The Transnational Legal Ordering of the Death Penalty

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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 transnational legal order 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 150 countries. The analysis finds that proportional representation electoral systems, country-specific NGO attention, and regional affects increase the likelihood that a country will abolish the death penalty in a given period.
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Wayne Sandholtz and Stefanie Neumeier

A transnational legal order (TLO) has emerged and settled 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 46 had abolished it de facto (by not carrying out any executions for at least ten years). It is 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, the International Covenant on Civil and Political Rights (ICCPR) does not abolish the death penalty but does address it in a way that makes clear that the drafters of the treaty envisaged its “progressive restriction” (Hood and Hoyle 2015, 26). Other regional and global treaties aim directly at its abolition, including the Second Optional Protocol to the ICCPR, the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, Protocol No. 6 to the European Convention on Human Rights (ECHR), and Protocol No. 13 to the ECHR. In addition, the death penalty is explicitly excluded as a punishment in the international criminal tribunals established in the 1990s and since. The hybrid criminal tribunals (those with mixed domestic and international features), like those established for Sierra Leone and Lebanon, likewise rule out capital sentences. Finally, the interconnected domestic, regional, and international 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 (Halliday and Shaffer 2015, 5, 20).

Transnational legal orders are almost invariably interconnected with respect to a specific issue. In the case of capital punishment, the TLO is linked to at least two broader legal orderings, one for human rights and one for criminal law. Basic standards and procedural guarantees in criminal law are by now subject to broad international consensus.

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1 Data compiled by the authors.
2 Including the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the International Criminal Court (ICC).
and are embedded in both national and international law. The criminal law TLO establishes standards for the rights of the accused, the treatment of those detained for trial, due process protections (the presumption of innocence, the right to counsel, and so forth), and proportionate and humane punishment. Clearly, the death penalty TLO relates to the last element. But the consolidation of international standards for criminal law was certainly shaped by the larger post-World War II human rights movement; indeed, both the Universal Declaration of Human Rights (UDHR) and the ICCPR delineate basic rights of those subject to criminal proceedings. The UDHR does so in Articles 9 – 11, affirming that “everyone charged with a penal offence” is entitled to a public trial in which she is presumed innocent and has “all the guarantees necessary for” her defense (UDHR, Art. 11).

The global human rights system is composed of both national and international law and includes a broad range of rights, specific populations (e.g., women, children, migrant workers), and legal instruments. The death penalty TLO emerged as part of that global human rights regime. 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 the core features of the TLO framework. It 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 (Halliday and Shaffer 2015, 3, 5). We trace the development of death penalty abolition from its origins in the immediate aftermath of World War II. Death penalty abolition was driven not by broad public demand but by activists and policy entrepreneurs, in both civil society organizations and in state elites. In fact, death penalty abolition at the national level generally occurred despite public support for retention. Because the practical effects of abolition – in terms of 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.

**Abolition: the big picture**

Punishment of 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. Enlightenment thinkers sought to demolish the assumptions and myths that accumulated over the centuries surrounding capital punishment. Cesare Beccaria, for example, 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 (Beccaria 2008).

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. 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, Sweden) abolished the death penalty for ordinary crimes (excluding treason and certain wartime offenses) in the first decades of the twentieth century (Hood and Hoyle 2015, 13).

Despite the early abolishers, the banning of capital punishment became a global movement, aiming to prohibit its use in both national and international law, only after World War II (figure 1).
Of course, states can abolish capital punishment through various legal means, by constitutional enactment or amendment, by judicial interpretation, and by legislation. To the extent that constitutions embody a state’s fundamental values and principles, death penalty abolition in constitutions is a signal of the most far-reaching form of its legalization. Abolition of the death penalty in constitutions has, like abolition overall, taken off after World War II (figure 2).
As the preceding figures show, the momentum for abolition gathered after World War II. It peaked in the 1990s and the first decade of the 21st century (table 1). The cumulative expansion of abolition is far-reaching (table 2), with the number of countries that retain capital punishment in law dropping as the number of abolitionist countries rises. 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 (Hood and Hoyle 2015).
Table 1: Abolition in law, by decade

<table>
<thead>
<tr>
<th></th>
<th>Abolished for all crimes</th>
<th>Abolished for ordinary crimes</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Before 1950s</td>
<td>9</td>
<td>9</td>
<td>18</td>
</tr>
<tr>
<td>1950s</td>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>1960s</td>
<td>4</td>
<td>4</td>
<td>8</td>
</tr>
<tr>
<td>1970s</td>
<td>10</td>
<td>6</td>
<td>16</td>
</tr>
<tr>
<td>1980s</td>
<td>14</td>
<td>4</td>
<td>18</td>
</tr>
<tr>
<td>1990s</td>
<td>35</td>
<td>6</td>
<td>41</td>
</tr>
<tr>
<td>2000-2009</td>
<td>23</td>
<td>4</td>
<td>27</td>
</tr>
<tr>
<td>2010-2017</td>
<td>9</td>
<td>2</td>
<td>11</td>
</tr>
</tbody>
</table>

Table 2: Abolition in law, cumulative

<table>
<thead>
<tr>
<th></th>
<th>Abolished for all and/or ordinary crimes</th>
<th>Retentionist in law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Before 1950s</td>
<td>17</td>
<td>181</td>
</tr>
<tr>
<td>1959</td>
<td>20</td>
<td>178</td>
</tr>
<tr>
<td>1969</td>
<td>27</td>
<td>171</td>
</tr>
<tr>
<td>1979</td>
<td>37</td>
<td>161</td>
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<tr>
<td>1989</td>
<td>52</td>
<td>146</td>
</tr>
<tr>
<td>1999</td>
<td>86</td>
<td>112</td>
</tr>
<tr>
<td>2009</td>
<td>104</td>
<td>94</td>
</tr>
<tr>
<td>2017</td>
<td>113</td>
<td>85</td>
</tr>
</tbody>
</table>

Note: "Retentionist in law" also includes countries that are classified as de facto abolitionist (or abolitionist in practice).

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.
Figure 3

National death penalty laws, 2017

- 104: Abolished, all crimes
- 38: Abolished, ordinary crimes only
- 46: De facto abolition
- 8: Retentionist

Figure 4

Abolition by region, 2017

- Abolished for all crimes
- Abolished for ordinary crimes
- De facto abolition
- Retentionist
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 regime. 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 (Elkins, Ginsburg et al. 2013; Law and Versteeg 2011; Versteeg 2015; Beck, Meyer et al. 2017; Sloss and Sandholtz 2018). The international movement to build global human rights norms started even before the war ended, so we begin with a historical sketch of the transnational movement to end capital punishment.

Global ordering

Though a number of countries abolished capital punishment in the 19th and early 20th centuries, 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 extra-judicial, as a tool of political repression. The Nazi Reich, for example, had issued “some 16,500 death sentences” (Evans 1996, 795). 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 10 December 1948. It declares in Article 3, “Everyone has the right to life, liberty and security of person” (U.N. General Assembly 10 December 1948). As Schabas relates, in the discussions that accompanied the drafting of the UDHR, the right to

3 See fn. 1.
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 Declaration affirmed the right to life without qualification and omitted any statement for or against the death penalty (Schabas 1997, 24-25).

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 *International Covenant on Civil and Political Rights* (ICCPR). The UN Commission on Human Rights 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. The Third Committee reached agreement on what would become Article 6 of the ICCPR in 1957 (Schabas 1997, 44, 48).

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. A working party produced the compromise language that eventually passed and entered Art. 6 as paragraphs 2 and 6. Article 6 passed in the Third Committee with 55 votes in favor, none opposed, and 17 abstentions; that article underwent no subsequent revision before the adoption of the Covenant by the General Assembly in 1966 (Schabas 1997, 68-70, 80). Article 6 reads 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.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

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 (U.N. General Assembly 10 December 1948).

In addition, Art. 4 prohibits any derogation from Art. 6, even in “time of public emergency which threatens the life of the nation” (U.N. General Assembly 10 December 1948). 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 extending its application to shielded categories of persons (Art. 6(5)), even during the most critical national emergencies (which would include wars and insurrections). In other words, the ICCPR signaled that the direction of development of human rights law was to the “progressive restriction” of capital punishment (Hood and Hoyle 2015, 26).

In 1980, a set of Latin American and European countries introduced in the General Assembly a draft Second Optional Protocol to the ICCPR. The Protocol would both require abolition of the death penalty and prohibit its reintroduction by any state that abolished it.

4 The sponsors were Austria, Costa Rica, the Dominican Republic, the Federal Republic of Germany, Italy, Portugal, and Sweden.
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 before it a draft Second Optional Protocol. The *Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty* passed in the General Assembly in December 1989; 59 states voted in favor, 26 against, and 48 abstained (Schabas 1997, 168-175). The key provisions of the *Second Optional Protocol* 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 (1989).

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, 85 states were parties to the Second Optional Protocol and another two had signed the Protocol but not ratified it (United Nations 2018).

**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 and the European Union 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” (Hood 2002: 16). We hypothesize that 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 Art. 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 Art. 1 of the *American Declaration* became obligatory with 1967 amendments to the Charter of the Organization of American States.

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 abolitionist additional protocol (Schabas 1997, 278-280). The *American Convention* follows the lead of the ICCPR in limiting the application of the death penalty and pointing toward abolition, but is more restrictive than the UN document. For instance, under Art. 4(2), the death penalty may “not be extended to crimes to which it does not presently apply” (Organization of American States 1969). Furthermore, states that have abolished the death penalty may not reinstate it (Art. 4(3)). The ACHR also expands the categories of persons to whom the death penalty cannot be applied to include those over 70 years of age (Art. 4(5)), and prohibits capital punishment for “political offenses” (Art. 4(4)).

The Inter-American Commission on Human Rights, created by the *American Convention*, became concerned in the mid-1980s 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 19 states parties to the Convention had retained capital punishment, and in June 1990 the OAS General Assembly approved the optional protocol (Schabas 1997, 290-292). Whereas the Second Optional Protocol to the ICCPR requires states to take legislative action to abolish capital punishment, the Protocol to the ACHR 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” (Organization of American States 1990, Art. 1). The ACHR Protocol, like the ICCPR Second 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 to Abolish the Death Penalty (Organization of American States 2018).

The abolition movement in Europe has been even more far-reaching, at least in terms of the number of countries affected. Western European countries were among the first to prohibit capital punishment. 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 many of the General Assembly resolutions on the subject. International institutions in Europe reflected the abolitionist commitments of a growing number of European states. For instance, the Council of Europe’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 (Council of Europe 1950). By the 1980s, most member states of the Council of Europe had abolished capital punishment in national law.

In order to bring the ECHR up to date with respect to European practice, the Council of Europe 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” (Council of Europe 1983, Art. 1). Under Protocol No. 6, states may retain capital punishment provisions for wartime or imminent threat of war (Art. 2). In May 2002, the Council of Europe passed Protocol No. 13 to the ECHR. Protocol No. 13 directly and completely abolishes the death penalty, with no reservations or derogations permitted (Council of Europe 2002, Arts. 1-3). As of May 2018, 44 states had ratified or acceded to Protocol No. 13 and one had signed but not ratified (Russia) (Council of Europe 2018).

The European Union has similarly embraced death penalty abolition. Of course, all EU states are also members of the Council of Europe and therefore potential parties to Protocol No. 6 and Protocol No. 13. By 2000, all 27 of the current EU member states had ratified Protocol No. 6. That same year, the EU bodies with legislative roles – the European

Even earlier, 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” (European Commission 1998). 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 démarche to the U.S. government, the EU declared that it was “deeply concerned about the high number of executions in the United States” and called on the government “to consider further steps towards the abolition of the death penalty” (European Union 2001). 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 has carried out its 1000th execution since the reinstatement of the death penalty in 1976” (Council of the European Union 2005). Over the past several years, the European Union has also filed amicus curiae briefs at the U.S. Supreme Court in death penalty cases, including the *Roper v. Simmons* case, 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 démarches.\(^5\)

To illuminate the influence of regional institutions, we take a closer look at how the Council of Europe (COE) and the European Union (EU) actively promoted abolition in 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.

\(^5\) For a compilation of EU death penalty actions vis-à-vis the United States and specific U.S. states, see European Union - Delegation of the European Commission to the USA (2006).
With respect to the Council of Europe, 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. The Parliamentary Assembly 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) (Parliamentary Assembly of the Council of Europe 1993; Parliamentary Assembly of the Council of Europe 1993).

By the mid-1990s, the Council of Europe had made signature and ratification of Protocol No. 6 to the ECHR a condition of joining (Parliamentary Assembly of the Council of Europe 1994: para. 6; Parliamentary Assembly of the Council of Europe 1996: para. 6). Thus the 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 (Parliamentary Assembly of the Council of Europe 1995). 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. The agreements with Moldova, Albania, Ukraine, Croatia, and Russia required ratification of Protocol No. 6 within three years of joining the COE. Some Council of Europe accession agreements obligated new members to establish an immediate moratorium on executions (Albania, Russia, Ukraine) or to pass within one year legislation abolishing the death penalty in domestic criminal codes (Armenia).

In a few cases, when new members failed to fulfill their obligations related to abolition of capital punishment, the PACE increased the pressure for them to comply. For instance, Armenia came in for strong criticism from the PACE in 2002 for having failed to

6 Parliamentary Assembly of the Council of Europe (1995); Parliamentary Assembly of the Council of Europe (2000); Parliamentary Assembly of the Council of Europe (1999); Parliamentary Assembly of the Council of Europe (2002).

ratify Protocol No. 6 and having failed to abolish the death penalty in its criminal code, contrary to commitments made at accession (Parliamentary Assembly of the Council of Europe 2000). By September 2003, Armenia had both ratified Protocol No. 6 and eliminated capital punishment from its domestic statutes (Organization for Security and Cooperation in Europe 2003: 18, 19). In other cases, Council of Europe pressure had not induced countries to abolish. After a number of executions in Belarus in the late 1990s, the Assembly suspended that country’s status as a Special Guest and froze its accession process. The PACE urged Belarus “to declare an immediate moratorium on executions and set in motion the legislative procedure for the abolition of capital punishment” (Parliamentary Assembly of the Council of Europe 2000).

Similarly, following executions in Ukraine in 1996, the PACE threatened to withhold recognition of the “credentials of the Ukrainian parliamentary delegation at its next session” (Parliamentary Assembly of the Council of Europe 1997). The following year, after more executions, the Parliamentary Assembly decided to “reconsider” the credentials of the Ukrainian delegation, pending notice of a moratorium on executions (Parliamentary Assembly of the Council of Europe 1998). A de facto moratorium followed, but the PACE continued to condemn Ukraine for failing to honor its accession commitment to ratify Protocol No. 6 and abolish capital punishment de jure (see Parliamentary Assembly of the Council of Europe 1999; Parliamentary Assembly of the Council of Europe 1999). The Parliamentary Assembly also criticized Russia for failing to honor its commitment to institute a moratorium on executions (1997), and has since repeatedly pressured Russia to ratify Protocol No. 6. In a 2005 resolution, the 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.8

In general, the Council of Europe 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 in 1989 (Hood 2002:16-18).

8 See Parliamentary Assembly of the Council of Europe (1997); Parliamentary Assembly of the Council of Europe (2005), and more recent PACE statements: Parliamentary Assembly of the Council of Europe (2006).
The European Union (EU) has similarly promoted abolition through its enlargement process. By the early 1990s, as the newly independent states of Central and Eastern Europe began to apply for EU membership, all of the existing 15 EU member states had ratified Protocol No. 6 except Belgium, Greece, and the United Kingdom. All three ratified 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” (European Council 1993: 13). 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” (European Commission 1997: 16). The initial report on Estonia noted that capital punishment had not been abolished, but that “the 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 1 February 1998” (European Commission 1997).

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 (European Commission 1998: 11). 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 (European Commission 1999). But by the 2001 report, all had ratified (European Commission 2001), and in 2005 the ten became EU members. The death penalty criterion, of course, 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.

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. Amnesty International (founded in 1961) has made death penalty abolition one of its main themes. Amnesty'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. Amnesty 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 pushed for abolition (Amnesty International 2018). Human Rights Watch was founded in 1978 as Helsinki Watch; in 1988 it joined with the other regional “Watch Committees” to form the current global organization. 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 reports on the status of capital punishment in specific countries in its annual World Report.

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. The collapse of the Soviet Union 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 cause. We argue that the international non-governmental organizations (INGOs) added political and normative force to the abolitionist movement. Researchers in the world society tradition have shown in a variety of substantive contexts that INGOs are effective carriers of international norms and institutional forms into national contexts (Boli 1987; Boli-Bennett and Meyer 1978; Cole 2009; Meyer, Boli et al.)
With respect to death penalty abolition, Kim argues that human 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 (Kim 2016, 597).

Kim’s empirical analysis demonstrates a strong link between the presence of human rights INGOs in a country and the likelihood that it abolishes the death penalty for all crimes (Kim 2016).

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 assess the documents (world reports, country reports) produced by Amnesty International and Human Rights Watch. We classify the documents as to whether they address a specific country or are global in coverage. Using textual analysis tools, we counted the number of references in each document to three key phrases: “death penalty,” “death sentence,” and “capital punishment,” coding each such reference as a “hit.” 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” as a measure of INGO activity regarding the death penalty. We also count the global number of documents containing “hits” and the number of hits for both INGOs as a measure of the scale of their worldwide campaigns for abolition. The database contains AI documents with global coverage from 1974 through 2007 and HRW documents of the same type for 1989-2014. The coverage for documents addressing specific countries is 1974 – 2012 for AI and 1989 – 2012 for HRW. Figure 5 depicts the total number of documents, both general and country-specific, referring to the death penalty. The highest levels are reached during the 1990s and after 2000. The following figure (figure 6) shows the number of hits (occurrences of death penalty phrases) in INGO documents; these also peak at nearly 1000 per year after 2000.
Clearly, death penalty abolition was the subject of vigorous INGO campaigning during the key period.

Figure 5
Case studies

[Note: Here we will add a handful (3 – 5) brief country case studies, illustrating various paths to abolition in national law.]

Data and analysis

[Note: We will add a more detailed description of the data and the method of analysis.]

The analysis 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 effective abandonment of capital punishment necessarily must happen at the national level. In the data analysis that follows, we 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. In the analyses, time is measured not by the calendar but in analysis time,
meaning that we analyze a country from the year in which it enters our data, which is either 1960 (given data limitations) or the year in which the country became independent, whichever is later. Beginning in 1960 is not costly because only two countries (Honduras and the Federal Republic of Germany) abolished the death penalty for all crimes between 1945 and 1959. The analyses generally cover through 2012, though some models include shorter periods (through 2007) because of limitations in time coverage of some variables. Even given those limitations, the scope of the analysis is quite comprehensive, including at least 150 countries in every model.

Our main argument is that abolition of the death penalty in national law is largely a product of domestic institutional features (the level of democracy, the nature of electoral institutions) and international factors (INGO activity, regional effects). The regional ordering of the death penalty in the key European institutions (described above) is decisive; a series of regional dummies captures this effect and compares it to other world regions. We probe the following propositions.

1. **Democracy**: The broader public is generally retentionist; abolition therefore tends to occur despite, not because of, popular pressures (McGann and Sandholtz 2012). Assuming that the more democratic a country is the more its law and policy will reflect public preferences, more democratic countries will not be more likely to abolish.

2. **Proportional representation**: Some democratic electoral systems will be more favorable to abolition than others. In parliamentary systems with at least some proportional representation (seats allocated to parties according to their overall share of the vote), political parties are less constrained by the average voter (who tends to be retentionist) because they can negotiate policy tradeoffs in the legislature with less fear of broader electoral punishment (McGann and Sandholtz 2012; Hammel 2010).

3. **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.
4. **INGO influence**: We include two measures of the effects of INGO activities 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 broad 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. This variable captures the overall level of INGO attention to death penalty issues in published documents. The higher the value on either measure, the more likely a state is to abolish.

5. **Other controls**: Finally, we include variables for additional factors that could affect a country’s likelihood of abolishing. These include internal violence (ethnic and civil war), on the idea that governments involved in internal conflict may want to retain the death penalty as a tool for suppressing opposition. We test two variables measuring dominant religion, Protestant % and Muslim %. Previous research has shown that states in which Protestantism is the dominant religious tradition are more likely to abolish (McGann and Sandholtz 2012). A series of region dummies captures the extent to which countries in the same region share cultural or political traditions or participate in regional institutions (as in Europe).

Figure 7 presents the results of the main regression (model 8 in the appendix, re-estimated with standardized variables). It depicts the estimated effect, with 95 percent confidence intervals, of each variable on the (logged) 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 non-binary variables), we can compare the relative size of the effects of the variables.
A few findings stand out:

1. *Democracy* in itself does not make abolition more likely.

2. Electoral systems with some element of *Proportional representation* are more likely to abolish, consistent with previous research.

3. As expected, prior abolition for ordinary crimes increases the likelihood of abolition for all crimes.

4. Country-specific NGO attention (death penalty phrases in texts focused on that country) has a significant effect on the likelihood of abolition; the size of that effect is smaller than that of proportional representation.

5. The effect of general NGO attention (death penalty phrases in all INGO texts, general and country-specific, in a given year) is in the hypothesized direction, but is not quite statistically significant.

6. States in some world regions are significantly more likely to abolish than are states in the omitted category (Middle East and North Africa, MENA): Western Europe,
Central & Eastern Europe and the former USSR, Oceania, and Sub-Saharan Africa. The other regions do not vary significantly from MENA.

7. In one model (found in the appendix but not reported here), ethnic war in a country significantly reduces its likelihood of abolishing the death penalty. One interpretation is that where the government is controlled by one ethnic group, it will retain the death penalty as a way to suppress its rival group(s).

In additional models (not reported here but available in the appendix), several variables were not found to have a significant effect on the likelihood of abolition, including civil war, wealth (GDP/capita), percentage Protestant (contrary to prior research), and percentage Muslim.

We can also illustrate graphically the effect of INGO death penalty references on the likelihood of abolition. Figure 8 illustrates that effect of INGO references to specific countries. This variable, to recall, counts the number of times Amnesty International and HRW documents focusing on a single country include references to the death penalty. The dashed line represents one such reference in a given year (the non-zero minimum), and the solid line represents nine references in a given year (the maximum in the data). The lines indicate the probability that a country will not have abolished the death penalty as time passes (time is not calendar time but analysis time, that is, the number of years since a country entered the analysis pool – either 1960 or the year of independence, whichever is later).9 The key is that the line for the maximum references is always substantially below the line for the minimum references. After twenty years, the probability that a country with the maximum number of INGO death penalty references has not already abolished is only about 40 percent. In contrast, with the minimum number of references, that probability is still more than 80 percent. Figure 9 illustrates the same effect, but for overall INGO documents (total death penalty references in all AI and HRW texts in a given year). Again, the line for the maximum references is substantially lower (meaning a higher probability of having abolished) than the line for the minimum references, at every point in analysis time. Because the gap between the lines is large in each figure, the effect of increasing the

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9 The graphs are survival plots, which depict the probability at each time period that a subject (country) has “survived” without yet undergoing the event being analyzed (abolition, in this case).
number of INGO references (country-specific or overall) is large and significant. Note also that country-specific references have a larger effect (the lines in figure 8 are lower than those in figure 9).

Figure 8
Conclusion

Abolition of the death penalty has developed in ways that fit well the transnational legal ordering model. Abolition was encoded in law at international, regional, and domestic levels. A relative handful of states abolished capital punishment before World War II, and the impetus for abolition emerged first at the international level after the war, in the form of the UDHR and the ICCPR. Death penalty abolition matters most at the domestic level, where it is criminal punishment is decided and meted out. Abolition in domestic law proceeded in parallel with its instantiation in treaty law. However, abolition was not a response to popular demands; publics by and large remained (and remain still, in many countries) retentionist. We argued that three broad features of the TLO process made it possible to abolish the death penalty in the absence of public demand for its abolition. First, some domestic political institutions open more space for political negotiation, persuasion, and compromise. Consensual democracies, characterized by proportional representation electoral systems, are more conducive to this type of politics (McGann and Sandholtz 2012). Second, international NGOs, notably Amnesty International and Human Rights Watch, took up the cause in the 1970s and 1980s, drawing attention to executions and
pressing for abolition. Our findings indicate that INGO efforts had an effect. Third, regional institutions in Europe played a decisive role for Western European countries but also for the states of Central and Eastern Europe and the former Soviet Union that underwent democratic transitions after 1990. The EU and the Council of Europe made death penalty abolition a condition of membership, with clear effects on the newly independent states.

Still, 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 most 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, 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 and some retreat may be possible.
# Appendix

Abolition for all crimes, Cox proportional hazard models

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Robust standard errors, clustered by country, in parentheses

*** p<0.01, ** p<0.05, * p<0.1
References

1. Legal materials


2. Documents


3. Articles, books, and chapters


