Parl. Ass., *Armenia's Application for Membership of the Council of Europe*, Op. No. 221 (2000).

56 See Human Rights Section of the Office for Democratic Institutions and Human Rights of the Organization for Security and Cooperation in Europe, *The Death Penalty in the OSCE Area*, Background Paper 2003/1 (2003).

57 Eur. Parl. Ass., *Situation in Belarus*, Rec. 1441 (2000).

58 Eur. Parl. Ass., *Honouring of the Commitment Entered into by Ukraine upon Accession to the Council of Europe to Put into Place a Moratorium on Executions*, Res. 1112 (1997).

59 Eur. Parl. Ass., *Executions in Ukraine*, Res. 1145 (1998).

60 See Eur. Parl. Ass., *Honouring of Obligations and Commitments by Ukraine*, Res. 1179 (1999); Eur. Parl. Ass., *Honouring of Obligations and Commitments by Ukraine*, Rec. 1416 (1999).

61 See Eur. Parl. Ass., *Russia Must 'Show Determination' and Abolish the Death Penalty in Law* (2006); Eur. Parl. Ass., *Honouring of Obligations and Commitments by the Russian Federation*, Res. 1455 (2005); Eur. Parl. Ass., *Honouring of the Commitment Entered into by Russia upon Accession to the Council of Europe to Put into Place a Moratorium on Executions*, Res. 1111 (1997).

62 HOOD, *supra* note 30, at 17.

63 "Enlargement process" refers to the mechanism for and conditions under which states may join the European Union. Any European country is able to apply for membership so long as it meets all the of the membership criteria.

By the early 1990s, as the newly independent states of Central and Eastern Europe began to apply for EU membership, all of the existing fifteen EU member states had ratified Protocol No. 6 except Belgium, Greece, and the United Kingdom, and these three would ratify by 1999. The European Council established in 1993 the "Copenhagen Criteria," political, economic, and legislative conditions that applicant states would have to meet before accession. The political criteria included "democracy, the rule of law, human rights and respect for and protection of minorities."⁶⁴ The European Commission translated those general ideals into detailed series of specific standards, which it published in "Enlargement Strategy" papers. With respect to the death penalty, the Commission's initial "opinions" reported on the status of capital punishment in each applicant country. For instance, the response to Bulgaria's application noted that "the death penalty has not been abolished in Bulgaria, but since 1990 it has been subject to a moratorium decreed by the President of the Republic."⁶⁵ The initial report on Estonia noted that capital punishment had not been abolished, but that "[t]he President of the Republic has declared a moratorium on the application of the death penalty and the Minister of Justice has undertaken to abolish it before February 1, 1998."⁶⁶

Succeeding annual reports on each applicant country monitored the status of the death penalty and ratification of Protocol No. 6. So, for instance, the 1999 report on Poland noted that Protocol No. 6 had not yet been ratified.⁶⁷ In its overall reports, the Commission included tables on the ratification of human rights treaties by all of the candidate countries. The June 1999 report showed that of the ten applicant states, only Bulgaria, Cyprus, and Poland had not yet ratified ECHR Protocol No. 6.⁶⁸ But by the 2001 report, all had ratified,⁶⁹ and in 2005, all ten candidate states became EU members. The death penalty criterion applied to the 2007 entrants (Bulgaria and Romania) as well, and will apply in any subsequent enlargements.

In short, European institutions have played an active role in pushing new democracies in Eastern and Central Europe toward abolition of the death penalty. The lure of the Council of Europe and the European Union was so great that post-Soviet, democratizing countries were willing to give up capital punishment in order to gain the political and economic benefits of membership in Europe's core institutions.

64 Presidency Conclusions, Copenhagen European Council (June 21–22, 1993).

65 European Comm'n *Commission Opinion on Bulgaria's Application for Membership of the European Union*, Doc. 97/11 (July 15, 1997).

66 European Comm'n, *Agenda 2000: Opinion of the Comm'n on Estonia's Application for Membership of the European Union*, DOC 97/12 (July 15, 1997).

67 See European Comm'n, *Regular Report from the Comm'n on Poland's Progress Towards Accession* 11 (1998).

68 See European Comm'n, *Composite Paper: Reps. on Progress Towards Accession by Each of the Candidate Countries*, annex 3, 49 (1999).

69 See European Comm'n, *Making a Success of Enlargement: Strategy Paper and Rep. of the European Comm'n on the Progress Towards Accession by Each of the Candidate Countries* (2001).

C. Transnational Actors

Efforts to craft international and regional legal instruments abolishing the death penalty began in intergovernmental fora immediately after World War II and continue to the present. The effort to ban capital punishment thus predates the emergence of transnational human rights NGOs and the expansion of their influence. The most prominent international human rights NGOs, Amnesty International (AI) and Human Rights Watch (HRW), have become consistent and vocal advocates of death penalty abolition. AI, founded in 1961, has made death penalty abolition one of its high-priority issue areas. AI's concern with executions arose in connection with its primary initial mission on behalf of political prisoners. The organization subsequently came to oppose capital punishment in general, and, in 1971, called for its universal abolition. AI launched a global anti-death penalty campaign in 1989; since then it has monitored and reported on the status of capital punishment around the world and has pushed for abolition.⁷⁰ HRW was founded in 1978 as Helsinki Watch; in 1988, it joined with the other regional "Watch Committees" to form the current global organization.⁷¹ HRW focuses its attention on the death penalty in specific countries rather than on a general campaign for abolition. It publicizes and condemns executions, and it reports on the status of capital punishment in specific countries in its annual *World Report*.⁷²

HRW and AI both began to campaign actively for death penalty abolition in the 1980s, just before the burst of abolition in national law after 1990. The NGOs did not cause that surge, however. The collapse of the Soviet Union, democratization in the successor states, and the subsequent inclusion of former Soviet states and satellites in the main European institutions—the EU and the Council of Europe—were clearly the key proximate causes. We argue that the international non-governmental organizations (INGOs) added political and normative force to the abolitionist movement. Researchers in the world society tradition⁷³ have shown in a variety of substantive contexts that INGOs are effective carriers of international norms and institutional forms into national contexts.⁷⁴ With

70 See Amnesty Int'l, *Death Sentences and Executions: 2017*, AI Index ACT 50/7955/2018 (2018).

71 *History*, HUMAN RIGHTS WATCH (Feb. 4, 2019), <https://www.hrw.org/history>.

72 The most recent *World Report* is available at <https://www.hrw.org/world-report/2019> (Feb. 4, 2019).

73 World Society theory focuses on transnational interaction and global social change and explores the importance of international institutions and culture in shaping the behavior of individuals, organizations, and states. Researchers of the world society tradition do not necessarily see individual states or the international system as predominant and the unit of analysis, but rather the global population, which is based upon and organized around common values and goals. As a result, INGOs play a key role as carriers of ideas, morals, and values.

74 See, e.g. Wade M. Cole, *Hard and Soft Commitments to Human Rights Treaties, 1966–2000*, 24 SOC. F. 563 (2009); Christine Min Wotipka & Kiyoteru Tsutsui, *Global Human Rights and State Sovereignty: State Ratification of International Human Rights Treaties, 1965–2001*, 23 SOC. F. 724 (2008); Kiyoteru Tsutsui & Christine Min Wotipka, *Global Civil Society and the International Human Rights Movement: Citizen Participation in Human Rights International Nongovernmental Organizations*, 83 SOC. FORCES 587 (2004); John W. Meyer et al., *World Society and the Nation-State*, 103 AM. J. OF SOC. 144 (1997); John Boli, *Human Rights or State Expansion? Cross-National Definitions of Constitutional Rights, 1870-1970*, in INSTITUTIONAL STRUCTURE (George Thomas, et al. eds., 1987); John Boli-Bennett & John Meyer, *The Ideology of Childhood and the*

respect to death penalty abolition, Kim argues:

[H]uman rights INGOs can empower pro-abolition constituencies and influence governments' calculations and deliberations toward abolition. Specifically, they do so by framing capital punishment as a human rights violation through abolitionist campaigns and lobbying parliamentarians to repeal death penalty laws. Through their anti-death penalty activism, human rights INGOs tip the domestic political balance between pro- and anti-death penalty constituencies in favor of complete abolition.⁷⁵

Kim's empirical analysis demonstrates a strong link between the presence of human rights INGOs in a country and the likelihood that the country abolishes the death penalty for all crimes.⁷⁶

We offer a similar argument and find support for it using a new method for gauging INGO influence. As a first cut, we present a descriptive picture of the scale of INGO death penalty activism. Instead of measuring the number of human rights INGOs present in a country, we assessed the documents (world reports, country reports) produced by AI and HRW. We classified the documents as to whether they address a specific country or are global in coverage. Using textual analysis tools, we counted the number of occurrences in each document of three key phrases: "death penalty," "death sentence," and "capital punishment," coding each such reference as a "hit."⁷⁷ The number of documents addressing a specific country in any given year is small, usually one or two. For specific countries, we therefore use the number of "hits" (death penalty references) in country-specific documents in a given year as a measure of INGO activity regarding the death penalty within that country. We likewise counted the number of general INGO documents (not country-specific) that include the death penalty phrases. The number of years covered for the two organizations differs because AI was created fifteen years before HRW. Figure 5 depicts the total number of documents, both general and country-specific, referring to the death penalty. It shows that the highest occurrences of death penalty phrases are reached during the 1990s and after 2000. The following figure (Figure 6) shows the number of hits in all INGO documents; these also peak at nearly one thousand hits per year after the year 2000. Clearly, death penalty abolition was the subject of vigorous INGO campaigning during the key period (during the 1990s and after 2000).

State: Rules Distinguishing Children in National Constitutions, 1870–1970, 43 AM. SOC. REV. 797 (1978).

⁷⁵ Dongwook Kim, *International Non-governmental Organizations and the Abolition of the Death Penalty*, 22 EUR. J. OF INT'L REL. 596 (2016).

⁷⁶ See *id.*

⁷⁷ The term "execution" and its stem ("execut") could not be used because they collected too many unrelated terms related to, for example, the executive branch, an executive summary, and so on.

Figure 5

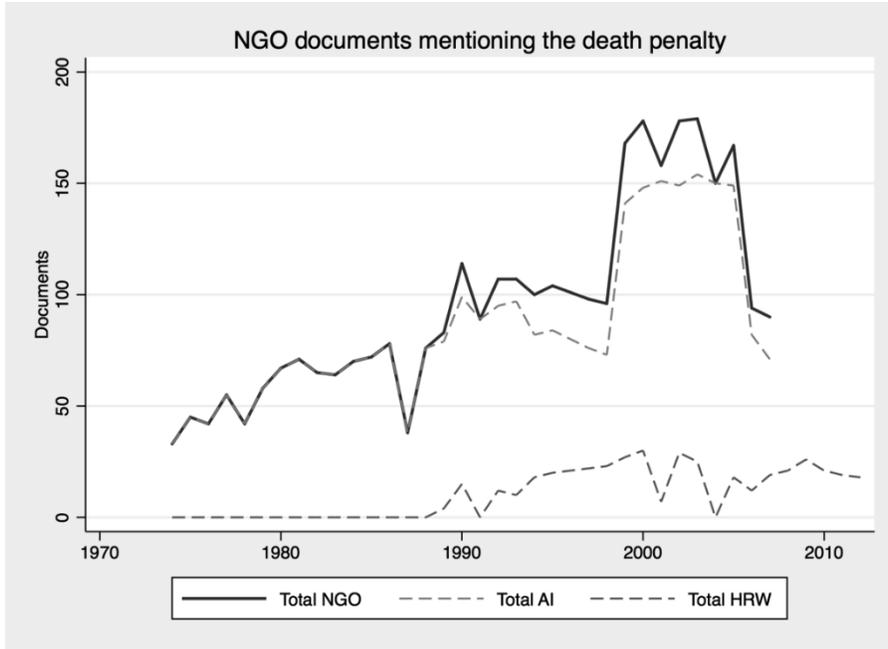
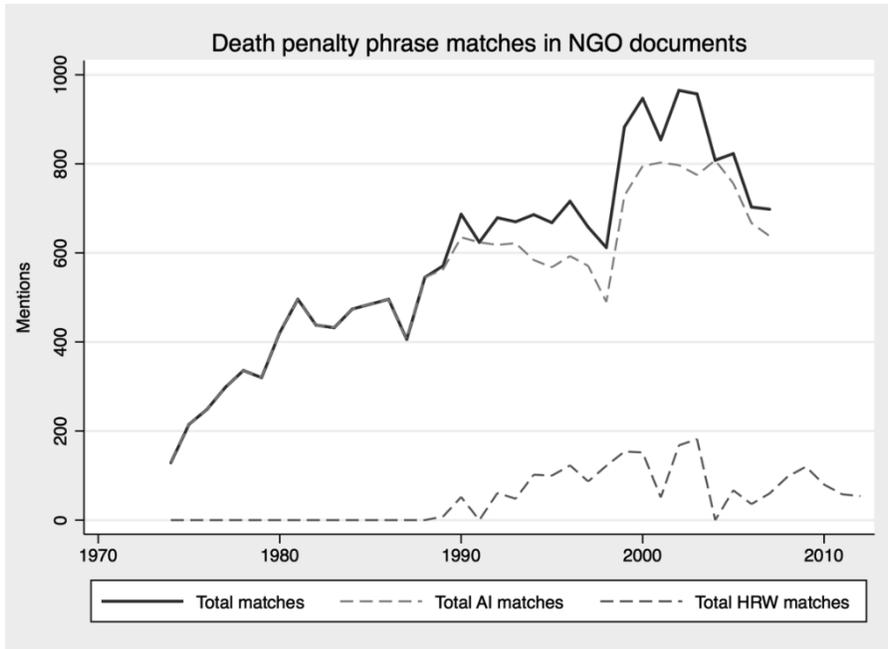


Figure 6



III. DATA AND ANALYSIS

The analysis now focuses on abolition of the death penalty in national law. Because penal law and the carrying out of punishments is a matter of domestic law and practice, the settling of a death penalty TLO must be visible at the national level. We therefore model the most comprehensive form of abolition (for all crimes) in domestic law. We utilize a technique—Cox proportional hazard models—that allows us to estimate the extent to which various domestic and international factors affect (a) the likelihood that a country will abolish the death penalty and, if it does, (b) how long it takes to do so. The period covered by our analyses begins in 1960 and ends in 2012;⁷⁸ the models include at least 150 countries.⁷⁹

Our central puzzle is that death penalty abolition virtually always occurs despite majority public support for retention. As Hood and Hoyle put it, “[W]here abolition has come about it has not been as a result of the majority of the general public supporting it.”⁸⁰ Indeed, abolition has generally occurred despite public opposition. As Gottschalk et al. put it, “Leading European countries abolished the death penalty [after World War II] in the face of strong, sometimes overwhelming, public support for its retention.”⁸¹ This was the case in Germany (abolished 1949), the United Kingdom (abolished 1969), France (1981), as well as Canada (1998).⁸² As we report in our brief case study of Lithuania, abolition there followed the same pattern.⁸³ The absence of comprehensive cross-national public opinion data makes it impossible to demonstrate conclusively that no state has ever abolished the death penalty at a time when the public supported such a change. However, in our review of country studies, we have yet to find an instance of supportive public opinion at the time of abolition.

The TLO framework posits constant recursivity, that is, influences flowing in both directions across levels (national and international) and between law and practices.⁸⁴ Thus, changes in law can affect attitudes and beliefs. There is evidence of that effect in death penalty abolition. To be sure, in some countries that have already abolished, public majorities favor reintroduction of capital punishment; examples include Brazil, the Dominican Republic, Peru, South Africa, the Czech Republic, and Poland.⁸⁵ But public support for the death penalty sometimes declines

78 The analysis loses little by not starting before 1960 as only two countries (Honduras and the Federal Republic of Germany) abolished the death penalty for all crimes between 1945 and 1959. Data for some key variables are not available for years prior to 1960.

79 The main models (1–4) include between 154 to 160 countries. Models 5–8, in which we include variables such as ethnic war, ethnic violence, civil war, and extrajudicial killings, cover 136 to 144 countries due to the lack of data for these variables.

80 See HOOD & HOYLE, *supra* note 2, at 350.

81 MARIE GOTTSCHALK, et al., *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* 227 (2006).

82 See HOOD & HOYLE, *supra* note 2, at 352.

83 See *infra* Part IV pp. 253–54.

84 See Halliday & Shaffer, *supra* note 4.

85 See HOOD & HOYLE, *supra* note 2, at 374–76.

after its abolition. Over time, people come to see capital punishment as outmoded.⁸⁶ In some countries, including in Britain, France, Germany, Italy, Norway, Australia, and New Zealand, where public opinion supported retention of capital punishment pre-abolition, that support declined steadily—and dramatically—post-abolition.⁸⁷

In many, perhaps most, countries (including some that have already abolished), capital punishment is regarded as not just appropriate for certain crimes but as necessary for upholding social morality and values. We therefore theorize that there are certain institutional arrangements under which it is possible for a polity to overcome majoritarian opposition to abolition. We suggest two such mechanisms, one legislative and one judicial.

1. *Proportional Representation (PR)*. Some democratic electoral systems will be more favorable to abolition than others. In parliamentary systems with at least some PR (seats allocated to parties according to their overall share of the vote), political parties are less constrained by the median voter (who tends to be retentionist) because they can negotiate policy tradeoffs in the legislature with less fear of broader electoral punishment. PR tends to produce multiparty governments, in which some parties might represent voters who favor abolition and other parties might see abolition as a low-priority issue for their supporters or who would be willing to trade support for abolition for concessions on other issues. In other words, PR offers more space for log-rolling and issue tradeoffs.⁸⁸ We therefore include a variable that captures whether states have at least some level of proportional representation in the legislature.

Given our argument that publics are generally retentionist, we must anticipate that democratic institutions play an ambiguous role. The more faithfully democratically elected legislatures follow the majority preferences of the public, the less likely they are to enact laws abolishing the death penalty. We therefore also include a variable measuring the quality of democracy in states, but we expect it to be either insignificant or to demonstrate a negative association with the likelihood of abolition.

2. *Judicial Independence*. Courts are non-majoritarian institutions. Though courts are necessarily strategic and pay attention to the other branches of government and broader social developments, they are less constrained by mass public opinion or the median voter. Apex courts can find that the death penalty is incompatible with a country's constitution or with its international obligations (for instance, the ECHR). Indeed, the judicial mechanism can operate in tandem with the legislative one. For example, a parliament that is eager to join the COE might refer the question of the constitutionality of the death penalty to a constitutional court, hoping for a ruling of unconstitutionality. As we will show, abolition in Lithuania

⁸⁶ See *id.*, at 376.

⁸⁷ See *id.*, at 376–77.

⁸⁸ See Anthony McGann & Wayne Sandholtz, *Patterns of Death Penalty Abolition, 1960–2005: Domestic and International Factors*, 56 INTERNATIONAL STUDIES QUARTERLY 275 (2012); ANDREW HAMMEL, ENDING THE DEATH PENALTY: THE EUROPEAN EXPERIENCE IN GLOBAL PERSPECTIVE (2010).

followed this path. We therefore include in the models a variable that measures the degree of judicial independence in states, on the hypothesis that courts that are more independent from the political branches will be more capable of ruling the death penalty impermissible.

In addition to PR and Judicial Independence, we also argue that transnational influences can affect public and elite opinion regarding the death penalty. The two major sources of transnational influence are INGOs and regional organizations, both of which operate through persuasion, socialization and material incentives.

3. *INGO Influence.* We include two measures of the effects of INGO pressure and persuasion on national abolition. One is a count of the number of occurrences of death penalty phrases in INGO documents regarding a specific country in a given year. This is a measure of the attention INGOs have devoted to the death penalty for that state. The second measure counts the global number of death penalty references in INGO documents, both country-specific texts and general texts, in a given year. Of course, INGOs engage in a variety of other activities, including direct lobbying of elected officials, filing amicus briefs in a country's courts, supporting local abolitionist organizations and campaigns, and providing technical assistance to governments and civil society actors contemplating constitutional revision, legislation, or litigation. Our INGO document variables are meant to capture, in broad terms, the overall level of INGO attention to death penalty issues, thus serving as indicators of their persuasive and socialization effects. The higher the value on either INGO measure, the more likely a state is to abolish.

4. *Regional Organization Incentives.* The regional ordering of the death penalty in the key European institutions (described above) has been decisive for many states that gained independence after 1990. A variable that directly measures this phenomenon is difficult to implement because, in the case of the COE, membership in the organization is virtually coterminous with death penalty abolition. A series of regional dummies roughly capture this effect.

Finally, we include variables to capture the influence of additional factors that could affect a country's likelihood of abolishing.

- *Post-election year.* Because abolition generally requires counter-majoritarian policy-making, governments may be more likely to abolish when their political support is presumably highest, namely, right after an election. The first year after an election is also generally farther in time from the next election, meaning that governments have time to rebuild any support they might lose as a result of abolitionist legislation. We include a variable that indicates the year after a national election in democratic countries (since elections in autocratic states have little meaning).
- *Prior steps toward abolition.* Many countries approach abolition in steps. In order to capture a country's previous movement toward complete abolition, we include a variable that indicates whether that state had previously abolished the death penalty for ordinary crimes. Prior progress toward abolition should make complete abolition more likely.

- *Country size.* Larger countries (measured either in terms of population or total GDP) may be less likely to abolish, given that the challenges of social control could be larger.
- *Religion.* Prior research has shown that dominant religions can influence a country's likelihood of abolishing.⁸⁹ We include variables for the percentage of the population adhering to Protestant Christianity, Catholicism, and Islam. In light of the Catholic church's official condemnation of the death penalty, strongly Catholic countries may be more likely to abolish.
- *Ethnic fragmentation and conflict.* Governments may be more inclined to retain the death penalty in countries with politically volatile ethnic divisions. The death penalty is often a tool of repression, which can be used to intimidate or eliminate leaders of rival ethnic groups. We include variables capturing the degree of ethnic fractionalization, the level of ethnic violence, and the presence of interethnic armed conflict.
- *Repression.* Governments that engage in political repression may be more inclined to retain the death penalty as a potent tool. We include a measure of states' use of extrajudicial killing, which could be operated in two ways. Extrajudicial killing could be a complement of capital punishment (governments that make use of one also employ the other) or a substitute (repressive governments might use extrajudicial killings so as not to be seen executing opponents).
- *Civil War.* We also include an indicator of the existence of *civil war*, which could also motivate governments to keep the death penalty as an instrument for suppressing rebels or rival political formations.

Some additional variables that might seem logical candidates for inclusion cannot be included. One would be data on homicide rates, on the supposition that high levels of violent crime might increase elite commitment to the death penalty as a tool for punishing and deterring crime. Unfortunately, reliable cross-national data on homicide rates do not exist for even a single-year cross section, much less for an analysis covering fifty-three years. Every existing source of national homicide data depends on national reporting, which varies so wildly in quality, reliability, and coverage that no cross-national analysis is possible. The best single source of homicide data is the United Nations Office on Drugs and Crime (UNODC), which has compiled data on national homicide counts and rates since 2003. But even the UNODC warns, "Data supplied by countries may not exactly reflect the definition [of intentional homicide] provided by UNODC," and "When using the figures, any cross-national comparison should be conducted with caution because of the differences that exist between the legal definitions of offences in countries, the different methods of offence counting and recording and differences in the share of criminal offences that are not reported to or detected by law enforcement

⁸⁹ See McGann & Sandholtz, *supra* note 87.

authorities.”⁹⁰ There is, nevertheless, some research on the relationship between homicide rates and death penalty abolition. One study involving fifty-one countries found no bivariate correlation between homicide rates and either support for the death penalty in public opinion or retention of capital punishment.⁹¹ A second study assessed 140 countries and found no significant relationship between homicide rates and the likelihood of a country abolishing the death penalty.⁹² A third study, utilizing multiple sources of homicide data, found the same thing: no relationship.⁹³ Each of these three studies was cross-sectional (analyzing a single year and the current abolition status of countries), making it impossible to model the abolition choice as we do. Given the data inadequacies and the evidence that homicide rates do not correlate with abolition, we have no reservations in omitting such a variable from the models.

A second potentially plausible but unusable variable is imprisonment rates. Again, reliable cross-national data with sufficient time coverage are simply not available. In one study, imprisonment rates are shown to be positively associated with death penalty retention—but in only half of the models.⁹⁴ The problem is that using data for a single year, and analyzing whether countries have abolished or not (as opposed to analyzing the decision to abolish), it is difficult to reach any conclusion about the relationship between imprisonment rates and death penalty abolition. On the one hand, high imprisonment rates might be associated with countries that have abolished if the lack of executions means more people in prison. On the other hand, low imprisonment rates might be associated with countries that have abolished if they are an indicator of a less punitive criminal justice system. Due to the lack of data reliability and coverage, we do not include a measurement for imprisonment rates.

Figure 7 presents the results of the main regression (Model 1 in the Appendix, reestimated with standardized variables). It depicts the estimated effect, with 95 percent confidence intervals, of each variable on the likelihood that a country will abolish the death penalty for all crimes. Estimates to the left of the zero-line decrease the likelihood of abolition; markers to the right of zero mean that the variable increases the likelihood of abolition. If the confidence interval lines overlap zero, we cannot be confident that the effect of the variable is not due to chance (it is not significant at the conventional five percent level). In addition, because the graph represents standardized coefficients (for the nonbinary variables), we can compare the relative size of the effects of the variables.

90 UNITED NATIONS OFFICE ON DRUGS AND CRIME, HOMICIDE COUNTS AND RATES (2000–2015) (2018) (on file with author).

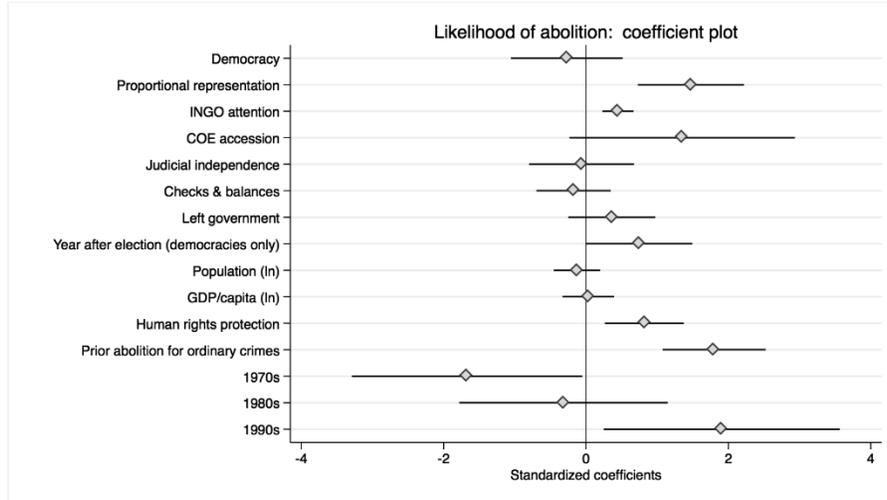
91 See Peter J. van Koppen et al., *Public Reasons for Abolition and Retention of the Death Penalty*, 12 INT'L CRIM. J. REV. 77, 86 (2002).

92 See Rick Ruddell & Martin G. Urbina, *Minority Threat and Punishment: A Cross-National Analysis*, 21 JUST. Q. 904, 923 (2004).

93 See David F. Greenberg & Valerie West, *Siting the Death Penalty Internationally*, 33 L. & SOC. INQUIRY 295, 320 (2008).

94 See *id.*, at 318.

Figure 7



We were particularly interested in (1) institutional arrangements that could make non-majoritarian policy-making more likely, and (2) transnational influences. A few findings stand out. First, the analysis shows that proportional representation has the expected effect of making abolition more likely; this is consistent with our argument that PR institutions make log-rolling and policy tradeoffs more feasible, even in contexts in which a majority of the public might favor retention of the death penalty. We also argued that independent courts would be more likely to rule the death penalty incompatible with constitutional law or treaty obligations. The analysis also shows that judicial independence is associated with an increased likelihood of abolition, but that it is significant in only some of the models.⁹⁵ Country-specific INGO attention clearly has the hypothesized effect. Each increase of one in the number of country-specific INGO hits increases the likelihood of abolition by about twenty to twenty-five percent.⁹⁶ Prior abolition for ordinary crimes, not surprisingly, makes abolition for all crimes more likely. Finally, the analysis illustrates that there is a strong, positive effect of Western Europe and Eastern and Central European regions on the likelihood of abolition. We interpret the effects of Western Europe and Eastern and Central European regions as rough indicators of the influence of the main European organizations, the COE and the

⁹⁵ See Table A in the Appendix.

⁹⁶ See the full results reported in the Appendix.

EU.⁹⁷ Countries in Oceania and sub-Saharan Africa are also more likely to abolish.⁹⁸ The variables representing the decades covered by this analysis control for the possibility that the likelihood of abolishing varies from decade to decade, as a product, for example, of broad international trends that affect many or most countries. Confirming what we presented in Figures 1 and 2 above, the 1990s—following the end of the Cold War and the collapse of the Soviet Union—were a period in which numerous countries ended capital punishment.

Some of the other findings are worth noting briefly (see the Appendix for more complete results):

- *Democracies* are more likely to abolish the death penalty in the year after an election, though the effect is not significant at the .10 level.
- In terms of *religion*, we expected that the larger the share of the population that is Catholic, the higher the likelihood of abolishing; neither of the other two religion variables (percent Protestant and percent Muslim) had a significant effect.⁹⁹
- Various measures of *ethnic heterogeneity and conflict* (ethnic fractionalization, ethnic violence, and ethnic war) had no significant effect on abolition.
- We suggested that *extrajudicial killing* could be a complement of capital punishment (repressive governments might use both) or a substitute (repressive governments might use extrajudicial killings so as not to be seen executing opponents). Neither intuition was supported by the analysis because the coefficient failed to reach significance.
- *Civil war* likewise had no significant effect on abolition. Our interpretation is that countries involved in civil wars do not appear to retain the death penalty as a tool for eliminating rebels.

IV. CASE STUDIES

In the following brief case studies, we seek to illustrate the main arguments. We selected two countries that fit the account of TLO development supported by the data analysis (Lithuania and South Africa) and two countries that could be seen as “off the regression line” and that did not abolish (Belarus and Japan). Furthermore, we chose countries in different geographic regions in an effort to diversify our case selection and trace the process of death penalty abolition in different regional contexts. Finally, our case selection was also influenced by data availability and the ability to draw from a variety of sources to cross-validate the information. Our investigation into the cases aligns with the findings of our

⁹⁷ The omitted region is the Middle East and North Africa (MENA), which has the lowest regional rate of abolition. The hazard ratios for the regional variables reported in the appendix should be interpreted as multiplying the likelihood of abolition *as compared to MENA*. Thus, in Model 1, countries in Western Europe are nearly six times as likely as MENA countries to abolish the death penalty in any given period.

⁹⁸ See generally HOOD & HOYLE, *supra* note 2 chs. 2 & 3 (discussing abolition trends in those regions).

⁹⁹ See Appendix.

quantitative analysis: democratic institutions, domestic and international NGO activism, as well as regional institutions and incentives play key roles in the path to abolition.

A. Lithuania

Lithuania displays several of the factors that we have argued make it possible to abolish capital punishment despite majority public opinion in favor of retention. Particularly crucial were democratization and the strong motivation to join the EU and the COE. Lithuania also illustrates that courts offer a mechanism for overcoming popular support for retention.

Lithuania made use of capital punishment during the Soviet era (1940–90) but began to shift away from it after regaining independence in 1990. The new constitution established a semi-presidential multi-party system, with the President as the head of state and the Prime Minister as the head of government. Lithuania’s democratic transition included judicial and penal reforms, and it was in that context that the death penalty became a central issue.¹⁰⁰ In the early 1990s, Lithuania revised its Criminal Code to gradually limit the use of the death penalty.

Joining European institutions—the COE and eventually the EU—was also a central element of Lithuania’s transition.¹⁰¹ Lithuania joined the COE and was thereby exposed to European debates on the abolition of the death penalty. More specifically, PACE criticized Lithuania and other Eastern European countries for the use of the death penalty and subsequently urged them to end executions.¹⁰² In response to the PACE’s recommendation, President Algirdas Brazauskas announced a moratorium on capital punishment in July 1996 and sent a draft law to the Lithuanian Parliament to suspend executions until the passage of a new Criminal Code. Parliament never debated the proposal, finding it too controversial.¹⁰³ However, in 1997, Lithuania, Latvia, and Estonia revived efforts to abolish the death penalty when they accepted a “Resolution on the Abolition of the Death Penalty” during a session of the Baltic Assembly that urged states to sign Protocol No. 6 to the ECHR.¹⁰⁴ In response, the Lithuanian parliament prepared a draft law abolishing the death penalty. However, again due to political and public pressures, the law was not debated until 1998. Political leaders found abolition unattractive in light of public support for retention. In fact, public opinion in the 1990s was “firmly in favour of the death penalty,” at the level of seventy to eighty percent.¹⁰⁵

100 See Aleksandros Dobryninas, *The Experience of Lithuania’s Journey to Abolition*, in CAPITAL PUNISHMENT: STRATEGIES FOR ABOLITION 236 (Peter Hodgkinson & William A. Schabas eds., 2004); Peter Hodgkinson, *Europe—A Death Penalty Free Zone: Commentary and Critique of Abolitionist Strategies*, 26 OHIO N. U. L. REV. 625, 637 (2000).

101 See HOOD & HOYLE, *supra* note 2, at 64–65.

102 See Dobryninas, *supra* note 99, at 235–36.

103 See Dobryninas, *supra* note 99, at 236; see Hodgkinson, *supra* note 99, at 637.

104 See Dobryninas, *supra* note 99, at 235–36.

105 See *id.*, at 236–37.

In an effort to increase public awareness in Lithuania about capital punishment and promote a pro-abolitionist viewpoint across society, human rights organizations introduced various projects in 1996–99 to “show that the death penalty was inhumane, inefficient and unjust and had no place in a contemporary criminal justice system.”¹⁰⁶ The COE helped to fund a public education project in Lithuania aimed at shifting opinion toward abolition. Faced with the dilemma of overwhelming constituent support for retention, but strongly desiring to join the EU, Lithuanian legislators passed the matter to the Constitutional Court, in essence asking the Court to take the abolitionist step for them.¹⁰⁷ The Constitutional Court investigated the compatibility of the death penalty with the Lithuanian Constitution and found it unconstitutional in December 1998.¹⁰⁸ Within weeks, the Lithuanian Parliament had modified the criminal Code, and the following month, it ratified Protocol No. 6, officially abolishing the death penalty for all crimes.

B. South Africa

South Africa also displays several of the factors that make abolition more likely, including a democratic transition, international influences, and NGO activism. The apartheid regime of South Africa relied heavily on death sentences because this form of punishment was considered a means of controlling violent crime and protecting the white minority from the majority African population.¹⁰⁹ The apartheid government also cited public opinion as a source for retention.¹¹⁰ However, the political apartheid system started to crumble in the late 1980s, giving way to constitutional change and social reforms, which would eventually amend and halt cruel types of treatment of prisoners and punishment such as the death penalty.

Even before the abandonment of apartheid, domestic and international pressure from states and non-state organizations fueled reforms and revitalized the cause for abolition. For instance, the South African Youth Congress, a new anti-apartheid organization, began to fight executions of anti-apartheid activists.¹¹¹ The Opposition Spokesman for Justice in Parliament also requested an investigation into death penalty practice in 1988 and 1989. Furthermore, various organizations—the Institute for Race Relations, the Association of Law Societies, the Society of University Teachers of Law, the General Council of the Bar, the Medical Association of South Africa, and especially Black Sash as well as Lawyers for Human Rights—pressed the government to reopen the discussion on the death penalty.¹¹² International pressure supported domestic calls for abolition. In 1986, AI

106 *See id.*

107 *See* Hodgkinson, *supra* note 99, at 637–38.

108 *See* HOOD & HOYLE, *supra* note 2, at 64–65.

109 *See* Peter Norbert Bouckaert, *Shutting Down the Death Factory: The Abolition of Capital Punishment in South Africa*, 32 *STAN. J. OF INT'L L.* 292–93 (1996).

110 *See* PETER HODGKINSON & ANDREW RUTHERFORD, *CAPITAL PUNISHMENT: GLOBAL ISSUES AND PROSPECTS* 161 (1996).

111 *See* Bouckaert, *supra* note 108, at 296.

112 *See id.*

announced a campaign to end human rights abuses in South Africa, calling attention to the death penalty. AI also sent an open letter to President Botha condemning the death penalty for political prisoners. U.N. General Assembly resolutions in 1986, 1987, and 1988 denounced apartheid and also opposed the death penalty and called for a halt to executions.¹¹³

In February 1990, President F.W. De Klerk gave in to the increasing domestic and international pressures and set the path to democratic reform.¹¹⁴ Such proposed reforms included the unbanning of political parties, the release of Nelson Mandela, as well as the revision of the death penalty legislation.¹¹⁵ The President also announced a death penalty moratorium, stating that “no executions will take place until Parliament has taken a final decision on the new proposals.”¹¹⁶ One year later, President De Klerk’s proposals were adopted, greatly reducing the applicability of the death penalty.¹¹⁷

Following democratic elections in 1994, an interim Constitution with a Bill of Rights was introduced, which enhanced the power of the Constitutional Court.¹¹⁸ The new Minister of Justice saw the death penalty as contrary to the human rights regime and a resumption of executions as undermining fundamental rights given by the new 1994 constitution.¹¹⁹ In June 1995, the Constitutional Court decided unanimously that the death penalty was unconstitutional.¹²⁰ The judgment drew attention to the international and regional abolition trend by stating that capital punishment had been abolished “by almost half the countries of the world including democracies of Europe and our neighboring countries Namibia, Mozambique and Angola,” and by referring to AI reports to stress that capital punishment was “seldom used” in retentionist countries.¹²¹ The court’s decision was endorsed by the South African Parliament, and with the Criminal Law Amendment Act of 1997, all references to capital punishment were removed from South Africa’s statute book.¹²²

113 Amnesty International Press Release and Open Letter to President Botha, African Activist Archive, Michigan State University (1986), <http://kora.matrix.msu.edu/files/50/304/32-130-229B-84-AI%20Hawaii%203-12-86%20opt.pdf>. (last visited on Oct. 6, 2018); G.A. Res. A 41/35, Policies of apartheid of the Government of South Africa, (Nov. 10, 1986); G.A. Res. A 42/23, Policies of apartheid of the Government of South Africa, (Nov. 20, 1987); G.A. Res. A 43/50, Policies of apartheid of the Government of South Africa, (Dec. 5, 1988).

114 F.W. De Klerk, State President of South Africa, Speech to Parliament (Feb. 2, 1990), as reprinted in Bouckaert, *supra* note 108, at 297; See also HODGKINSON & RUTHERFORD, *supra* note 109, at 161.

115 See Bouckaert, *supra* note 108, at 297.

116 See *id.*, at 296–97; Hodgkinson & Rutherford, at 161.

117 See Bouckaert, *supra* note 108, at 297.

118 See *id.*, at 300–01.

119 See *id.*, at 301.

120 See *id.*, at 304; Hodgkinson & Rutherford, at 161.

121 *S. v. Makwanyane* 1995 (6) BCLR 665 (CC) at 685 (S. Afr.), as reprinted in Bouckaert, *supra* note 88, at 306.

122 See HOOD & HOYLE, *supra* note 2, at 89.

C. Belarus

Belarus is the only country in Europe that actively applies the death penalty, though Criminal Code revisions in 1999 limited the scope and applicability of capital punishment and thereby reduced the number of executions. While there were forty-seven executions in 1998, this number decreased to an average of two per year since 2008.¹²³ The Belarussian government has claimed that the reason to retain the death penalty is public support for it, pointing to a 1996 referendum where eighty-five percent of the votes were in favor of retaining capital punishment. Unlike in Lithuania and South Africa, where abolition passed despite public support, Belarus still retains the death penalty on these grounds. However, Belarus also lacked several of the factors that are associated with abolition: democratic government, robust INGO activity, the incentive of membership in the EU and the COE, and independent courts.

Belarus has been ruled autocratically since independence. It has lacked a developed parliament, separation of powers, a real opposition that is able to challenge the ruling parties loyal to President Lukashenko, and fair and secret elections. The Venice Commission of the COE stated that Belarus's constitution was "illegal" and "[did] not respect minimum democratic standards and violates the separation of powers and the rule of law."¹²⁴ Another major concern for European institutions and INGOs is the lack of judicial independence and its effect on the criminal justice system. AI and HRW have criticized the country's judicial system, pointing to unfair trials, no presumption of innocence, torture and ill-treatment of prisoners, lack of confidential communications with lawyers, and lack of independent investigations.¹²⁵

We have also argued that INGOs can be carriers of anti-death penalty norms. Though AI has criticized Belarus, NGOs are often unable to operate there effectively and without government interference. For instance, Viasna, a leading local human rights organization, was not allowed to register in 2003 even though such a denial is a violation of the ICCPR.¹²⁶ Unregistered organizations are not allowed to receive or spend funding, and any activities carried out are punishable with imprisonment. In 2011, Belarus refused to let AI, Viasna, and the Belarus Helsinki Committee deliver to the president a petition in favor of abolition.¹²⁷ While INGOs such as AI and HRW have been reporting human rights abuses and have campaigned against Belarus' death penalty practices, they have also decried the lack of public information on executions as hindering abolitionist efforts.

123 See VIKTORIA SERGEYEVA & ALLA POKRAS, *THE ABOLITION OF THE DEATH PENALTY AND ITS ALTERNATIVE SANCTION IN EASTERN EUROPE: BELARUS, RUSSIA AND UKRAINE* 8 (2012).

124 AMNESTY INTERNATIONAL, *REPORT 99* (1998).

125 AMNESTY INTERNATIONAL, *ENDING EXECUTIONS IN EUROPE: TOWARDS ABOLITION OF THE DEATH PENALTY IN BELARUS* (2009), <https://www.refworld.org/docid/49cb3e112.html>; HUMAN RIGHTS WATCH, "Belarus: Abolish the Death Penalty" (2012), <https://www.hrw.org/news/2012/03/19/belarus-abolish-death-penalty> (last visited Oct. 24, 2018).

126 See SERGEYEVA & POKRAS, *supra* note 122, at 22.

127 See *id.*, at 23.

The absence of democratic, rule of law institutions bears directly on another pro-abolition factor: European regional organizations. The COE and the EU made democratization and respect for rights prerequisites for membership, creating powerful incentives for newly independent states in Central and Eastern Europe to (among other steps) abolish capital punishment. The Belorussian regime under President Lukashenko has embraced a conservative Stalinist ideology and has oriented itself away from Europe. A report issued by the European Parliament described EU-Belarus relations as “hav[ing] always been difficult and hav[ing] developed at a much slower pace” compared to other countries.¹²⁸ Relations with the EU remained strained throughout the 1990s and 2000s; in fact, the EU has reduced “contacts between the EU and Belarus to below ministerial level and terminated all technical assistance.”¹²⁹ This outcome was mainly a result of Belarus’ continued reluctance to meet human rights standards by the continuation of the death penalty. The EU underlined that “specific and irreversible steps of Belarus on promotion of universal freedoms involving freedom of speech . . . as well as the rule of law and human rights, [and] *abolition of the death penalty* would be the key point to . . . further relations with the country.”¹³⁰ The PACE agreed in 2009 to restore Belarus’s guest status if the country introduced an official moratorium on executions. This revived the debate and Belorussian officials expressed interest in moving towards a moratorium due to both prospects of regaining COE guest status as well as changes in public opinion increasingly supporting abolition. Belarus acknowledged to the UN Human Rights Council the importance of shifting public opinion on the death penalty and of eventually abolishing it. However, after the disputed presidential elections of December 2010, President Lukashenko halted progress toward abolition. The main argument for this development was the terrorist attack on the Minsk subway in 2011; the two men responsible for the attack were sentenced to death by the Supreme Court in 2011 and executed in 2012. The latest human rights dialogue between Belarus and the EU occurred in July 2017 and specifically addressed freedoms of expression, assembly, and association, as well as electoral rights, and the death penalty.¹³¹

D. Japan

Besides the United States, Japan is now the only highly developed democratic country that retains the death penalty in legal and practical terms.¹³² However, compared to the US and other Asian countries, where executions have been

128 GISELLE BOSSE & ALENA VIEIRA, HUMAN RIGHTS IN BELARUS: THE EU’S ROLE SINCE 2016, at 8 (2018).

129 *Id.*, at 18.

130 *Id.*, at 21, (emphasis added).

131 *Id.*, at 22.

132 See David T. Johnson, *Progress and Problems in Japanese Capital Punishment*, in CONFRONTING CAPITAL PUNISHMENT IN ASIA: HUMAN RIGHTS, POLITICS, AND PUBLIC OPINION 168, 168 (Roger Hood & Surya Deva eds., 2013); MAI SATO, THE DEATH PENALTY IN JAPAN: WILL THE PUBLIC TOLERATE ABOLITION? 21 (2014).

decreasing in recent years, Japan presents a unique case with its increasing numbers in death penalty sentences and executions.¹³³ Historically, except for a brief period in the late 1980s, during which the country implemented a moratorium on capital punishment for three years, Japan has been consistently retentionist since the end of World War II.¹³⁴ The Japanese government grounds the decision for maintaining the death penalty in public support for retention. A government survey in 2009 found that eighty-six percent of participants favored retention.¹³⁵ Interestingly, death penalty practice in Japan takes place out of public view, leaving the public with only “abstract ideas” about the legal and practical procedures of execution.¹³⁶ Why has Japan not followed the path of most other wealthy democracies, abolishing the death penalty despite retentionist public opinion? We argued that proportional representation increases the likelihood of legislative bargains that include abolition. Japan’s political system has prevented those kinds of coalitional log-rolling agreements.

Though Japan has a multiparty system, the conservative Liberal Democratic Party (LDC) has been the dominant ruling party since it was founded in 1955. Other parties were largely irrelevant until the Democratic Party (DPJ) emerged in 1998. After defeating the LDC in the 2009 general elections, the DPJ held power for three years. While abolitionists expected this to be a potential breakthrough moment for death penalty abolition, executions continued to be carried out during this time, albeit at a decreased rate.¹³⁷ With the LDC regaining power in 2013, executions have again been increasing.¹³⁸ Japan’s judiciary has also referenced the majority public support for retention to justify continued application of death penalty sentences and executions.¹³⁹ Several Ministers of Justice referred directly or indirectly to the “duty to order executions.”¹⁴⁰ The Supreme Court has acknowledged the global trend of abolition but has also referred to government surveys on public attitudes favoring retention for its reluctance to challenge the constitutionality of the death penalty.¹⁴¹ As Sato notes, the court considers that abolishing the death penalty is a “‘legislative policy decision’ rather than a judicial action.”¹⁴²

In terms of domestic and international pressure, thus far Japan has successfully resisted demands for abolition. Like in Belarus, NGOs do not have the ability to operate at full effect and face a variety of regulations and restrictions in Japan. Local NGOs often receive funding from the government and have been referred to as

133 See HOOD & HOYLE, *supra* note 2, at 112; Johnson, *supra* note 131, at 168.

134 See SATO, *supra* note 131, at 22.

135 See HOOD & HOYLE, *supra* note 2, at 113; SATO, *supra* note 131, at 25

136 Shigemitsu, Dando, *Toward the Abolition of the Death Penalty*, 72 *Ind. L.J.* 9, 10 (1996), *quoted in* SATO, *supra* note 131, at 25.

137 See Johnson, *supra* note 131, at 170; SATO, *supra* note 131, at 22.

138 See SATO, *supra* note 131, at 22.

139 See Shanhe Jiang, et al., *Death Penalty Views in China, Japan and the U.S.: An Empirical Comparison*, 38 *JOURNAL OF CRIMINAL JUSTICE*, 863 (2010); SATO, *supra* note 131, at 23.

140 Johnson, *supra* note 131, at 171.

141 See SATO, *supra* note 131, at 24.

142 *Id.*, *quoting* Fédération Internationale des Ligues des Droits de l’Homme [FIDH], 2003, p.10).

“quasi-governmental organizations.”¹⁴³ Further, human rights NGOs lack consultation status and do not participate in the drafting of official human rights reports in Japan. NGOs have access to these reports only after they are published and they have to submit separate reports to international organizations.¹⁴⁴ In terms of INGO activity, AI has consistently criticized Japan’s retentionist position as well as the questionable procedures surrounding the practice. The EU in 2001 threatened to withdraw Japan’s observer status. Though Japan did not respond, the EU has yet to follow through with this threat.¹⁴⁵

CONCLUSION

In this conclusion, we return to questions posed in the introductory essay.

Framing. The death penalty TLO is not about enhancing the power of state officials to combat transnational crime. The death penalty is situated at the punishment end of the criminal justice spectrum, and thus the death penalty TLO is about establishing limits to what the state can do to punish the guilty. Capital punishment is framed by advocates and policy entrepreneurs as a global human rights problem. In this sense, domestic processes of enforcement have “become more enmeshed in transnational frameworks.”¹⁴⁶ The post-World War II context was propitious for advancing a human rights framing of the death penalty, in reaction to the massive abuses of execution as a tool of political repression and genocide. But the success of the human rights framing has been partial because normative counter-narratives are available, even within the expanding international human rights regime. The right to life is not absolute; taking human life is permissible in war and in personal self-defense, for example. The right to life, in some constructions, can be forfeited. Divergent national frameworks regarding capital punishment could therefore be asserted and retained even while retentionist states accept the broader international human rights system.

Settling. What inhibits settling of TLO norms? In the case of the death penalty, transnational norms are neither ambiguous nor indeterminate: capital punishment is framed as a violation of the most fundamental human right, the right to life. Settling of this norm is incomplete because it is in direct collision with national or local norms that see capital punishment as justified or even necessary to defend social order or national security. The norm of abolition has settled in much of the world but it remains contested, especially in some regions (Middle East and North Africa, Asia).

Concordance. We observe considerable concordance at the regional and domestic levels in some parts of the world (Europe, Oceania, and Latin America)

143 Frank Schwartz, *Civil Society in Japan Reconsidered*, 3 JAPANESE J. OF POL. SCI. 195, 203–04 (2002).

144 See IAN NEARY, HUMAN RIGHTS IN JAPAN, SOUTH KOREA, AND TAIWAN 66 (2002).

145 See MIKA OBARA-MINNITT, JAPANESE MORATORIUM ON THE DEATH PENALTY 110 (2016); Roger Hood & Carolyn Hoyle, *Abolishing the Death Penalty Worldwide: The Impact of a 'New Dynamic,'* 38 CRIME AND JUST. 1, 29 (2009).

146 Ely Aaronson and Gregory Shaffer, conference framework paper on file.

but with continuing gaps in others. The variation is mainly across countries and regions.

State power. The death penalty TLO has not been driven by powerful states seeking to impose their conceptions of criminal justice on others. In fact, several of the most powerful states (the United States, China) remain among the leading resisters to the TLO. At the international level, in the drafting of key instruments like the UDHR, the ICCPR, and its Second Optional Protocol, the policy entrepreneurs tended to represent small and midsized states, often from Latin America and Western Europe.

Data power. Data and information on the death penalty have been collected and disseminated largely by INGOs at the heart of transnational human rights networks: AI and HRW. Even so, the ongoing dynamics of abolition and resistance are not driven primarily by differing quantitative or qualitative assessments of capital punishment, but rather by divergent underlying values.

The transnational legal ordering of capital punishment remains uneven, with significant parts of the world remaining outside its reach. As shown above, countries in the Middle East, North Africa, and much of Asia have largely retained the death penalty. Moreover, some of the world's largest countries continue not just to keep the death penalty on the books but to carry it out: China (the world leader in executions), the United States, Egypt, India, Indonesia, Iran, Japan, and Nigeria. In this light, the transnational legal ordering of the death penalty may well have reached a point at which its further extension is unlikely. In the current climate of populist authoritarianism, some retreat may even be possible.

APPENDIX

Table A								
Abolition for all crimes, Cox proportional hazard models								
	1	2	3	4	5	6	7	8
Democracy	1.091 (1.057)	0.882 (0.897)	2.027 (2.184)	2.408 (2.913)	0.336 (0.457)	0.246 (0.343)	0.404 (0.567)	0.514 (0.668)
Proportional representation	4.190*** (1.546)	4.146*** (1.539)	3.282*** (1.199)	3.203*** (1.197)	4.095*** (1.857)	4.357*** (1.891)	3.696*** (1.728)	2.430** (0.949)
Judicial independence	1.9 (1.650)	1.87 (1.639)	0.688 (0.725)	1.412 (1.286)	6.571* (6.389)	8.790** (9.024)	7.039* (7.019)	3.064 (3.214)
INGO country-specific "hits"	1.208*** (0.051)	1.209*** (0.052)	1.252*** (0.057)	1.215*** (0.059)	1.241*** (0.075)	1.249*** (0.079)	1.242*** (0.075)	1.187*** (0.062)
Prior abolition for ordinary crimes	3.930*** (1.485)	3.743*** (1.385)	4.927*** (1.739)	3.909*** (1.562)	3.934*** (2.003)	4.381*** (2.330)	3.991*** (2.038)	4.171*** (2.023)
Population (ln)	0.809** (0.084)	0.804** (0.082)	0.747*** (0.076)	0.807* (0.090)	0.825 (0.129)	0.852 (0.136)	0.817 (0.127)	0.962 (0.125)
1970s	2.314 (2.361)	2.314 (2.357)	2.364 (2.232)	0.715 (0.520)				
1980s	5.307 (5.653)	5.384 (5.802)	4.983 (5.335)	1.54 (0.870)				1.099 (0.717)
1990s	18.884* (17.413)	19.240* (17.877)	19.699* (18.191)	4.129** (2.326)	6.860*** (4.139)	6.529*** (3.725)	6.346*** (3.788)	3.877** (2.583)
2000s	4.858 (4.937)	4.848 (4.954)	5.022 (4.984)					
Western Europe	5.981*** (3.543)	6.490*** (3.892)	3.124 (2.316)	5.574*** (3.471)	7.607** (6.444)	5.914** (5.250)	7.321** (6.391)	6.513** (4.758)
CEE & ex-USSR	6.903*** (4.242)	7.317*** (4.507)	4.100** (2.832)	5.674*** (3.526)	7.177*** (4.818)	6.028*** (4.167)	7.510*** (5.255)	8.860*** (5.712)
Oceania	10.839* (9.635)	11.754* (10.337)	6.266* (6.105)	10.132** (8.919)	0 (0)	0 (0)	0 (0)	5.528 (7.023)
Latin America	1.369 (0.838)	1.438 (0.896)	0.352 (0.285)	1.353 (0.863)	1.379 (1.021)	1.218 (0.922)	1.39 (1.062)	1.61 (1.112)
North America & the Caribbean	3.421 (3.449)	3.463 (3.515)	1.614 (1.698)	1.702 (1.954)	0.919 (1.508)	0.666 (1.153)	0.814 (1.353)	1.408 (1.938)
Sub-Saharan Africa	5.594*** (2.689)	5.843*** (2.869)	2.786* (1.662)	4.993*** (2.572)	4.964*** (2.538)	4.672*** (2.474)	4.630*** (2.505)	4.199*** (2.262)
Asia	2.748 (1.943)	2.815 (2.019)	2.008 (1.398)	2.516 (1.836)	1.784 (1.568)	1.829 (1.735)	1.796 (1.609)	2.134 (1.669)
Year after election; democracies only		1.663 (0.571)						
Percent protestant			1.003 (0.009)					
Percent Catholic			1.019*** (0.005)					

Percent Muslim			0.997					
			(0.006)					
Ethnic fractionalization				1				
				(0.001)				
Ethnic violence					1.02			
					(0.401)			
Ethnic war						0.627		
						(0.229)		
Civil war							1.151	
							(0.149)	
Extrajudicial killings								0.736
								(0.182)
Observations	6,160	6,160	6,096	4,390	2,515	2,515	2,515	3,314
Countries	160	160	158	154	136	136	136	144
Abolition (number of countries)	69	69	68	59	48	48	48	50
Log-likelihood	-252	-251	-241.8	-212	-144.5	-143.1	-144.1	-166.6
Chi ²	137.5	139.3	167.5	103.8	87.58	84.78	96.9	91.97
Robust standard errors, clustered by country, in parentheses.								
*** p<0.01, ** p<0.05, * p<0.1								