

Death Penalty Abolition and the Ratification of the Second Optional Protocol

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ABSTRACT *This article analyses which factors promote or hinder ratification by nation states of the Second Optional Protocol to the International Covenant on Civil and Political Rights, the only universal treaty aimed at the abolition of the death penalty. The study finds that a democratic regime, a left-wing oriented government, regional peer influence, and a high level of economic development speed up ratification. A legal system built on common law and, if less robustly, ethnic fractionalisation lower the likelihood of ratification. These results are compared to the determinants of domestic death penalty abolition. Besides similarities, one striking difference is that Eastern European country membership in the Council of Europe has been important for domestic abolition, but has had no influence on ratification of the Second Optional Protocol. Western European countries exerted pressure on Eastern European countries to abolish the death penalty, but did not extend their pressure towards a ratification of the Second Protocol. Also, whereas economic development does not matter for domestic abolition, an internationally binding commitment to abolition becomes more likely the richer the country.*

Introduction

The continued existence of the death penalty in many countries of the world is highly contentious. It creates conflict and tensions between abolitionist countries and those retaining the death penalty (so-called retentionists). Governments of abolitionist countries routinely intervene if one of their citizens is threatened to become executed in a foreign country. Truly committed abolitionists believe that the death penalty violates basic human rights and are therefore not content with abolishing the penalty within their own jurisdiction only. Instead, they try to persuade and sometimes pressure retentionist countries into joining the abolitionist camp. This article examines what factors prompt countries to ratify or accede to the only international treaty aimed at the abolition of the death penalty that is not restricted to a particular region.¹ This universal treaty is the *Second Optional Protocol to the International Covenant on Civil and Political Rights*, aiming

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at the abolition of the death penalty (hereafter: Second Protocol). It has been adopted with resolution 44/128 by the United Nations General Assembly as of 15 December 1989.

The Second Protocol represents a milestone for the international abolitionist movement. The UN had passed resolutions on the use of the death penalty as early as 1959.² *The International Covenant on Civil and Political Rights* from 1966 itself requires its State Parties to restrict the death penalty to 'the most serious crimes in accordance with the law' (Article 6.2). It also sets up a number of safeguards for those facing the death penalty, which have been reiterated and later on extended by (non-binding) UN resolutions. From the 1970s onwards the secretary-general provided quinquennial reports on the use of the death penalty and in 1977 a resolution called for a restriction of the number of offences that could lead to capital punishment 'with a view to the desirability of abolishing the punishment'.³ But the Second Protocol remains to date the most important and substantive achievement of abolitionist countries. In particular, it is the only universal international treaty that requires abolition of the death penalty.⁴

This article is structured as follows: the next section clarifies the relationship between domestic death penalty abolition and ratification of the Second Protocol, arguing that ratification is the more far-reaching decision. We then discuss which factors are suggested by theory as determinants of ratifying this Protocol, focusing on political factors, which we argue to be more important than cultural, legal or social factors. This is followed by a presentation of the research design and the results of the empirical estimations, the implications of which are discussed in the final, concluding section.

Death Penalty Abolition and the Second Protocol

Eric Neumayer has provided an analysis of the political foundations underlying the global trend toward domestic death penalty abolition for all crimes as well as for ordinary crimes only in a cross-national sample over the period 1950 to 2001.⁵ (Countries abolitionist for ordinary crimes only allow the death penalty for exceptional crimes such as crimes committed during times of war or crimes committed in exceptional circumstances.) He argues that the major determinants are political in the form of democracy, partisan and regional peer pressure effects. Article 1 of the Second Protocol requires State Parties not to execute anybody and to undertake 'all necessary measures to abolish the death penalty within its jurisdiction' (Article 1.2). So why study ratification of the Second Protocol at all then? Is it not simply synonymous to looking at domestic abolition of the death penalty?

To start with, by far not all abolitionist countries are also state parties to the Second Protocol. In addition, there are at least three substantive reasons why an analysis of the determinants of Second Protocol ratification provides additional insight to analysing the determinants of death penalty abolition within countries. First, the Second Protocol requires State Parties to undertake more ambitious and comprehensive measures than mere abolition. Whilst the Second Protocol allows 'the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime' (Article 2.1), such a reservation to the abolition clause in Article 1 is only admissible if it is made at the time of ratification or accession. In other words, countries that are abolitionist for ordinary crimes, but not State Parties, can change their legislation at any time to extend the scope of crimes considered punishable by death. Indeed, in principle they could even reintroduce the death penalty, even though in reality this is rarely done.⁶ State Parties cannot revert to or extend the scope of

crimes considered punishable from the time of ratification onwards. Furthermore, a State Party making such a reservation must communicate to the secretary-general of the UN the relevant legislative provisions applicable during wartime (Article 2.2) and must notify the secretary-general of any beginning or ending of a state of war (Article 2.3). Countries, which have merely abolished the death penalty for ordinary crimes, but are not State Parties to the Second Protocol, are not subjected to any such restrictions. The Second Protocol therefore commits State Parties to a more restrictive application of the death penalty in times of war.

Second, the Second Protocol opens the way to independent and international supervision of whether formally abolitionist countries actually comply with their commitment of abolition. Article 3 requires State Parties to report to the UN's Human Rights Committee compliance measures undertaken that give effect to the Protocol. In case of non-fulfillment of its obligations, other State Parties (Article 4) as well as individuals subject to its jurisdiction (Article 5) can complain to the said Committee, which will consider such communication.⁷

Third, in ratifying the Second Protocol, the State Parties make it clear that in their view the abolition of the death penalty is a necessary consequence of respect for basic human rights and that the continued existence of the penalty in retentionist countries therefore cannot be regarded as an internal domestic affair. The Preamble to the Second Protocol expresses the belief of State Parties that 'abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights' with all measures of abolition to be considered as 'progress in the enjoyment of the right to life'. Most importantly, it declares that the State Parties undertake 'an *international* commitment to abolish the death penalty' (emphasis added). Even though no specific measures are required from State Parties to persuade retentionist countries against capital punishment, it is clear that countries go beyond the mere domestic abolition of the death penalty in becoming State Parties to the Second Protocol. Indeed, this is why attempts by Italy and the Nordic countries in 1994 as well as the EU in 1999 to pass a UN resolution calling upon states to ratify the Second Optional Protocol were met with fierce resistance by retentionists and were unsuccessful.⁸

Presumably, for these three reasons there are a great many abolitionist countries that are not State Parties to the Second Protocol, even though there are more abolitionist State Parties (54) than abolitionist non-State Parties (38). Table 1 provides a list of countries that are regarded as abolitionist for all crimes or at least abolitionist for ordinary crimes only by amnesty international together with information on whether and when they have ratified the Second Protocol.⁹

Political Foundations of Second Protocol Ratification

In this section, we look at which political factors theory would suggest as likely determinants of Second Protocol ratification. We start with international relations theories that focus on how external factors persuade or pressure countries to ratify. We then move on to theories that focus on internal or domestic factors, particularly theories of regime type (democracy versus autocracy and the type and length of democratic regime) and partisan theories.

From a (neo-)realist perspective, powerful countries ratify international treaties and pressure less powerful countries into doing the same if this is in their perceived interest.

Table 1. Abolitionist State Parties and Non-State Parties (as of April 2005)

State Parties to the Second Protocol (Total number: 54)	Year of ratification/accession	Abolitionist non-State Parties (Total number: 38)
Australia	1990	Albania*#
Austria	1993	Andorra
Azerbaijan	1999	Angola
Belgium	1998	Argentina*
Bosnia and Herzegovina*	2001	Armenia*
Bulgaria	1999	Bolivia*
Cape Verde	2000	Brazil*
Colombia	1997	Cambodia
Costa Rica	1998	Canada
Croatia	1995	Chile*#
Cyprus	1999	Cook Islands*
Czech Republic	2004	Côte d'Ivoire
Denmark	1994	Dominic Republic
Djibouti	2002	El Salvador*
Ecuador	1993	East Timor
Estonia	2004	Fiji*
Finland	1991	France
Georgia	1999	Guinea-Bissau#
Germany	1992	Haiti
Greece*	1997	Honduras#
Hungary	1994	Israel*
Iceland	1991	Kiribati
Ireland	1993	Latvia*
Italy	1995	Marshall Islands
Liechtenstein	1998	Mauritius
Lithuania	2002	Mexico*
Luxembourg	1992	Micronesia
Macedonia, FYR	1995	Moldova
Malta	1994	Nicaragua#
Monaco	2000	Palau
Mozambique	1993	Peru*
Namibia	1994	Poland#
Nepal	1998	São Tomé e Príncipe#
Netherlands	1991	Solomon Islands
New Zealand	1990	Tuvalu
Norway	1991	Turkey*#
Panama	1993	Ukraine
Paraguay	2003	Vanuatu
Portugal	1990	
Romania	1991	
San Marino	2004	
Serbia and Montenegro	2001	
Seychelles	1994	
Slovak Republic	1999	
Slovenia	1994	
South Africa	2002	
Spain	1991	
Sweden	1990	

(Table continued)

Table 1 Continued

State Parties to the Second Protocol (Total number: 54)	Year of ratification/accession	Abolitionist non-State Parties (Total number: 38)
Switzerland	1994	
Timor-Leste	2003	
Turkmenistan	2000	
United Kingdom	1999	
Uruguay	1993	
Venezuela	1993	

*Abolitionist for ordinary crimes only. # Signed, but not ratified.

Source: <http://www.ohchr.org/english/countries/ratification/12.htm> and <http://web.amnesty.org>.

Power is often approximated by population size and per capita income¹⁰ and much evidence suggests that more populous and more developed countries are more active members of the world system in that they negotiate, sign and ratify more international treaties in many areas of international co-operation than smaller and/or poorer countries, for example, in the area of environment,¹¹ monetary affairs¹² and women's rights.¹³ However, the question is whether more powerful countries regard an international protocol aimed at the abolition of the death penalty to be in their own interest. With respect to the Second Protocol, the problem is that the United States (US), the most powerful country in the world, is divided into states that are retentionist and states that are abolitionist, with the retentionist states vastly outnumbering the abolitionist ones. No initiative can therefore be expected from the US. Japan, India and China are also retentionist. Western Europe, however, is totally abolitionist and has officially declared that it is 'opposed to the death penalty in all cases and accordingly aims at its universal abolition'.¹⁴ Its 1998 *Guidelines to EU Policy Towards Third Countries on the Death Penalty* explicitly states that it 'has now moved beyond' abolition within its own political jurisdiction and 'espouses abolition for itself and others'.¹⁵ This fits well into a realist account where powerful countries persuade or coerce weaker states into accepting international treaties that enshrine the powerful countries' own norms. The good news to powerful countries is that shirking is hardly possible when it comes to the Second Protocol. It is relatively easily observable whether or not a country applies the death penalty and there is not much room for dispute over its application. This makes the Second Protocol different from human rights treaties where the abuse of human rights is more difficult to prove. Oona Hathaway argues that many countries ratify human rights treaties to deflect and disperse criticism of their human rights record.¹⁶ Stephen Krasner calls such behaviour formal, but not actual, endorsement of the 'script of modernity'.¹⁷ However, this strategy cannot work with the Second Protocol as violation of the rule of abolition is easy to monitor.

It is well documented that Western European countries have exerted pressure on Eastern European countries to abolish the death penalty.¹⁸ Abolition of the death penalty has been an important criterion for membership in the Council of Europe in the early 1990s and was made a formal requirement for entry in 1996. Eastern European countries considered membership in the Council of Europe as one foot in the door towards eventual desired membership in the European Union or the North Atlantic Treaty Organization (NATO)

and were willing to succumb to the pressure from Western European countries and abolish the death penalty, often against the expressed will of a majority of citizens. The question is: did Western European countries extend their pressure on Eastern European countries to become State Parties to the Second Protocol as well or were they already satisfied if these countries abolished the penalty domestically?

Another theory of international relations called 'external socialisation' argues that countries are likely to be influenced by the decisions of their regional peers with regards to whether to ratify an international treaty.¹⁹ If many countries within a region have ratified the Second Protocol, pressure mounts on the remaining ones to follow suit. Conversely, if few countries within a region have ratified the treaty, opponents of ratification will find it easier to defend their position and to reject criticism from home and abroad. It need not be pressure that matters as a realist account would suggest, however, but norm diffusion within regions sharing similar political cultures and histories can take place without any form of coercion involved.²⁰ Such regional policy contagion dynamics working via communication, learning, imitation, and altered reputational payoffs are well established in the literature on the diffusion of economic policies.²¹ They have also been documented for the ratification of human rights treaties²² and the acceptance of the authority of the international criminal court.²³

Moving from theories that focus on external factors to theories focusing on internal or domestic factors instead, many abolitionists argue that the institution of the death penalty violates fundamental human rights. For example, the EU sees the death penalty as a 'denial of human dignity' and holds 'that the abolition of the death penalty contributes to (. . .) the progressive development of human rights'.²⁴ From this perspective, abolition of the death penalty is the logical result of a process of humanizing the penal system—either in its benign version forming part of a process of civilisation and modernisation analysed by Elias²⁵ or in its less benign Foucaultian²⁶ version contributing to the sophistication of power and control as the penal system moves from violent punishment in the open to penitentiary correction behind closed prison doors.

If the severity of punishment is a human rights issue then democracies can also be expected to be more willing to abolish the death penalty than autocracies. This is because democracies, almost by definition, are more willing to accept constitutional limits on governmental power and there is evidence that they respect better the human rights of their citizens.²⁷ Along the same line of reasoning, it is not surprising that, with the exception of the United States, the countries making the most vigorous use of the death penalty are dictatorships. Robert Burt provides a different argument on the link between democracy and abolition when he maintains that the 'democratic principle, properly understood, is inherently inconsistent with the practice' of capital punishment since the death penalty rejects the democratic principle of equal citizenship and the (theoretical) possibility of reconciliation among adversaries.²⁸ Corey Brettschneider similarly argues that the death penalty violates human dignity derived from free and equal citizenship in a democratic regime.²⁹ Another reason why democracy might have a positive impact upon abolition is that the alleged deterrent effect of the death penalty is arguably strongest if the penalty is mandatory and applied without exception for certain types of crimes. Roger Hood argues that this 'is not an option for democratic states bound by the rule of law and concern for humanity and respect for human rights'.³⁰ Austin Sarat pushes this argument further in expressing his concern that the practice of capital punishment undermines the legal values and the institutions constituent of democracy.³¹

A caveat to keep in mind concerning the positive effect of democracy on abolition is that leadership by the political elite is important since in many countries abolition has been achieved against the majority opinion of the people.³² This also suggests that any positive link between democracy and abolition is not caused by the fact that democracies are more accountable to the will of the people. Rather, what matters is that most democracies might grant inviolable rights to individuals, even if they are criminals. Jack Donnelly warns, however, that not all democracies are necessarily respectful of human rights.³³ The simple fact of electoral competition and democratic participation need not coincide with human rights protection. He argues that it is 'liberal democracy' rather than democracy per se that matters, i.e. 'a very specific kind of government in which the morally and politically prior rights of citizens and the requirement of the rule of law limit the range of democratic decision-making'.³⁴ The unique character of state-determined criminal law and substantial laymen participation and influence on the extent of punitiveness of the criminal sanction system, which stir populist and demagogic penal policies, might provide hints why many states in the US maintain the death penalty and execute a great number of people.³⁵ And yet, if we follow Foucault³⁶ and take the employed penal technology itself seriously, then the trend towards more 'humane', 'civilized' and 'physically painless' executions in the US and other retentionist democracies might signal that in these countries even advocates of the death penalty understand that there is a fundamental conflict between capital punishment and the human rights and dignity typically afforded to citizens in democracies.

None of these arguments so far suggest, however, that democracies would want to go beyond domestic abolition. Such an argument can be derived from a liberal perspective though. From this perspective, a country's willingness to ratify an international treaty is predominantly influenced by domestic politics. Domestic groups with an interest in death penalty abolition, be they non-governmental organisations, protest movements, political parties or any other group, pressure their domestic government into the ratification of human rights regimes.³⁷ Obviously, there is more leeway for such pressure where the domestic political regime allows opposition and the exertion of peaceful political pressure on the government. Democracies are also more willing to accept limits on governmental power and discretion imposed by binding international treaties.

Andrew Moravcsik argues, however, that not all democracies share the same willingness to accept legally binding international obligations.³⁸ Recognising that ratification of an international treaty brings with it some constraint on domestic sovereignty, he argues that this cost needs to be balanced against the benefits of ratification, which comes from binding future policy makers to the current decision. Such self-binding can be beneficial if the current government wants to prevent future governments to revert to the death penalty again. He contends that newly established democracies have a much larger incentive to accept such constraints as policy makers regard the imposition of external constraints as a means for stabilising the recently established democracy and for dispersing domestic political uncertainty. An institutionalist international relations perspective would stress, however, that there are many more benefits from international treaties than merely self-binding, which help countries to reap the mutual, often long-term benefits of co-operation. For example, international human rights treaties provide a common human rights language, reinforce the universality of human rights, signal a consensus of the international community, create stigma for offenders, provide support to human rights campaigners and the like.³⁹ From this perspective, it seems more likely

that the older and well-established democracies with a longer tradition of human rights protection are more willing to forego national sovereignty in order to bring their long cherished normative ideal to international recognition.

International treaties are typically ratified by national parliaments, but governments need to sign them first. Countries with left-wing governments might be more likely to ratify the Second Protocol than countries with right-wing governments since left-wing politicians are less likely to subscribe to arguments of deterrence and retribution typically used to justify capital punishment.⁴⁰ Some studies show that partisanship does indeed have an impact upon penal policies.⁴¹ In addition, left-wing governments often have a more internationalist orientation, which makes them more willing to commit to binding international treaties.⁴² Todd Landman shows that countries ruled by leftist governments are more likely to ratify international human rights treaties and the death penalty issue is regarded as a human rights issue by abolitionists, even if this is contested by retentionists.⁴³ Part of the reason for this partisan effect could be similar to the logic advanced by Moravcsik,⁴⁴ namely to lock the country into the policy preferences of the current left-wing government. Jon C. Pennington argues that left-wing governments in English-speaking countries outside the US have often initiated a moratorium on the death penalty and have, after leaving office, obstructed attempts by right-wing parties to re-install the use of the death penalty.⁴⁵ Ratification of an international treaty abolishing the death penalty would be even more effective than a temporary moratorium.

A final political dimension is suggested by the fact that many countries maintain, for some time at least, the death penalty for offences committed during wartime even if they have abolished the death penalty for ordinary crimes. Quite a few countries have been much more hesitant to abolish the death penalty for all crimes than for ordinary crimes only. For example, Portugal and the Netherlands abolished the death penalty for ordinary crimes in 1867 and 1870, but for all crimes only in 1976 and 1982, respectively. Countries, which have experienced a longer history of warfare are likely to be more reluctant to abolish the death penalty for all crimes.⁴⁶ Conversely, in countries, which have a long history of peace and are not likely to face war in the future, it makes less sense to retain the death penalty for treason and similar offences. However, since the Second Protocol allows retention of the death penalty in time of war, admittedly with restrictions, political violent conflict need not have any impact on countries' willingness to ratify the Protocol.

Other Determinants of Second Protocol Ratification

Of course, political factors are not the only determinants of Second Protocol ratification. Culture and legal tradition as well as social factors can also have an effect on countries' willingness to accept international commitments in general and commitments to abolish the death penalty in particular. In the discussions leading up to the conclusion of the Second Protocol, Pakistan maintained that abolition of the death penalty was not consistent with Islamic law.⁴⁷ Many Islamic countries voted against a resolution calling for the drafting of the Second Protocol, citing the conformity of capital punishment with Islamic law as justification.⁴⁸ The same happened when it came to a vote on the actual resolution passing the Second Protocol in the General Assembly.⁴⁹ The Sudanese representative to the UN stated in 1994: 'Capital punishment is a divine right of some religions. It is embodied in Islam and these views must be respected'.⁵⁰ One would therefore expect countries

with a predominantly Muslim population not to ratify the Second Protocol. However, looking at Table 1 reveals that four such countries have so far ratified, namely Azerbaijan in 1999, Turkmenistan in 2000, Bosnia and Herzegovina in 2001 and Djibouti in 2002. Still, the vast majority of Muslim countries are not State Parties.

Britain in the nineteenth century was a staunch believer in the death penalty with a high execution rate well above that of continental European countries.⁵¹ With the spread of the British Empire the common law legal system and the death penalty came to be applied in its colonies. Such legal and penal traditions can impact upon what are regarded as culturally and socially acceptable forms of punishment. Many common law Caribbean countries in particular are outspoken defenders of the death penalty. In common law 'the customs of the people provide the original source of the law',⁵² rather than the decisions of rulers and legislators. Many important legal decisions are set by judiciary precedent and interpretation of the law by the court. Legally binding international commitments essentially bypass the evolutionary emergence and development of common law. In contrast, civil law countries find it relatively easy to incorporate rules from international treaties into their codified legal system. This might suggest that common law countries are more reluctant to accept legally binding rules imposed via internationally binding obligations and in combination with the long retentionist tradition of many common law countries would lead one to expect that they are less likely to ratify the Second Protocol.

Some suggest that the death penalty is employed as an instrument of social control over ethnic minorities and the perceived threat emanating from them.⁵³ The death penalty can be used as a demonstration of the ultimate power of the state over the life of its citizens and ethnic divisions prompt politicians to take a tough stance on crime. Evidence suggests that cities, metros and counties in the US spend more on police and less on productive public expenditures if they are more ethnically diverse.⁵⁴ The conflict study literature suggests that ethnically more diverse societies lack social cohesion and might experience more violence and conflict.⁵⁵ One would therefore expect that such countries are less likely to commit to internationally binding rules banning the death penalty and thus taking away the most powerful sanction available to keep ethnic minorities in check.

Research Design

There are basically two approaches for examining the determinants of Second Protocol ratification. One is to simply look at whether a country has ratified the Protocol or not. In this case, the dependent variable is a dichotomous one, for which estimation techniques such as probit or logit are most suitable. The other approach is to look at the speed by which countries ratify the Second Protocol, if at all. The dependent variable in this case is therefore a continuous time variable. One possible estimation technique for this method is the Cox proportional hazards model, also known as a survival model.⁵⁶ It assumes that there is a time-variant underlying base hazard of ratification at any point of time that depends on unobserved variables, possibly in a complex way. Observed control variables increase or lower this base hazard by a constant proportional amount. The proportionality assumption is critical, but its validity can be tested. More formally, let $\rho(t)$ be the probability of ratification at time t ; this is the *hazard* of ratification. Denoting $\rho_0(t)$ the exogenous *baseline hazard*, which reflects those time-dependent factors affecting

$\rho(t)$ that are common to all countries, the Cox proportional hazard model assumes that:

$$\rho(t) = \rho_0(t) \exp(\boldsymbol{\beta}^T \mathbf{x}(t)), \quad (1)$$

where $\mathbf{x}(t)$ is a vector of covariates shifting the baseline hazard, and $\boldsymbol{\beta}^T$ is a vector of parameters to be estimated. Countries become “at risk” of ratification in 1990, the year the Second Protocol became open to ratification, or the year of their national independence, if later. A maximum likelihood estimation is carried out, where the likelihood function is constructed using the observation that the probability that country i ratifies at time t_i equals

$$\hat{\rho}_i(t_i) = \frac{\rho_i(t_i)}{\sum_{j|t_j \geq t_i} \rho_j(t_j)} = \frac{\exp(\boldsymbol{\beta}^T \mathbf{x}_i(t_i))}{\sum_{j|t_j \geq t_i} \exp(\boldsymbol{\beta}^T \mathbf{x}_j(t_j))} \quad (2)$$

The likelihood function to be maximized with respect to the vector $\boldsymbol{\beta}^T$ is then simply $\prod_i \hat{\rho}_i(t_i)$.

Both approaches have their respective advantages and disadvantages. The first approach is conceptually clear: a country either ratifies the Second Protocol or not. Also, probit and logit are widely used estimation techniques familiar to most social scientists. The second method is conceptually somewhat less clear. Early ratification demonstrates a great commitment to the cause. Indeed, it is typically only after a minimum number of countries have ratified a treaty that it comes into force. For example, Article 8(1) of the Second Protocol specifies that it enters into force three months after ten countries have notified to the Secretary-General of the UN their ratification of the treaty or their accession to it.⁵⁷ However, while early ratification shows commitment, a delay in ratification can be caused by many factors other than lack of commitment. For example, some countries might find it difficult to achieve early ratification due to the peculiarities of their political system. The great advantage of the second approach is that it allows for greater variation among countries since the dependent variable is not simply a dichotomous one. Indeed, the introduction of a time dimension allows us to test for the external socialisation theory of regional norm diffusion over time. For these reasons we prefer the second approach.

The dependent variable is set to zero until the year a country ratifies or otherwise accedes to the Protocol, after which it drops out of the sample. Time is measured in discrete rather than continuous time since the explanatory variables are only available in discrete annual form.⁵⁸ The period of study ends in 2002. Of course, the Second Protocol is still open to ratification and accession, which Paraguay and Timor-Leste have done in 2003 and Estonia, Czech Republic and San Marino have done in 2004, but 2002 represents the end of our study period due to lack of data for the explanatory variables.

With respect to the explanatory variables, we measure power by the log of population size and by the level of economic development as approximated by the log of per capita income.⁵⁹ As a crude proxy for the difficult to measure pressure that Western European countries might have exerted on Eastern European countries, a dummy variable was set to one for the years in which an Eastern European country has been a member of the Council of Europe.⁶⁰ The average share of countries within a region that have ratified the Second Protocol in the previous year is supposed to capture regional diffusion effects. The regions follow the boundaries of the three existing regional human rights

regimes, which exist in the Americas, in Africa and Europe, including Russia and the Caucasus republics of Armenia, Azerbaijan and Georgia. The two remaining regions have no regional regimes, namely the Middle East and Asia. The regional diffusion variable is not without problems, however. In effect, it introduces a spatial lag into the model and often captures variables omitted from the model.⁶¹ We believe our model is relatively comprehensive, but it would be difficult to say with confidence that there are no omitted variables. For this reason, we only include the regional diffusion variable in additional estimations.

The Polity IV project provides the most commonly used measure of democracy in political science.⁶² The data are derived from expert judgment on aspects of institutionalised democracy and autocracy within a country, both measured on an additive 0 to 10 scale. The autocracy score is deducted from the democracy score to create a variable that runs from -10 to 10. However, in most regressions we will use data from the competing Freedom House measure.⁶³ This is for two reasons: first, Freedom House data are available for more countries than the Polity data, which are restricted to countries with a population size of more than half a million. Second, the Freedom House measure is closer to the 'liberal democracy' ideal, which Donnelly⁶⁴ argues to be important for human rights protection, whereas the Polity measure refers more to electoral competition and democratic decision-making, which are procedural characteristics of democracy. Freedom House provides two indices based on surveys among experts assessing the extent to which a country effectively respects political rights and civil liberties, both measured on a 1 (best) to 7 (worst) scale. Political rights refer to, for example, the existence and fairness of elections, existence of opposition and the possibility to take over power via elections. Civil rights typically refer to such rights as the freedom of speech, the freedom of assembly and association and the freedom of religious expression. A combined freedom index was constructed by adding the two indices and reverting the index, such that it ranges from 2 (least democratic) to 14 (most democratic). However, there is one exception to our rule of generally using the Freedom House measure. In one regression, we enter the number of years a country has been an established democracy as an explanatory variable. For this, we resort to the Polity measure since it goes back to 1800 and therefore goes back much further in time than the Freedom House data, which only start in 1972.

To test for partisan effects, we use a dummy variable that is set to one if the chief executive's party is considered as left-wing (mainly communist, socialist and social democratic parties) by our source.⁶⁵ Unfortunately, this variable is only available until 2000. To test the impact of historical experience with armed political conflict on Second Protocol ratification we use data from the Uppsala Project.⁶⁶ Our variable measures the number of years that have passed since the last incident of an armed political conflict with at least 25 casualties. In sensitivity analysis we found that it makes no difference to the results reported below if we separate peace years since last civil war from peace years since last inter-state war events or account for the intensity of the last conflict.

We use a dummy variable for countries considered to have a predominantly Muslim population,⁶⁷ and another one for countries whose legal system is based on English common law.⁶⁸ Finally, our measure of ethnic fractionalisation is provided by Tatu Vanhanen.⁶⁹ He distinguishes three types of ethnic groups, namely groups based on, first, racial differences, second, linguistic, national or tribal differences and, third, religious differences. Vanhanen takes 100 minus the percentage of the largest group in each type of ethnic group as a proxy for fractionalisation in each group and then sums the resulting percentages across all three groups to arrive at the aggregate measure of fractionalisation.

Table 2 reports descriptive statistics for the variables together with a bivariate correlation matrix.

Results

Table 3 reports results for the Cox proportional hazard model with ratification delay as the dependent variable. All estimations are based on a robust variance estimator and observations are assumed to be clustered, that is, are assumed to be independent only across countries, but are allowed to be correlated within countries over time. Since the same set of countries appear repeatedly over time in the sample, a failure to take clustering into account would underestimate standard errors. Note that the reported results are hazard ratios, which cannot become negative. A hazard ratio lower than one signals that an increase in the variable lowers the hazard of ratification, whereas a hazard ratio greater than one means that an increase in the variable raises the hazard of ratification.⁷⁰ The proportional hazards assumption underlying the Cox estimator can be statistically tested with the help of Schoenfeld residuals. Such tests fail to reject the assumption at the ten per cent significance level throughout. This suggests that the Cox estimator reports valid results.

We start with a regression in column I of Table 3, in which only the Muslim, common law and Council of Europe membership dummies together with population size, democracy, the number of peace years and the measure of ethnic fractionalisation are entered. This regression can draw on the greatest sample size. As expected, countries with a legal system built on English common law and ethnically more fractionalised countries are less likely, whereas more democratic countries are more likely to have ratified the Second Protocol (early on). However, the coefficients of the Council of Europe membership and the Muslim dummy variables as well as the number of peace years and population size are statistically insignificant.

The insignificance of the Muslim dummy variable is particularly striking. What explains the absence of a statistically significant effect? If one were to re-run the regression of column I without the democracy variable, then the Muslim dummy variable becomes highly statistically significant. A strong correlation between the lack of democracy and a predominantly Muslim population is well known.⁷¹ The results therefore suggest that it is the lack of democracy in many Muslim countries rather than their being Muslim per se, which inhibits ratification of the Second Protocol.

In column II, we add per capita income, which leads to a reduction in sample size. Economic development speeds up ratification of the Second Protocol. The ethnic fractionalisation variable retains its negative coefficient sign, but becomes marginally statistically insignificant, whereas more populous countries are now estimated to be less rather than more likely to ratify (early on). The other variables are hardly affected. In column III, we add the political orientation of the chief executive's party to the estimated model, which leads to a further reduction in sample size. A left-wing political orientation speeds up ratification. The other variables are again little affected. Ethnic fractionalisation becomes statistically significant again with a hazard ratio below one, as theory would predict. There is evidence for regional diffusion as a higher average of ratifications within a region in the previous year speeds up ratification when this variable is added to the model in column IV. Crucially, all the other variables remain the same in terms of statistical significance. Finally, in column V we want to test the impact of length of

Table 2. Descriptive statistical information and bivariate correlation matrix

Variable	Obs	Mean	Std. Dev.	Min	Max
Ratification delay	1900	0.02	0.15	0	1
Council of Europe	1900	0.05	0.21	0	1
Common law	1900	0.36	0.48	0	1
Ethnic fractionalisation	1900	45.61	36.74	0	177
Islam	1900	0.31	0.46	0	1
Democracy	1900	7.94	3.87	2	14
Years of democracy	1635	9.75	25.95	0	191
Peace years	1900	19.5	20	0	52
Population (ln)	1900	15.61	2.01	10.62	20.99
GDP p.c. (ln)	1454	8.18	1.02	5.64	10.41
Left-wing executive	1553	0.29	0.45	0	1
Regional ratification (lagged)	1900	0.08	0.12	0	0.64

	Ratification delay	Council of Europe	Common law	Ethnic fractionalisation	Islam	Democracy	Years of democracy	Population (ln)	Peace years	GDP p.c. (ln)	Left-wing executive
Council of Europe	0.03										
Common law	-0.04	-0.16									
Ethnic fractionalisation	-0.11	-0.08	0.24								
Islam	-0.09	-0.11	-0.12	0.22							
Democracy	0.16	0.20	0.15	-0.16	-0.41						
Years of democracy	0.16	-0.08	0.23	-0.15	-0.24	0.53					
Population (ln)	-0.01	-0.04	0.02	-0.04	0.06	-0.04	0.16				
Peace years	0.04	0.29	0.01	-0.03	-0.27	0.31	0.04	-0.32			
GDP p.c. (ln)	0.17	0.13	0.01	-0.24	-0.23	0.58	0.52	0.10	0.19		
Left-wing executive	0.06	0.00	0.09	0.01	-0.14	0.11	0.13	0.08	0.09	0.01	
Regional ratification (lagged)	0.10	0.62	-0.16	-0.15	-0.14	0.26	0.08	0.02	0.15	0.28	0.01

Table 3. Estimation results for ratification delay of the Second Protocol

	I	II	III	IV	V
Council of Europe	1.096 (0.17)	1.298 (0.49)	1.066 (0.10)	0.475 (0.90)	0.815 (0.26)
Common law	0.281*** (2.95)	0.256*** (2.71)	0.253*** (2.61)	0.330** (2.21)	0.456 (1.63)
Ethnic fractionalization	0.992* (1.67)	0.993 (1.32)	0.987** (2.57)	0.987** (2.49)	0.982*** (2.58)
Islam	0.489 (0.94)	0.320 (1.04)	0.319 (1.05)	0.349 (0.98)	0.272 (1.23)
Democracy	1.412*** (4.58)	1.204** (2.51)	1.166** (2.03)	1.161* (1.90)	
Peace years	0.987 (1.17)	0.987 (1.24)	0.987 (1.29)	0.993 (0.63)	0.990 (0.88)
Population (ln)	0.992 (0.09)	0.853* (1.69)	0.779*** (2.62)	0.796** (2.44)	0.687*** (2.76)
GDP p.c. (ln)		2.007*** (3.14)	2.027*** (3.01)	1.656** (2.20)	1.945*** (2.78)
Left-wing executive			2.060** (2.10)	1.816* (1.66)	2.175** (2.12)
Regional ratification (t-1)				49.514* (1.81)	57.740** (2.08)
Years of democracy					1.009** (2.29)
Log likelihood	-173.5	-149.0	-132.0	-130.1	-113.3
Global χ^2 test propor- tional hazard (p-value)	5.13 (0.645)	4.01 (0.856)	5.40 (0.798)	7.11 (0.715)	8.46 (0.584)
Countries	171	155	149	149	139
Observations	1900	1454	1208	1208	1131

Note: Cox proportional hazard estimation. Observations assumed to be independent across, but not necessarily within countries (clustering). Reported coefficients are hazard ratios. Absolute z-values in parentheses.

*significant at $p < 0.1$; **at $p < 0.05$; ***at $p < 0.01$.

democratic experience on ratification. To do so, we construct a variable that measures the number of years since 1800 a country has continuously been a democracy, defined as a Polity value of 6 or above.⁷² Unfortunately, this variable cannot be included in the estimations alongside the Freedom House measure as the two variables are very highly correlated with each other ($r = 0.6$). The reported results in column V show that it is the longer established democracies that ratify the Second Protocol early on as the coefficient of the variable measuring the years of democracy has a hazard ratio above one that is statistically significant. The other variables are hardly affected.

Conclusion

Our results suggest that regional diffusion, democracy, economic development, the left-wing orientation of the chief executive's party, common law, and ethnic fractionalisation are determinants of ratification of the only universal treaty aimed at the abolition of the

death penalty. How do these results compare to the determinants of death penalty abolition domestically?⁷³ Regional diffusion and democracy are consistent and robust determinants for both. However, contrary to Moravcsik's suggestion⁷⁴ we find that it is not the newly established, but the old democracies, which are more likely to ratify the Second Protocol (early on). In many newly established democracies, particularly, but not exclusively in Eastern Europe, abolition of the death penalty was undertaken due to outside pressure with little domestic enthusiasm for it, which might partly explain this result.⁷⁵

Partisan effects are apparent both in domestic abolition and in ratification of the Second Protocol. This suggests that left-wing oriented governments take the opportunity to lock-in their preference for abolition. Some of the other results are also compatible. For example, in some estimations we find that ethnically more fractionalised countries are less likely to ratify the Second Protocol and they are also less likely to have abolished the death penalty domestically. Countries with a predominantly Muslim population are not less likely to have ratified the Second Protocol once democracy is controlled for. This mirrors the finding that the share of Muslim population has no consistent and robust effect on death penalty abolition either. It is also noteworthy that whilst there are only six countries with a predominantly Muslim population that have abolished the death penalty, only two of these have not also ratified the Second Protocol (Turkey and Albania, who have however signed it at least). Similar to domestic death penalty abolition, no evidence is found that historical experience of violent political conflicts has an effect on the likelihood of ratifying the Second Protocol. Our analysis suggests that such experience is not likely to impose a barrier on abolition, dispersing a concern raised by Dunér and Geurtsen in this journal.⁷⁶

It is reassuring that some of the main determinants of death penalty abolition within countries in a global sample spanning the time period of more than half a decade (1950 to 2001) are broadly similar to the determinants of Second Protocol ratification from the 1990s onwards. This similarity in results suggests that the variables included do not simply fit one specific set of data, but really capture the fundamental drivers of abolition. Having said that, there are also three main differences between the results on domestic death penalty abolition and the results reported here.

First, a common law legal system is more consistently related to a lower likelihood of Second Protocol ratification than it is to a lower likelihood of domestic death penalty abolition. What this suggests is that even if common law countries abolish the death penalty, they are reluctant to delegate authority and sovereignty about the issue to an international regime. As mentioned above, internationally binding commitments essentially bypass the evolutionary process of law development by judiciary precedent and are therefore less easily compatible with a common law than with a civil law system, which might explain the difference in results.

Second, the level of economic development is a determinant of Second Protocol ratification, but not of domestic death penalty abolition. The latter confirms the observation that many rich countries like Japan, Singapore and the United States retain the death penalty whilst many poor countries have abolished it. Hence, aversion against capital punishment in itself does not really seem to be what economists call a normal good, that is a good for which demand rises with rising income. Instead, what seems to be a normal good is an international commitment to abolition. This is in accordance with the fact that with the exception of Canada and France all Western developed abolitionist countries have also ratified the Second Protocol such that the abolitionist non-State Parties are almost

exclusively Eastern European and developing countries. More research is needed, however, to find out why the level of economic development is a significant determinant of Second Protocol ratification, but not of death penalty abolition as such. One likely explanation is that richer countries generally are more willing and capable to negotiate, sign and ratify international treaties. In as much as economic development leads to power in the international system, realist theories would predict that richer countries are more likely to ratify. However, we do not find such an effect for population size. Indeed, in some estimations we find that more populous countries are less rather than more likely to ratify. All in all, the evidence in favour of a realist account is therefore limited. This leads us to the final and most striking difference in results.

Third, the single greatest difference between the determinants of death penalty abolition and Second Protocol ratification is with respect to the Council of Europe membership dummy variable. This variable is a highly significant determinant of domestic death penalty abolition, but it is statistically insignificant as a determinant of Second Protocol ratification in all regressions. What this suggests is that Western European countries did not extend their pressure on Eastern European countries towards a ratification of the Second Protocol. Once Eastern European countries had abolished the death penalty within their jurisdiction and had become Parties to the Protocol No. 6 to the *European Convention for the Protection of Human Rights*, Western European abolitionist countries were satisfied. Future research should address the question why Western European countries, all of which are Parties to the Second Protocol except France, did not go all the way in exerting pressure on Eastern European countries and demanded that they join the Second Protocol as well. This failure is unfortunate from the perspective of the global abolitionist movement since it is only the Second Protocol that has a universal coverage. It also puts the extent of EU commitment to promoting the international agenda for death penalty abolition in some doubt. If more Eastern European abolitionist countries had become Parties to the Second Protocol, this would have rendered the treaty more successful and would have put more pressure on the remaining abolitionist and perhaps even retentionist countries to join. There is certainly no point for Western European countries to initiate a United Nations resolution aimed at encouraging countries to ratify the Second Protocol if they cannot even persuade their Eastern European partner countries to do so.

Acknowledgement

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Notes

1. Throughout this article we treat ratification and accession equally.
2. For a detailed account of the developments at the UN leading up to the eventual passing of the Second Protocol, see W. A. Schabas, *The Abolition of the Death Penalty in International Law*, 2nd ed. (Cambridge: Cambridge University Press 1997).
3. Quoted in R. Hood, 'Capital Punishment' in M. Tonry (ed) *The Handbook of Crime & Punishment* (New York and Oxford: Oxford University Press 1998), pp.739–776, at p.743.
4. Important regional abolitionist treaties include the *Protocol to the American Convention on Human Rights*, adopted by the General Assembly of the Organization of American States in 1990, and the Protocols No.6 and No.13 to the *European Convention on Human Rights*, adopted by the Council of Europe in 1982 and 2002, respectively. Of these international treaties, the Protocol No.13 to the European Convention on

Human Rights is the only one that demands abolition of the death penalty for all crimes, whereas the others allow parties to retain the penalty in time of war.

5. E. Neumayer, 'The Determinants of Death Penalty Abolition in Global Perspective', *Human Rights Review*, Vol. 9 (2008) (forthcoming).
6. Italy is one of the few exceptions, where the death penalty became abolished early on in 1889, but was re-instated under Mussolini rule in 1926 and became applicable again for ordinary crimes in 1930. Similarly, Brazil was abolitionist for ordinary crimes since 1882, but re-instated the death penalty for political crimes during military dictatorship between 1969 and 1979 (United Nations, *Status of the International Covenants on Human Rights. Question of the Death Penalty*. E/CN.4/1998/82 (New York: United Nations Economic and Social Council, 1998)). It is more common for *de facto* abolitionist countries, that is, countries that have not legally abolished the death penalty, but have not executed anyone for some time, to revert to using capital punishment. R. Hood, 'Capital Punishment – A Global Perspective', *Punishment & Society*, Vol. 3 (2001), pp.331–54, at p.335 reports that after 1994 eight countries previously considered *de facto* abolitionist resumed executing people.
7. This is subject to State Parties having accepted similar procedures within the *International Covenant on Civil and Political Rights*. Also, State Parties can make a statement to the contrary at the moment of ratification or accession, but so far none has done so.
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