

CHAPTER ONE

INTRODUCTION: PROHIBITION OF THE DEATH PENALTY AS A HUMAN RIGHTS NORM

Even if a civil society were to dissolve itself by common agreement of all its members—for example, if the people inhabiting an island decided to separate and disperse themselves around the world—the last murderer remaining in prison must first be executed. . . . If they fail to do so, they may be regarded as accomplices in this public violation of legal justice.

—Immanuel Kant, *The Metaphysical Elements of Justice*

“The chief and worst pain may not be in the bodily suffering but in one’s knowing for certain that in an hour, and then in ten minutes, and then in half a minute, and then now, at the very moment, the soul will leave the body and that one will cease to be a man, and that that’s bound to happen; the worst part of it is that it is certain. To kill for murder is a punishment incomparably worse than the crime itself. Murder by legal sentence is immeasurably more terrible than murder by brigands. . . . Take a soldier and put him in front of a cannon in battle and fire at him and he will still hope; but read the same soldier his death sentence for certain, and he will go out of his mind or burst into tears. Who can tell whether human nature is able to bear this madness? . . . No, you can’t treat a man like that!”

—Fyodor Dostoyevsky, *The Idiot*

INTERNATIONAL STANDARDS PROHIBITING CAPITAL PUNISHMENT

Punishing people with death has a history as old as society itself, and was not considered a human rights violation until the last decades of the twentieth century. Policy regarding the death penalty has been commonly understood to be the prerogative of national governments. In Europe, where executions

are completely banned at present, more than two hundred crimes were once punishable by death, including such minor offenses as stealing, cutting down a tree, and robbing a rabbit warren.¹ The state's "right to kill" within the accepted domestic legal system gained increasingly broad public support over time.² Especially with regard to heinous crimes, people assumed that the state should demonstrate a fair and determined authority by imposing the ultimate punishment. Even Immanuel Kant, who strongly believed in a person's intrinsic worth and dignity, argued that no one should be spared from the death penalty who, as a rational being, chose not to submit to a common rule of law.³

Not until World War II did the death penalty become a major issue on the human rights agenda. The bloody horror of the war and the Holocaust triggered a global revulsion against death and its imposition as a legitimate penalty. With the increasing interest in human rights safeguards during the postwar period, the recognition of the "right to life" as a normative objective gained momentum.⁴ The focus shifted from the state's right to kill to a citizen's right not to be executed by the state. Over the years, international bodies have increasingly made statements and adopted policies favoring the abolition of capital punishment on human rights grounds. National court decisions are beginning to support such statements and policies by ruling out the death penalty as a violation of human rights.

The Universal Declaration of Human Rights, which was unanimously adopted by the United Nations General Assembly on December 10, 1948, and which even today provides the most authoritative statement of international human rights norms, declared that "[e]veryone has the right to life, liberty and security of the person" (Article 3), and "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment" (Article 5). Thirty years after the introduction of the Universal Declaration, the United Nations General Assembly adopted a resolution to "progressively [restrict] the number of offenses for which the death penalty may be imposed with a view to the desirability of abolishing capital punishment."⁵ Following this, in 1984, the General Assembly of the United Nations endorsed a resolution adopted by the Economic and Social Council that listed nine safeguards guaranteeing protection of the rights of those facing the death penalty, on the understanding that "they would not be invoked to delay or prevent the abolition of the death penalty."⁶

At present, four international treaties call for the abolition of capital punishment: the scope of one is worldwide; the other three are regional.

The Second Optional Protocol to the International Covenant on Civil and Political Rights

The idea of prohibiting the death penalty, which is only vaguely articulated in the Universal Declaration of Human Rights, was strengthened in 1966 when

the United Nations incorporated it in the International Covenant on Civil and Political Rights (ICCPR). It was proclaimed even more explicitly in the Second Optional Protocol to the International Covenant Aiming at the Abolition of the Death Penalty, which the UN General Assembly adopted on December 15, 1989. The protocol declared that “[n]o one within the jurisdiction of a State Party to the present Protocol shall be executed” (Article 1.1) and that “[e]ach State Party shall take all necessary measures to abolish the death penalty within its jurisdiction” (Article 1.2). The only reservations permitted under the protocol are those that would provide “for 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). As of January 2006, fifty-six states have ratified the protocol. Eight other states have signed it, indicating their intention to become parties to it at a later date.

Arguing that an appeal to universal human rights potentially limited its sovereign power to impose capital punishment within its territory, the United States voted against the adoption of the Second Optional Protocol. And when it ratified the ICCPR in June 1992, the United States entered reservations both with respect to the prohibition on executing convicted criminals under the age of eighteen and to Article 7, which proscribes cruel and unusual treatment or punishment. The United States declared that it would only be bound by this article to the extent that “cruel, inhuman or degrading treatment or punishment” means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, or Fourteenth Amendments to the Constitution of the United States.⁷

Protocol No. 6. to the European Convention for the Protection of Human Rights and Fundamental Freedoms

The European Convention for the Protection of Human Rights and Fundamental Freedoms, hereafter referred to as the European Convention on Human Rights (ECHR), was the first international instrument to embrace the abolition of the death penalty as a policy objective. Protocol No. 6 to the European Convention on Human Rights was opened for signature and ratification in 1983. Since then, states applying for membership to the Council of Europe have been expected to ratify it prior to admission.⁸ As of January 2006, the protocol had been ratified by forty-five European states and signed by one other. The protocol outlaws death sentences generally, but narrowly allows countries to retain capital punishment “in time of war or imminent threat of war.”

Protocol No. 13 to the European Convention on Human Rights

Over time, in Europe at least, the norm against capital punishment became stronger, more specific, and more closely tied to efforts at monitoring and

enforcement. In February 2002, the Committee of Ministers of the Council of Europe took the final step on the road to abolition by signing Protocol No. 13 to the ECHR. Whereas Protocol No. 6 specifies the abolition of the death penalty only in peacetime and allows states to retain the death penalty in wartime as an exception, Protocol No. 13 provides for the *total* abolition of the death penalty in all circumstances, permitting no exceptions. The number of signatories and state parties continues to grow. As of January 2006, Protocol No. 13 had been ratified by thirty-three states and signed by ten others.

The Protocol to the American Convention on Human Rights to Abolish the Death Penalty

In June 1990, the General Assembly of the Organization of American States adopted the Protocol to the American Convention on Human Rights to Abolish the Death Penalty. Article 1 calls upon states to abstain from its use, although it does not obligate them to erase it from the statute books. Like the Second Optional Protocol to the ECHR, it permits reservations with regard to “extremely serious” wartime crimes. This protocol has been ratified by eight states and signed by one other in the Americas. The United States and some English-speaking Caribbean countries, such as Barbados, Jamaica, and Trinidad and Tobago, are still unwilling to ratify.

In the past three decades a substantial number of countries have joined the international movement to abolish the death penalty by excluding it from domestic legislation either for all offenses or for peacetime offences, and by respecting the international treaties forbidding the death penalty. As recently as 1970, only twelve countries had completely abolished the death penalty, and eleven others had abolished it for ordinary crimes in peacetime. The pace of abolition accelerated in the second half of the twentieth century, especially between 1980 and 2000. Since 1985, about seventy countries have abolished the death penalty, and only four countries that had abolished it have reintroduced it. The number of countries that have ended capital punishment in law or practice (124) now exceeds the number that retain it (72), and most of the latter have moratoriums on execution.⁹ Moreover, most countries that continue to carry out executions today do so only for murder, although many retain the death penalty in law for other crimes. The rate of executions in most such countries has declined to a point where it represents only a tiny percentage of the number of reported murders.

The death penalty has been deemed inappropriate to the values that international justice is meant to represent. No provision of the death penalty appeared in the statutes of the tribunals set up by the UN Security Council to adjudicate crimes committed in the former Yugoslavia and in Rwanda, nor in the statutes of the International Criminal Court (ICC), which came into force on July 1, 2002, for prosecuting war crimes, genocide, and crimes against

humanity. Instead, the maximum penalty is life imprisonment or, for some crimes, a maximum of thirty years imprisonment.¹⁰ Despite the appalling nature of some of these crimes, the death penalty is no longer considered to be an option. Punishments such as the hanging of numerous individuals after the Nuremberg and Tokyo war crimes trials would not take place today. The UN Commission on Human Rights adopted a resolution in April 1998 calling on all countries that retained the death penalty to consider suspending executions with a view to completely abolishing the death penalty. Instruments such as the international conventions, protocols, and treaties enable us to affirm that the attempt to abolish the death penalty has gained a “kind of universal moral consensus.”¹¹ The death penalty is no longer regarded as a domestic, internal, criminal justice issue. It is no longer acceptable to define the death penalty in “relativistic” religious or cultural terms or as a matter purely for national sovereignty.¹² The norm that prohibits this “cruel, inhuman and degrading” penalty has become largely international. It has become a dominant feature among the issues of international human rights as a legitimate focus of global attention.

Yet not all governments are equally concerned about the international human rights norm. In the United States, the number of executions has been significantly increasing since the early 1980s, at a time when most European democratic countries and a growing number of countries in other parts of the globe have joined in the abolitionist campaign. Since the death penalty was reinstated in 1976, the United States has carried out 1,070 executions, and nine hundred-fifty of them have occurred since 1990 (as of April 2007). The death penalty is also widely practiced in Asia and northern Africa. These empirical observations suggest that while international norms are often a critical source of ideas for change in state policy, their impact varies greatly.

Why is the international norm banning the death penalty more influential in some countries? Why do some countries comply with this international norm while others do not? The purpose of this book is to answer these questions. Regarding the question of why the international norm has more influence in some countries than in others, I intend to address how, when, and through what political processes states comply with the international norm. By identifying the political and sociological factors that account for its varying influence, I attempt to specify the causal mechanism that produces compliance with the norm. This research offers an explanation of the domestic empowerment of norms and how their impact varies cross-nationally.

INTERNATIONAL NORMS IN INTERNATIONAL RELATIONS RESEARCH

International norms are commonly defined as “collective expectations about proper behavior for a given identity.”¹³ According to Janice Thomson, norms

emerge as “outcomes of individual beliefs which subsequently can exert influence over behavior independent of the beliefs of individual actors.” Yet they grow as “the character of structures once they are embedded in social institutions.”¹⁴ My review of the previous literature on international norms focuses on two major elements: (1) whether it attempts to provide a productive dialogue between different theoretical approaches; (2) whether it correctly emphasizes the importance of domestic politics in norm enforcement. For the past decade, a central locus of contention in the field of international relations has been the rationalist-constructivist debate. A series of research projects engaging the rational choice approach have stressed the way norms constrain the behavior of states or argued that norms matter only when they serve state interests. In contrast, constructivist research, focusing on the learning process and socialization mechanism of interest formation, contends that norms do not merely constrain behavior; rather, they help shape agents’ identities and interests. The purpose of reviewing these features is not to produce a synthesis from these theoretical approaches or to replace them in any way. Rather, it is an attempt to highlight their limitations and to suggest alternative paths of norm compliance that traditional approaches miss. In other words, it is a way of building bridges between two theoretical views and finding productive ways to combine some of their elements. Avoiding a restrictive methodology of simple dichotomies, I seek richer explanations on the assumption that neither of these explanatory frameworks by itself can adequately explain norm compliance.

In spite of the recent upsurge in scholarly attention to international norms, few attempts have been made to understand the domestic political context of norm institutionalization.¹⁵ The systemic role of domestic variables in norm compliance has not received enough attention. To fill this gap, I examine how the effects of international human rights norms are mediated or conditioned by different domestic political configurations. Without denying the autonomous effects of norms at the level of the international system, I attempt to clarify the domestic structural determinants of norm compliance, which entails a state level of analysis.

International Norms and State Behaviors: Major International Relations Theories

Why do states obey international norms and rules? An obvious answer is that states benefit from doing so. Free trade agreements are made to enlarge markets and to ensure imports of needed goods. Arms control treaties are made to lessen the risk of war and to reduce military costs. States are likely to comply with international norms when they serve their mutual interests and help solve problems of coordination and cooperation. A more complex question, then, is why states comply with international norms when doing so does not appear to serve their interests. Why do states adhere to international norms when such behavior is actually quite costly?

Realists, who theorize a world of international anarchy and state power, do not expect international norms to have much of an impact unless they are enforced by powerful states or secure national interests. Considering the distribution of power among states under anarchy as the chief determinant of state behavior, realists regard norms merely as a reflection of that power relationship. International arrangements that rely upon common principles or norms “are only too easily upset when either the balance of bargaining power or the perception of national interest (or both together) changes among those states who negotiate them.”¹⁶ Because the outcomes of international interactions largely reflect the interests and relative strength of the contending parties, norms are reducible, in this view, to optimizing behavior by sovereign, egoistic, and strategic actors that calculate costs and benefits in the pursuit of basic goals. Norms are the products of interests, and a state’s obedience to a norm is nothing but an epiphenomenon. International norms are merely post hoc rationalizations of self-interest.¹⁷

The realist notion of states and anarchy has been a useful analytical tool for explaining unfavorable international agendas in the modern era such as war. One strength of this realist perspective is its ability to describe the difficulty of state cooperation when there is no central government above governments. In this condition, states have few choices aside from following national interests. Yet realism has serious limitations. How do states come to define their interests, and how can interests be redefined through certain political processes? And who decides what the national interest is? Realists tell us little about these questions. In the realist world, interests are simply “out there” waiting to be discovered; thus, there is no chance that states’ identities and interests can be defined by prevailing ideas or norms. In favor of material forces such as military and economic might, realists have neglected how states pursue strategies to improve their normative standing. In short, the realist perspective fails to explain why states voluntarily comply with international precepts and standards.

Neoliberal institutionalists, who have a relatively optimistic view of the likelihood of sustained international cooperation, consider norms as more enduring and influential variables than do the realists.¹⁸ Stephen Krasner defines norms, which he sees as one component of regimes along with “principles, rules and decision-making procedures,” as “standards of behavior defined in terms of rights and obligations.”¹⁹ The norms that help to constitute regimes “serve to constrain immediate, short-term power maximization.”²⁰ Regimes or institutions based on norms “prescribe acceptable forms of state behavior, and proscribe unacceptable kinds of behavior.”²¹

Neoliberal institutionalists, however, grant only a limited role to norms, assuming that interests are still the key to state behavior. In their view, norms influence behavior only when they help states advance their interests by resolving coordination problems with other states. Even if a state’s compliance with a norm seems to be in conflict with its short-term interest, it

is *beneficial* from a long-term perspective. As Robert Keohane says, “[T]he norm requires action that does not reflect specific calculations of self-interest: the actor making a short-run sacrifice does not know that future benefits will flow from comparable restraint by others, and can hardly be regarded as making precise calculations of expected utility . . . but . . . *we should nevertheless assume that regime-supporting behavior will be beneficial to us even though we have no convincing evidence to that effect.*”²² According to Keohane, therefore, institutions die when members no longer “have incentive to maintain them.”²³ The sustained pattern of states responding to norms and rules depends on whether such norms provide each state with satisfactory benefits. States that benefit less from a particular rule will eventually break that rule. Here, norms are intervening variables between material incentives and state behavior.

Even though neoliberal institutionalists have underscored, far more than realists have, the importance and autonomy of norms in world politics, their ongoing reliance on cost-benefit analysis does not explain why states obey international norms even when such norms provide them with no clear benefits. International norms are still seen as instruments whereby states eventually seek to attain their interests in wealth, military might, or some other material capability. States adhere to international norms when doing so brings material benefits or the threat of sanctions. In short, all explanations of neoliberal institutionalists still return to interest-based motives.

In reaction to this rationalist view, constructivists suggest that many international norms do not serve clear functional purposes. It is apparent that states comply with international norms because of power differentials or because they help resolve coordination problems. Yet constructivists argue that modern norms are not consistently enforced by powerful states and do not necessarily resolve coordination problems nor advance the common interests of states. Quite a few scholars, whether they are considered constructivists or not, have maintained that states exist in a normative environment; in other words, normative beliefs serve as important guides to state behavior. Their research agendas vary but include human rights, national security, environmental policy, immigration, economic policy, nationalism, decolonization, regional integration, and terrorism.²⁴ Investigating how interests are constructed discursively in and through political dynamics, instead of inquiring into the assumed interests of political agents, they suggest that “nonfunctional” norms matter and have powerful effects.

While rationalists see norms as a reflection of the fixed preferences of states, the constructivist approach considers that norms play a role in determining those preferences. Interests are not immediately transparent to states. Norms shape and reshape the goals of states, and build their perceptions of state interests: “Social institutions (norms) are the product of actor interactions, while these actors’ identities and interests in turn are defined by such social institutions.”²⁵ Preferences are not just exogenously given. Rationalists are wrong, from a constructivist perspective, when they neglect the role of

shared understandings and expectations in “constituting actors with certain identities and interests, and material capabilities with certain meanings.”²⁶ States hold ideas that are often independent of objective material interests and environmental conditions. And states interact in an environment that is fundamentally social and ideational as well as material. As Nicholas Onuf notes, “[C]onstructivism holds that people make society, and society makes people. It is a continuous, two-way process.”²⁷ To put it another way, international norms are major *ex ante* sources of state action separate from interest, not post hoc creations of calculated self-interest. This is a key difference between neoliberal institutionalists and constructivists. For neoliberal institutionalists, norms do not function independently; their impact varies in accordance with the condition of material structures. Rather than independent variables, norms are, instead, “intervening variables that modify the relationship between material conditions and behavior.”²⁸ Constructivists, in contrast, see norms as crucial causal variables—not mere reflections of the distribution of power and other material capabilities—that determine state policy outcomes.

States adopt norms through a process of social interaction and learning.²⁹ In other words, social context influences actors’ preference and choice: “[C]hoices are rigorously constrained by the webs of understanding of the practices, identities, and interests of other actors that prevail in particular historical context.”³⁰ For those who are inspired by sociology, and the Weberian insight in particular, there is an uneasy prediction about the complexity of political behavior: “[I]f there are at all universal regularities in human behavior, then they are shaped not only by interests alone but also by ideology and habit.”³¹ Interests are no longer considered as objectively given, but neither are they merely subjective. The division between objectivity and subjectivity has been problematized, so that what appears to be necessary and given is shown to be the result of political creation and historical sedimentation. As a consequence, the ideas of “socialization” and the “learning process” are major components of this new research inquiring into political formation.³²

Interests and preferences, in this view, emerge from social construction in that states must *learn* what they want; in contrast rationalist theories assert that states *know* what they want.³³ Problematizing some of the central assumptions has led to a renewed investigation of the politico-historical processes that produce these identities or interests and structure the political landscape. Such inquiry has opened new areas of investigation previously considered uninteresting or unimportant.

In the realm of international relations, the role of norms is particularly important because there is no formal institutionalized process for the formulation of international laws, much less any central enforcement authority. Since rules and norms are based on predictable and replicable patterns of action such as custom and habit, they would be better than other interest-oriented rules

in terms of stability and sustainability. According to the logic of utility-maximization, states are always inclined to retreat from international rules whenever the costs of those rules seem to exceed the benefits. By contrast, if state adherence to rules and norms relies mainly on ideas and shared knowledge and is thus embedded in societies, heedless retreat from the rules will be more difficult.

Domestic Sources of Norm Compliance

With the growing academic interest in international norms, many empirical works have highlighted domestic variables as the primary determinants of state compliance with international norms. Adopting the position held by many comparativists, they argue that domestic political factors and structures mediate the impact of international norms on policy choice. Andrew Cortell and James Davis maintain that international norms have important effects on state behavior via domestic political processes, especially when they are incorporated into national law and the administrative regulations of domestic agencies.³⁴ Similarly, Jeffrey Checkel suggests that the effects of international norms are conditioned by domestic structures, that is, by the congruence of the norms with domestic political culture and political settings.³⁵ Jan Egeland analyzes how “small and big nations are differently disposed to undertaking coherent human rights–oriented foreign policies.”³⁶ In his comparison of the foreign policies of the United States and Norway regarding human rights, Egeland argues that the domestic political setting and culture make Norway quick and bold and entrepreneurial in international work, which allows this country to play an important role in conflict areas and humanitarian work. According to Andrew Moravcsik, an independent civil society and robust domestic legal institutions can take advantage of international human rights norms to pressure governments from within.³⁷ International norms, besides being imposed from outside, can affect a nation’s foreign policy because governmental and nongovernmental actors involved in policymaking may promote them out of moral and legal considerations, reputational concerns, or just a desire to emulate others.

Given the importance of domestic variables, we want to understand exactly how these variables matter in determining state compliance with international norms, and which domestic variables contribute most to such compliance. According to Thomas Risse-Kappen, it is crucial to understand how the state is associated with civil society. For him, the ability of transnational actors to promote principled ideas and to influence state policy is largely dependent on domestic structure understood in terms of state-societal relations. He sees the role of domestic structure as mediating two stages through which international norms reach the domestic arena: (1) getting on the agenda for social and political discussion (norm access); and (2) getting support at the level of decision making (norm institutionalization, norm legalization). The

significance of identifying different stages lies in the fact that international norms are more likely to get easy access to the political system in a society-dominant domestic structure; however, it is rather difficult, in these pluralist societies, to implement norms and thus bring about policy changes. In contrast, in a state-controlled society, norms are less likely to gain access to the political agenda in the first stage, but once they do so, they are more likely to be effectively implemented by strong political leadership.³⁸ In a similar fashion, Jeffrey Checkel also gives special attention to domestic political structure in order to explain how international norms affect domestic political change. He argues that certain regime types—namely, “statist” regimes—are largely impenetrable to grassroots advocacy, so that change in such regimes only occurs through elite learning.³⁹

While I do not disagree that the systemic role of domestic variables is significant, I argue that there are two major shortcomings in the current literature on norms. First, they have so far concentrated on single countries or regions, rather than how and why the impacts of norms vary cross-nationally. Such narrowly focused research does not help us to explain similar dynamics in other countries. It leaves our understanding of the causal mechanisms of norm diffusion incomplete. Instead, we need a methodology of the cross-national comparison, which ought to help reduce the problem of overdetermination and allow us to acquire reproducible evidence on norms. The comparative case study offered here includes cases in which a given international norm enjoyed various degrees of state compliance across national contexts. Additionally, such an approach may help to overcome a general problem of large-*n* methods, which can tell us whether hypotheses hold but cannot explain why they hold: “[A] large-*n* test of a hypothesis provides little or no new insight into the causal process that comprises the hypothesis’ explanation, nor does it generate data that could be used to infer or test explanations of that process.”⁴⁰

Second, the literature shows a tendency to rely on cases in which norms “mattered” and have actually affected state policies. In other words, scholars tend to highlight only successful cases of norm compliance. As Paul Kowert and Jeffrey Legro note, “Efforts to identify and measure norms . . . suffer from a bias toward ‘the norm that worked.’”⁴¹ Similarly, Checkel maintains that “there has been a bias to focus on successful cases of [norm] diffusion; thus, in terms of research design, there is often a failure to consider the ‘dog who didn’t bark.’”⁴² This bias overlooks two questions: (1) Why do some international norms penetrate the domestic political discourse more easily than others (For example, free-trade rather than human rights norms)? (2) Why does an international norm resonate in some countries but not in others? (For example, Europe complies with the norm against capital punishment, but the United States does not.)⁴³ A necessary first step in answering these questions is to pay attention to those norms that apparently do *not* seem to affect domestic policy change, or certain cases that have *not* changed

despite the wide-spreading norm. Examining “negative cases” does not directly explain cause and effect, but it does allow us to identify the conditions that obstruct domestic salience of international norms.

METHODOLOGICAL AND ANALYTICAL ISSUES

Case Selection: Why These Four Countries?

Different types of governments differ in the way they punish criminal offenders. A number of theoretical perspectives suggest that as states modernize, civilize, and democratize, social control shifts inward and people become more tolerant of social deviance.⁴⁴ In his analysis of the evolution of the death penalty and civilization, Jeffrey Reiman argues that the “abolition of the death penalty is part of the civilizing mission of modern states.”⁴⁵ Drawing upon Durkheim’s laws of penal evolution, he notes that civilization results in less use of violence in society as people develop more civilized ways of resolving disputes and problems. The reduction in use of violence to solve problems at the national level contributes to a nation’s decision to abolish the death penalty. As Robert Badinter points out, there is an “indissoluble link between dictatorship and death penalty.”⁴⁶ In authoritarian or totalitarian regimes, the death penalty is far more likely to be enforced than in liberal democracies. China, Iran, and Saudi Arabia still make assiduous use of the death penalty not only for criminal but also for political or moral offenses, whereas the Netherlands, Sweden, Denmark, and Switzerland banned the death penalty decades ago for all crimes and in all circumstances. Since the death penalty is “the ultimate expression of the absolute power that the rulers wield over their subjects,” most dictatorships frequently use the death penalty.⁴⁷ In describing the perception and use of the death penalty in terms of their relation to types of political rule in various states, Bertil Dunér and Hanna Geurtsen note that 70 percent of countries categorized as “free” according to the standards defined by Freedom House have signed one of the three protocols abolishing capital punishment, whereas only 30 percent of countries labeled “partly free or not free” have done so: “It seems likely that this statistical connection is in the first place a manifestation of the interests of the governing elites of authoritarian states to suppress opposition. In other words, the death penalty is one of many instruments for regime preservation.”⁴⁸ Given that the number of non-abolitionist democracies is steadily decreasing, abolition has been strongly linked to democratic regimes.⁴⁹

To avoid “researching the obvious,” I did not choose repressive authoritarian regimes that abuse the death penalty as retentionist cases, nor did I choose established democracies as abolitionist cases. Instead of focusing on cases merely explained by a “civilization/democracy hypothesis,” I have chosen theoretically and empirically “significant” cases that seem to have a much stronger potential to reveal different pathways of norm compliance.

I examine four countries: Ukraine, South Africa, South Korea, and the United States. The first three either abolished the death penalty relatively recently or have a moratorium on executions. These countries ban the death penalty for different political reasons and through different political processes, which capture theoretically significant pathways of norm compliance. At the same time, the three countries' policy changes regarding the death penalty are outlier cases in each region. Ukraine, South Africa, and South Korea attempted to comply with the international norm when many other Asian and African countries and former Eastern Bloc countries were still hesitant to do so. Explicitly devoted to analyzing the conditions and practices of those countries that make such outcomes possible, this research calls attention to how different outcomes are heavily conditioned by domestic sociopolitical factors.

Also, I investigate possible factors that determine U.S. policy toward the death penalty.⁵⁰ Studying its peculiarities, estranged from the uniform trend among other Western industrial nations, is worthwhile because of the general merit of research on extreme outlier cases: "We select cases where the values on the dependent variable are high and its known causes are absent."⁵¹ To address this situation is the first step in understanding why this society in general continues to embrace the death penalty, which has been abandoned by every other developed nation in the West, as well as in exploring the broader issue of "U.S. exceptionalism" in matters pertaining to human rights in general. Table 1.1 presents the four cases examined in this book.

Table 1.1. Cases: Different Stages of Norm Compliance

<i>Abolitionists</i>	<i>Under Moratorium</i>	<i>Retentionist</i>
South Africa (1995) Ukraine (2000)	South Korea (no executions since 1998)	United States (38 of 50 states retain the death penalty)

Specification of the Variables

As Victor Kvashtis notes, "In any country the death penalty is not only an institution of criminal law but also an instrument of criminal policy, a social-cultural phenomenon. Attitudes toward this institution are an indicator of the sentiments dominant in a particular society. Such an attitude is formed on the basis of a complex interaction of historical, political, cultural, legal, and many other social factors."⁵² An understanding of death penalty policy and abolition processes in a particular country, therefore, requires a review of relevant historical, sociopolitical, historical, psychological, and criminal situations.

The dependent variable in this study is norm compliance, that is, a political phenomenon in which domestic policymaking and practice incorporate the international norms concerning the death penalty. Studies of

norms exhibit three different levels of analysis: norm emergence, norm development, and norm internalization.⁵³ All three are worthwhile subjects of analysis.⁵⁴ The focus of this research, however, is limited to the last phase of norm implementation, relying on the assumption that domestic conditions are major factors affecting states' compliance with international rules and norms. By observing cases that reached different stages of norm compliance, I attempt to identify the factors that determine the variance in the dependent variable.

The explanatory variables that influence a government's response to the international human rights norm are grouped into five main categories: (1) Domestic Agents (public opinion, elite leadership, and grassroots activities); (2) International or Regional Forces; (3) Radical Political Transformation; (4) "Cultural Match" (crime rates and social inequality); and (5) Domestic Institutional Structures. Among these five categories, the first two are actor-centered (agent-centered), whereas the last three are context-centered (see table 1.2). We can also divide the variables into two groups on the basis of domestic or international factors: (1) domestic context and agents, that is, differences in internal normative and institutional arrangements, major political events such as regime change, prevailing public beliefs, and the role of political leadership; and (2) international context and agents, that is, the extent to which state behaviors are influenced by international or regional human rights regimes and transnational networks. In any case, norm compliance may be a function of one or more of these variables.

Before we can explore empirically how these variables interrelate, we must first identify and analyze each individually. In the following sections, I develop and operationalize the variables and factors that are likely to influence government response to the international human rights norm.

Table 1.2. Variables Categorized by Two Axes

	<i>Actor-centered</i>	<i>Context-centered</i>
Domestic	Domestic agents (public opinion, elite leadership, grassroots activities)	Radical political transformation Cultural match (crime rates, social inequality) Domestic institutional structures (centralized vs. decentralized)
International	International or regional human rights regimes	

Domestic Agents

PUBLIC OPINION

International norms are likely to have more impact if they promote ideas, beliefs, and values that fit well with preexisting, domestic social understanding. Where international human rights norms resonate with domestic cultural understandings and beliefs, states are more likely to respond to human rights pressures. In the case of capital punishment, general public opinion has been considered as an important domestic factor because of the belief that strong public support contributes to the continued use of the death penalty.⁵⁵ Death penalty supporters commonly cite public opinion to buttress their argument. Given its importance, I explore how different social groups hold different attitudes toward the death penalty, and what such opinions and attitudes are based on.⁵⁶ Escaping the simplistic “for or against” opinion polls on the death penalty, I examine public attitudes with more elaboration and qualification. A simple approach to public opinions obscures the underlying determinants of death penalty support, including race or income. Clearly, careful consideration and evaluation of the underlying causes of attitudes to the death penalty should be in order.

In most countries, however, the death penalty has consistently been supported by a majority of people anyway since systematic polling began. This raises the question: If public attitudes on the death penalty follow similar patterns across countries, what accounts for differences between various countries in death penalty policy? Why do different countries have different policy outcomes despite similar public opinions on the death penalty?

ELITE LEADERSHIP

The role of political leaders and their evolving beliefs must be taken into account in explaining how some countries have abolished the death penalty despite majority public support for its continued use. Successful abolition of the death penalty has required elite leadership to persuade a reluctant public to accept abolitionist norms. Research on norm compliance usually portrays state elites as the ones who initially hesitate to empower international human rights norms in the domestic arena.⁵⁷ It takes perhaps five to ten years of societal pressure before political elites are finally ready to comply with them. In this regard, it is interesting to note that the process in the case of the death penalty norm runs contrary to the implicit dichotomy between the “good” activists, civil society and nongovernmental organizations, and the “bad” state and elite decision makers. According to Checkel, this dichotomy-based research, by focusing only on the coercive function of grassroots activists, can neglect the dynamics of the elites’ learning process: “[P]olitical/state agents do not simply or always calculate how to advance given interests;

in many cases, they seek to discover those interests in the first place, and do so prior to significant social mobilization.”⁵⁸ It is apparent that “elite voluntarism” is sometimes more important than social pressure from below in obtaining state compliance with international normative prescriptions.

GRASSROOTS ACTIVITIES

One of the most important pathways of norm diffusion involves the mobilization of societal pressure from below. International relations scholars have argued that socialization can occur as a result of the actions of nonstate actors and may involve the use of “soft” power resources, such as moral leverage and technical knowledge (“epistemic communities”). Margaret Keck and Kathryn Sikkink identify transnational advocacy networks as an important influence for states that come to adopt international norms. These transnational groups succeed not only “by holding governments . . . accountable to previous commitments and the principles they have endorsed,” but also by framing their ideas in ways that “resonate or fit with the larger belief systems” of the target states.⁵⁹ As Ann Marie Clark suggests, societal pressure is the predicted mechanism for bringing international norms to the domestic arena.⁶⁰ Nonstate actors routinely use both norms and power to pressure governments to improve their human rights records. They attempt to influence government decision makers to favor policy changes on relevant issues.

International and Regional Forces

Transnational human rights organizations have rallied around the norm when pressuring governments to ratify international human rights treaties. Nongovernmental organizations and their transnational advocacy networks play a role in persuading and pressuring political elites to embrace internationally promoted norms and principles.⁶¹ Along with the societal pressure dynamics of nongovernmental organizations, we should emphasize the pressure on political elites by intergovernmental institutions.⁶² The independent activities of international institutions are “teachers of norms.”⁶³

More than ten years have passed since the UN General Assembly adopted its first protocol calling for the abolition of the death penalty. Cruel treatment and punishment are now prohibited by virtually all contemporary international human rights instruments. That those international laws evidence a trend in favor of abolishing the death penalty seems to be beyond dispute. In the modern conscience, the death penalty is no longer an internal matter of justice, but a matter of general, universal concern. International bodies, including the European Union and the United Nations, have endorsed and promoted the global trend toward abolition of the death penalty. An active network of international nonstate and intergovernmental actors has sought to mobilize and coerce decision makers to embrace the

human rights norm against the death penalty. The Parliamentary Assembly of the Council of Europe, which has become one of the most effective and robust international human rights regimes in operation today, recommended, in 1994, the addition of a further protocol to the European Convention on Human Rights that would provide for the complete abolition of the death penalty, with no possibility of reservations being entered for its retention in any special circumstances.

Radical Political Transformation

Research from several theoretical perspectives attempts to discover empirical associations between the occurrence of important historical events (such as wars, revolutions, or major crises) and policy change. Many of these key events are hypothesized to trigger elite learning.⁶⁴ As John Keeler points out, political crises “create a sociopolitical context for governance uniquely conducive to the passage of reforms.”⁶⁵ They “open the window for reform,” and decision makers are more willing to listen to new ideas espoused by transnational actors or regional governments.⁶⁶ It is a truism that “politics opens up, becomes more fluid, under conditions of crisis and uncertainty.”⁶⁷ In terms of operationalization, I associate this variable with a radical political transformation. The political transition captures and broadens the imagination of policymakers, leading them to question commitments to existing practices. When a regime changes drastically from authoritarianism to democracy, the new government usually adopts different kinds of human rights discourse in order to distinguish itself from the former authoritarian rule that marginalized human rights norms and actors. For example, after experiencing the long era of apartheid, the first decisions taken by the new Constitutional Court of South Africa modified the criminal justice system to make it more friendly to human rights for every member of society.

“Cultural Match”

Domestic political conditions of norm compliance have been recently highlighted in terms of the “cultural match” between domestic practices and international norms,⁶⁸ also described as “domestic salience,”⁶⁹ or “normative fit.”⁷⁰ With regard to punitive policies, Warren Young and Mark Brown suggested that variations in such policies across nations are deeply rooted in cultural values about punishment, which in turn reflect the historical experiences of nations.⁷¹ Theda Skocpol warns against the misuse or abuse of cultural factors, however, arguing that previous studies on culture or national values are “too holistic and essentialist” to offer explanatory leverage.⁷² To avoid this error, we must delve into specific aspects of culture that may account for the variance in the level of compliance with the international norm.

There seems to be a certain correlation between religion and the death penalty. Latin America, predominantly Catholic, is largely free of capital punishment: only Cuba and Guatemala still apply the death penalty.⁷³ It is interesting to note, however, that the Philippines, where 95 percent of the population is Catholic, is also one of very few regions that have reinstated the death penalty after abolishing it. In addition, a substantial number of Muslim countries have abolished the death penalty in recent years, although some Islamic scholars maintain that Islamic Law “demands” the death penalty. Among countries with large Muslim majorities, Azerbaijan, Bosnia-Herzegovina, and Turkmenistan have abolished the death penalty, and Tajikistan and Uzbekistan have substantially reduced its scope. These examples suggest that religion is not a determining factor in explaining the variance in cross-national death penalty policy. Hence, my measure of “culture match” contains only nonreligious elements, such as crime rates and social inequality.

CRIME RATES

Crime rates are relevant to national variations in use of the death penalty because higher crime rates are more likely to provoke a stronger demand for capital punishment. In fact, the main justification for the death penalty offered by its supporters is deterrence. Scores of researchers have examined the possibility that the death penalty has a greater deterrent effect on homicide rates than long-term imprisonment. While some econometric studies in the mid-1970s claimed to find deterrent effects,⁷⁴ these studies were soon found to suffer from critical flaws.⁷⁵ Virtually all of the deterrence studies done in the past thirty years conclude that no scientifically proven correlation exists between the use of capital punishment and crime reduction. The claim that the death penalty should be used to curb rising crime rates seems to be a response to the demands of the public, most of whom are opposed to abolition.⁷⁶

SOCIAL INEQUALITY

The degree of social inequality or social exclusion must also be considered as one of the societal characteristics associated with abolition or retention of the death penalty. Several studies have highlighted the relationship between the use of the death penalty and a nation's failure to assimilate minorities into the mainstream of national life. William Bowers and his colleagues argued that the characteristic of “incomplete incorporation” was the single most important factor predicting which nations retained the death penalty in their total sample of the “highly developed” countries ($n = 36$).⁷⁷ James Marquart and his colleagues maintained that a “cultural tradition of exclusion,” deriving from slavery and its legacy of racial discrimination, accounted

for the disproportionate number of executions in the United States.⁷⁸ Tony Poveda argued that “the tradition of social exclusion” is one of the key factors explaining why some countries continue to justify the execution of criminal offenders.⁷⁹

In different terms, but in a similar vein, other studies have noted the high frequency of the death penalty in polarized societies. The death penalty is more likely to be applied to the “others” in polarized societies as an instrument enforcing the social hierarchy.⁸⁰ In this view, a society’s punitive policies are part of, and reflect, a society’s general tolerance of inequality, so that such policies should be associated with the degree of relative inequality in nations. The measure of different sentiments about the death penalty among different groups in a society, which are strongly shaped by in-group favoritism and out-group prejudice, offers a compelling alternative explanation of why the death penalty prevails under certain contexts of social relations.⁸¹ In the United States, those who favor the death penalty tend to be disproportionately white, male, Republican, middle-class, and Southern.⁸²

Domestic Institutional Structures

If conventional cultural accounts based on a homogenous “political culture” are too holistic in explaining a state’s attitude and receptiveness toward international norms, another strategy is to incorporate an institutional approach. A variety of scholars have argued that the influence of international norms depends on domestic institutional structures, suggesting that differences in the key political institutions of states explain variations in norm adoption. According to Harald Müller, pathways by which international rules become relevant domestically depend on the interests and actions of state and societal actors during a given policy debate.⁸³ In his study on U.S. ambivalence with regard to the application of global human rights norms, Andrew Moravcsik argues that the exceptionally decentralized and divided nature of political institutions is of particular importance in limiting U.S. support for domestic enforcement of norms.⁸⁴

Especially in cases of low congruence between the international norm in question and widespread domestic public beliefs, as is the case with the death penalty, the features of decision-making structures matter even more as they mediate the leverage of political leadership in enforcing unpopular international norms at home. In a centralized state, political elites preserve a greater autonomy vis-à-vis public demands, and thus crucial policy decisions can be taken in the absence of mass public consensus. Decentralized federal political institutions, by contrast, are open to pressures of local decision makers and public opinion, making it less likely that a government will pursue any policies in the face of public opposition. In such a society, the rationalists’ instrumental logic is more often effective in capturing the domestic effect of systemic social structures than it is in other countries where

Table 1.3. Summary of Variables

<i>Explanatory Variables</i>	<i>Intervening Variables</i>	<i>Dependent Variable</i>
Domestic agents (public opinion, elite leadership, grassroots activities)	Domestic institutional structures (centralized vs. decentralized)	Norm compliance: domestic policy change regarding capital punishment
Cultural match (crime rates, social inequality)	Radical political transformation	
International or regional human rights regimes		

decision makers have greater autonomy and insulation from society. Distinctive structures of political institutions, especially the degree of their centralization, have a profound effect on political behavior and often play a key role in producing policy variation across nations.

Methodologically, this book offers a comparative and historical case study of norm compliance. For the “successful cases” of nations that have abolished the death penalty—Ukraine and South Africa, and, to some extent, South Korea—I compare the conditions under which the international human rights norm is institutionalized. Regarding the case of the United States, I make some comparisons between the U.S. and European liberal democracies and identify some cases that make this country’s pattern unique.

Concerning research materials and evidence, I synthesized qualitative content analysis of primary sources with additional analysis of secondary sources selected from published studies. I used three types of primary source data in this research. First, Ukrainian, South African, Korean, and U.S. press reports, and the reports of human rights groups, including intergovernmental organizations, were useful in chronicling state behavior regarding death penalty policies and the corresponding human rights pressure on each country. I used the public documents and pronouncements of each government and of intergovernmental organizations, which included published and draft versions of legislation as well as public interviews and speeches of high-level officials. I carefully reviewed and analyzed the complete set of detailed records written by the Council of Europe, for which I visited public libraries and archives in Strasbourg, France.

Second, I conducted interviews with top legal advisors, high-level government officials, members of human rights nongovernmental organizations, and low-level intergovernmental organization officials. The interviews ranged in time from one hour to more than three hours each, and sometimes occurred in two different sessions.

Finally, for recent survey data concerning the death penalty, I consulted the Data Archive of Social Indicators provided by the Interuniversity Consortium for Political and Social Research (ICPSR) as well as the Gallup database. Statistics on the death penalty issue provided by the Bureau of Justice Statistics and the NAACP Legal Defense and Education Fund were thoroughly probed for the case of the United States. Crime rates are assessed by both data of the UN Crime and Justice Profile and the Federal Bureau of Investigation.

The book is organized as follows. Chapters 2 through 5 take up a specific country to explore under what circumstances it comes to comply, or not, with the international norm of banning the death penalty. More specifically, Chapters 2 and 3 examine the cases of two countries, Ukraine and South Africa, where the international norm concerning the prohibition of the death penalty has been embraced and legitimized in the domestic arena. Chapter 4 explores the practice of capital punishment in South Korea, focusing on whether, or to what extent, the evolving human rights norm is associated with democratic institutional and behavioral change. Chapter 5 offers an explanation for the U.S. aversion to acceptance and enforcement of the norm, and its consequences. The last chapter begins with a summary of each case. Making comparisons between the “successful” cases and the “unsuccessful” case, as well as within the “successful” cases of domestic implementation of the international norm, the chapter goes on to specify a causal mechanism that leads to state compliance or noncompliance with the norm, and finally assesses broad theoretical debates.